



Limiting Judicial Intervention through Recourse in Arbitration Proceedings - An Analysis

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ABSTRACT

Arbitration is one of the alternative dispute resolution methods wherein a third party adjudicator delivers the verdict. Arbitration proceedings are similar to that of courts but it does not involve the procedural laws and it may be conducted when the parties have specifically subjected the dispute to the arbitration. It is one of the most important forms of alternative to the courts. The Arbitration evolved during the British times due to the constraints of the courts and the same constraints such as time and cost efficiency if parties subject a dispute to court has led to the development of arbitration in India and around the world. This paper tries to explore the scope of when parties who have subjected their dispute to arbitration can seek recourse to the ordinary courts of law.

I. INTRODUCTION

Arbitration can only be used when there is agreement to subject a dispute arising between the parties.¹ Without an agreement there cannot be arbitration proceeding. However, parties can subject dispute to arbitration even after it has arisen and need not be before the dispute has arisen specifically i.e. agreement can be made to subject dispute to arbitration even after dispute has been brought out by any party but it shall be agreed upon by the other party as well.² However, all arbitrations may not be fruitful or legal or may suffer from irregularities. To cure this a recourse to the ordinary courts becomes essential. Section 34 of the Arbitration and Conciliation Act, 1996 deals with this problem.³ It is further explained in detail below.

II. UNDERSTANDING SECTION 34

Section 34 of the Arbitration and Conciliation Act speaks about the recourse to the court proceedings on certain grounds including incapacity, invalid clause of arbitration, agreement containing arbitration clause does not cover the relevant dispute etc. When party feels that arbitration is not applicable or falls under section 34 of the Act, then the affected party may seek judicial intervention.⁴

Section 34 reads as under:

“34. Application for setting aside arbitral award. —

(1) 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).

(2) An arbitral award may be set aside by the Court only if—

(a) the party making the application furnishes proof that—

(i) a party was under some incapacity, or

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law

¹ Bachawat R.S., *Law of Arbitration and Conciliation: With Exhaustive Coverage of International Commercial Arbitration and ADR* (LexisNexis, Gurgaon, 2009)

² Tripathi S. C., *Arbitration and Conciliation Act, 1996; With Alternative Means of Settlement of Disputes*, (Central law Publications, Allahabad, 1998).

³ Pattabhi, Ramiah U., *Arbitration & ADR including Conciliation, Mediation and Negotiation*, (Asia Law House, Hyderabad, 2011).

⁴ Section 34 of the Arbitration and Conciliation Act, 1996

for the time being in force; or

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or

(b) the Court finds that—

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

(ii) the arbitral award is in conflict with the public policy of India.

Explanation. —Without prejudice to the generality of sub-clause (ii) it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81.

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral tribunal: Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter.

(4) 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.”

Thus, under aforementioned reasons, parties who are effected can approach the regular courts but these grounds are limited and parties cannot recourse unless it is justified and complies the aforementioned provisions.

III. SCOPE UNDER PRE 2015 AMENDMENT POSITION

1. Application under Section 34 is mandatory

*Mallikarjun V. Gulbarga University*⁵

Facts: No application was made under Section 34 even through the party had problem with respect to contentions such as lack of opportunity to lead evidence, there was no arbitration agreement and there was no proper appointment of arbitrators. Not even an objection was made before the arbitrator or High Court but objection was made only at the time of execution proceedings.

Decision: The objection was rejected as the application under section 34 was necessary.

2. Application where to be filed

*Deepak Mitra v. District Judge Allahabad*⁶

Facts: The application to set aside the arbitral award was made before the Allahabad High Court. The question was whether the High Court had original civil jurisdiction to entertain the application as per Section 2(e).

⁵ AIR 2004 SC 716

⁶ AIR 200 SC All 9

Decision: It was held that as defined under Section 2(e), the court of relevant jurisdiction would be Principal Civil Court of Original Jurisdiction in the District.

3. Territorial Jurisdiction

*Hatti Gold Mines Limited v. Vinay Heavy Equipments*⁷

Facts: The arbitration agreement provided that court at Bangalore alone shall have the jurisdiction to entertain the recourse application. The question was whether such jurisdiction is to be considered valid.

Decision: The Court held that application under section 34 must be filed only in the Court at Bangalore which has relevant jurisdiction.

4. Award may be upheld partly

*JG Engineering Pvt. Ltd. Union of India*⁸

Facts: An award was made by the Arbitral Tribunal exceeding its jurisdiction. The award was challenged before the civil court. The court upheld award on certain items. The same was challenged before High Court with contention that Civil Court has erred in complete quashing of the award and it cannot partially uphold the award. The High Court also upheld the decision given by the civil court. The same was challenged before the High Court.

Decision: The Supreme Court held that if an award deals with and decides several claims separately and distinctly even if the court finds that the award in regard to certain items is bad the court will segregate award on items which did not suffer from any infirmity and uphold the award to that extent.

5. Arbitral award contains decision on matters beyond the scope of the submission to arbitration

*Rajinder Krishan v. Union of India*⁹

Facts: During the pendency of an SLP in the Supreme Court parties reached an arbitration agreement, whereunder disputes and differences arising between them in the SLP were to be referred to arbitration. The SLP arose out of a writ petition filed by the appellants in the High Court. Hence what was referred to arbitration was the dispute in the writ petition. The dispute in the writ petition was that petitioners claimed compensation for destruction of their houses, crops, garden and for reclamation of their lands. The arbitrators in their award however awarded compensation for loss of potential of the lands. The same was challenged as outside the scope of the reference made to arbitration.

Decision: The Supreme Court held that the award was outside the scope of reference made to arbitration.

6. Presence of statutory authority

*Union of India v. Tata Hydro Electric Power Supply Co. Ltd.*¹⁰

Facts: The arbitrator gave an award on a dispute relating to correctness of electric metre. Such a dispute was within the exclusive jurisdiction of Electrical Inspector under Section 26 of the Indian Electricity Act. The question was whether arbitrator had jurisdiction over the matter.

Decision: It was held that the arbitrator had no jurisdiction to enter upon the reference and the award was set aside.

7. Construction of a contract

*Delhi Development Authority v. Wee Aar Constructive Builders*¹¹

Facts: There was a clause in the agreement that Delhi Development Authority would not be liable to give any damages even if there was delay in making available the site to the contractor. The arbitrator interpreted this clause to mean that there must exist some reason for not making available the site to the contractor before the clause could come to the rescue of DDA. The question was whether the compensation can be given or not.

Decision: It was held that arbitrator had gone into detailed items of losses suffered by the contractor on account of delay in delivering of the site, on the basis of material produced before him. The view of the arbitrator with regard to the clause in question was plausible view and therefore it was maintained.

⁷ AIR 2005 Kant 324

⁸ AIR 2011 SC 2477

⁹ AIR 1999 SC 463

¹⁰ AIR 2000 Bom 272

¹¹ AIR 2005 Del 140

8. Decision against terms of contract

*Shri Narmada Enterprises v. State of MP*¹²

Facts: Period of contract was one year. There was no clause in the contract for extension of the period of contract. The arbitrator holding that the contract was unlawfully terminated by the State Mining Corporation during the currency of the period of the contract, the arbitrator by his award extended the period of 1 year of the contract to another 1 year from the date of expiry of the period of contract.

Decision: It was held that the award was contrary to the terms of the contract. The award was quashed.

9. Arbitral award dealing with excepted matters

*District Food and Civil Supplies controller Moga v. Aggarwal Rice Mills*¹³

Facts: An agreement provided that if there was shortage of delivery of rice by the rice miller to the District Food and Supplies Controller, the rice miller shall pay to the government 1.5 times of the economic cost of the shortage and if there was late delivery, shall pay interest at the rate of 21 percent per annum. When there was shortage of delivery the matter was referred to arbitration. The award was passed in the favour of the government. The award was challenged before the court.

Decision: It was held that the dispute was with regard to a matter the decision of which was expressly provided in the contract. The same could not have been referred to an arbitrator. The award was rightly set aside and liberty was given to the Director to take back the record of arbitration proceedings and to proceed with the matter in accordance with law.

10. Second arbitral award made in contravention of the principles of constructive res judicata

*KV George v. The Secretary to Government, Water and Power Department Trivandrum*¹⁴

Facts: A works contract was terminated by the Govt. as the contractor failed to complete the work as per the terms of the contract. In the first arbitration proceedings, the contractor claimed enhanced rate for earth work, interest on delayed payments and costs. In the second reference the contractor raised 13 items of claims, including enhanced rates on other items of works. The same was challenged before the court.

Decision: The Supreme Court held that all issues which arose out of the termination of the contract should have been raised by the contractor in his first claim petition before the arbitrator. If the contractor failed to raise some of those issues, he cannot raise them in a second claim petition. The principles of Order 2 Rule 2 and constructive res judicata apply to arbitration proceedings. It was held that the contractor was precluded from seeking second reference and therefore award made in the second arbitration was set aside.

11. Improper proceeding ex parte by the arbitral tribunal against any party

*Juggilal Kamalpat v. General Fibre Dealers Ltd.*¹⁵

Facts: A peremptory notice to the defaulting party was given but arbitral tribunal did not proceed with ex parte on the date fixed but it fixed another date. No peremptory notice was issued for the subsequent date. The question was whether such peremptory notice on second date was mandatory and whether it amounts to a ground for challenge under section 34.

Decision: It was held that he cannot proceed ex parte on such subsequent date unless he has issued peremptory notice in respect of that date as well. It was accepted as a ground to challenge the award.

12. Disregard to personal law

*Mohd. Yusuf v. Wilayat Husain*¹⁶

Facts: The arbitrator did not apply the rule of personal law in arriving at the shares of the parties in the property in dispute. He only followed his own views as to what was right and proper in the circumstances of the case. The question was whether there was a misconduct on the part of the arbitrator and as a result of that award could be challenged or not.

¹² 2003 (2) Arb LR 420

¹³ 2010 (1) Arb LR 331

¹⁴ AIR 1990 SC 53

¹⁵ AIR 1955 Cal 354

¹⁶ AIR 1929 Oudh 1

Decision: It was held that there was no misconduct on the part of the arbitrator although it might have been so if the arbitrator stated in the award that he was awarding the shares according to the rules of personal law. But if it was provided in the reference that the dispute should be decided according to the personal law and still the arbitrators ignored the direction, their decision would be perverse.

13. Failure to keep note of proceedings

*Srustidhar Mohanty v. Steel Authority of India*¹⁷

Facts: The arbitrator did not maintain any order sheet of day to day proceedings, but when passing some order on each date he was intimating the same to the parties concerned retaining one copy of the file. The question was whether there was misconduct and whether it was a ground for setting aside the award.

Decision: The court held that the arbitrator was not a court of law and non maintenance of order sheet did not amount to misconduct on his part.

14. Award on contradictory view

*Bharat Sanchar Nigam Ltd. Narasinghal Aggarwal*¹⁸

Facts: The arbitrator at one place stated that issue regarding levy of compensation was beyond the scope of arbitration clause and yet in another award allowed the claim. The contradictory awards was challenged.

Decision: It was held that this was unjustified and the award in respect of that claim was set aside.

15. Error of fact or law

*Union of India v. Kama Chand and Co.*¹⁹

Facts: The counter claim of the appellant based on liquidated damages for shortfall of milk supply by the claimant was dismissed on the ground that there was no pleading or proof of any legal injury caused to the appellant on account of non supply of milk.

Decision: It was held that loss suffered by appellant was inherent in the failure of the claimant to supply milk as per the contract. The liquidated damages could not be considered penalty, much less excessive penalty. Dismissal of the counter claim on the ground that no proof of loss was given was patently wrong. The dismissal of the counter claim was set aside.

16. Invalidity of arbitration agreement

*Gopalchandra v. Lakshmikanta*²⁰

Facts: A non compoundable criminal matter was referred to arbitration and award was also passed. The question was whether such reference is valid.

Decision: It was held that the award was invalid and the award was illegal and inoperative.

17. Incapacity of the party

*Mohd. Ejaj v. Mohd. Ifrikhar*²¹

Facts: A mother entered into an arbitration agreement on behalf of her minor son. The question was whether a mother who under mohameddan law is considered to be de facto guardian can enter into such agreement or not.

Decision: It was held that under Mahomeddan Law father is natural guardian of the minor and the mother has no authority to enter into an agreement of reference on behalf of the minor.

IV. POST AMENDMENT

The Arbitration and Conciliation Act, 1996 was further amended in the year 2015. The Parliament passed the Arbitration and Conciliation (Amendment) Act, 2015. It was given effect from 23rd October, 2015.

¹⁷ AIR 1989 Ori 252 (254)

¹⁸ AIR 2006 Ori 148

¹⁹ 2009 (1) Arb LR 421

²⁰ AIR 1933 Cal 816

²¹ AIR 1932 PC 76

The amendment to section 34 reads as under:

“(I) in sub-section (2), in clause (b), for the Explanation, the following Explanations shall be substituted, namely:— “Explanation 1.—For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if,—

(i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or

(ii) it is in contravention with the fundamental policy of Indian law; or

(iii) it is in conflict with the most basic notions of morality or justice.

Explanation 2.—For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute.;

(II) after sub-section (2), the following sub-section shall be inserted, namely:—

(2A) An arbitral award arising out of arbitrations other than international commercial arbitrations, may also be set aside by the Court, if the Court finds that the award is vitiated by patent illegality appearing on the face of the award: Provided that an award shall not be set aside merely on the ground of an erroneous application of the law or by reappraisal of evidence.;

(III) after sub-section (4), the following sub-sections shall be inserted, namely:—

(5) An application under this section shall be filed by a party only after issuing a prior notice to the other party and such application shall be accompanied by an affidavit by the applicant endorsing compliance with the said requirement.

(6) An application under this section shall be disposed of expeditiously, and in any event, within a period of one year from the date on which the notice referred to in sub-section (5) is served upon the other party.’.”

Further, the Arbitration and Conciliation Act, 1996 was further amended in the year 2019. The Parliament passed the Arbitration and Conciliation (Amendment) Act, 2019.

“In section 34 of the principal Act, in sub-section (2), in clause (a), for the words ‘furnishes proof that’, the words “establishes on the basis of the record of the arbitral tribunal that” shall be substituted.”

According to the new amendment, an international arbitration award can only be set aside on the grounds that it is against India's public policy if I the award is tainted by fraud or corruption; (ii) it is in violation of Indian law's fundamental policy; and (iii) it is at odds with fundamental view of morality and justice. The current modification clarifies that the additional basis of "patently unlawful" can only be used to appeal a judgement in domestic arbitrations, not in foreign arbitrations. Furthermore, the amendment stipulates that domestic awards can be questioned on the basis of patent illegality on the face of the award, but that the award cannot be disregarded solely on the basis of an incorrect application of law or reappraisal of evidence. The new Act also stipulates that an application for the completely disregarding of an award can only be lodged after the other party has been given prior notice. Together with the application, the party submitting it must provide an affidavit attesting to conformity with the need of advance notification to the other party.

V. CONCLUSION

It can be concluded that recourse to the ordinary courts is available in limited situations. This is necessary to develop the arbitration as an alternative to the judicial system as the judicial system is already burdened with the cases and the delay and also cost efficiency cannot be improved immediately. Thus, many amendments were carried out to support the arbitration and limiting the recourse to the ordinary courts. Arbitration will become an effective alternative when there is proper institutionalization by the government and minimal monitoring and intervention by the judiciary.

References

1. Arbitration and Conciliation Act, 1996
2. Arbitration and Conciliation (Amendment) Act, 2015
3. Arbitration and Conciliation (Amendment) Act, 2019
4. Bachawat R.S, *Law of Arbitration and Conciliation: With Exhaustive Coverage of International Commercial Arbitration and ADR*

(LexisNexis, Gurgaon, 2009)

5. Pattabhi, Ramiah U., *Arbitration & ADR including Conciliation, Mediation and Negotiation*, (Asia Law House, Hyderabad, 2011).
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