



## JUDICIAL INTERVENTION: IS SECTION 34 CREATING AN ENDLESS LOOP?"

By Shreya Gopal.Ar  
From Sastra Deemed To Be University

### ABSTRACT

#### Judicial interference in Arbitration: Is section 34 of the Arbitration and conciliation act creating an endless loop?

The topic “Judicial interference in Arbitration : Is section 34 of the Arbitration and Conciliation act creating an endless loop?” is a topic of great significance for the reason being that parties specifically oust jurisdiction of the courts when they opt for arbitration and by providing the power to set aside a binding award passed by an arbitrator, the legislature has paved the way for losing parties to set aside an arbitral award by filing a section 34 application and moving to fresh arbitration thereby creating an endless loop. The author agrees that judicial intervention is required for the smooth functioning of the arbitration system but excessive interference leads to delay in enforcing arbitral awards and defeats the main objective of the Act. The generally accepted justification provided for this excessive intervention was the incompetence of the arbitrators but the 2019 amendments brought to the Act has aptly tackled with this loophole and the author has attempted to co-relate the amendment with the theoretical loop created to put things into perspective.

The author has dealt with the several cases that limit the scope of intervention along with procedure set in place for appointing an arbitrator and the establishment of arbitral institutions set up for the grading and accreditation of the said arbitrators to ensure greater reliability regarding arbitral award. Specific provisions having an effect on narrowing down the scope of judicial intervention has been elaborated in detail.

*“The courts of this country should not be the places where the resolution of disputes begins. They should be the places where the disputes end after alternative methods of resolving disputes have been considered and tried.”* – Sandra Day O’Connor

### INTRODUCTION

One of the strongest modes of settling disputes from time immemorial that remains efficacious is the procedure of arbitration. The law of arbitration is based upon the principle of withdrawing the dispute from the ordinary courts and enabling the parties to substitute a domestic tribunal<sup>1</sup> thus it becomes clear that the powers of the court of law are specifically ousted for the sake of economic and expeditious disposal of a case. It could be defined as the reference of dispute or difference between not less than two parties for determination after hearing both sides in a judicial manner by a person or persons other than a Court of competent jurisdiction<sup>2</sup>. The parties must intend to submit to arbitration i.e, there must be animus arbitrandi<sup>3</sup>. In simpler terms when parties consent to lay before or submit their dispute before one or more arbitrators and authorise

<sup>1</sup> Fazalally Jivaji Raja v. Khimji Poonji & Co. AIR 1934 Bom 476.

<sup>2</sup> Jain, Sankalp, Judicial Intervention in Arbitration (November 27, 2015). Available at

SSRN: <https://ssrn.com/abstract=2801454> or <http://dx.doi.org/10.2139/ssrn.2801454>

<sup>3</sup> Hormusji & Daruwala v. Distt. Local Board, AIR 1934 Sind200.



them to make a binding decision, the process of arbitration is said to have taken place. An award is a decision given in an arbitration proceeding by an Arbitration Tribunal and is said to be analogous to the judgement given by a court of law. The award is necessarily binding on both of the parties as it would not be a reference to arbitration if it only bound one of the parties<sup>4</sup>.

It is to be noted that it doesn't come as a shock that arbitration doesn't take place completely on its own like other adjudications of administrative bodies but at some point, does come under the purview of judicial control. With the object being speedy dispute redressal, it is important that arbitration cases must be decided based on affidavits and other relevant documents and without oral evidence. There may be few exceptional cases where it may become necessary to grant an opportunity to the parties to lead oral evidence. In both circumstances, the judicial authority is required to decide the issue expeditiously within a time frame and not to treat such matter like regular civil suits<sup>5</sup>

### JUDICIAL INTERFERENCE JUSTIFIED

Off late arbitration has become an off-set of litigation in the sense that it has involved itself in the spiral of pleadings and proceedings, the reason for the same being the lack of institutions that can give the required codification, infrastructure and the convenience of arbitral facilities to conduct arbitration of disputes by the book. Most of the arbitral tribunals are not institutionalised rather ad hoc the lack of a streamlined

process or qualified arbitrators due to the Act's insistence on party autonomy has failed in its objective of expeditious and economical disposal of disputes in its aim to reduce the line of numerous people waving their dockets in a litigated case. As most arbitrators appointed are retired judges under Section 11 of the Act, the reliance of long-standing procedures and submissions are placed as per their experience behind the bench leading to a long and arduous process much similar to a court proceeding. Hence arbitration ends up involving issues, oral and documentary evidence, chief and cross-examination etc wherein problems arise as to the disputes involving the power of the arbitrator to mark evidence, his power to record objections and order of such recording, to name a few.

Further, party-appointed arbitrators may not be competent adding to which advocates who try to procure unnecessary adjournments add up to the unethical working of the arbitration process and if the scope of judicial interference is curtailed, it may lead to disastrous consequences for the parties and the system as a whole.

### SCOPE OF JUDICIAL INTERVENTION

The major reason behind Arbitration becoming the most sought after grievance redressal system could be attributed to the litigation process being extremely time consuming and expensive. Majority of the people approach the courts in one of the two scenarios, either to get justice served due to their genuine belief in the Indian judicial system or the implied assurance that a case filed before a civil court would take years to

<sup>4</sup> State of U.P. v. Padam Singh Rana, AIR 1971 All 270.

<sup>5</sup> Shin Etsu Chemical Co.Ltd .v.Aksh Optifibre Ltd., (2005) 7 SCC 234.



come to a close thereby giving ample time for a wrongdoer to exploit this means. Arbitration, on the other hand, assured that its main objective was to minimize if not oust the supervisory role of the courts as well as to dispose of cases in a timely and cost-efficient manner<sup>6</sup>.

Though the umbrella belief is that arbitration will completely oust the jurisdiction of the court, it is far from reality. Due to the incompetence inherent in the arbitration process because of the party autonomy provided within the law, it necessitates a certain amount of judicial interference to maintain the rule of law.

It would be surprising to know the number of provisions that are allotted for the purpose of facilitating judicial interference into the arbitral sphere,

Section 5 which is of the Arbitration and Conciliation Act 1996 defines the extent of judicial intervention in arbitration proceedings. It paves the way for judicial intervention in following among other cases which can be drawn under three groups i.e. before, during and after arbitration<sup>7</sup>.

Section 8 – Power to refer the parties to arbitration.

Section 9 – Power to make interim orders.

Section 11 – Appointment of the arbitrator in certain events.

Section 13 (5) - Procedure for challenging an arbitrator.

Section 14(2) - Power to decide on the termination of the mandate of the arbitrator in

the event of his inability to perform his functions.

Section 16 (6) - Competence of an arbitral tribunal.

Section 27 – Assistance in taking evidence.

Section 34 – Power to set aside an award.

Section 34(4) – Power to remit the award to the arbitration tribunal.

The Supreme Court has held that “an arbitrator is a judge appointed by the parties and as such an award passed by him is not lightly interfered with.”<sup>8</sup> However, seeing that the main aim of the Award is to render an award in the interest of justice, the Court is vested with the power to keep a close eye on the Arbitrator’s actions. Keeping this aim in mind, the law provides certain remedies against the Arbitral Awards

Section 34 of the Arbitration and conciliation act gives the court the power to interfere within the ambits of the Arbitration and set aside an award passed by the Arbitrator. The section not only lays out under what circumstances an arbitral award may be set aside but also defines the limitation period within which an application to set aside an arbitral award must be made before the court. An arbitral award can be set aside only if any of the grounds as laid out in S.34(2)(a) or S.34(2)(b) can be established<sup>9</sup> thereby sealing the fact that if the application cannot stand within the boundaries set by the sections then the petition doesn’t have a

<sup>6</sup> Pursottam Das Chokhani v. Sarita Devi Nathani, (2006) 2 SrL LR 176.

<sup>7</sup> Shodhganga “judicial interference”  
[https://shodhganga.inflibnet.ac.in/bitstream/10603/201577/10/10\\_chapter%204.pdf](https://shodhganga.inflibnet.ac.in/bitstream/10603/201577/10/10_chapter%204.pdf)

<sup>8</sup> Indu Engineering and Textiles Ltd. v. Delhi Development , (2001) 3 SCR 916.

<sup>9</sup> Olympus Superstructures Pvt.Ltd. v. Meena Vijay Khetan ,(1999) 3 SCC 65.



standing<sup>10</sup>. The scope of section 34 has been reduced significantly so as to minimise the interference of court in arbitral matters and the recourse to court can opt only in the following circumstances,

1. If the party challenging the award furnishes proof that he was under some incapacity;
2. That the agreement was not valid under the law;
3. That the party was not given proper notice of the appointment of an arbitrator or the arbitral proceeding or was otherwise unable to present this case;
4. That the award deals with a dispute not referred to or not falling within the terms of the agreement;
5. If the award contains decisions on matters beyond the scope of the submission to arbitration only when of the decisions on matters submitted to arbitration can be separated from those not to be submitted and in that case, only the severable part is liable to be set aside;
6. If the composition of the arbitral tribunal of the procedure was not in accordance with the agreement of the parties;
7. If the subject matter of the dispute is found, in the opinion of the court, not capable of settlement under the law
8. If the award is in conflict with the public policy of India.

The courts pertaining to such grounds still don not have the power to sit in the capacity of an appellate court and decide upon the merits of the case. The court must restrict itself to setting aside an arbitral award only upon the following possible events<sup>11</sup> :

If the composition of the arbitral tribunal is not in accordance with the law

The arbitral proceedings transgressed from the procedure and other specifics laid out in the agreement between the parties.

And in absence of such an agreement, the procedure adopted by the arbitrator wasn't in accordance with part I of the act. This means that the award must necessarily be in accordance with part I of the act and transgression from the same may lead to the award getting set aside<sup>12</sup>.

#### SCOPE OF THE PUBLIC POLICY & PATENT ILLEGALITY GROUND

The term public policy which implied public good or the interest of the general public found its definition in the act and the resulting ambiguity led to the courts interpreting that ground how they wanted to. This ambiguity was sought to be tackled with by the The Law Commission in its 246th Report which made setting aside an arbitral award restricted on grounds of public policy to apply only when the award was affected by fraud or corruption, or was against the fundamental policy of Indian law or in contravention with the most basic notions of justice or morality , was added as an explanation appended to sub-clause 2 of S.34(2)(b) of the act by way of an amendment. It has also added an explanation to sub-clause (ii) which establishes that if anyone moves an application to set aside an arbitral award on the grounds of public policy, the courts are barred from going into the merits of the case. It was held that the court should not set aside an award just because it does not agree with the interpretation of the agreement given by the

<sup>10</sup> Food Corporation of India v. Joginder pal Mohinder pal, (1989) 2 SCC 347.

<sup>11</sup> Mafatlal securities v. Birla Sunlife securities ltd (2002) Arb LR 304 (BOM).

<sup>12</sup> (2003) 5 SCC 705.



arbitrator rather it should base its decision on whether or not the award was based on no evidence or irrelevant evidence or was perverse<sup>13</sup>.

Though what constitutes a violation of public policy in the sense that what is in the best interest of the people and what is not is still debatable but what is erroneous on the face of the law or what is in clear violation of a statutory provision and can be inferred on the face of the award cannot be said to be in the interest of the common people.

What constitutes as patent illegality has been elaborated in Associate Builder's v. Delhi Development Authority<sup>14</sup>

1. fraud or corruption
2. contravention of substantive law
3. error of law by the arbitrator
4. contravention of the arbitration and Conciliation Act, 1996 itself
5. the arbitrator fails to consider the terms of the contract and usages of trade under section 28(3) of the Act
6. arbitrator fails to give a reason for his decision

#### JUDICIAL INTERVENTION POST-2015 AMENDMENT OF THE ACT

After taking into account the vagueness inherent in the ground of public policy and its misuse by parties to snake in the judiciary's interference upon the award passed through the system of arbitration, the Arbitration and conciliation (Amendment) Act, 2015 sought to limit and curb the judiciary's interference by narrowing down the scope of public policy

to the extent of an award being considered inconsistent with the public policy of India,

1. If the award was affected or influenced by fraud or corruption
2. It is against the fundamental policy of Indian law
3. It is against the basic notions of morality or justice.

The court also opined that it can only set aside the award leading to fresh arbitration between the parties only upon finding that the arbitrator was biased or influenced fraudulently or if there has been a gross miscarriage of justice of any sorts etc. the court must merely perform the role a supervisory role for the parties have explicitly chosen to oust the jurisdiction of the court when they opted for arbitration and this objective of the system of arbitration must be respected and safeguarded<sup>15</sup>. Most of the times the arbitral award is sought to be set aside on the plea of misinterpretation of the contract by the arbitrator. The parties use this as a back door to set aside an award by an arbitrator thereby misusing S.34 as an appeal mechanism in courts, which the Supreme Court has time and again clarified that it doesn't. It is made clear that interpretation of contract falls solely within the ambit of the powers of the arbitrator, with that being established emphasis is laid upon the fact that misinterpretation of the contract is not a ground that has been established under s.34.

The most recent judgement on this matter being the Ssangyong Engineering<sup>16</sup> and Construction v. National Highways Authority of India the Supreme court held

<sup>13</sup> Wishwa Mittar Bajaj and Sons v. Shipra Estate Ltd. and Jaikishan Estates Developers (P) Ltd., **2018 SCC OnLine Del 12918**, dated 14-12-2018

<sup>14</sup> Associate Builders v. Delhi Development Authority, (2014) 4 ARBLR 307 SC.

<sup>15</sup> McDermott International Inc. v. Burn Standards Co. Ltd (2006) 11 SCC 181.

<sup>16</sup> F.A.O. (OS) Comm. 82/2016.



that the arbitrator's view cannot be substituted with the courts own view and if a contract could be interpreted in two ways it should not be set aside if the view does not coincide with the view of the court. The court held that the view held by the majority of applying the circular over the contract amounted to rewriting of the contract itself which was in gross violation of natural justice.

In a very recent judgement, the Supreme Court has also clarified that the award passed by the Arbitral Tribunal can be interfered with in the proceedings under Section 34 and Section 37 of the Arbitration Act ONLY in a case where the finding is perverse and/or contrary to the evidence and/or the same is against public policy<sup>17</sup>

### **THE ARBITRATION AND CONCILIATION (AMENDMENT) ACT, 2019 & JUDICIAL INTERFERENCE**

The Arbitration and Conciliation (Amendment) Bill, 2019 arose from the recommendation of a high-level committee under the chairmanship of Justice BN Srikrishna. August 2019 brought with it the amendments to the act and has included some prominent changes to the Arbitration and Conciliation act 1996 while modifying its recent amendments from 2015. The act formally received the presidential assent on 9th August 2019 and has been published in the Official Gazette.

The author would neither be elaborating on every individual amendment introduced nor critique it. However, emphasis will be laid on specific provisions relating to the setting aside of an award and its implication on

whether or not judicial interference into arbitral matters has been narrowed down.

The Act mainly aims to set up an independent body that will provide grading of arbitral institutions that will be set up for the purpose of appointment of arbitrators as designated by the courts, frame policies for speedy and cost-effective disposal of cases, maintain a record of all arbitral awards made in India and also most importantly recognize institutions that provide professional accreditation to arbitrators.

### **ARBITRAL INSTITUTIONS**

The function of appointment of arbitrators under S.11 has been considered exclusively under the domain of the judiciary<sup>18</sup>. The function was carried out by the Supreme Court for international commercial arbitration or by the High Court for domestic arbitration when the parties aren't able to come to consensus upon the arbitrator chosen or when the parties or two appointed arbitrator do not seem to come to an agreement or when the person or institution designated to carry out the appointment process fails to carry out their duties.

This function has been expressly delegated to an individual institution for this specific purpose of appointing arbitrators among other duties that have been so delegated by the Judiciary.

The 2019 amendment was the implementation of the subtle push that was being hinted upon by the 2015 amendment through S.11(6)(B) where the delegation of the power to appoint arbitrators does not amount to delegation of judicial power. The provision involves setting up and enabling specific arbitral institutions in India to take

<sup>17</sup> State of Jharkhand v M/s HSS Integrated SDN.

<sup>18</sup> *SBP & Co. v. Patel Engineering Ltd.*, (2005) 8 SCC 618.



over the functions of appointing arbitrators as accredited or graded by the Arbitral Council of India. Thus, all application that was to be filed before the Supreme Court or High Court is to be filed before the arbitral institutions so designated for this purpose by the court that has the jurisdiction to do so.

If there is no arbitral institution set up within the jurisdiction of a certain High Court, the Hon'ble court may maintain a panel of arbitrators to fulfil the said purpose. The application for appointment needs to be disposed of within 30 days from the date of service of notice to the opposite party, though the mandatory nature of this provision is still in doubt.

This amendment has drawn significant inspiration from the practices followed in Singapore<sup>19</sup> and Hongkong<sup>20</sup> wherein appointment of arbitrators is handled by the Singapore International Arbitration Centre and the Hong Kong International Arbitration Centre (HKIAC).

The fee payable to the arbitrator will be determined as per the fourth schedule unless the parties have decided on fees as per the rules of the arbitral institutions, and will apply only to domestic arbitrations and not international commercial arbitrations.

Moreover, the amendment has provided for the deletion of Section 11(6)(A) while keeping Section 11(6)(B). The B.N.Srikrishna Committee recommended the deletion with an aim to reduce judicial interference in the hopes of accepting and

implementing systems similar to that in Singapore and Hong Kong would help in reducing the unwanted delays caused as well as to aid the growth of arbitration in India through the process of doing away with the provision of examining the existence of a valid arbitration agreement by the courts.

The scope of the court's powers to decide its own jurisdiction to accept arbitration petition<sup>21</sup> as well as different categories of issues<sup>22</sup> which are within the jurisdiction and competence of the court while exercising powers under Section 11 was decided by the Supreme Court with regard to the issues that could be decided by the chief justice or whomsoever he designates on the matters of jurisdiction and existence of arbitration agreement and issues that should be left to the arbitral tribunals should decide.

The 2015 amendment codified the above mentioned by bringing in Section 11(6)(A) wherein the power of the courts was curtailed ONLY to the examining the existence of a valid agreement<sup>23</sup>.

The 2019 amendments take away this residual power of the courts too when it comes to scrutinising the existence of a valid arbitration agreement by deleting Section 11(6)(A). This was done so to reduce the delay caused by the examination of the existence of a valid agreement as the same would require producing evidence and arguments. What is to be considered here is the fact that courts were carrying out a very vital duty of examining the existence of an arbitration agreement so as to not prejudice any party and the deletion of the same may

<sup>19</sup> Sections 9A(2), 2(1) and 8(2), International Arbitration Act (Chapter 143a) (Singapore).

<sup>20</sup> Section 13(2) and 24, Arbitration Ordinance, [1 June 2011] L.N. 38 of 2011 (Hong Kong).

<sup>21</sup> SBP vs. Patel Engineering, (2005) 8 SCC 618

<sup>22</sup> National Insurance Company Limited v. Boghara Polyfab Private Limited (2009) 1 SCC 267.

<sup>23</sup> Duro Felguera, S.A. v. Gangavaram Port Limited (2017) 9 SCC 729.



lead to the automatic appointment of tribunals for issues that are prima facie not arbitrable like issues that have to do with rights in rem.

Thus without any initial test to determine whether or not there exists a valid arbitration agreement may ironically lead to more wastage of the tribunals time for, at the end of it, the tribunal may find that there exists no valid arbitration agreement in the first place!

### QUALIFICATION OF ARBITRATORS

The 1996 act or the 2015 amendment had not prescribed any minimum qualifications for a person to be appointed as arbitrator in addition to the general conditions of a person capable of being unbiased and impartial. The 2019 amendment, however, has brought in the eighth schedule that prescribes certain specific qualification standards that a person has to fulfil to be accredited as an arbitrator. Any lawyer, company secretary, chartered account, cost accountant, Indian legal service officer, legal officer or an officer with an engineering degree both in private and public sector or any degree with a ten years' experience bracket within the scientific stream of Information technology, IPR, telecom services etc along with having reasonable legal competence to give a reasonable arbitral award.

However any person that has been convicted of an offence involving, moral turpitude would automatically lose accreditation but with that being said, there is no punishment, action or fine imposed on arbitrators not falling within the qualification standards prescribed.

### SECTION 17 POWERS OF THE TRIBUNAL

Another area where the tribunals powers have been narrowed down allowing for greater discretion of the courts is the amendment of section 17 whereby the powers of the tribunal to grant interim relief to a party during the pendency of an arbitration proceeding or after the award has been rendered but before its enforcement has been reduced to merely granting interim relief during the pendency of the proceeding under section 17 and not after the award has been given by the arbitrator.

Any post-award interim relief has to be taken up in court through a section 9 application and not through section 17.

### “FURNISH PROOF” UNDER SECTION 34

One of the most significant yet subtle amendments was the limitation of the scope of Section 34. Prior to the amendment section 34(2) of the Act 1996 involved furnishing of proof which allowed courts to frame issues and asked to lead evidence beyond the record of the arbitral tribunal which thereby seemed like conducting an arbitration proceeding like a civil suit.

The amended section thereby restricts the scope of Section 34 by making it clear that an application to set aside an arbitral award would only require perusing evidence on record of the tribunal and nothing beyond that. It substitutes the words “furnishes proof” with “establishes on the basis of the record of the arbitral tribunal”.

### 2019 AMENDMENT'S EFFECT ON JUDICIAL INTERFERENCE

Judicial interference was justified earlier by the author for the sole reason that arbitrators both appointed by the parties or by the court could turn out to be incompetent, biased or



may lack a general calibre in law or the best practices involved in conducting an arbitral proceeding and go on to render a legal arbitral award that will be binding on the parties.

That is to say that an appeal against a judgement is within the rights of the person because he had no say in which judge he wanted or their expertise in a particular field of law thus entailing the provision of looking into the merits of the case again to pass a reasonable judgement. This isn't the case when it comes to arbitration where the parties are at full liberty to choose their arbitrator and with the 2019 amendment in place, a specific qualification requirement for the arbitrator to get accreditation has been established. This clarifies the further limitation on judicial interference for a qualified arbitrator is presumed to provide an independent unbiased and well reasoned arbitral award compared to arbitrators that haven't been accredited by the arbitral council of India.

The motive behind this is to reduce the time taken to go over the process of setting aside an award for the reasons pertaining to the incompetence of the arbitrator chosen or appointed.

Further, the arbitral institutions that will be set up will take care of the appointment of arbitrators entirely thereby reducing the interference of courts through a section 11 application.

As clarified in the case of TPI Ltd vs Union of India, it is reiterated that the arbitral award should not be appealed on the basis of merits for the reason that there was no pressure on the parties to opt for arbitration. Arbitration has always been an alternate dispute redressal system where the parties have consented to abide by the award given by the arbitrator chosen by them. Now that qualified arbitrators have become mandatory the

question of perusing the award based on merits does not arise thereby ousting the jurisdiction of courts even further.

### CONCLUSION

The whole point of resorting to arbitration is to specifically oust the jurisdiction of the courts. it is a time-saving mechanism set in place to tackle disputes that arise between parties in a quick cost-efficient manner. Section 34 in theory could lead to an endless loop between the parties by way of the court entertaining the petition to set aside the award by the losing party say on the grounds of public policy which is still rather vague thereby delaying the enforcement of the award and also undermining the arbitrator who rendered the award in a way following which if the award does get set aside, there is nothing to say that the losing party to the "appeal" wouldn't apply for another S.34 petition for the same creating the said loop. This could lead to increased wastage of the courts time which was exactly what arbitration sought to tackle.

The author does concede to the point that arbitration does cause the parties a lot of money and that in reality, the parties would arrive at a settlement sooner or later, the possibility of it still undermines the whole objective of arbitration in toto.

Where the parties have agreed to oust the jurisdiction of the courts to come together and determine the dispute through arbitration the courts must not interfere. With the provision to provide for skilled qualified and unbiased arbitrators has been set in place, the question of mandatory judicial interference has reduced significantly.

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