



Arbitration Newsletter
December 2024

Sumana Verma vs. Arti Kapur & Anr. W.P. (C) 16203/2024 – Delhi High Court: Arbitrator’s Jurisdiction Exceeded in Striking Off Defense for Non-Payment of Fees – The Court examined whether an arbitral tribunal can strike off a party’s defense for non-payment of its share of arbitral fees.

The case arose when the arbitrator struck off the Petitioner’s defense after repeated non-compliance with orders to deposit the requisite fees. The Petitioner cited financial inability, while the Respondents argued that the tribunal acted within its jurisdiction under the Arbitration and Conciliation Act, 1996. The High Court ruled that the arbitrator exceeded its authority by imposing such a punitive measure, emphasizing that the striking off of a defense should be used only in exceptional circumstances where expressly provided for in law.

The court relied on Section 38(2) of the Arbitration and Conciliation Act, which stipulates that parties must deposit equal shares of arbitral fees unless otherwise agreed. The first proviso permits the claimant or respondent to advance the defaulting party’s share, ensuring the continuation of proceedings. If neither party pays, the tribunal may suspend or terminate proceedings under the second proviso. The High Court highlighted that the Act does not empower an arbitrator to penalize a party by striking off its

defense solely for non-payment of fees, a position consistent with principles of natural justice. Citing *Union of India v. Singh Builders Syndicate*, (2009) 4 SCC 523, the court reiterated that access to justice must not be unduly curtailed in arbitration due to procedural inflexibility or financial constraints.

The court also invoked its supervisory jurisdiction under Article 227 of the Constitution to stay the ongoing arbitral proceedings, reasoning that the arbitrator’s actions constituted a manifest violation of justice. Supervisory powers, as outlined in *Radhey Shyam v. Chhabi Nath*, (2015) 5 SCC 423, are intended to rectify procedural irregularities that go to the root of the matter. The High Court emphasized that arbitration’s flexibility does not permit decisions undermining fundamental fairness. The ruling also referenced Rule 33 of the DIAC (Arbitration Proceedings) Rules, 2023, affirming that the arbitral institution may recover unpaid fees by retaining a lien on the award rather than by excluding a party’s participation.

The decision underscored the limited scope of punitive measures in arbitration. While the tribunal is empowered to direct compliance with procedural requirements, it must prioritize equitable resolution mechanisms over draconian actions. The High Court's interpretation aligns with the overarching principle of balancing

procedural discipline with substantive justice in arbitration, reaffirming that measures such as striking off a defense should remain a measure of last resort, exercised only where expressly permitted by the governing legal framework.

Neilan International Co. Limited vs. Powerica Limited (05.09.2024 - MHOR): MANU/MHOR/14840/2024 – Bombay High Court on Limited Scope of Section 48: Enforcement of Foreign Arbitral Awards – The Bombay High Court reiterated the constrained jurisdiction of courts under Section 48 of the Arbitration and Conciliation Act, 1996, emphasizing that the enforcement stage is not the venue for a merits review of a foreign arbitral award.

The Bombay High Court, in its judgment reaffirmed that the jurisdiction of an enforcement court under Section 48 of the Arbitration and Conciliation Act, 1996, is severely restricted. The Court emphasized that, while enforcing a foreign arbitral award, the court is not permitted to delve into the merits of the case, focusing instead on the procedural validity of the award.

The underlying dispute arose from a consortium agreement between the Petitioners and Respondents, executed in 2006 for the construction of power plants in Sudan. The agreement and subsequent contracts contained an

arbitration clause stipulating London as the venue and Sudanese law as the governing law. Following the dissolution of the entity NEC, the Petitioners assumed responsibility for outstanding payments and claims against the Respondents, which led to arbitration proceedings. The tribunal issued a partial award in 2015, confirming the existence of the arbitration agreement and upholding the assignment of rights under Sudanese law. The Respondents did not challenge this award, allowing it to attain finality.

In considering the Petitioner's request for enforcement, the Respondents contended that the award violated Indian public policy, particularly regarding the unilateral assignment of rights by NEC and the arbitration agreement's applicability to non-signatories. The Court rejected these arguments, noting that challenges based on public policy concerns under Section 48(2)(b) of the Arbitration Act must meet a high threshold and cannot involve a review of the merits of the case. The Court cited the Supreme Court's decision in *McDermott International Inc. v. Burn Standard Co. Ltd., (2006) 11 SCC 181*, affirming that the enforcement court's role is not to reassess the tribunal's findings on the substantive issues but to ensure that no fundamental violations of Indian law occurred.

The Indian judiciary has consistently emphasized that under Section 48 of the Arbitration and Conciliation Act, 1996, enforcement courts are limited to examining procedural aspects of a foreign arbitral award. This ensures that the enforcement process remains efficient and respects international arbitral awards, except where enforcement contravenes fundamental public policy. Supreme Court judgments like *Vijay Karia v. Prysmian Cavi E Sistemi SRL*, (2020) 11 SCC 1 have underscored that enforcement courts cannot act as appellate bodies to reassess the merits of the arbitral decision.

The Respondents further argued that the assignment was invalid as it lacked their consent, but the Court dismissed this claim, referencing the *Chloro Controls India (P) Ltd. v. Severn Trent Water Purification Inc.*, (2013) 1 SCC 641 judgment, which established that a third-party beneficiary to an arbitration agreement may be compelled to arbitrate under certain circumstances, even without direct signatory status. Additionally, the Court found that the Respondents, as signatories to the original contracts, had implicitly agreed to arbitrate disputes arising under or in connection with those contracts.

In conclusion, the Bombay High Court upheld the enforcement of the foreign award, reiterating the

limited grounds for refusal under Section 48, especially where the award is not contrary to Indian public policy. The judgment aligned with India's pro-arbitration stance, emphasizing that challenges to foreign arbitral awards must be narrowly construed and should not involve a review of the arbitral tribunal's findings unless there is a clear violation of Indian legal principles.

Imaging Solutions Pvt. Ltd. vs. Hughes Communications India Ltd. (21.11.2024 - DELHC): MANU/DE/8172/2024 – Delhi High Court: Section 34 Applications Require Substantive Examination, Not Summary Rejection – The Delhi High Court addressed the critical interplay between judicial deference to arbitral awards and the statutory obligation to substantively evaluate Section 34 objections under the Arbitration and Conciliation Act, 1996.

The case arose from disputes concerning an agreement involving property, where the Claimant sought specific performance, which the arbitrator denied, awarding compensation instead. The Respondents challenged the compensation as outside the arbitrator's mandate, given the absence of an explicit request. Both parties raised claims of patent illegality, alongside other objections, in their respective applications under Section 34. The Single Judge dismissed

both applications, relying heavily on the principle of minimal interference with arbitral awards.

The Division Bench underscored that while courts must respect arbitral autonomy, this principle does not absolve them of their duty to adjudicate objections under Section 34 comprehensively. Referring to *Ssangyong Engg. & Construction Co. Ltd. v. NHAI*, (2019) 15 SCC 131, the court noted that patent illegality, a recognized ground for challenging awards, necessitates careful scrutiny to ensure compliance with fundamental legal principles. The court criticized the impugned orders for failing to evaluate the grounds raised, observing that the Single Judge's reliance on judicial deference as the sole rationale for dismissal was inadequate.

The High Court emphasized that *Associate Builders v. DDA*, (2015) 3 SCC 49, established a framework for assessing arbitral awards, which includes reviewing patent illegality and violations of public policy. The bench noted that a mere acknowledgment of the limited scope of interference does not substitute for a reasoned adjudication of the issues raised. It also highlighted that the impugned orders spanned over 75 paragraphs but contained no meaningful analysis of the arbitral findings, instead merely reiterating the principle of non-interference.

Public policy as a ground for refusal under Section 48 has been narrowly interpreted to align with India's pro-arbitration stance. The Supreme Court in *Renusagar Power Co. Ltd. v. General Electric Co.*, 1994 Supp (1) SCC 644 established that enforcement could be denied only if an award contravenes the fundamental policy of Indian law, the interests of India, or justice or morality. This principle was reiterated in subsequent cases, including *Ssangyong Engineering v. NHAI* (2019), where it was noted that a mere error in applying foreign law does not justify a public policy challenge.

Moreover, the bench observed that procedural lapses, such as disregarding substantive objections and failing to provide reasons for rejecting claims, undermine the statutory safeguards under Section 34. It reiterated that courts must engage with objections objectively and cannot reject applications solely on the premise of minimal judicial intervention. The approach taken in this case, the court held, was contrary to the principles articulated in *ONGC Ltd. v. Saw Pipes Ltd.*, (2003) 5 SCC 705, where the Supreme Court recognized that arbitral awards must be set aside if they are in conflict with public policy or demonstrate patent illegality.

The court concluded that the impugned orders were unsustainable in law, as they failed to address the substantive grounds raised by the parties. Consequently, it allowed the appeals, setting aside the orders and remanding the matters for fresh adjudication in accordance with the principles established in precedent.

Engineer-in-Chief & Ors. Versus Dev Raj OMP(M) No. 25 of 2024 in Arb. Case No. 851 of 2024– Himachal Pradesh Court holds that Timely Objections Under Section 34(3) of Arbitration Act are Mandatory – The Himachal Pradesh High Court reaffirmed that objections to an arbitral award under Section 34(3) of the Arbitration and Conciliation Act, 1996 must be filed within the stipulated three-month limitation period unless sufficient cause for delay is shown. The court emphasized that a failure to adhere to this timeframe, without valid justification, bars the petition from being entertained.

In the present case, the Petitioner, the State of Himachal Pradesh, sought condonation of a 24-day delay in filing objections to an arbitral award. However, the court, citing procedural delays and inadequate reasoning, dismissed the application for delay condonation.

The Petitioner argued that the delay resulted from administrative procedures, including consultation

with legal departments and internal processing of the arbitral award. The Respondent countered that these delays were not beyond the control of the Petitioner and did not constitute sufficient cause under the proviso to Section 34(3). The court underscored that Section 34(3) permits a limited extension of 30 days beyond the three-month period, provided sufficient cause is demonstrated, but does not allow for delays beyond this extended timeframe. Referring to *State of W.B. v. Rajpath Contractors & Engineers Ltd., (2024) 7 SCC 257*, the court clarified that Sections 4 and 5 of the Limitation Act are excluded in this context, making the proviso to Section 34(3) the sole basis for condoning delays. The decision also relied on the Supreme Court's ruling in *P. Radha Bai v. P. Ashok Kumar, (2019) 13 SCC 445*, which confirmed that Section 34(3) embeds the limitation provision directly into the remedy framework, eliminating recourse to the Limitation Act for extending timeframes.

The court further referred to *State of Maharashtra v. Borse Bros. Engineers & Contractors (P) Ltd., (2021) 6 SCC 460*, which held that governmental entities are not entitled to special consideration in delay condonation cases under the Act. Equal standards apply to all litigants, and bureaucratic inefficiencies cannot be a ground for deviation from statutory timelines.

In its judgment, the court concluded that the Petitioner had failed to provide a sufficient explanation for the delay, particularly for the prolonged administrative handling of the award before filing objections. As procedural compliance is central to the arbitration framework's efficacy, the court dismissed the application, upholding the mandatory nature of the limitation provision under Section 34(3).

Impleadment in Indian law allows the court to add or remove parties to ensure complete and effective resolution of disputes. It applies to both necessary parties (essential for passing a decree) and proper parties (those whose presence aids in resolving all issues). In arbitration, the principle is less straightforward due to its contractual nature. However, the *Chloro Controls India (P) Ltd. v. Severn Trent Water Purification Inc., (2013) 1 SCC 641* decision allowed impleadment of non-signatories under the "group of companies" doctrine when their participation was integral to the dispute or agreement.

Coslight Infra Co. (P) Ltd. v. Concept Engineers, 2024 SCC OnLine Del 7832 – Delhi High Court Holds Procedural Orders Cannot Be Challenged as Interim Awards Under Section 34 of the Arbitration Act – The Court clarified that procedural orders issued by an Arbitral

Tribunal, such as the rejection of an application seeking the impleadment of a party, cannot be classified as interim awards. As such, these orders cannot be challenged under Section 34 of the Arbitration and Conciliation Act, 1996.

The decision arose from a dispute between the Petitioners and Respondents concerning a Service Contract Agreement executed in 2019, which led to arbitration following a breach by one of the directors of the Petitioner. The Petitioner had sought to implead the director into the arbitration proceedings, alleging fraudulent activities that needed to be addressed for a just resolution. However, the Arbitral Tribunal rejected the application, deeming it a procedural matter that could not be resolved at that stage of the proceedings.

The Court's analysis primarily focused on the nature of the order issued by the Tribunal. It reiterated that procedural orders made during the course of arbitration, such as those involving party joinder or case management, do not resolve the substantive issues of the dispute. Therefore, such orders do not constitute interim awards, which are typically reserved for decisions that affect the substance of the arbitration. In this case, the rejection of the impleadment application was purely procedural and did not impact the merits of the case or provide any partial relief that would

warrant challenge under Section 34. The Court emphasized that the Tribunal had not yet adjudicated the substantive issues related to the disputed facts, including whether the director was a necessary party, and that such matters would be determined in due course once evidence was presented by both parties.

The Court further emphasized that procedural decisions, even if they seem to impact the process, should not be subjected to judicial intervention unless they result in a final decision on substantive matters. This ruling aligns with the principles outlined in *Indian Oil Corpn. Ltd. v. Amritsar Gas Service, (1991) 1 SCC 533*, where the Supreme Court reinforced that procedural orders made by an Arbitral Tribunal are not to be treated as interim awards. Additionally, the Court cited *Union of India v. Dinesh Engineering Corpn., (2001) 8 SCC 491*, which highlighted that only substantive awards or decisions that conclusively determine issues of law or fact are subject to review under Section 34 of the Arbitration Act. The Court also reiterated the point made in *Essel Highway Ltd. v. National Highways Authority of India, 2017 SCC OnLine Del 9841*, where the Supreme Court further clarified that the scope of Section 34 challenges is limited to decisions that substantially affect the rights of the parties, rather than those dealing with procedural aspects.

In the present case, the Court noted that the rejection of the impleadment application did not prevent the Tribunal from continuing to hear the case or decide on the merits of the claims. Issues concerning the director's involvement were still open for evidence and determination by the Tribunal. The Court observed that the dismissal of the application did not equate to a final determination of any of the issues in dispute, particularly since evidence had not yet been presented by either party regarding the director's role. Therefore, the Court concluded that the Tribunal's procedural order did not qualify as an interim award and was not amenable to challenge under Section 34.

Moreover, the Court dismissed the Petitioner's plea, emphasizing that parties involved in arbitration must adhere to the procedural rules set forth by the Tribunal, and procedural challenges should not be permitted to delay or derail the arbitration process. It upheld the principle that arbitration is intended to provide a quick and efficient resolution of disputes, and any effort to review every procedural decision would undermine the efficacy of the arbitration process itself.

The Court's decision reaffirms the distinction between procedural management decisions and substantive rulings, which significantly affect the outcome of arbitration proceedings.

