

**REMEDIES AGAINST ARBITRAL AWARD: A CRITIQUE OF
SECTION 34 OF ARBITRATION AND CONCILIATION ACT, 1996**

*Prof. (Dr.) Mahendra Tiwari**

“Do I believe in arbitration? I do. But not in arbitration between the lion and the lamb, in which the lamb is in the morning found inside the lion.”

Samuel Gompers¹

I Introductory Reflections

CHAPTER VII of Arbitration and Conciliation Act, 1996 encompasses Section 34, which covers Recourse against Arbitral Award. Section 34 provides that parties can move an application to court for setting aside an award. The present Act consists of three sections, namely Section 34, 37(2) and 14(2) which essentially empowers the court to intrude in the matter.² The courts in general cannot replace their own interpretation in place of the interpretation done by arbitrator. However, when an arbitrator puts an unacceptable interpretation on an arbitral clause, then the courts can intrude and interpret.³ Section 5 of the present Act also makes it clear that no judicial authority can interfere except as provided in Part I of the Arbitration and Conciliation Act, 1996.

II Elucidation of section 34

Section 34(1)⁴ at the outset provides that recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with Section 34(2) and Section 34(3).⁵ The limitation period of three months extendable up to further thirty days period prescribed under Section 34 to challenge the award is absolute. This period is unextendable, even though the delay is sufficiently explained⁶ by the court under Section 5 of the Limitation Act, 1963.⁷ The words “but not

* LL.B. (Gold Medalist), LL.M. (Gold Medalist), Former Dean, Head, Faculty of Law, Jagan Nath University, Jaipur-
Email: mahendra.tiwari@jagannathuniversity.org

1 Samuel Gompers (1850-1924) was an English-born American cigar maker who became a Geogist labor union leader and a key figure in American labor history. Gompers founded the American Federation of Labor (AFL), and served as the organization's president from 1886 to 1894 and from 1895 until his death in 1924.

2 *United India Insurance Co. Ltd. v. Kumar Texturister*, AIR 1999 Bom. 118

3 *Numaligarh Refinery Ltd. v. Daelim Industrial Co. Ltd.*, (2007) 8 SCC 466.

4 Arbitration and Conciliation Act, 1996; Section 34 (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).”

5 Section 34 is analogous to Article 34 of the Model Law.

6 *State of H.P. v. Himachal Techno Engineers and Another*, AIR 2009 H.P. 58

7 *Union of India v. M/s Mukherjee and Mukherjee Pvt. Ltd.*, AIR 2007 (NOC) 894 (Cal.)

thereafter” used in proviso to Section 34(3) amount to an express exclusion within the meaning of Section 29(2) of the Limitation Act, 1963 and the applicability of section 5 of the Limitation Act would be barred.⁸ However, arbitrator has power to grant interest pendent lite.⁹ Arbitrator can also award interest for the pre-reference period.¹⁰ It is also clear that the courts can’t go in the mind course of the arbitrator when he makes the award on various claims. The court has certain restraints while examining the non-speaking award; however, the award can always be examined in terms of contract or in terms of reference.¹¹ On the other hand, the Apex Court in the Cases of *Trustee, Port of Madras*¹² and *New India Civil Erectors*¹³ has declared that the courts should see the awards to give them validity and not to set aside them.

III Grounds available to party

Section 34(2)(a)¹⁴ provides that an arbitral award may be set aside by a court only if the party making the application furnishes proof of any of the following five grounds-

- (1) Incapacity of a party; or
- (2) Arbitration agreement is not valid; or
- (3) The party making the application for setting aside the award was not given proper notice of appointment of arbitrator or of the arbitral proceedings; or
- (4) The nature of dispute does not fall within the terms of submission to arbitration; or
- (5) Composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties.

8 *Union of India v. Popular Construction Co.*, 2001(7) Supreme 354 (SC)

9 *Secretary, Irrigation Department, Government of Orissa v. G.C. Roy*, AIR 1992 SC 732

10 *Executive Engr, Dhenkanal Minor Irrigation Division, Orissa v. N.C. Bhudraj (Dead) by LRs*, 2001(1) JT 486 (SC)

11 *J&K v. Dev Dutt Pandit*, AIR 1999 SC 3196.

12 *Trustee, Port of Madras v. Engineering Constructions Corporation Ltd.*, AIR 1195 SC 2423

13 *New India Civil Erectors (P) Ltd. v. ONGC*, AIR 1997 SC 980

14 Arbitration and Conciliation Act, 1996; Section 34 (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 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 matter 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;

IV Additional grounds-vested powers of court

Apart from and in addition to the grounds mentioned in Section 34(2)(a), Section 34(2)(b)¹⁵ further provides two more grounds, for them it is necessary for the party to prove existence of any of the two grounds or the court may on its own take notice of existence of the said ground and set aside the award on the said ground. These are:

- (1) The arbitral award may also be set aside if the court finds that the subject-matter of the dispute is not capable of settlement by arbitration under the law of India; or
- (2) The arbitral award may also be set aside if the court finds that the enforcement of the award would be contrary to the public policy of India. Explanation attached to this provision provides that without prejudice to the generality of Section 34(2)(b)(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.

V Setting aside award

An arbitrator derives the authority from the agreement¹⁶ and if an arbitrator violates the terms it is misconduct and disrespect of authority.¹⁷ Arbitration agreement is required to be examined closely to confirm whether the arbitrator has acted within the terms of the agreement or beyond.¹⁸ In view of the judgment in *Srivastava Case*¹⁹ it is evident that the arbitral tribunal is the creation of arbitration agreement and so the tribunal cannot implement the judicial power of the state as such, consequently, the rationality of reasons given by the tribunal can't be challenged. However, after the *Jain Associates Case*²⁰ it has been established that if the arbitral award consists of permissible and unacceptable part. The unacceptable part, because of Section 34(2)(b)(iv) proviso and doctrine of severability, can be set aside. It is also pertinent to note that Section 34(4) does not mean that court has the power to validate

15 Arbitration and Conciliation Act, 1996; Section 34 (2)(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.

16 *New India Civil Erectors (P) Ltd. v. ONGC*, AIR 1997 SC 980

17 *Steel Authority of India v. J.C. Budharaj*, AIR 1999 Sc 3275.

18 *Continental Construction Co. Ltd. v. State of Madhya Pradesh*, AIR 1988 SC 1166.

19 *B. N. Srivastava v. M. Srivastava*, AIR 1994 SC 2562

20 *Union of India v. Jain Associates*, (1994) 4 SCC 655.

the part of an award and send the rest to the arbitral tribunal.²¹ The words “terms of the submission to arbitration” used in Section 34(2)(b)(iv) mean the terms of arbitration clause.²²

In *M.M.T.C. Case*²³ Hon’ble Supreme Court held that it was held that an arbitral award cannot be challenged on the ground that the agreement is invalid because it provided for even number of arbitrators. The validity of arbitration agreement depends upon section 7. Section 10, which provides for the number of arbitrators is a part of machinery provision for the working of the arbitration agreement and hence will not affect the validity of the agreement. This case was relied upon by the Bombay High Court in the case of *Satya Kailashchandra Sahu Case*.²⁴

In *Narayan Prasad Lohia Case*²⁵ Hon'ble Supreme Court held that section 34(2) (a)(v) provides for setting aside of the arbitral award if the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties. If such composition or procedure was in accordance with the agreement of the parties though in conflict with the provisions of Part I of the Act, the award cannot be challenged. Same is true of vice-versa i.e. a composition or procedure not in accordance with the agreement but in accordance with the Act, will attach validity to the award and such an award cannot be challenged under section 34.

In *Sanshin Chemicals Industry Case*²⁶ Hon'ble Supreme Court held that the decision of Arbitration Tribunal as to the venue of Arbitration is not an award within the meaning of section 2(6). This is because such conclusion is not an independent judicial determination but the one based upon the guidelines given in the arbitration agreement. Hence it cannot be challenged under section 34 of the Act. But it does not signify that such a decision cannot be assailed in the ultimate arbitration award. It the decision as to venue has affected the procedure followed in the arbitration proceedings, and then it can be challenged under section 34(2) but only as a part of ultimate arbitration award.

21 *State v. Reshma Devi*, AIR 1974 All 257

22 This meaning becomes clear when we refer to the meaning of the words “dispute submitted to arbitration” used in Section 28 and the words “submit future disputes to arbitration” used in Section 43(3).

23 *M.M.T.C.Limited v. Sterlite Industries (India) Ltd.* (1996) 6 SCC 716

24 *Satya Kailash Chandra Sahu v. Vidarbha Distilleries, Nagpur and Others*, AIR 1998 Bom 210.

25 *Narayan Prasad Lohia v. Nikunj Kumar Lohia* (2002) 3 SCC 572: AIR 2002 SC 1139.

26 *Sanshin Chemicals Industry v. Oriental Carbons and Chemicals Ltd.* AIR 2001 SC 1219.

In *Indian Commercial Company Ltd. Case*²⁷ Bombay High Court held that “the inadequacy of evidence brought before the Arbitrator or the suppression of certain matters by the witness of the opposite party cannot be a ground of fraud. The Court in execution cannot decide the legal misconduct of an arbitrator since it is not a question relating to execution, discharge or satisfaction of decree, but involves the determination of the manner in which the Arbitrator conducted the proceedings. Also legal misconduct is not one of the grounds provided under section 34 for setting aside the award.” In the *BFIL Case*²⁸ Bombay High Court held that an award cannot be set-aside on ground of public policy and non-application of mind, merely because another view of the matter is possible: Judicial review in arbitration does not permit to look into the merits, legality or validity except what is provided in Section 34.

In *Em and Em Associates Case*²⁹ Delhi High Court held that where on perusal of relevant clauses of the contract, many views are possible; the Court cannot under Section 34 impose its own interpretation on that of the Arbitrator, when view of Arbitrator is also a possible one.

VI Limitation period

In *Western Builders Case*³⁰ it was said that it is true that the 1996 Act intended to expedite the commercial issue. It is also clear in the Statement of Objects and Reasons that in order to recognize economic reforms the settlement of both of domestic and international commercial disputes should be disposed of quickly so that country’s economic progress can be expedited. The 1996 Act nowhere excludes the application of Limitation Act 1963 as a whole and S.43 of 1996 Act applies to arbitration as it applies to proceeding in court.

In *Popular Construction Co. Case*³¹ Hon’ble Supreme Court held that Section 34(3)³² provides for a period within which an application for setting aside the arbitration award can be filed. The use of words

27 *Indian Commercial Company Ltd. v. Amrishi Kilach anand Others* 2003(1) Arb. LR 10 (Bombay)

28 *BFIL Finance Ltd. v. G. Tech Stone Ltd.* [2003] 7 CLA-BL Supp. (snr.) 6 (Bom)

29 *Em and Em Associates v. DDA.* [2003] 8 CLA-BL Supp. (Snr.) 4 (Delhi)

30 *State of Goa v. M/s. Western Builders* AIR 2006 SC 2525

31 *Union of India v. Popular Construction Co.* (2001) 8SCC 470

32 Arbitration and Conciliation Act, 1996; Section 34 (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

"in accordance with" in Section 34(1) and the words "but not thereafter" in Section 34(2) suggest that there is express exclusion of the Limitation Act. The Arbitration Act is a special Law and provides for a limitation period different from the Limitation Act. Hence the limitation period provided for under the Arbitration Act will apply. The Award will not be allowed to be challenged after that period. This is because now under section 36 Award directly becomes a decree of the Court and achieves finality as soon as the limitation period under Arbitration Act gets over. Party hence cannot be allowed to rely upon section 6 of the Limitation Act.

VII Stay of proceedings

The grounds on which the Court can stay the proceedings under Section 34(4) should be such which will give an opportunity to the arbitration tribunal to correct the mistakes, which made the award liable to be set aside. Section 34(4) does not provide for any specific grounds. But, as the aim is to give an opportunity to the arbitration tribunal to set aside the award, the grounds for the stay should be in conformity with that objective.³³

VIII Section 34 and Section 3(5)

Punjab and Haryana High Court in its Double Bench Decision³⁴ held that Section 13(5) and Section 34 of the New Act are not ultra vires and contrary to each other. The Parliament has enacted this Act on the lines of the Model law on International Commercial Arbitration as approved by the General Assembly of the United Nations. Under the Model Law a party has been given a right to challenge the appointment of the Arbitrator before the Arbitrator himself. If the Arbitrator decides against him he can go to the Court before waiting for the award. However Indian Parliament has made certain changes in that respect, with a view to prevent dilatory tactics. The unsuccessful party is not allowed to challenge the arbitrator till he makes the award. The two sections are in conformity with the said object and can be harmoniously construed.

prevented by sufficient cause from making the application within the said period of three months if may entertain the application within a further period of thirty days, but not thereafter.

33 *Midex Overseas Ltd. v. M/s Dewas Saya Ltd. And Others*, 2001 Arb. W.L.J. 523 (MP); 2001(2) MPLJ 391.

34 *Atish Chander Gupta & Sons v. Union of India and Others* 2003(10 Arb. LR 589 (P8H)(DB)

IX Connotation of public policy

Section 34(2)(b)(ii) inter-alia provides that an award can be set aside if it is against public policy of India. However, this phrase is not defined in the Act. This term should be interpreted in the context of the jurisdiction of the court where the award is challenged. A revisional or an appellate court can set aside an award, which is patently illegal (i.e. in violation of any statutory provisions) because it will amount to breach of public interest. An illegality of trivial nature can be avoided but not of a patent nature. The illegality must go to the root of the matter.³⁵ Mere error of law does not amount to the breach of public policy. It should be clearly established that there was such breach.³⁶

X Concluding Observations

An award can be set aside by the court if the arbitrator has committed an error like acting beyond jurisdiction.³⁷ For example, an arbitrator can't decide on an amount which is prohibited by the agreement.³⁸ If a plea of the jurisdiction is not raised before the arbitrator under Section 16 then this plea can't be raised under Section 34.³⁹ When the applicant keeps himself absent on various dates and the application gets dismissed in default. In this instance, the plea that dismissal is inappropriate because CPC provisions are not applicable to Arbitration and Conciliation Act, 1996 is not acceptable.⁴⁰ Similarly, when the party refuses to take award through postman and the award was deemed to be served. The application to set aside under Section 34 was rejected because there was no misconduct or illegality.⁴¹

On receipt of an application under Section 34(1), the Court, where it is appropriate and it is so requested by a party, adjourns 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.⁴²

-----*****-----

35 *Oil & Natural Gas Corporation Limited v. Saw Pipes Ltd.* [2003] 8 CLA-BL Supp.(Snr.) 14 SC.

36 *Union of India v. Modi Enterprises* [2003] 7 CLA-BL Supp. (Snr.) 28 (Bom)

37 *Union of India v. Rattan Singh Gehlot*, AIR 1999 Raj. 117

38 *New India Civil Erectors (P) Ltd. v. ONGC*, AIR 1997 SC 980

39 *Gas authority of India Ltd. v. Keti Construction(I) Ltd.*, (2007) 5 SCC 38

40 *B. Rama Swamy v. B. Ranga swamy*, AIR 2004 A.P. 280.

41 *Kailash Rani Dang v. Rakesh Bala Aneja and Another*, AIR 2009 SC 1662.

42 Arbitration and Conciliation Act, 1996; Section 34 (4)