



EMERGING DYNAMICS AND DIMENSIONS OF ARBITRATION

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ABSTRACT

"I can imagine no society which does not embody some method of arbitration"

-Herbert Read

The industrial revolution has led to a rapid escalation in global trade and commerce. To agree with the economic growth, the parties of an agreement prefer arbitration over litigation as a dispute resolution mechanism. Not only in India, even the economies of various other developing countries have realized that arbitration happens to be a favorable way out of all. Arbitration has always been a means of securing an arbitral award on a conflict issue by reference to the third party also known as Arbitrator and as a contractual arrangement, arbitration is, at least in theory, governed by the principle of party autonomy. About 120 countries have signed the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, known as "New York Convention". The Convention facilitates enforcement of awards in all contracting states. There are several other multilateral and bilateral arbitration conventions that may also help in enforcing Arbitral Award.

The Arbitration and Conciliation Act, 1996 facilitates the provisions regarding the finality of Arbitral Award and setting aside of Arbitral Award. The Supreme Court has described the beneficial features of this act as, (i) party autonomy; (ii) fair resolution of a

dispute by a tribunal; (iii) the Arbitral Tribunal has a duty to act fairly and impartially. This research paper consists of a detailed analysis regarding the finality of Arbitral Award and Grounds to set aside Arbitral Award. This paper also attempts to give more suggestion as to an agreement which indicates that "no reason to be given while delivering an Arbitral Award."

Keywords: arbitration, finality, award, set aside, dispute resolution mechanism, enforcement.

Finality and Grounds for setting aside Arbitral Awards

Introduction

The industrial revolution has led to a rapid escalation in global trade and commerce. To agree with the economic growth, the parties of an agreement prefer arbitration over litigation as a dispute resolution mechanism. Not only in India, even the economies of various other developing countries have realized that arbitration happens to be a favorable way out of all. Arbitration has always been a means of securing an arbitral award on a conflict issue by reference to the third party also known as Arbitrator and as a contractual arrangement, arbitration is, at least in theory, governed by the principle of party autonomy. About 120 countries have signed the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, known as "New York Convention". The Convention facilitates enforcement of awards in all contracting states. There are several other multilateral and bilateral arbitration conventions that may also help in enforcing Arbitral Award.

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Arbitration, a form of alternative dispute resolution (ADR), is a process where two parties make their arguments to an arbitrator, who is a neutral third party, instead of litigating the matter in court. The arbitrator, typically a lawyer or retired judge, makes a decision following the arbitration hearing. The decision is legally binding and enforceable by the court, unless all parties stipulate that the arbitration process and decision are non-binding. An arbitration award is the award granted by the arbitrator in their decision. This award can be the money which one party has to pay the other party. It can also be a non-financial award, such as stopping a certain business practice or adding an employment incentive. An award which merely embodies a compromise of the parties themselves before the arbitrator, is a valid award.

The parties cannot appeal against an arbitral award as to its merits and the court cannot interfere on its merits. The Supreme Court has observed that “an arbitrator is a judge appointed by the parties and as such an award passed by him is not to be lightly interfered with.” But this does not mean that there is no check on the arbitrator’s conduct. In order to assure proper conduct of the proceeding, the law allows certain remedies against an award. Let’s further look into the provisions which are been provided by Arbitration and Conciliation Act, 1996 regarding the finality

of Arbitral Award and setting aside of Arbitral Award.

FINALITY OF THE AWARD

A final award is an award which determines all the outstanding issues in the arbitration. An arbitral tribunal can make only one final award in the absence of some specific authority to make more than one final award. Every arbitration agreement contains a provision that the award is to be final and binding on the parties and any other persons claiming under them.

In *Premji Kumbabhai V. Union of India*¹, it was discussed that after the award becomes final, an end is put to all controversies between the parties on the points which were taken, either in attack or in defense. Once an award is delivered it cannot be reopened or reagitated. It is in the interest of the public at large that finality should attach to the binding decision pronounced by courts and the interest of the individuals should not be vexed twice over the same kind of litigation.

If an award has been pronounced between the parties it shall be presumed that the award has dealt with all the disputes between them which existed at the time of the reference². Similarly, a final decision would mean a decision, which would operate as *res judicata* between the parties. Though the provisions of CPC are not applicable to the proceedings under the Arbitration and Conciliation Act, 1996, the principles incorporated in section 11 and order 2 rule 2 of the CPC can be applied to the arbitration proceedings. The major issue regarding the finality of an award is that, there is no general test has been laid down for finality of an award. The reason is that a judgement or an order maybe final for one purpose and interlocutory for another.

¹AIR 1965 A&N 81 (DB)

²Satish Kumar V. Surinder Kumar, (1969) 2 SCR 244: AIR 1970 SC 833



An award made under the act besides being final is of binding in nature on the parties and persons claiming under them. Except for seeking the setting aside of the award or its modification, no party can challenge the award by any legal mode of litigation. The legal representatives, successors in interest and assignees of the parties are also bound by the arbitral award.

The award shall be final and binding on the parties and persons claiming under it subject to the time limit prescribed under section 33 and 34 of the Act³. The time limits are as follows:-

1. Correction and interpretation of the award – 30 days from the receipt of the award;
2. Tribunal making a correction or giving an interpretation on a receipt of application for correction/interpretations – 30 days of the receipt of the request (this time period cannot be extended by the tribunal);
3. Tribunal making a correction on its own – 30 days from the date of award (this time period cannot be extended by the tribunal);
4. Party applying for an additional award against the claim omitted in the award – 30 days from the date of receipt of the award;
5. Tribunal making the additional award – 60 days of the receipt of request (this time period may be extended by the tribunal). The additional award should have the aspects of the award mentioned above.
6. Application for setting aside the award – 3 month from the date of receipt of award or the date of disposal of the application in the above categories (the court can extend to a maximum of 30 days)⁴.

In the cases of points from 1 to 5, the award becomes final and binding only after the

expiry of the above time limits for the application or the disposal of the application. In the case of point no. 6, the award becomes final and binding if no application is made within the specified period of making the application and the grace period of 30 days. If the application for setting aside the award has been made in time and admitted by the court, the award shall not become final and binding till the court rejects the application.

SETTING ASIDE ARBITRAL AWARD

There is no provision for appeal against an arbitral award and it is final and binding between the parties. However, an aggrieved party may take recourse to law court for setting aside the arbitration on certain grounds specified in section 34 of the Arbitration and Conciliation Act, 1996.

Under the repealed 1940 Act three remedies were available against an award, which are:

- Modification
- Remission
- Setting Aside

These remedies have been put under the 1996 Act into two groups. To the extent to which the remedy was for rectification of errors, it has been handed over to the parties and the Tribunal. The remedy for setting aside has been older with returning back the award to the Tribunal for removal defects.

Section 34 provides that an arbitral award may be set aside by a court on certain specific grounds, which are:

1. The party is under some incapacity;
2. Arbitration agreement between the parties is not valid;
3. Lack of notice of appointment of arbitrator or of holding of arbitral proceeding;

³Arbitration and Conciliation Act, 1996

⁴Justice R.P. Sethi Commentary on Law of Arbitration and Conciliation [Act No.26 of 1996]



4. Arbitral award deals with the dispute not contemplated by or not falling within the terms of the submission to the arbitration or it contains decisions on matter beyond the scope of submission of arbitration;
5. Composition of Arbitral Tribunal or Arbitral procedure was not in accordance with the agreement of the parties;
6. The court finds that the subject matter of the dispute is not capable of settlement by arbitration under the law;
7. The award is in conflict with the public policy.

UNCITRAL MODEL LAW

Section 34 of Arbitration and Conciliation Act is based on Article 34 of the UNCITRAL Model Law and the scope of the provisions for setting aside the award is far less than it was under the sections 30 or 33 of the 1940 Act. In *Municipal Corporation of Greater Mumbai V. Prestress Products*⁵, the court held that the new act was brought into being with the express parliamentary objective of curtailing judicial intervention. Section 34 significantly reduces the extent of possible challenge to an award.

It is necessary for the aggrieved party to make an application under section 34 stating the grounds of challenge. An application for setting aside the award has to be made by a party to the arbitration agreement. But a legal representative can apply for it because he is a person claiming under them. There is no special for prescribed for making an application under section 34 of the act except it has to be a written statement filed within the period of limitation.

In *Sanshin Chemical Industry V. Oriental Carbons & Chemical Ltd*⁶, there arose a dispute between the parties regarding the

decision of the joint arbitration committee relating to venue of arbitration. The Apex court held that a decision on the question of venue will not be either an award or an interim award so as to be appeal able under section 34 of the act

In *Brijendra Nath V. Mayank*⁷, the court held that where the parties have acted upon the Arbitral Award during the pendency of the application challenging its validity, it would amount to estoppel against attacking the award.

An award which is set aside is no longer remains enforceable by law. The parties are restored to their former position as to their claims in the dispute. Setting aside an award means that it is rejected as invalid. The award is avoided and the matter becomes open for decision again. The parties become free to go back to arbitration or to have the matter decided through litigation in court.

GROUND FOR SETTING ASIDE ARBITRAL AWARD

I. Incapacity of parties

If a party to the arbitration is not capable of looking after his own interests, and he is not represented by a person who can protect his interests, the award will not be binding on him and may be set aside on his application.

If a minor or a person of unsound mind is a party, he must be properly represented by a proper guardian. Otherwise the award will not be liable to be set aside. Such a person is not capable of binding himself by a contract and therefore, an award under a contract does not bind him.

Section 9 of 1996 Act enables him to apply to the court for appointment of a guardian for a minor or a person of unsound mind for the

⁵(2003) 4 RAJ 363 (Bom)

⁶AIR 2001 SC 1219

⁷AIR 1994 SC 2562



purpose of arbitral proceedings. The ground of incapacity would cease to be available when the incompetent person is represented by a guardian.

II. Invalidity of agreement

The validity of an agreement can be challenged on any of the grounds on which the validity of the contract may be challenged. In cases where the arbitration clause is contained in a contract, the arbitration clause will be invalid if the contract is invalid.

In *State of U.P. v. Allied Constructions*⁸, the court held that the validity of an agreement has to be tested on the basis of law to which the parties have subjected it. Where there is no such indication, the validity would be examined according to the law which is in force.

III. Notice not given to the parties

Section 34(b)(a)(iii) permits challenge to an award if the party was not given proper notice of the appointment of an arbitrator, or the party was not given proper notice of the arbitral proceedings, or the parties was for some reasons unable to present his case.

Under section 23(1) the Arbitral Tribunal has to determine the time within which the statements must be filed. This determination must be communicated to the parties by a proper notice. Section 24(2) mandates that the parties shall be given sufficient advance notice of any hearing or meeting of the

tribunal for the purpose of inspection of documents, goods or other property.

If for any good reason a party is prevented from appearing and presenting his case before the Tribunal, the award will be liable to set aside as the party will be deemed to have been deprived of an opportunity of being heard i.e., the principle of natural justice.

In *Dulal Podda V. Executive Engineer, Dona Canal Division*⁹, the court held that appointment of an arbitrator at the behest of an appellant without sending notice to the respondent, Ex Parte award given by the arbitrator was illegal and liable to be set aside.

In *Vijay Kumar V. Bathinta Central Co-operative Bank & ors*¹⁰, the court observed that "it is a typical case where the arbitrator misconducted himself. Arbitrator held the first and only hearing on May 17, 2010. No points for settlement or issues were framed. The bank filed affidavits of four employees. Appellant was not given the opportunity to cross-examine them. He was denied the opportunity to produce evidence. A complete go bye was given to the provisions of law, procedure and rules of justice. It would thus be seen that appellant was unable to present his case.

IV. Award beyond scope of reference

The limits of the authority and jurisdiction when mentioned in the arbitration agreement, the arbitrator should not exercise his powers beyond the limits prescribed under such agreement.

⁸(2003) 7 SCC 396

⁹(2004) 1 SCC 73

¹⁰FAO No.2161 of 2012



Section 34(2)(a)(iv) of the act provides that an arbitral award could be set aside if it deals with a dispute not contemplated or contains a decision beyond the reference.

In *Gautam Construction & Fisherie Ltd V. National Bank of Agriculture and Rural Development*¹¹, the Supreme Court modified the award to the extent that the rate of construction meant for ground floor could not be applied to the construction of the basement area.

Section 16 of the 1996 Act states that the initial decision with respect to the jurisdiction lies with the tribunal. In case of excess of jurisdiction the aggrieved party may apply under sec.34(2)(a)(iv) for setting aside the award. The appointed Arbitrator has no right to violate the terms and conditions of the contract. Even if it is not clear and unambiguous, he has the right to interpret the contract, but not go against it. Even in the case, *State of Rajasthan V. Nav Barat Construction c*¹², the majority of the claims allowed were against the terms and conditions of the contract.

V. Illegality in arbitral procedure

An award can be challenged in case of irregularity in composition of the tribunal with respect to the arbitration agreement or if the procedure that was agreed by the parties were not followed by the tribunal, then the aggrieved party can challenge the award under sec.34(2)(a)(v). Such irregularity in composition of the tribunal amounts to procedural misconduct. If it is found that the arbitrator had deliberately deviated from the

terms and conditions of the agreement, such act amounts to misconduct of the arbitrator.

Section 13 provides that, if the challenge against the arbitrator is not successful for his procedural misconduct, then the aggrieved party may apply for setting aside of the award under section 34 before the court. In *State Trading Corp. V. Molasses Co., the Bengal Chamber of Commerce*¹³, the arbitral tribunal denied a company to be represented by its law officer who happened to be an employee of the company. It was not only a misconduct of the arbitrator, it was also a misconduct of the arbitration proceedings, the court held.

VI. Dispute not Arbitrable

A dispute must be arbitral in nature for the exercise of power by an arbitrator. Only matters of indifference between the parties to litigation which affect their private rights can be referred to arbitration. Therefore, matters involving public rights, insolvency proceedings and criminal proceedings cannot be referred to arbitration.

In the case *PNB Finance ltd. V. Shital Prasad Jain*¹⁴, the Delhi High Court held that specific performance of an act does not fall within the scope of arbitration proceeding. However, the Supreme Court did not approve the view of Delhi High Court. The Supreme Court held that the right to specific performance deals with the contractual obligation and it is certainly open to the parties to refer the issue relating to specific performance to arbitration.

¹¹AIR 2000 SC 3018

¹²AIR 2005 SC 4430

¹³AIR 1981 Cal. 440

¹⁴AIR 1991 Del.13



VII. Award against public policy

Section 34(2)(b)(ii) states that, an arbitral award can be set aside if it is in conflict with the public policy of India. An award obtained fraudulently or through corruption i.e., by suppressing facts, misleading or deceiving, by bribing, by exerting pressure on the arbitrator will also be considered as an award against the public policy. If the arbitral award is contrary to the provisions of the act or against the terms of the arbitral agreement, it would be regarded as patently illegal. Under such circumstances the award could be set aside. In the case *Venture Global Engineering V. Satyam Computer Service Ltd.*¹⁵, the court held that the award could be set aside if it is contrary to fundamental policy of Indian law or justice or morality or if it is patently illegal.

LIMITATION FOR FILING APPLICATION FOR SETTING ASIDE

An application for setting aside an arbitral award must be filed within 3 months from the date of receiving the award from the arbitral tribunal. This limitation period can further be extended for another 30 days exceeding the time limit of 3 months¹⁶. At the expiry of the said time period, the award shall become enforceable¹⁷.

In the case *Union of India V. Shring Construction Co.(p) Ltd*¹⁸, the Hon'ble Supreme Court held that the district court should have decided whether the application was filed within the limitation period after excluding the time period that was lost in a wrong court.

¹⁵2008(4) SCC 190

¹⁶The Arbitration and Conciliation act, 1996 Section 34(3)

¹⁷The Arbitration and Conciliation act, 1996 Section 36

ADDITIONAL RESEARCH : IS IT FAIR IF THE REASON FOR DELIVERING AN AWARD IS NOT GIVEN BY THE ARBITRATOR, SINCE IT IS MENTIONED BY THE PARTIES, IN THE AGREEMENT?

Section 31(3) of the act speaks about two types of awards, (i) Reasoned awards and, (ii) Non-Reasoned awards. This section states that, the reason for an arbitral award shall be mentioned unless the terms and conditions of the agreement states no reasons shall be given for the award. A reasoned award is one in which the adjudicating authority sets out the reason for its decision and these reasons form part of the award itself. An award must contain the reasons unless either it is an agreed award or the parties have agreed to dispense with reasons¹⁹. The parties to an arbitration, and especially the losing party, are entitled to know the reasons for the tribunals decision by which they are bound, unless they have mutually agreed in writing to dispense with reasons. In *Siemens Engineering's V. Union of India*²⁰, the court observed that, if courts of law are to be replaced by administrative authority and tribunals, as indeed, should accord fair and proper hearing and give sufficiently clear and explicit reasons in support of the orders made by them.

The Supreme Court settled the legal position that a *speaking order* or *reasoned award* is one which discusses or elaborates the reasons which let the arbitrator to make the award. In a reasoned award it is very important to discuss about the factors that led to such a

¹⁸(2006) 8 SCC 18

¹⁹The Arbitration and Conciliation act, 1996 Section 53(4)

²⁰AIR 1976 SC 1785



conclusion and setting out the conclusions upon the questions of issues that arise in the arbitration proceedings without discussing the reasons for coming to these conclusions, does not make an award reasoned or speaking award²¹.

there is no elaborate discussion does not mean that the reasons have not been articulated. The rational basis of the award is revealed in the narration. In our opinion it is a speaking award, and not a silent award, though it speaks in few words. We must therefore proceed on this basis²².

In *Union of India V. Om Prakash Baldev Krishna*²³, the court held that a non-reasoned award is liable to be set aside by the court as contemplated by section 31(3) which requires that arbitral award shall state reasons upon which it is based unless the parties have mutually agreed that no reasons are to be given.

CONCLUSION

The main objectives of arbitration is speedy trial and to maintain confidentiality. As there is no place for appeal in arbitration in India, the moment an award has been set aside, either the award becomes unenforceable or either of the parties go for an appeal before the court against the award. In this case, the concept of speedy trial gets affected. Hence, an Appellant Authority for appeals against arbitral award must be introduced. An authority in the designation of providing justice, must always state the reason for delivering such a decree. The duty to record reasons is a responsibility of an arbitrator and it cannot be dispensed with by a clause. The validity of the order passed by the statutory authority must be judged by the reasons

recorded therein and cannot be construed in the light of subsequent explanation given by the arbitrator concerned or by filing an affidavit.

“Orders are not like old wine becoming better as they grow older”.

-Krishna Iyer

²¹Jajodea (overseas) Pvt.ltd. V. IDC of Orissa ltd. 1993 SCR (1) 229, 1993 SCC (2) 106

²²Union of India V. Hindustan Motors Ltd.1980 CENCUS 156 D, 1980 (6) ELT 423 DEL

²³AIR 2000 J&K 79