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LAW ADVISORY

Arbitration Newsletter

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The Supreme Court held that Arbitral Awards cannot be modified under Sections 34 & 37 of the Arbitration & Conciliation Act – *S.V. Samudram v. State of Karnataka [2024 SCC OnLine SC 19]*

The Supreme Court reaffirmed the established legal position that any attempt to "modify an award" while adjudicating Sections 34 and 37 petitions is not permissible under the Arbitration and Conciliation Act, 1996 **(hereinafter referred to as 'The Act')**, while deciding on a plea regarding whether there is a scope of interference with arbitral awards under Sections 34 and 37 of the Act. It was upheld that no interference may be done throughout the adjudication process of Sections 34 and 37 petitions by changing the award for the following reasons-

1. An Arbitral Award cannot be modified under Sections 34 and 37 of the Act as it is no longer *res integra.*
2. An Arbitral Award can only be modified under Section 34 of the Act if it is against the Public Policy of India.

Referring to the judgement of ***Indian Oil Corporation Ltd. v. Shree Ganesh Petroleum [(2022) 4 SCC 463]***, the Court summarized that an award could be considered to be against the public policy of the country in, *inter alia*, the following circumstances;

1. When an award patently violates a statutory provision, the principles of natural justice, or is patently illegal or unreasonable or perverse.
2. When the Arbitrator/Arbitral Tribunal has failed to adopt a judicial approach in deciding the dispute.
3. When an award is contrary to the interest of the country, or against the ideas of justice, morality, in the sense that it shocks the conscience of the Court.

Section 37 does not allow for Modifications of the Award, only ensures Statutory Compliance.

The Supreme Court observed that Courts do not have the power to assess the merits of an award, as Section 37 only enables the courts to ensure that any court does not exceed the scope of Section 34.

The phrase '*res integra'* translates to 'undecided'. Here, the Court has clarified that there is no uncertainty in Sections 34 and 37. The Arbitration Act of 1940 gave the courts the power to interfere with arbitral awards. However, in the Arbitration and Conciliation Act, 1996, the same provision was omitted. Therefore, the Apex Court noted that the removal of this power was intentional on part of the legislature, and the same must be adhered to.

Consequently, **the Hon'ble Bench of the Supreme Court allowed the appeal of the Claimant, and set aside the judgement passed by the High Court and the Civil Judge.**

The observations of the court in pronouncing this judgement provide a clear framework under which Courts may operate under Sections 34 and 37 of the Act. The judgement also clarifies the stance of the courts in dealing with any arbitration award that violates public policy, and clarifies that the courts may only modify an arbitral award if the award genuinely violates the country's public policy. In any, and every other circumstance, an arbitral award can only be modified by the Arbitral Tribunal, or the Arbitrator that passes the award.

Notable Observations on the Provisions of the Arbitration and Conciliation Act Pronounced by the Delhi High Court - *MBL Infrastructures Ltd. v. DMRC, 2023 [2023 SCC OnLine Del 8044]*

The Delhi High Court, while deciding upon the case, observed the following;

1. Arbitral Tribunal can award damages for delay by employer even in absence of any clause in agreement.
2. A clause that restricts the right of the contractor to seek damages for delay attributable to the employer is against public policy.
3. The Court, under Section 34 of the Arbitration and Conciliation Act, can partially set aside the award.

   Reiterating the powers of the Court under Section 34 of the Act, the Court clarified that it cannot reassess or reevaluate the merits of the Arbitral Award, and held that the Court can only interfere with the arbitral award if the grounds under Section 34 of the Act are made out and not otherwise.

   In this case, the respondents were held accountable by the tribunal for the project work's execution delay, and the termination was unlawful. The petitioner was entitled to damages from the tribunal as soon as it was determined that the respondent caused the delay that resulted in the petitioner's losses.

   The contract between the parties, which limited the remedy to a simple extension of time, could not have been used by the tribunal to deny the damages. It concluded that, particularly in light of Sections 55 and 73 of the Indian Contract Act, this condition does not restrict the tribunal's ability to award damages.

   The Court determined that a provision that limits the injured party's ability to sue for damages is prohibitive in character and goes against the core principles of Indian law. The Court decided that even in cases where the contractor's only remedy under the agreement is a time extension, the arbitral tribunal may

nonetheless award damages for the employer's delay. The tribunal can transgress the boundaries of the agreement and grant relief to the aggrieved party which it is rightfully entitled to in situations that were unexpected at the time of making the contract, and consequently, the tribunal cannot withhold a relief merely because of the explicit provision for such a relief in the agreement.

The Court further held that a clause that restricts the right of the aggrieved party to claim damages is prohibitionary in nature and against the fundamental policy of Indian Law. It held that the arbitral tribunal may still have the power to grant unliquidated damages to a party that has suffered loss due to the delay attributable to the other party.

Coming to the provisions of Section 34 of the Act, **the Hon'ble Court held that a Court exercising powers under Section 34 of the Act can sever an offending portion of the arbitral award.** The exercise of such authority amounts to only a partial annulment of the award, and not a revision. The Bench clarified that modification of an award occurs only when the court adjusts interest rate, damages granted, and other such aspects. However, just overturning separate or unrelated tribunal rulings on unrelated issues does not change the award.

Nonetheless, the Court maintained the award in relation to the denial of claims for reputational harm, arbitration fees, and interest component, for the reason that the petitioner had not established any harm to its reputation as a result of the agreement's termination and that the filing of an insolvency petition could not be fully linked to the termination.

This judgement clarifies upon the relationship between Employers and Contractors when dealing with Contracts, and Arbitration on such issues. The observations on the issues of claims of damages, as well as the provision of an arbitration clause, all serve to further protect the interest of parties aggrieved due to unjust breaches in construction contracts, which is especially crucial considering the economical quantum being dealt with in such cases.

The Group of Companies Doctrine seeks to adopt a pragmatic approach by bringing together all parties that are closely connected with a disputed transaction before a single forum. This is particularly relevant in disputes involving multiple agreement and parties. The Doctrine seeks to ensure accountability of all parties who have been materially involved in the negotiation and performance of the concerned transaction. Additionally, the Doctrine also aids in reducing multiplicity of proceedings and the risk of contradictory or conflicting decisions.

The Delhi High Court held that the Group of Companies Doctrine Cannot be Applied to Directors of a Company to Make Them a Party to Arbitration - *Vingro Developers Pvt. Ltd. vs. Nitya Shree Developers Pvt. Ltd. and Ors. [(24.01.2024 - DELHC): MANU/DE/0504/2024]*

In the case of ***Vingro Developments Pvt Ltd v. Nitya Shree Developers***, The High Court of Delhi has held that directors of a company cannot be made parties to arbitration through 'Group of Companies' doctrine. It held that the relationship between the company and its director(s) is that of the 'Principal' and 'Agent' as defined under Section 182 of the Indian Contract Act.

The bench of Justice Dinesh Kumar Sharma held that in terms of Section 230 of the Indian Contract Act, the agent cannot be made personally liable for acts carried out on behalf of the principal. The decision passed by the Hon'ble court observed that the agreements, in essence, were between the Petitioner and Respondent 1, which is the Company, and that the agreements were signed by Respondent 2 on behalf of Respondent 1 purely in the capacity of a director.

The Court held that the Doctrine cannot be applied to include the directors as parties of arbitration, and gave the reason to be that the relationship between the company and its director(s) is that of the 'Principal' and 'Agent' as defined under Section 182 of the Indian Contract Act. The Court determined that the agents cannot be held personally accountable for actions taken on behalf of the principal under Section 230 of the Indian Contract Act. It was decided that in order for the directors to be held personally accountable for any activity, the proviso of Section 230 requires an express agreement to the contrary.

The judgement relied upon by the petitioner, ***Cox & Kings Ltd. v. SAP India (P) Ltd., [2023 SCC OnLine SC 1634]***, dealt with the extent of the application of the Doctrine under Indian law. The judgment not only declared the Doctrine to be an intrinsic part of the Indian legal system, but also defined the contours of the Doctrine by guard-railing it from misuse. In doing so, the Supreme Court reiterated the essential difference between a non-party and non-signatory and held that consent may be implied in some situations to include a non-signatory to an agreement as party to an arbitration.

Nevertheless, there is no such agreement between the parties, therefore Respondents 2 and 3 will not be held individually accountable for the Company's actions.

Accordingly, it held that dispute is liable to be referred to arbitration without Respondents 2 and 3 being a party to it.

This judgement serves as a crucial supplement to the Cox and Kings judgement in clarifying the stance of the Indian Courts with respect to the Group of Companies Doctrine, preventing future abuse of the doctrine, while also providing additional clarity upon its usage.

The Delhi High Court holds that a Party Cannot Insist on Fulfilment of Pre-Arbitral Steps After Terminating the Contract - *Gajendra Mishra v. Pokhrama Foundation, [2024 SCC OnLine Del 267]*

The case, involving a contractual dispute between the Petitioner and the Respondents. Pursuant to the dispute, the Respondents terminated the contract with the Petitioner. On the Petitioner invoking the arbitration, the Respondents objected to the maintainability of the petition, on the grounds that the petition is pre-mature, as the agreement between the two parties dictated that the dispute had to be referred to negotiations first. As such, the petitioners argued that the petition was not maintainable due to non-fulfillment of the pre-arbitral steps by the Petitioner, which are mandatory in nature.

The Court, in deciding the matter, held that a party that has terminated the agreement itself cannot then insist upon the fulfilment of the pre-arbitration conciliation clause. The supplementing reason was the fact that the pre-arbitration clause that was in the agreement was nullified with the rest of the agreement when the Respondents terminated it.

The court further clarified that once a party terminates the agreement without following the pre-arbitration steps laid out in the agreement, they cannot object to the maintainability of the other party's petition using the very same grounds of non-fulfilment of the pre-arbitral clause.

Pre-Arbitral Clauses in a contract are generally contingencies built within a contract in the event that a dispute arises. These clauses compel parties to follow certain steps before they can file for arbitral proceedings. Generally, these clauses facilitate for an amicable round of negotiations between the parties, sometimes facilitated by a mediator, in an attempt to settle the dispute without having to move to arbitration. It is to be noted that if an agreement includes a pre-arbitration clause, such a clause is mandatory, and must be followed before any party can file for arbitration.

The Court also noted that the authority to whom the dispute was supposed to be referred to in case of the pre-arbitration also loses its powers the moment the contract itself is terminated.

This Judgement sheds light on pre-arbitral agreements, and provide guardrails on any potential abuse of provisions of a contract in cases of a dispute. Another important observation that can be made from this judgement is for all parties to ensure that in the event of any potential dispute, they exhaust all possible remedies available to them within the contract before taking any rash actions that may later bar them from seeking proper remedies.

Issues Related to Bias of An Arbitrator and Conduct of Arbitral Proceedings Cannot Be Determined Under Section 29A Of the Act - *Vivek Aggarwal v. Hemant Aggarwal, [2024 SCC OnLine Del 229]*

In the submissions presented to the court, one of the objections raised by the respondents was concerning the arbitral proceedings, the nature in which the proceeds were conducted, which was allegedly due to the arbitrator presiding over the case having a bias towards the petitioner.

Any apprehension of bias that a party may have against an Arbitrator can only be sought remedy under Section 13 of the Act, which provides the parties with the option to either change the arbitrator upon mutual agreement, or for the arbitrator to recuse themselves from the case by providing a statement of explanation against the allegations.

The Petitioner's submission to the court, countering the claims of the Respondent, was that the issue of bias and conduct of Arbitral Proceedings cannot be determined under Section 29A of the Act.

The Court, in deciding the case, observed that the scope of the power conferred to the courts under Section 29A is limited to examining the validity of the reasons under which an extension to the arbitration is sought by a party, and to decide whether such an extension, if requested, should be granted or not.

Consequently, the Court noted that the grievance of a party regarding the conduct of the arbitral proceedings, or any other substantive challenge regarding the arbitration is not one that the Court can decide under Section 29A.

The Court further clarified that any party that expresses concerns regarding any irregularity in the arbitration proceedings, including alleged bias of the arbitrator, cannot be included in a petition under Section 29A. Referring to the judgement of ***Wadia Techno-Engineering Services Ltd. v. Director General of Married Accommodation Project, [2023 SCC OnLine Del 2990],*** the court held that if a party has any such grievances regarding the conduct of the arbitrator, the same can be pursued separately.

This judgement by the Court reinforces the necessity of segregation of issues.

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