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Re-arbitration at the stage of setting aside the award

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Arbitration is an alternative dispute resolution forum where Arbitrator is the anchor of the whole proceeding. It works on the principle of party autonomy. We all know that once an Award is passed by the Arbitrator in terms of the provisions of Section 35 of the Arbitration and Conciliation Act, 1996 (Act), it is enforced under Section 36 of the Act.

Section 34 of the Act provides that an Award can be challenged within three months of the same being passed on the grounds as provided in the Section i.e.

- A party being under some incapacity
- Arbitration agreement was not valid under the law
- If arbitral proceedings or notice for an appointment of an arbitrator was done in absence of the party making application
- If the award deals with dispute which is not within the submission to arbitration or any matter which is beyond the scope of arbitration
- If composition of Arbitral Tribunal or the arbitral proceedings was not as per the agreement of the parties
- If subject-matter of the dispute is not capable of settlement by arbitration
- If the award conflicts with public policy of India
- If the Arbitral Award is patently illegality on the face of Award¹

The Court while exercising jurisdiction under Section 34 of the Act has to decide the validity of the Award based on the aforesaid parameters. It is also relevant to note that once the Award is passed, the scope of interference of the Court under Section 34 is very limited.

By way of this article we endeavor to discuss the fate of the disputes of the party, once the arbitral award is set aside.

It is relevant to note that the Hon'ble Delhi High Court while dealing with the case of Steel Authority of India vs. Indian Council of Arbitration², relying on the judgment of Mcdermott International Inc vs. Burn Standard Corporation Limited³ held that the order of the Court setting

¹ Section 34 (2A) inserted by 2015 amendment

² (2015) SCC Online Del 13394

³ (2006) 11 SCC 181

aside the award, unless set aside on merits does not amount to determination of issues between the parties and hence principles of Res-judicata shall not apply.

Furthermore, the Delhi High Court in *State Trading Corporation of India Ltd. vs. Toepfer International Asia PTE Ltd.*⁴, observed that annulment under Section 34 of the Act operates to negate a decision, in whole or in part, depriving the portion negated of legal force and returning the parties, as to that portion, to their original litigating positions. The Court further observed that Section 34 provides for annulment only on the grounds affecting legitimacy of the process of decision as distinct from substantive correctness of the contents of the decision and considers whether, regardless of errors in the application of law or determination of facts, the decision resulted from a legitimate process.

It is interesting to note that the Bombay High Court in *Pushpa P. Mulchandani and Ors. vs. Radhakrishin Tahiliani and Ors*⁵ held that when the award is set aside for reasons other than merits, then it is open to the parties to again invoke the arbitration agreement and to have the matter referred to arbitration. It is relevant to mention here that the Full Bench of Bombay High Court in *R. S. Jiwani v. IRCON International Ltd.*⁶, set aside the view taken in the case of *Pushpa Mulchandani (Supra)* in respect of severability of award. However, it appears that the view taken in this case regarding the issue of re-arbitration has not been overruled.

It is further of relevance to note that this view is similar to the view taken by the Supreme Court in the case of *Juggilal Kamlatpat vs General Fibre Dealers Ltd*⁷, wherein the Supreme Court while relying on the provisions of Indian Arbitration Act 1940, observed that if the Court does not supersede the reference and leaves the arbitration agreement as effective even when setting aside the award, thereupon it would depend upon the terms of the arbitration agreement whether the arbitration proceedings could go on with respect to the same dispute or with respect to some other dispute arising under the arbitration agreement.

In other words, while deciding Objections under Section 34 of the Act, the Court only tests the award on the anvil of the grounds provided under Section 34 and does not tests the reasoning which led to passing of the award. Therefore, if a Court sets aside an award, it would result in annulment of the entire award.

Now the question arises whether the Court can relegate the parties to arbitration after setting aside the Award. In this regard the judgment of *Kinnari Mullick vs. Ghanshyam Das Damani* [Civil Appeal No. 5172 of 2017 arising out of SLP (Civil) No. 2370 of 2015] would come to aide. In this

⁴ 2014 (144) DRJ 220

⁵ Appeal No. 981 of 2001 in Arbitration Petition No. 432 of 1998

⁶ (2010) 1 Mh. L. J. 547

⁷ 1962 SCR Supl. (2) 101

case the Hon'ble Supreme Court observed that a Court can relegate the parties to the arbitral tribunal, only if there is a specific written application under Section 34(4) of the Act, from one party to this effect; and relegation has to happen before the arbitral award passed by the same arbitral tribunal is set aside by the Court.

Section 34(4) states that on receipt of an Application in terms of Section 34, the Court may, where it is appropriate and it is so requested by a party, adjourn the proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of arbitral tribunal will eliminate the grounds for setting aside the arbitral award.

This further leads us to discuss what is the ambit within which the Court needs to work while dealing with Objections under Section 34 (4) of the Act. In this regard, the decision of the Hon'ble Supreme Court in Kinnari Mullick (*Supra*) while placing reliance to the decisions of various High Courts observed as follows:

- a. The Court can defer the hearing on an application filed under Section 34 of the Act for setting aside the award on a written request made by a party to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of arbitral tribunal will eliminate the grounds for setting aside the arbitral award (@ para 13);
- b. The power under Section 34(4) of the Act can be exercised if challenge to the award has been set up about the deficiencies in the arbitral award which may be curable by allowing the arbitral tribunal to take such measures which can eliminate the grounds for setting aside the arbitral award (@ Para 13);
- c. No power has been invested by the Parliament in the Court to remand the matter to the Arbitral Tribunal except to adjourn the proceedings for the limited purpose mentioned in Sub-Section 4 of Section 34 (@ Para 13 and 16)
- d. The limited discretion available to Court under Section 34(4) of the Act can be exercised only upon a written application made by a party made before the arbitral award is set aside and such discretion cannot be exercised by suo motu by the Court (@ Para 14).

The aforesaid has also been reiterated by the Hon'ble Supreme Court in Radha Chemicals v Union of India⁸.

A reading of the above would show that once the Award is challenged, only upon a written request of the parties in terms of Section 34(4), can the matter be relegated back to the arbitrator, and not

⁸ Civil Appeal No. 10386 of 2018 (Arising out of SLP (C) No. 2334 of 2018) Decided On: 10.10.2018

suo motu by the Court. The essence of this provision is that the arbitral award has still not been set aside.

