MODIFICATION OF ARBITRAL AWARDS BY COURTS: AN ANALYSIS OF SECTION 34

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ABSTRACT

The English Arbitration Act of 1889 served as the model for the first Indian Arbitration Act, which was passed in 1899. The Indian Arbitration Act of 1940 followed, and it was again replaced by the Arbitration and Conciliation Act of 1996. Prior to 1996, this law's foundation was the UNCITRAL Model Law on International Commercial Arbitration, 1985. There were once several reasons to set aside arbitral rulings, but those reasons were eventually clarified, and just a few reasons are listed under clauses 2 and 3 of section 34. The usage of the word "setting aside" in the section demonstrates the clear legislative intent to limit the section's authority to the setting aside of arbitral awards rather than expanding it to include the power and authority to alter such arbitral awards decided by Arbitral Tribunals. According to *Lakshmi Mathur v. Chief General Manager, 2000 (2) Arb LR 684 (Bom).* and several other judgments, it was noted that the court cannot evaluate the reasonableness of a case where the arbitral tribunal has already provided a reason. However, despite this fact, the courts had been amending the arbitral award under Section 34 of the Arbitration Act as early as 2000. In addition to setting aside arbitral awards, this article thoroughly examines the viability of invoking section 34 to alter arbitral awards. Whether it is right for the Courts to exercise their powers under Section 34(4) to itself decide claims which were erroneously rejected by the Arbitrator has to be analysed by tracing the validity or invalidity of their powers through various precedents. Whether the Courts can modify the arbitral award to rectify the errors committed by the Arbitral Tribunal would be explored in this paper. The way Courts have been using their power under Section 34 to alter or modify the arbitral awards would be explored to check whether it goes against the legislative intent of the Arbitration & Conciliation Act, 1996.

Keywords: Modification, Setting-Aside, Arbitral award, Alteration, Courts.

Section 34 of the Arbitration and Conciliation Act, 1996

Even a cursory reading of Section 34 of the Arbitration and Conciliation Act, 1996 reveals that it was highly ambiguous prior to the Hon. Supreme Court of India's ruling. According to the plain reading, Section 34's interpretation is limited to the ability to set aside arbitral awards solely. However, it was discovered by reviewing the numerous judicial precedents that judges had also altered arbitral verdicts in a large number of cases. Before the verdict in *Project Director, National Highways Authority of India v. M Hakeem*[1] in July 2021, the courts' interpretation of Section 34 can be ascertained by analysing a few judgements.

It is crucial to comprehend the clauses and sub-sections of Section 34 that apply in the current situation before analysing the instances in which courts have altered arbitral awards. The pertinent sub-sections that require attention are Sections 34(1) and 34(4).

> Section 34(1) states that "*Recourse to a Court against an arbitral award may be made only by an application for* ***setting aside*** *such award in accordance with sub-section (2) and sub-section (3).*"
>
> Section 34(4) provides that "*On receipt of an application under sub-section (1), 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.***"

The usage of the word "setting aside" in the section demonstrates the clear legislative intent to limit the section's authority to "setting aside" arbitral awards rather than expanding it to include the "ability to alter" such awards. Additionally, sub-clause (4) of the Section's usage of the word "may" indicates that courts have been granted discretion in how to handle applications submitted under the sub-clause (1). Such discretionary rights only apply to decisions that would make it impossible to challenge an arbitral award. The Court will only take the action if the arbitral tribunal rules in its favour. Therefore, the section's legislative objective was very apparent; that is, it should be read to simply grant the authority to set aside arbitral awards and

[1] Project Director, National Highways Authority of India v. M Hakeem, 2021 SCC OnLine SC 473.

nothing else. Despite this, courts had been altering arbitral awards in response to requests submitted in accordance with Section 34.

Precedents favouring Modification: An Analysis

One of the judgments in which an arbitral award was modified by the Supreme Court is of 2019.[2] The tribunal's decision had been overturned by the High Court. Following that, a petition was sent to the Hon'ble Apex Court, which noted that the abovementioned award could not be upheld. However, in light of the fact that the litigation had continued for 25 years without yielding any favourable outcomes for either party, it was decided to change the award.

The Delhi High Court recognised that the interest granted in the arbitral award was unreasonable since it was higher than the current banking rates of interest and, as a result, reduced it in *V4 Infrastructure Private Limited v. Jindal Biochem Private Limited*[3]. Similar to this, the Supreme Court altered an arbitral award in *Oriental Structural Engineers Private Limited v. State of Kerala*[4], stating "justice and equity" as the justification for the alteration. Although it was not given in the initial arbitral award, another Madras High Court decision granted an alternative relief that had been requested in the arbitration process under a motion for setting aside under Section 34. These rulings show that courts have frequently and broadly interpreted Section 34 to include the right to modify and have also granted alternative reliefs even though they were not expressly granted in the award. However, the courts were unable to defend their authority to make such a revision.

Precedents not favouring Modification: An Analysis

In *McDermott International Inc v Burn Standard Co. Limited,* the Supreme Court stated that they did not have the power to correct the errors made by the arbitrators and if any errors apparent are found, the only thing they can do is quash or set aside the impugned arbitral award under Section 34. In another case of *Angel Broking Limited v Sharda Kapur*, it was held by the Delhi High Court that the courts do not have the power to modify arbitral awards. However, there was another issue with regard to the granting of alternative reliefs which were not prayed for or which were not granted by the arbitral tribunal. In this context, it was stated that the court were not empowered to grant such alternative or additional reliefs. Two cases were referred by

[2] Dyna Technologies Private Limited v. Crompton Greaves, Ltd (2019) 20 SCC 1.
[3] V4 Infrastructure Private Limited v. Jindal Biochem Private Limited, 2018 SCC OnLine Del 8029.
[4] Oriental Structural Engineers Private Limited v. State of Kerala, 2009 SCC OnLine Ker 6812.

the court while arriving at the decision; one being the *McDermott case* and the other being *Puri Construction Limited and Ors v Larsen and Turbo Limited*[5].

Therefore, it is clear that there were conflicting views on the same issue which gave rise to a sense of uncertainty in coming to the conclusion whether the power of courts under Section 34 to set aside arbitral awards included the power to modify those awards. This uncertainty was solved by the recent judgment of the Hon'ble Supreme Court.

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In the present case, while the District Collector's arbitral award was modified by the District and Sessions Judge to enhance the compensation amount, an appeal was filed to decide whether Section 34 empowers the courts to modify arbitral awards besides setting them aside.

The court read Section 34 and noted that it is an appellate provision in nature and only permits the setting aside of awards on the specific reasons listed in sub-sections (2) and (3) upon the filing of an application. The clause makes it clear that the decision to reject a reason for setting aside an award is made based on the opinion of the tribunal.[6] The court cited the UNCITRAL Model Law on International Commercial Arbitration[7], which also prohibits courts from modifying awards after hearing a challenge to them. The McDermott International Inc. case was referred to the Court, and it was decided that since the 1996 Act only gives courts a supervisory function, they are unable to fix the arbitrators' mistakes. The McDermott case's directive would be broken if the Court modified or varied the award while "fixing the errors of the arbitrators". Therefore, they can only quash the award, leaving it on the parties to initiate another arbitration.

The Court referred to the *Cybernetics Network case*[8] and concluded that the court can't exercise its powers under Section 34(4) to itself decide claims which were erroneously rejected by the Arbitrator. Further, it was stated that the Court will be acting like an Appellate Court if the power to modify was recognised within the ambit of Section 34. This would again be contrary to the legislative intent behind the Section. The ratio behind *McDermott case* has been followed

[5] Puri Construction Limited and Ors v. Larsen and Turbo Limited, 2005 (79) DRJ 281.
[6] Lakshmi Mathur v. Chief General Manager, 2000 (2) Arb LR 684 (Bom).
[7] K D Kerameus, *Waiver of setting aside procedures in International Arbitration,* TAJCL, (1993).
[8] Cybernetics Network Private Limited v. Bisquare Technologies Private Limited, (2012) 129 DRJ 7.

by this court in *Kinnauri Mullick case*[9] and *Dakshin Haryana Bijli Vitran Nigam case*[10] as well, reaffirming that a statute should not be interpreted to make the remedy worse than the disease. While interpreting a statute, a judge shall keep in mind the legislative intent which in this case was very clear, that no power of modification of award exists in Section 34. By including the power to modify an award under Section 34, one would be crossing the Lakshman Rekha.

However, the Court admitted that differential compensation can't be awarded on the ground that a different public purpose is sought to be achieved. Also, the court accepted that compensation was awarded perversely without taking into account the sale deeds. Keeping in mind that NHAI had allowed compensation at a higher rate to persons in similar situations and as per *Nagpur Improvement Trust case*[11], the Apex Court declined to exercise their jurisdiction under Art. 136 in favour of the Appellants.

Conclusion

The Arbitration and Conciliation Act, 1996's plan calls for swift dispute settlement with little involvement from the courts. To avoid the Court's jurisdiction, the parties voluntarily choose to resolve their problems through arbitration. Given this, it would go against the Act's legislative design if the Courts used their authority to change the awards made by the arbitral tribunal. It undermines the goal of the entire arbitration process. The Courts ought to have recognised their limited authority in this situation and restricted their attention to setting aside arbitral awards that satisfy the conditions outlined in clauses (2) and (3). There would be no question regarding the court's interference and they would have recognised the fundamental principles of Section 34.

The extent to which the courts abide by the Hon'ble Supreme Court's ruling that changing an arbitral award under Section 34 would violate the "Lakshman rekha" would still need to be seen. The setting aside of the award and submitting it for new arbitration, if there is an error that is obvious on the face of the arbitral ruling, would again defeat the goal of swift dispute settlement, which is urgently required.

[9] Kinnari Mullick v. Ghanshyam Das Damani, (2018) 11 SCC 328.
[10] Dakshin Haryana Bijli Vitran Nigam v. Navigant Technologies Private Limited, 2021 SCC OnLine SC 157.
[11] Nagpur Improvement Trust v. Vithal Rao, (1973) 1 SCC 500.