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Challenge to an Arbitral Award



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Handbook on Challenge to an Arbitral Award
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A Thought Leadership Publication

We now present this handbook to enable readers to have an overview of the systems and legal rules and regulations that are essential for business operations in India.

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Challenge to an Arbitral Award - A primer on Section 34 of the Arbitration and Conciliation Act, 1996

Please allow us to take a moment, at the outset, to shed some light on the rationale for this compendium. This is not, and was never intended as a piece of academic thought, but is instead meant as a ready reference/ guide for practitioners. To this end, we haven't been descriptive of concepts which we believe are well known/ established and have also otherwise been parsimonious with our words. We hope that towards its intended purpose, this Handbook becomes the first (and hopefully final) port of call for every practitioner before advising a client on a challenge to an arbitral award.

A. SECTION 34 IS APPLICABLE ONLY TO AWARDS COVERED BY PART I OF THE ARBITRATION AND CONCILIATION ACT, 1996

Part I of the Arbitration and Conciliation Act, 1996 (“**Arbitration Act**”) applies only to those arbitrations that have their juridical or legal seat within the territory of India, except for certain provisions as set out in Section 2(2) of the Arbitration Act. Part I of the Arbitration Act does not have any application to awards passed in arbitrations seated outside India. Therefore, only an award passed in a domestic arbitration or an international commercial arbitration

¹ 34. *Application for setting aside arbitral award.* – (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).
(2) An arbitral award may be set aside by the Court only if—
(a) the party making the application establishes on the basis of the record of the record of the arbitral tribunal 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 matters 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

seated in India can be the subject matter of challenge under Section 34¹ (which falls in Part I) of the Arbitration Act². An award passed in an arbitration seated outside India can only be subjected to the jurisdiction of Indian courts when the same is sought to be enforced in accordance with the provisions contained in Part II of Arbitration Act.³

B. COMPETENT COURT FOR ENTERTAINING APPLICATIONS UNDER SECTION 34 OF THE ARBITRATION ACT

The designation of a seat by the parties to an arbitration, has been held to be akin to an exclusive jurisdiction clause. The moment the seat is determined, exclusive jurisdiction for the purpose of regulating arbitral proceedings would vest in courts of that seat or place.⁴ Therefore, challenge proceedings under Section 34 of the Arbitration Act, must be filed in the competent court, which has jurisdiction (territorial, pecuniary and special/subject matter) over of the seat of arbitration.

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; or

(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.

Explanation 1.—For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if,—

(i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or

(ii) it is in contravention with the fundamental policy of Indian law; or

(iii) it is in conflict with the most basic notions of morality or justice.

Explanation 2.—For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute.

(2A) An arbitral award arising out of arbitrations other than international commercial arbitrations, may also be set aside by the Court, if the Court finds that the award is vitiated by patent illegality appearing on the face of the award:

Provided that an award shall not be set aside merely on the ground of an erroneous application of the law or by reappraisal of evidence.

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

(4) On receipt of an application under sub-section (1), the Court may, where it is appropriate and it is so requested by a party, adjourn 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.

(5) An application under this section shall be filed by a party only after issuing a prior notice to the other party and such application shall be accompanied by an affidavit by the applicant endorsing compliance with the said requirement.

(6) An application under this section shall be disposed of expeditiously, and in any event, within a period of one year from the date on which the notice referred to in sub-section (5) is served upon the other party.

² *Noy Vallesina Engineering SpA v. Jindal Drugs Limited & Ors., Judgment dated 26th November 2020 passed in Civil Appeal Number 8607 of 2010.* (Para No. 17-23)

³ *Bharat Aluminium Company v. Kaiser Aluminium Technical Services Inc., (2012) 9 SCC 552.* (Para No. 194)

⁴ *Indus Mobile Distribution (P) Ltd. v. Datawind Innovations (P) Ltd., (2017) 7 SCC 678.* (Para No. 20)

Where both a High Court exercising “ordinary original civil jurisdiction” and the “principal Civil Court of original jurisdiction” in a district would qualify as the competent court, the Supreme Court has held that Section 2(1)(e)⁵ of the Arbitration Act confers jurisdiction upon the High Court, irrespective whether the District Court is in the same district over which the High Court exercises original jurisdiction.⁶

⁵ 2. Definitions. – (1) In this Part, unless the context otherwise requires, –

(e) “Court” means –

(i) in the case of an arbitration other than international commercial arbitration, the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, but does not include any Civil Court of a grade inferior to such principal Civil Court, or any Court of Small Causes;

(ii) in the case of international commercial arbitration, the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, and in other cases, a High Court having jurisdiction to hear appeals from decrees of courts subordinate to that High Court.

⁶ Executive Engineer, Road Development Division No. III, Parvel and Ors. v. Atlanta Limited, (2014) 11 SCC 619; (Para No. 24) and State of West Bengal vs. Associated Contractors, (2015) 1 SCC 32. (Para No. 13)



Grounds for setting aside an award

Section 34 of the Arbitration Act sets out an exhaustive list of grounds on which an award passed in a domestic arbitration or an international commercial arbitration seated in India can be challenged, in before the appropriate Court in India. Recently, a three-judge bench of the Supreme Court in *Bhaven Construction v. Executive Engineer Sardar Sarovar Narmada Nigam Ltd. and Anr*⁷ has highlighted that the opening phase of Section 34 read as ‘*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).*’ The Court emphasised that the use of term ‘only’ as occurring under the provision served two purposes of (i) making the enactment a complete code; and (ii) laying down the procedure.

C. INCAPACITY OF PARTY

Section 34(2)(a)(i) of the Arbitration Act provides that a court can set aside an award, if the party making an application proves that a party to the award was under some legal incapacity (i.e. cases where a minor or a person of unsound mind or any other person legally incapable of representing his own interests is a party) *inter-alia* to conclude a valid arbitration agreement.

D. INVALIDITY OF THE ARBITRATION AGREEMENT

Section 34(2)(a)(ii) of the Arbitration Act provides that an award may be set aside if the party making the application proves that 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.

Where there is no valid arbitration agreement in law, the arbitral proceedings would be unauthorized.⁸ Where an arbitration clause was inserted into a document after the parties had signed it, and the document had not been signed or even initialed by them, reference of the matter to the arbitrator named in the

⁷ [Judgment dated 6th January 2021 passed in Civil Appeal No. 14665 of 2015](#) (Para No. 16)

⁸ [Union of India \(UOI\) v. A.L. Rallia Ram, AIR 1963 SC 1685](#). (This is a one-page judgment)

said clause was held to be unwarranted and the award was set aside.⁹ In a case where the arbitration clause was affixed in small font at the bottom of the invoice, it was observed that it was doubtful whether the party signing the invoice had noticed that he was signing a document which had an arbitration clause. Accordingly, it was held that that arbitration clause itself was vague and that there was no arbitration agreement between the parties¹⁰. In *Young Achievers vs. IMS Learning Resources Pvt. Ltd.*¹¹, the Supreme Court has held that if the contract is superseded by another, the arbitration clause, being a component part of the earlier contract, falls with it. Addressing the issue of separability and survival of an arbitration clause contained in a Memorandum of Understanding (“MoU”), the Supreme Court has held that the arbitration agreement in the MoU is valid as it constitutes a stand-alone agreement independent from its underlying contract¹².

E. ABSENCE OF PROPER NOTICE OF THE APPOINTMENT OF AN ARBITRATOR OR OF ARBITRAL PROCEEDINGS

Failure of a party to give notice invoking arbitration to the other party (as required under Section 21¹³ of the Arbitration Act) would necessarily result in setting aside an award, as has been held by the Delhi High Court in *Alupro Buildings Systems Pvt. Ltd. v. Ozone Overseas Pvt. Ltd.*¹⁴ Observing that the running theme of the Arbitration Act is consent or the agreement between the parties at every stage, the Delhi High Court held that Section 21 of the Arbitration Act performs an important function of forging such consensus on several aspects such as (i) the scope of the disputes; (ii) determination of which disputes remain unresolved; (iii) which disputes are time-barred; (iv) identification of the claims and counter-claims; and (v) most importantly, on the choice of arbitrator. Thus, the inescapable conclusion of a proper interpretation of Section 21 of the Arbitration Act would be that in the absence of an agreement to the contrary, notice by the claimant under Section 21 of the Arbitration Act invoking the arbitration clause, preceding the reference of disputes to arbitration, is mandatory. In other words, arbitral proceedings that are commenced without such notice would be unsustainable in law.

⁹ [Harjinder Pal v. Harmesh Kumar, 157 \(2009\) DLT 151](#) (Para No. 16)

¹⁰ [Parmeet Singh Chatwal & Ors. v. Ashwani Sahani \(Judgment dated 14th February 2020 passed in OMP No. 1445/2014 and I.A. No. 22669/2014\)](#) (Para No. 25)

¹¹ [\(2013\) 10 SCC 535](#) (Para No. 8)

¹² [Ashapura Mine-Chem Ltd. v. Gujarat Mineral Development Corporation, \(2015\) 8 SCC 193](#) (Para No. 30)

¹³ 21. Commencement of arbitral proceedings. — Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent.

¹⁴ [2017 \(162\) DRJ 412](#) (Para No. 23-32)

F. INABILITY OF A PARTY TO PRESENT HIS CASE OR VIOLATION OF NATURAL JUSTICE

Courts and quasi-judicial authorities must, while determining the rights and obligations of the parties before it, do so in accordance with the principles of natural justice. The principle of *audi alteram partem* is one of the fundamental principles of natural justice and is contained Section 18¹⁵ and Section 34(2)(a)(iii) of the Arbitration Act.¹⁶ In fact, the principles of natural justice are also embodied in Sections 24(3)¹⁷ and 26¹⁸ of the Arbitration Act and are important pointers to what is contained in the ground of challenge mentioned in Section 34(2)(a)(iii) of the Arbitration Act.¹⁹

It is not necessary that the conditions in relation to evidence and opportunity of hearing, etc. be specifically mentioned in the arbitration agreement. Such conditions are implicit in the decision-making process in the arbitral proceedings. Compliance with the principles of natural justice is inherent in an arbitration process. They, irrespective of the fact as to whether recorded specifically in the arbitration agreement or not, are required to be followed. Once the principles of natural justice are not complied with, the award made by the arbitral tribunal is rendered invalid.²⁰

It is settled law that every party to an arbitral proceeding must be given a reasonable opportunity to present its case. The Supreme Court has, while laying down the test of what constitutes a ‘reasonable opportunity’, held that a party must be given an opportunity to explain its arguments and to adduce evidence in support of its case.²¹ However, such rights of the parties to the arbitral proceedings are not unfettered and the arbitral tribunal has the power to call

¹⁵ **18. Equal treatment of parties.** — The parties shall be treated with equality and each party shall be given a full opportunity to present his case.

¹⁶ **Associate Builders v. Delhi Development Authority.** (2015) 3 SCC 49. (Para No. 12)

¹⁷ **24. Hearings and written proceedings.** —

...(3) All statements, documents or other information supplied to, or applications made to the arbitral tribunal by one party shall be communicated to the other party, and any expert report or evidentiary document on which the arbitral tribunal may rely in making its decision shall be communicated to the parties.

¹⁸ **26. Expert appointed by arbitral tribunal.** — (1) Unless otherwise agreed by the parties, the arbitral tribunal may—

(a) appoint one or more experts to report to it on specific issues to be determined by the arbitral tribunal, and
(b) require a party to give the expert any relevant information or to produce, or to provide access to, any relevant documents, goods or other property for his inspection.

(2) Unless otherwise agreed by the parties, if a party so requests or if the arbitral tribunal considers it necessary, the expert shall, after delivery of his written or oral report, participate in an oral hearing where the parties have the opportunity to put questions to him and to present expert witnesses in order to testify on the points at issue.

(3) Unless otherwise agreed by the parties, the expert shall, on the request of a party, make available to that party for examination all documents, goods or other property in the possession of the expert with which he was provided in order to prepare his report.

¹⁹ **Ssangyong Engineering and Construction Company Ltd. v. National Highways Authority of India.** (2019) 15 SCC 131. (Para No. 23, 38)

²⁰ **Mallikarjun v. Gulbarga University.** (2004) 1 SCC 372. (This is a one-page judgment)

²¹ **Sohan Lal Gupta (Dead) thr. L.Rs. and Ors. v. Asha Devi Gupta and Ors.** (2003) 7 SCC 492. (Para No. 21, 22)

upon a party to comply with his/her procedural orders and directions including those imposing limits as to time and content of submissions and evidence and conduct the arbitral hearings before it. The following pre-requisites are to be considered for ascertaining whether ‘a reasonable opportunity’ was given to a party to the arbitral proceedings: (i) each party must have notice that the hearing is to take place; (ii) each party must have a reasonable opportunity to be present at the hearing together with his advisers and witnesses; (iii) each party must have the opportunity to be present throughout the hearing; (iv) each party must have a reasonable opportunity to present evidence and argument in support of his own case; (v) each party must have a reasonable opportunity to test his opponent’s case by cross-examining their witnesses, presenting rebutting evidence and addressing oral argument; (vi) the hearing must, unless the contrary is expressly agreed, be the occasion on which the parties present the whole of their evidence and argument.²²

Where material has been taken behind the back of the parties by the arbitral tribunal, or on which the parties have had no opportunity to comment, the ground under Section 34(2)(a)(iii) of the Arbitration Act would be made out.²³ Similarly, an award passed by relying on disputed documents (and if not proved) and without giving proper opportunity to parties to lead evidence would also amount to gross violation of natural justice.²⁴ The phrase “otherwise unable to present his case” is a facet of principles of natural justice which will be breached only if a fair hearing is not given by the arbitral tribunal to the parties. A good working test for determining whether a party has been unable to present its case is to see whether factors outside the party’s control have combined to deny the party a fair hearing. Thus, where no opportunity was given to deal with an argument that goes to the root of the matter, or findings based on evidence which go behind the back of the party, and which results in denial of justice to the prejudice of the party; or additional or new evidence is taken which forms the basis of the award on which the party has been given no opportunity of rebuttal, would, on the facts of a given case, render an award liable to be set aside on the ground that a party has been unable to present its case.²⁵

G. AWARDS DEALING WITH DISPUTES NOT FALLING WITHIN THE TERMS OF SUBMISSION TO ARBITRATION

Section 34(2)(a)(iv) of the Arbitration Act provides that an award may be set aside if the party making the application in this regard proves that the award

²² *Sohan Lal Gupta (Dead) thr. L.Rs. and Ors. v. Asha Devi Gupta and Ors.* (2003) 7 SCC 492. (Para No. 23)

²³ *Ssangyong Engineering and Construction Company Ltd. v. National Highways Authority of India.* (2019) 15 SCC 131. (Para No. 8, 30, 37)

²⁴ *Nazim H. Kaziv. Konkan Mercantile Cooperative Bank Ltd.*, 2013 SCC OnLine Bom 193. (Para No. 33 - 38)

²⁵ *Vijay Karia and Ors. v. Prysmian Cavi E Sistemi SRL and Ors.*, 2020 SCC OnLine SC 177. (Para No. 27, 33, 54, 55, 62, 63, 76, 77)

deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration. If the decisions on matters submitted to arbitration can be separated from those not so submitted, the *proviso* to Section 34(2)(a)(iv) provides that only that part of the award which contains decisions on matters not submitted to arbitration may be set aside.

An award is liable to be set aside if the arbitral tribunal has transgressed the limitations of its jurisdiction, which is limited by the parameters that the parties have agreed to. In this regard, it is important to note that an arbitral tribunal's authority and jurisdiction is traceable to the agreement between parties.²⁶

A determination of whether an award deals with a dispute not contemplated by or not falling within the terms of submission to arbitration, or contains decisions on matters beyond the scope of submission to arbitration, is addressed by the courts in terms of construction of the contract between the parties. A review of such construction cannot be made in terms of re-assessment of the material on record, but only in terms of the principles governing interference with an award, which limit the court's scope of review of an award.²⁷

Further, for such a determination, what must be seen is whether the claimant can raise a particular claim before the arbitral tribunal. For instance, if there is a specific term in the contract or the law which does not permit the parties to raise a claim before the arbitral tribunal, or if there is a specific bar in the contract to raising of a point, then the award passed by the arbitral tribunal in respect thereof would be in excess of its jurisdiction.²⁸

Excepted matters

The contract between the parties may exclude certain matters from the scope of arbitration. An award adjudicating claims which are 'excepted matters', excluded from the scope of arbitration, would violate Sections 34(2)(a)(iv) and 34(2)(b) of the Arbitration Act.²⁹

The contract may also designate an official/ authority (usually found in contracts with government departments/ PSUs) to adjudicate certain types of disputes. In *Mitra Guha Builders (India) Company v. Oil and Natural Gas Corporation Limited*,³⁰ the Supreme Court held that since the parties have decided that certain matters are to be decided by the Superintending Engineer of the

²⁶ [Regency Hotels Private Limited v. Cherish Investments Private Limited and Ors., 2008 \(4\) ARBLR 301\(Bom\)](#), (Para No. 19)

²⁷ [MMTC Ltd. v. Vedanta Ltd., \(2019\) 4 SCC 163](#), (Para No. 13)

²⁸ [West Bengal State Warehousing Corporation and Ors. v. Sushil Kumar Kayan and Ors., \(2002\) 5 SCC 679](#), (Para No. 4, last para)

²⁹ [J.G. Engineers Pvt. Ltd. v. Union of India \(UOI\) and Ors., \(2011\) 5 SCC 758](#), (Para No. 7)

³⁰ [\(2020\) 3 SCC 222](#), (Para No. 21)

respondent therein, and that his decision would be final, such matters cannot be the subject matter of the arbitration.

If a party chose not to raise a challenge to the assumption of jurisdiction by the arbitral tribunal on a matter falling in the category of “excepted matters”, then such a party will be precluded from raising such objections under Section 34 of the Arbitration Act. Section 34(2)(a)(iv) of the Arbitration Act cannot be read in isolation and allowed to render otiose the provisions of Sections 4³¹, 5³² and 16³³ of the Arbitration Act.³⁴ Recently, in *Quippo Construction Equipment Limited v. Janardhan Nirman Private Limited*³⁵, the Supreme Court has observed that in the event a party fails to participate in the arbitral proceedings or raise any submission that the arbitrator did not have jurisdiction or was exceeding the scope of his authority, it would be deemed that the party has waived its right to raise all such objections.

H. ISSUES IN RELATION TO COMPOSITION OF THE ARBITRAL TRIBUNAL OR WHERE THE PROCEDURE ADOPTED IS NOT IN ACCORDANCE WITH THE ARBITRATION AGREEMENT OR PART I OF THE ARBITRATION ACT

Section 34(2)(a)(v) of the Arbitration Act provides that an award may be set aside if the party making the application in this regard proves that 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 Part I of the Arbitration Act from which the parties cannot derogate,

³¹ **4. Waiver of right to object.** — A party who knows that—

(a) any provision of this Part from which the parties may derogate, or

(b) any requirement under the arbitration agreement, has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time limit is provided for stating that objection, within that period of time, shall be deemed to have waived his right to so object.

³² **5. Extent of judicial intervention.** — Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part.

³³ **16. Competence of arbitral tribunal to rule on its jurisdiction.** — (1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose,—

(a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and

(b) a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence; however, a party shall not be precluded from raising such a plea merely because that he has appointed, or participated in the appointment of, an arbitrator.

(3) A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.

(4) The arbitral tribunal may, in either of the cases referred to in sub-section (2) or sub-section (3), admit a later plea if it considers the delay justified.

(5) The arbitral tribunal shall decide on a plea referred to in sub-section (2) or sub-section (3) and, where the arbitral tribunal takes a decision rejecting the plea, continue with the arbitral proceedings and make an arbitral award.

(6) A party aggrieved by such an arbitral award may make an application for setting aside such an arbitral award in accordance with section 34.

³⁴ *S.N. Malhotra and Sons v. Airport Authority of India and Ors.*, 149 (2008) DLT 757; (Para No. 31) per contra, see *Lion Engineering Consultants v. State of M.P. and Ors.*, (2018) 16 SCC 758. (Para No. 17)

³⁵ Judgment dated 29th April 2020 passed in Civil Appeal No. 2378 of 2020 (arising out of Special Leave Petition (C) No. 11011 of 2019 (Para No. 20)

or, failing such agreement, was not in accordance with Part I of the Arbitration Act.

An award cannot be challenged on the ground that the composition of the arbitral tribunal was not in accordance with the agreement of the parties, where such a plea was not taken before the arbitral tribunal under Section 16 of the Arbitration Act, unless good reasons are shown for not doing so.³⁶ However, in *Lion Engineering Consultants v. State of M.P. and Ors.*,³⁷ the Supreme Court held that there is no bar against raising the plea of jurisdiction by way of an objection under Section 34 of the Arbitration Act, even if no such objection was raised before the arbitral tribunal under Section 16 of the Arbitration Act.

The composition of the arbitral tribunal and the procedure followed by the arbitral tribunal must comply with the arbitration agreement. The absence of such agreement attracts the procedure prescribed in Part I of the Arbitration Act. In any event, the agreement for composition of an arbitral tribunal or the arbitral procedure should not conflict with provisions of the Arbitration Act from which parties cannot derogate.³⁸ However, in *Narayan Prasad Lohia v. Nikunj Kumar Lohia and Ors.*³⁹ the Supreme Court held that Section 10⁴⁰ of the Arbitration Act is derogable, and an award cannot be challenged on the ground that the composition of the arbitral tribunal or the arbitral procedure was in conflict with the provisions of Part I of the Arbitration Act, if the same was in accordance with the agreement of the parties.

I. DISPUTES NOT CAPABLE OF SETTLEMENT BY ARBITRATION

Generally, all disputes relating to rights in *personam* are arbitrable whereas disputes relating to rights in *rem* are required to be adjudicated by courts and public tribunals. Every civil or commercial dispute whether based on contract or otherwise which is capable of being decided by a civil court is in principle capable of being adjudicated upon and resolved by arbitration ‘*subject to the dispute being governed by the arbitration agreement*’ unless the jurisdiction of the arbitral tribunal is excluded either expressly or by necessary implication.⁴¹ Recently, a three-judge bench of the Supreme Court in *M/s N.N. Global Mercantile Pvt. Ltd. v. M/s Indo Unique Flame Ltd. & Others*⁴² whilst discussing the development of law on arbitrability of disputes, observed that even though

³⁶ *Gas Authority of India Ltd. and Ors. v. Ketki Construction (I) Ltd. and Ors.*, (2007) 5 SCC 38, (Para No. 19)

³⁷ (2018) 16 SCC 758; Per contra, (Para No. 6) see *Union of India v. Pam Development Private Limited*, (2014) 11 SCC 366, (Para No. 10)

³⁸ *Oil & Natural Gas Corporation Ltd. v. Saw Pipes Ltd.*, (2003) 5 SCC 705.

³⁹ (2002) 3 SCC 572, (Para No. 6)

⁴⁰ 10. Number of arbitrators. – (1) The parties are free to determine the number of arbitrators, provided that such number shall not be an even number.

(2) Failing the determination referred to in sub-section (1), the arbitral tribunal shall consist of a sole arbitrator.

⁴¹ *M/s N.N. Global Mercantile Pvt. Ltd. v. M/s Indo Unique Flame Ltd. & Others*, Civil Appeal Nos. 3802–3803/2020 arising out of SLP (Civil) Nos. 13132–13133 of 2020, (Para No. 8) *A. Ayyasamy v. A. Paramasivam and Ors.*, (2016) 10 SCC 386, (Para No. 6, 16)

⁴² *Civil Appeal Nos. 3802–3803/2020 arising out of SLP (Civil) Nos. 13132–13133 of 2020*, (Para No. 3, 6, 8)

the Arbitration Act did not exclude any category of disputes as being non arbitrable, Section 2(3)⁴³ specifically recognized that certain categories of disputes, by law, may not be submitted to arbitration. While there are various classes of disputes which are generally considered by the courts as appropriate for decision by public *fora*, there are some which fall within the exclusive domain of special *fora* under their respective legislations which confers exclusive jurisdiction on such special *fora*, to the exclusion of an ordinary civil court.⁴⁴ Such disputes are deemed to have been impliedly excluded from the ambit of arbitration and are non-arbitrable. Consequently, where the cause/dispute is non-arbitrable (either expressly or by necessary implication), the court where a suit is pending, will refuse to refer the parties to arbitration, even if the parties may have agreed to arbitrate such disputes.⁴⁵

An illustrative list of non-arbitrable disputes, as laid down by the Supreme Court in *Booz Allen and Hamilton Inc. v. SBI Home Finance Ltd.*,⁴⁶ is as follows: (i) disputes relating to rights and liabilities which give rise to or arise out of criminal offences; (ii) matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights, child custody; (iii) guardianship matters; (iv) insolvency and winding up matters; (v) testamentary matters (grant of probate, letters of administration and succession certificate); and (vi) eviction or tenancy matters governed by special statutes where the tenant enjoys statutory protection against eviction and only the specified courts are conferred jurisdiction to grant eviction or decide the disputes.

Arbitrability of disputes alleging fraud

A mere allegation of fraud *simpliciter* is not a ground to nullify the effect of an arbitration agreement between the parties. An arbitration agreement can be side-tracked only in those cases where the court, while dealing with Section 8⁴⁷ of the Arbitration Act (i.e., reference of parties to arbitration where there is an arbitration agreement), finds that:

⁴³ Section 2(3) This Part shall not affect any other law for the time being in force by virtue of which certain disputes may not be submitted to arbitration.

⁴⁴ *Ibid.*

⁴⁵ *Booz Allen and Hamilton Inc. v. SBI Home Finance Ltd.*, (2011) 5 SCC 532. (Para No. 20 – 24, 27, 29)

⁴⁶ (2011) 5 SCC 532. (Para No. 22)

⁴⁷ **Power to refer parties to arbitration where there is an arbitration agreement.** – (1) A judicial authority, before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party to the arbitration agreement or any person claiming through or under him, so applies not later than the date of submitting his first statement on the substance of the dispute, then, notwithstanding any judgment, decree or order of the Supreme Court or any Court, refer the parties to arbitration unless it finds that *prima facie* no valid arbitration agreement exists.

(2) The application referred to in sub-section (1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof.

Provided that where the original arbitration agreement or a certified copy thereof is not available with the party applying for reference to arbitration under sub-section (1), and the said agreement or certified copy is retained by the other party to that agreement, then, the party so applying shall file such application along with a copy of the arbitration agreement and a petition praying the Court to call upon the other party to produce the original arbitration agreement or its duly certified copy before that Court.

(3) Notwithstanding that an application has been made under sub-section (1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made.

- (i) there are very serious allegations of fraud which virtually make out a case of criminal offence; or
- (ii) allegations of fraud are so complicated that it becomes absolutely essential that such complex issues be decided only by civil court on the appreciation of the voluminous evidence that needs to be produced; or
- (iii) there are serious allegations of forgery/fabrication of documents in support of the plea of fraud; or
- (iv) the allegation of fraud is of such a nature that it permeates the entire contract, (including the agreement to arbitrate).⁴⁸

The Supreme Court had earlier, in *Rashid Raza v. Sadaf Akhtar*⁴⁹ elucidated two working tests to determine whether the allegation of fraud constitutes a serious fraud. They were as follows: (i) whether the plea permeates the entire contract and above all, the agreement of arbitration, rendering it void; and (ii) whether the allegations of fraud touch upon the internal affairs of the parties *inter se* having no implication in the public domain. In the event that the answer to the aforesaid tests is in the negative and the court found that the allegations were that of fraud *simplicitor*, the parties would be relegated to arbitration. Subsequently, the Supreme Court, has in the matter of *Avitel Post Studios Limited & Ors. V. HSBC PI Holdings (Mauritius) Limited*,⁵⁰ clarified that any finding that the contract itself is either null and void or voidable as a result of fraud or misrepresentation would not by itself entail the invalidity of the arbitration clause. In this regard, the Court has held that ‘*serious allegations of fraud*’, leading to non-arbitrability, would arise only in the following two situations (and not otherwise): (i) where the Court finds that the arbitration agreement itself cannot be said to exist, being vitiated by fraud; or (ii) where allegations are made against the State or its instrumentalities, relating to arbitrary, fraudulent, or mala fide conduct, giving rise to question of public law as opposed to questions limited to the contractual relationship between parties. As a result, all other cases involving ‘*serious allegation of fraud*’, i.e. cases that do not meet the abovementioned criteria, would be arbitrable. The Court further observed that in a given case, the same set of facts may lead to civil as well as criminal proceedings and if it was clear that the civil dispute involved questions of fraud which could be the subject matter of a proceeding under section 17 of the Indian Contract Act, 1872 and/ or the tort of deceit, the mere fact that a criminal proceeding has been instituted in respect of the same subject matter would not lead to the conclusion that a dispute which is otherwise arbitrable would cease to be so.

⁴⁸ *A. Ayasamy v. A. Paramasivam and Ors.*, (2016) 10 SCC 386, (Para No. 13 – 24)

⁴⁹ (2019) 8 SCC 710, (Para No. 4 – 6)

⁵⁰ 2020 SCC OnLine SC 656, (Para No. 9, 21)

Recently, a three-judge bench of the Supreme Court in *M/s N.N. Global Mercantile Pvt. Ltd. v. M/s Indo Unique Flame Ltd. & Others*⁵¹ whilst discussing the arbitrability of disputes involving fraud⁵², observed that the view taken by a two-judge bench earlier in *N. Radhakrishnan v. Maestro Engineers*⁵³ that allegations of fraud were not arbitrable on the basis that the issues involved detailed investigation into the allegations and production of elaborate evidence, was a “wholly archaic view, which has now become obsolete, and deserves to be discarded”. It recognised that, to the contrary, in contemporary arbitration practice, arbitral tribunals are required to traverse through volumes of material in various kinds of disputes such as oil, natural gas, construction industry, etc.

Reiterating *Avitel Post Studioz Ltd. & Ors. v. HSBC PI Holdings (Mauritius Limited)*⁵⁴, the Court observed that the civil aspect of fraud⁵⁵ is considered to be arbitrable in contemporary arbitration jurisprudence, with the only exception being where the allegation is that the arbitration agreement itself is vitiated by fraud or fraudulent inducement, or the fraud goes to the validity of the underlying contract, and impeaches the arbitration clause itself. Another category of cases is where the substantive contract is “expressly declared to be void” under Section 10 of the Contract Act where the agreement is entered into by a minor (without following the procedure prescribed under the Guardian and Wards Act, 1890) or a lunatic, which would be with a party incompetent to enter into a contract.

Arbitrability of disputes involving trust

The Indian Trusts Act, 1882 not only deals with the trust, trustees and beneficiaries but also adequately and sufficiently provides for exhaustive remedies in the nature of right to approach civil courts for redressal of any disputes arising out of trust deeds and/or under the Indian Trusts Act, 1882. Since sufficient and adequate remedy is provided under the Indian Trusts Act,

⁵¹ *Supra*, (Para No. 8)

⁵² *N. Radhakrishnan v. Maestro Engineers* (Para No. 6, 7, 10, 12, 15), *Abdul Kadir v. Madhav Prabhakar* (2010) 1 SCC 72 (Para No. 5, 8, 9), *A. Ayyasamy v. A. Paramasivam & Ors.* (2016) 10 SCC 386 (Para No. 4, 6, 9 – 21); *Rashid Raza v. Sadaf Akhtar* (2019) 8 SCC 710 (Para No. 4 – 6); *Avitel Post Studioz Ltd. & Ors. v. HSBC PI Holdings (Mauritius Limited)* (2020) SCCOnLine SC 656, (Para No. 5, 9 – 21); *Deccan Paper Mills v. Regency Mahavir* (2020) SCCOnLine SC 655 (Para No. 3 – 6, 11, 15) and *Vidya Drolia & Others v. Durga Trading Corporation* Civil Appeal No.2402 of 2019 decided vide Judgment dated 14.12.2020. (Para No. 8, 11, 33 – 47)

⁵³ (2010) 1 SCC 72, (Para No. 6, 7, 10, 11, 12, 15)

⁵⁴ *Supra*, (Para No. 5, 9 – 21)

⁵⁵ The civil aspect of fraud is defined by Section 17 of the Indian Contract Act, 1872 as follows:

Section 17. Fraud defined. – Fraud means and includes any of the following acts committed by a party to a contract, or with his connivance, or by his agent, with intent to deceive another party thereto or his [agent], or to induce him to enter into the contract:

- (1) the suggestion, as a fact, of that which is not true, by one who does not believe it to be true;
- (2) the active concealment of a fact by one having knowledge or belief of the fact;
- (3) a promise made without any intention of performing it;
- (4) any other act fitted to deceive;
- (5) any such act or omission as the law specially declares to be fraudulent.

1882 for deciding disputes in relation to trust deeds, trustees and beneficiaries, the Supreme Court has, in *Vimal Kishor Shah and Ors. v. Jayesh Dinesh Shah and Ors.*,⁵⁶ held that the remedy provided by the Arbitration Act for deciding disputes is barred by implication in such cases. In *Vidya Drolia and Ors. v. Durga Trading Corporation*⁵⁷, the Supreme Court, has reiterated that by necessary implication, disputes arising under the Indian Trusts Act cannot be referred to arbitration. It has been observed that while deciding the question of how arbitration is excluded by necessary implication, it is important to bear in mind the fact that the statute, considered as a whole, must necessarily lead to a conclusion that the disputes which arise under it cannot be the subject matter of arbitration.

Arbitrability of consumer disputes

Whilst dealing with the issue of arbitrability of consumer disputes, the Supreme Court has observed that proceedings under the Consumer Protection Act, 1986 are special proceedings that are required to continue despite the existence of an arbitration agreement between the parties.⁵⁸ Accordingly, it was held that the remedy provided under the Arbitration Act is barred by implication in case of consumer disputes. However, it was clarified that in the event the aggrieved person opts not to exercise his right under the special statute and instead opts to arbitrate, then there is no restriction on such disputes being resolved by way of arbitration.⁵⁹ It is only in those cases where specific/special remedies are provided for and opted for/ exercised by an aggrieved person that a judicial authority can refuse to relegate the parties to arbitration.

Arbitrability of disputes under the Bombay Rent Act, 1947

In *Natraj Studios (P) Ltd. v. Navrang Studios and Ors.*,⁶⁰ the Supreme Court was faced with the task of determining the issue of arbitrability of disputes falling under the purview of the Bombay Rent Act, 1947. The Court observed that the Bombay Rent Act, 1947 is a welfare legislation aimed at the definite social objective of protection of tenants against harassment by landlords and that the said legislation is a matter of public policy. The scheme of the said Act implies that the conferment of exclusive jurisdiction on certain courts is pursuant to the social objective. It was observed that public policy mandates that contracts which nullify the rights conferred on tenants by the said Act ought not be permitted. Accordingly, arbitration agreements between parties whose rights

⁵⁶ (2016) 8 SCC 788. (Para No. 45)

⁵⁷ AIR 2019 SC 3498; See also *M/s N.N. Global Mercantile Pvt. Ltd.* (Para No. 5, 19, 54, 88) v. *M/s Indo Unique Flame Ltd.* (Para No. 8) & Others, Civil Appeal Nos. 3802 – 3803/ 2020 arising out of SLP (Civil) Nos. 13132 – 13133 of 2020).

⁵⁸ *Enmar MGF Land Limited vs. Aftab Singh*, (2019) 12 SCC 751. (Para No. 12, 26)

⁵⁹ *Ibid.* (Para No. 12, 25)

⁶⁰ (1981) 1 SCC 523. (Para No. 17 – 29)

are regulated by the Bombay Rent Act, 1947 cannot be recognised by a court of law. However, it must be noted that the Supreme Court in *Vidya Drolia and Ors. vs. Durga Trading Corporation*⁶¹ has observed that disputes falling under the purview of the Transfer of Property Act, 1882 are not non-arbitrable as the Transfer of Property Act is silent on non-arbitrability and did not negate arbitrability as such⁶². It was clarified that none of the provisions of the said statute indicated conferment of exclusive jurisdiction on civil courts. Distinguishing cases arising under the Transfer of Property Act from that of the decision in *Natraj Studios*⁶³ and the *Booz Allen*⁶⁴ judgment (*supra*), the Hon'ble Supreme Court noted that the judgment in *Natraj Studios* was a judgment which dealt with Section 28 of the Bombay Rent Act, in the context of arbitrability. The Section made it clear that disputes between landlords and statutory tenants would be referable only to the small causes court in Bombay and "*no other court has jurisdiction to entertain any such suit, proceeding or application or to deal with such claim or question*".

Further, in *Booz Allen* (*supra*), it was made clear by the Court that only those tenancy matters that are (i) governed by special statutes (ii) where the tenant enjoys statutory protection against eviction and (iii) where only specified courts are conferred jurisdiction to grant eviction or decide disputes, are cases where the dispute between landlord and tenant can be said to be non-arbitrable.

Arbitrability of Voidable agreements

With respect to the arbitrability of voidable agreements (as defined in Section 19 of the Contract Act)⁶⁵, the Supreme Court observed that such disputes would be arbitrable. The Court reasoned that since the issue whether the consent was procured by coercion, fraud, or misrepresentation requires to be adjudicated upon by leading cogent evidence, which could very well be decided through arbitration, the same was arbitrable.

J. CHANGE IN SCOPE OF PUBLIC POLICY

An award may be set aside if the court finds that it is in conflict with the public policy of India. Prior to the amendment of the Arbitration Act in 2015, Section 34(2)(b)(ii) of the Arbitration Act provided that an award would be in conflict with the public policy of India if the making of the award was induced by fraud or

⁶¹ *Supra*. (Para No. 48, 49)

⁶² *Suresh Shah v. Hlpad Technology India Private Limited, Judgment dated 18th December 2020 passed in Arbitration Petition (Civil) No(s) 08/2020*. (Para No. 8, 10, 11)

⁶³ *Supra*. (Para No. 17 - 29)

⁶⁴ *Supra*. (Para No. 17, 21)

⁶⁵ *M/s N.N. Global Mercantile Pvt. Ltd. v. M/s Indo Unique Flame Ltd. & Others, Civil Appeal Nos. 3802 - 3803/2020 arising out of SLP (Civil) Nos. 13132 - 13133 of 2020*. (Para No. 4, 5, 6, 8)

corruption, or of it violated Sections 75⁶⁶ or 81⁶⁷ of the Arbitration Act.

Judicial precedent expanded the concept of public policy to include fundamental policy of Indian law, interest of India, justice and morality, and the existence of patent illegality in the award. Fundamental policy of Indian law was recognized as including compliance with statutes and judicial precedents, adopting a judicial approach, compliance with the principles of natural justice, and *Wednesbury* reasonableness. Patent illegality included contravention of substantive law of India, contravention of the Arbitration Act itself, and contravention of the terms of the contract.⁶⁸

The Arbitration and Conciliation (Amendment) Act, 2015 (“**2015 Amendment Act**”) inserted Explanation 1 in Section 34(2), which clarified that an award is in conflict with the public policy of India only if the making of the award was induced or affected by fraud or corruption or was in violation of Section 75 or Section 81 of the Arbitration Act, the award contravenes the fundamental policy of Indian law, or is in conflict with the most basic notions of justice and morality.⁶⁹ A caveat was also introduced by way of Explanation 2, which provides that the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute.

Therefore, it has been held⁷⁰ that the expression “public policy of India”, whether contained in Section 34 or in Section 48⁷¹ of the Arbitration Act (as amended), would now include “fundamental policy of Indian law” i.e., the scope of fundamental policy of Indian law would be relegated to the meaning provided by

⁶⁶ **75. Confidentiality** - Notwithstanding anything contained in any other law for the time being in force, the conciliator and the parties shall keep confidential all matter relating to the conciliation proceedings. Confidentiality shall extend also to the settlement agreement, except where its disclosure is necessary for purposes of implementation and enforcement.

⁶⁷ **81. Admissibility of evidence in other proceedings** - The parties shall not rely on or introduce as evidence in arbitral or judicial proceedings, whether or not such proceedings relate to the dispute that is the subject of the conciliation proceedings,-

(a) views expressed or suggestions made by the other party in respect of a possible settlement of the dispute;

(b) admissions made by the other party in the course of the conciliation proceedings;

(c) proposals made by the conciliator;

(d) the fact that the other party had indicated to accept a proposal for settlement made by the conciliator.

⁶⁸ *Associate Builders v. Delhi Development Authority*, (2015) 3 SCC 49 (Para No. 12). Also see *Renusagar Power Co. Ltd. v. General Electric Co.*, 1994 Supp (1) SCC 644 (Para No. 63–76); *Oil & Natural Gas Corporation Ltd. v. Saw Pipes Ltd.*, (2003) 5 SCC 705 (Para No. 7–15); and *Oil & Natural Gas Corporation Ltd. v. Western Geco International Ltd.*, (2014) 9 SCC 263, (Para No. 24, 25)

⁶⁹ Also see *M.M.T.C. v. Vedanta Ltd.*, (2019) 4 SCC 163, (Para No. 11)

⁷⁰ *Ssangyong Engineering and Construction Company Ltd. v. National Highways Authority of India*, (2019) 15 SCC 131, (Para No. 10, 13, 16, 17, 23, 30, 4, 48)

⁷¹ **48. Conditions for enforcement of foreign awards.** – (1) Enforcement of a foreign award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the court proof that—

(a) the parties to the agreement referred to in section 44 were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(b) the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(c) the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters 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, that part of the award which contains decisions on matters submitted to arbitration may be enforced; or

the Supreme Court in *Renusagar Power Co. Ltd. v. General Electric Co.*⁷² The expansion of the said expression by the Supreme Court in *Oil & Natural Gas Corporation Ltd. v. Saw Pipes Ltd.*⁷³ and *Oil & Natural Gas Corporation Ltd. v. Western Geco International Ltd.*⁷⁴ has been done away with. The ground of “interest of India” has been deleted. The ground of interference on the basis that the award is in conflict with justice and morality now requires a conflict with the “most basic notions of morality and justice” and only awards which shock the conscience of the court would be set aside on this ground.⁷⁵

In so far as awards arising out of arbitrations other than international commercial arbitrations are concerned, an additional ground with inbuilt exceptions, is now available under sub-section 2A added by the 2015 Amendment Act viz. the award is vitiated by patent illegality appearing on the face of the award which refers to such illegality which goes to the root of the matter but which does not amount to erroneous application of law. Mere contravention of substantive law of India, by itself, is no longer adequate to set aside an award. However, if an arbitral tribunal gives no reasons for an award and contravenes Section 31(3)⁷⁶ of the Arbitration Act, that will amount to patent illegality on the face of the award. A decision which is perverse, while no longer a ground for challenge under the larger “public policy of India” head, would amount to patent illegality appearing on the face of the award.⁷⁷

(d) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

(2) Enforcement of an arbitral award may also be refused if the Court finds that—

(a) the subject-matter of the difference is not capable of settlement by arbitration under the law of India; or

(b) the enforcement of the award would be contrary to the public policy of India.

Explanation 1.—For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if,—

(i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or

(ii) it is in contravention with the fundamental policy of Indian law; or

(iii) it is in conflict with the most basic notions of morality or justice.

Explanation 2.—For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute.

(3) If an application for the setting aside or suspension of the award has been made to a competent authority referred to in clause (e) of sub-section (1) the Court may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

⁷² [1994 Supp \(1\) SCC 644](#), (Para No. Page 63 – 76)

⁷³ [\(2003\) 5 SCC 705](#), (Para No. Page 7 – 15)

⁷⁴ [\(2014\) 9 SCC 263](#), (Para No. 24, 25)

⁷⁵ [Ssangyong Engineering and Construction Company Ltd. v. National Highways Authority of India, \(2019\) 15 SCC 131](#), (Para No. 24, 44)

⁷⁶ **31. Form and contents of arbitral award. —**

(3) The arbitral award shall state the reasons upon which it is based, unless—

(a) the parties have agreed that no reasons are to be given, or

(b) the award is an arbitral award on agreed terms under section 30.

⁷⁷ [Ssangyong Engineering and Construction Company Ltd. v. National Highways Authority of India, \(2019\) 15 SCC 131](#), (Para No. 8, 18, 24, 44)

K. APPLICABILITY OF SECTION 34 AS AMENDED BY THE 2015 AMENDMENT ACT—WHETHER PROSPECTIVE OR RETROSPECTIVE?

The 2015 Amendment Act, which came into force on October 23, 2015, amended *inter alia* Sections 34 and 36⁷⁸ of the Arbitration Act. The scope of “public policy” in Section 34(2)(b)(ii) was curtailed and the prior “automatic stay” of the award upon filing challenge proceedings under Section 34 was done away with. Award-holders are now required to file a separate application seeking stay of an award and the grant of stay may be subject to such conditions as the court may deem fit.

In *Board of Control for Cricket in India v. Kochi Cricket Private Ltd.*,⁷⁹ the Supreme Court held that the requirement to separately apply for stay of an award, as imposed in Section 36, will apply even to challenge proceedings which were pending on October 23, 2015 as well as challenge proceedings filed thereafter. Thereafter, in *Ssangyong Engineering and Construction Company Ltd. v. National Highways Authority of India*,⁸⁰ the Supreme Court held that the amended Section 34 will apply to challenge proceedings that have been filed on or after October 23, 2015, irrespective of the fact that the arbitral proceedings may have commenced prior to that date.

On August 9, 2019, the Arbitration and Conciliation (Amendment) Act, 2019 (“**2019 Amendment Act**”) introduced Section 87⁸¹ into the Arbitration Act which *inter alia* stated that the provisions of the 2015 Amendment Act will not apply to court proceedings arising out of or in relation to arbitral proceedings, which have commenced prior to October 23, 2015, irrespective of whether such court proceedings are commenced prior to or after October 23, 2015. The 2019

⁷⁸ **36. Enforcement.** — (1) Where the time for making an application to set aside the arbitral award under section 34 has expired, then, subject to the provisions of sub-section (2), such award shall be enforced in accordance with the provisions of the Code of Civil Procedure, 1908 (5 of 1908), in the same manner as if it were a decree of the court.

(2) Where an application to set aside the arbitral award has been filed in the Court under section 34, the filing of such an application shall not by itself render that award unenforceable, unless the Court grants an order of stay of the operation of the said arbitral award in accordance with the provisions of sub-section (3), on a separate application made for that purpose.

(3) Upon filing of an application under sub-section (2) for stay of the operation of the arbitral award, the Court may, subject to such conditions as it may deem fit, grant stay of the operation of such award for reasons to be recorded in writing: Provided that the Court shall, while considering the application for grant of stay in the case of an arbitral award for payment of money, have due regard to the provisions for grant of stay of a money decree under the provisions of the Code of Civil Procedure, 1908 (5 of 1908).

⁷⁹ (2018) 6 SCC 287. (Para No. 58)

⁸⁰ (2019) 15 SCC 131. (Para No. 19)

⁸¹ **87. Effect of arbitral and related court proceedings commenced.** — Unless the parties otherwise agree, the amendments made to this Act by the Arbitration and Conciliation (Amendment) Act, 2015 shall—

(a) not apply to—

(i) arbitral proceedings commenced before the commencement of the Arbitration and Conciliation (Amendment) Act, 2015 (23rd October, 2015);

(ii) court proceedings arising out of or in relation to such arbitral proceedings irrespective of whether such court proceedings are commenced prior to or after the commencement of the Arbitration and Conciliation (Amendment) Act, 2015;

(b) apply only to arbitral proceedings commenced on or after the commencement of the Arbitration and Conciliation (Amendment) Act, 2015 and to court proceedings arising out of or in relation to such arbitral proceedings.

Amendment Act also deleted the savings provision in the 2015 Amendment Act (i.e., Section 26 of the 2015 Amendment Act), with effect from October 23, 2015. This was struck down by the Supreme Court, in *Hindustan Construction Company Ltd. and Anr. v. Union of India*,⁸² as being manifestly arbitrary under Article 14⁸³ of Constitution of India, 1950. The Supreme Court's judgment in *Board of Control for Cricket in India (supra)* continues to apply, so as to make the salutary amendments made by the 2015 Amendment Act, applicable to all court proceedings initiated after October 23, 2015.

L. THE INTERPLAY BETWEEN SECTIONS 34 AND 36 OF THE ARBITRATION ACT

Pursuant to the unamended Section 36 of the Arbitration Act, if the time for making an application to set aside the award under Section 34 has expired, or such an application having been made, has been refused, the award has to be enforced in the same manner as if it were a decree of the court. However, the amended Section 36 provides that the filing of an application under Section 34 of the Arbitration Act does not itself render the award unenforceable, unless the court grants a stay of the operation of the award on a separate application made for that purpose. Therefore, in order to seek stay of an award, a party will now have to file an application under Section 36(2) of the Arbitration Act after an application to set aside the award has been filed before the court.

The Supreme Court has held that to read Section 36 of the Arbitration Act as inferring something negative, namely where the time for making an application under Section 34 of the Arbitration Act has not expired and therefore, on such application being made within time, an automatic stay ensues, is to read something into Section 36 which is not there at all. Section 36, even as originally enacted is meant to do away with the two bites at the cherry doctrine in the context of domestic awards. The amended Section 36, being clarificatory in nature, merely reaffirms the earlier position i.e., the unamended Section 36 does not stand in the way of the law as to grant of stay of a money decree under the provisions of the Code of Civil Procedure, 1908.⁸⁴

M. 'THE PUBLIC POLICY OF INDIA' AND 'PATENT ILLEGALITY ON THE FACE OF THE AWARD'

The Supreme Court has in *Ssangyong (supra)* observed that the challenge to an award on the ground of it being in 'conflict with public policy of India' is now⁸⁵ restricted to the ingredients as set out in Section 34(2)(b)(ii) of the Arbitration

⁸² [2019 SCC OnLine SC 1520](#). (Para No. 57 & 60)

⁸³ **14. Equality before law** – The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

⁸⁴ [Hindustan Construction Company Ltd. and Anr. v. Union of India, 2019 ACC OnLine SC 1520](#). (Para No. 30)

⁸⁵ i.e. after the Arbitration and Conciliation (Amendment) Act, 2015 (w.r.e.f. 23.10.2015).

Act. It was observed that the ground for interference with the award insofar as it concerns “interest of India” has been deleted.

Fundamental Policy of Indian law

The Supreme Court, in *Associate Builders v. Delhi Development Authority*,⁸⁶ relied upon its findings in *Renusagar (supra)* and *Western Geco (supra)* to identify the juristic principles which would comprise the “fundamental policy of Indian law”. While most of the said juristic principles as identified in *Associate Builders (supra)* are relevant even today, some of them have been shifted from the umbrella of “fundamental policy of Indian law” to the umbrella of “patent illegality” as understood under the amended Section 34. This is mainly on account of the amendments brought to the Arbitration Act, in the year 2015.

The juristic principles, which continue to form a part and parcel of the “fundamental policy of Indian law” as recognized by the Supreme Court in *Ssanyong (supra)*, a breach of which would result in the award being set aside as being in contravention with the public policy of India, are as follows:

- (i) disregarding the orders of a superior court in India;
- (ii) disregarding binding effect of the judgment of a superior court in India;
- (iii) the principle of *audi alteram partem* which is also contained in Section 18 and Section 34(2)(a)(iii) of the Arbitration Act; and
- (iv) violation of the provisions of a statute linked to public policy or public interest would also qualify as being in contravention of the “fundamental policy of India”.

The Supreme Court in *Vijay Karia and Ors. vs. Prysmian Cavi E Sistemi Srl and Ors*⁸⁷ explaining the meaning and scope of acts that would amount to breach of the fundamental policy of Indian law, has held that such a breach must amount to a ‘breach of some legal principle or legislation that is so basic to Indian law that it is not susceptible of being compromised’. It was observed that ‘Fundamental Policy’ refers to the core values of India’s public policy as a nation. The Court explained that such core values may find expression not only in statutes, but also in time-honoured, hallowed principles followed by the Courts.

Morality and Justice

The ground for interference on the basis that the award is in conflict with justice or morality is now to be understood as a conflict with the “most basic notions of morality or justice”.⁸⁸ Accordingly, the said ground can be attracted only in

⁸⁶ (2015) 3 SCC 49 (Para No. 12)

⁸⁷ AIR 2020 SC 1807, (Para No. 25, 31, 33, 54, 79, 81, 82)

⁸⁸ i.e. after the Arbitration and Conciliation (Amendment) Act, 2015 (w.r.e.f. 23.10.2015).

exceptional circumstances when the award passed by the arbitral tribunal is such that would shock the conscience of the court by infraction of fundamental notions or principles of justice.⁸⁹

Patent Illegality

Recognising the additional ground (of the award being “by patent illegality on the face of the award”) inserted by way of Section 34(2-A), the Supreme Court has in *Ssangyong (supra)* observed that patent illegality must be such which goes to the root of the matter and not just a mere erroneous application of the law. It has been clarified that what is not subsumed within “the fundamental policy of Indian law”, namely, the contravention of a statute not linked to public policy or public interest, cannot be brought in by the backdoor when it comes to setting aside an award on the ground of patent illegality. Accordingly, a mere contravention of the substantive law of India, by itself, is no longer a ground available to set aside an award. Further, re-appreciation of evidence, which is what an appellate court is permitted to do, cannot be permitted under the ground of patent illegality.

It has also been clarified that while applying the “public policy” test to an award, a court should not act as a court of appeal and consequently errors of fact cannot be corrected in such matters. A possible view taken by the arbitral tribunal on facts must necessarily be upheld as the arbitral tribunal is the ultimate master of the quantity and quality of evidence to be relied upon when he/she delivers the award. Thus, an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind will not be set aside on this ground alone. Once it is found that the arbitral tribunal’s approach is not arbitrary or capricious, he has the last word on facts.⁹⁰

The following instances would require the court to set aside an award on the ground of being “vitiating by patent illegality on the face of the award”:

- (i) **Contravention of the Arbitration Act** – For instance, if an arbitral tribunal gives no reasons for the award and contravenes Section 31(3)⁹¹ of the Arbitration Act.

Further, if the challenge to the award is on the ground that the same is unintelligible, the same would be equivalent to providing no reasons at all. However, if the challenge is due to inadequacy of reasons, the court while

⁸⁹ *Ssangyong Engineering and Construction Company Ltd. v. National Highways Authority of India*, (2019) 15 SCC 131. (Para No. 44)

⁹⁰ *Associate Builders v. Delhi Development Authority*, (2015) 3 SCC 49; (Para No. 12) See also *Dyna Technologies Pvt. Ltd. v. Crompton Greaves Ltd.*, 2019 SCC OnLine SC 1656; (Para No. 19, 20) and *South East Asia Marine Engineering and Constructions Ltd. (SEAMEC LTD.) v. Oil India Limited*, 2020 SCC OnLine SC 451. (Para No. 8, 12, 13, 15, 18)

⁹¹ Section 31(3)

The arbitral award shall state the reasons upon which it is based, unless—

(a) the parties have agreed that no reasons are to be given, or

(b) the award is an arbitral award on agreed terms under section 30.

exercising jurisdiction under Section 34 has to adjudicate the validity of such an award based on the degree of particularity of reasoning required, having regard to the nature of issues falling for consideration. The degree of particularity cannot be stated in a precise manner and would depend on the complexity of the issue. If the court comes to the conclusion that there were gaps in reasoning for the conclusions reached by the arbitral tribunal, the court needs to have regard to the documents submitted by the parties and the contentions raised before the arbitral tribunal, so that awards with inadequate reasons are not set aside in a casual and cavalier manner. However, ordinarily, unintelligible awards are to be set aside, subject to party autonomy to do away with a reasoned award. Therefore, courts are required to be careful while distinguishing between inadequacy of reasons in an award and unintelligible awards.⁹²

- (ii) **Construction of a contract being unreasonable** – The construction of the terms of the contract is within the jurisdiction of the arbitral tribunal. Interpretation of the contract is a matter for the arbitral tribunal to determine, even if it gives rise to a question of law.⁹³ If a clause in a contract is capable of two interpretations, and the view taken by the arbitral tribunal is a possible view, if not a plausible one, it cannot be said that the arbitral tribunal has travelled outside its jurisdiction or that the view taken by it was against the terms of the contract.⁹⁴ Courts should not interfere with an award merely because an alternative view on facts and interpretation of contract exists.⁹⁵ However, if the arbitral tribunal construes the contract in a manner that no fair-minded or reasonable person would, which means that the arbitral tribunal's view is not even a possible view to take, then the award rendered by the arbitral tribunal can be challenged under Section 34 (2-A) of the Arbitration Act.⁹⁶ Therefore, courts need to be cautious and should defer to the view taken by the arbitral tribunal even if the reason provided in the award is implied unless such award portrays perversity unpardonable under Section 34.⁹⁷

⁹² *Dyna Technologies Pvt. Ltd. v. Crompton Greaves Ltd.*, 2019 SCC OnLine SC 1656. (Para No. 19, 20)

⁹³ *McDermott International Inc. v. Burn Standard Co. Ltd. & Ors.*, (2006) 11 SCC 181. (Para No. 12)

⁹⁴ *Rashtriya Ispat Nigam Ltd. v. Dewan Chand Ram Saran*, (2012) 5 SCC 306. (Para No. 29) Also see *Swan Gold Mining Ltd. v. Hindustan Copper Ltd.*, (2015) 5 SCC 739 (Para No. 21) and *National Highway Authority of India v. Progressive-MVR (JV)*, (2018) 14 SCC 688. (Para No. 12, 24)

⁹⁵ *Dyna Technologies Pvt. Ltd. v. Crompton Greaves Ltd.*, 2019 SCC OnLine SC 1656. (Para No. 13) Also see *Numaligarh Refinery Ltd. v. Daelim Industrial Co. Ltd.*, (2007) 8 SCC 466. (Para No. 8, 11) and *South East Asia Marine Engineering and Constructions Ltd. v. Oil India Ltd.*, 2020 SCC OnLine SC 451. (Para No. 12, 13, 33)

⁹⁶ *Ssangyong Engineering and Construction Company Ltd. v. National Highways Authority of India*, (2019) 15 SCC 131. (Para No. 9, 17, 23 – 30, 39, 40) Also see *Patel Engineering Ltd. v. North Eastern Electric Power Corporation Ltd.*, 2020 SCC OnLine SC 466. (Para No. 21 – 28) *Associate Builders v. Delhi Development Authority*, (2015) 3 SCC 49. (Para No. 42) *National Highways Authority of India v. ITD Cementation India Ltd.*, (2015) 14 SCC 21. (Para No. 21) *HRD Corporation (Marcus Oil and Chemical Division) v. Gail (India) Ltd.*, (2018) 12 SCC 471. (Para No. 14) *Numaligarh Refinery Ltd. v. Daelim Industrial Co. Ltd.*, (2007) 8 SCC 466. (Para No. Page 4 – 7) and *McDermott International Inc. v. Burn Standard Co. Ltd. & Ors.*, (2006) 11 SCC 181. (Para No. 12)

⁹⁷ *Dyna Technologies Pvt. Ltd. v. Crompton Greaves Ltd.*, 2019 SCC OnLine SC 1656. (Para No. 27)

In a recent judgment, the Supreme Court delved into the merits of the contract between the parties as it was found that the interpretation adopted by the arbitral tribunal was unreasonable and unfair⁹⁸.

- (iii) If the arbitral tribunal deals with matters outside the contract or exceeds the scope of his authority, he commits an error of jurisdiction.
- (iv) A finding based on no evidence at all or an award which ignores vital evidence in arriving at its decision would be perverse. Additionally, a finding based on documents taken behind the back of the parties by the arbitral tribunal would qualify as a decision based on no evidence inasmuch as such decision is not based on evidence led by the parties, and therefore, would be characterised as perverse.⁹⁹ As stated aforesaid, awards should not be interfered with in a casual and cavalier manner, unless the court comes to a conclusion that the perversity of the award goes to the root of the matter, without there being a possibility of alternative interpretation which may sustain the award. If the challenge to an award is based on impropriety or perversity in reasoning, only then can it be challenged strictly on the grounds provided under Section 34 of the Arbitration Act.¹⁰⁰

It is pertinent to note that the ground of patent illegality is not available for setting aside awards in international commercial arbitrations.¹⁰¹

N. BIAS AS A GROUND FOR SETTING ASIDE AN AWARD

Bias is available as a ground for setting aside an arbitral award, under the Arbitration Act. The Supreme Court has held that an award can be set aside if the parties have a reasonable basis to doubt the arbitral tribunal's ability to be independent and impartial in pronouncing the award. There should be no room for *potential perceived bias*, as the very basis of arbitration is that the parties get an opportunity of nominating a judge of their choice in whom they have trust and faith, unlike in the normal course of litigation where they do not have such a choice. When one is required to judge the case of another, justice should not only be done, but it should also seem to be done is the bottom line.¹⁰² Further, the Bombay High Court has recently held that bias arises when the arbitral tribunal has a direct pecuniary or proprietary connection with the subject matter of the dispute or the parties.¹⁰³

⁹⁸ [South East Asia Marine Engineering and Constructions Ltd. \(SEAMEC LTD.\) v. Oil India Limited](#), 2020 SCC OnLine SC 451, (Para No. 15)

⁹⁹ [Ssangyong Engineering and Construction Company Ltd. v. National Highways Authority of India](#), (2019) 15 SCC 131, (Para No. 30)

¹⁰⁰ [Dyna Technologies Pvt. Ltd. v. Crompton Greaves Ltd.](#), 2019 SCC OnLine SC 1656, (Para No. 26)

¹⁰¹ Section 34 (2-A) of the Arbitration Act.

¹⁰² [Vinod Bhaiyalal Jain & Ors. v. Wadhvani Parmeshwari Cold Storage Pvt. Ltd. & Anr.](#), 2019 SCC OnLine SC 904, (Para No. 10 - 11)

¹⁰³ [Nobel Resource Ltd. v. Dharni Sampda Private Limited](#), 2019 SCC OnLine Bom 4415, (Para No. 30)

The Delhi High Court has held that once the aspect of bias on the part of one of the arbitrators (in a panel comprising of three arbitrators) was established, the mere fact that the award in question was a unanimous would not be sufficient to uphold the award. The Court held that even if one of the members of the arbitral tribunal has compromised the essential requirement of fairness by failing to disclose the circumstances which may give rise to justifiable doubts as to the independence and impartiality of the arbitral tribunal, the award rendered by the arbitral tribunal would get vitiated.¹⁰⁴

O. SCOPE OF REVIEW UNDER SECTION 34(2) – NOT AN APPELLATE PROCEEDING

The jurisdiction of a court hearing challenge proceedings, under Section 34 of the Arbitration Act, cannot be equated with normal appellate jurisdiction.¹⁰⁵ The court does not sit in appeal over the award and may interfere only on the grounds provided under Section 34(2) of the Arbitration Act.¹⁰⁶ Re-appreciation of evidence or re-examination of facts, to ascertain whether a different decision can be arrived at, is not permitted.¹⁰⁷ Recently, in *Anglo American Metallurgical Coal Pty Ltd. v. MMTC Ltd.*¹⁰⁸, the Supreme Court has categorically observed that *‘it is well established that the arbitral tribunal is the final judge of the quality, as well as the quantity of evidence before it’*. The arbitral tribunal is the master of evidence and the findings of fact which are arrived at by the arbitral tribunal on the basis of the evidence on record are not to be scrutinised as if the court was sitting in appeal.¹⁰⁹ The Supreme Court has recognized that the mandate under Section 34 is to respect the finality of awards and the autonomy of parties to get their dispute adjudicated by an alternative forum as provided under the law.¹¹⁰

P. NO REVIEW ON MERITS OF THE AWARD

A court has no jurisdiction to sit in appeal and examine the scope and correctness of the award on merits. None of the grounds contained in Section 34(2)(a) of the Arbitration Act deal with the merits of the decision rendered by an arbitral tribunal.

However, Explanation 2 of Section 34(2)(b)(ii) of the Arbitration Act (inserted by the 2015 Amendment Act) specifically provides that the test as to whether an

¹⁰⁴ *M/s. Lanco-Rani (JV) v. National Highways Authority of India*, 2016 SCC OnLine Del 6267. (Para No. 30)

¹⁰⁵ *Dyna Technologies Pvt. Ltd. v. Crompton Greaves Ltd.*, 2019 SCC OnLine SC 1656. (Para No. 30)

¹⁰⁶ *M.M.T.C. Ltd. v. Vedanta Limited*, (2019) 4 SCC 163. (Para No. 11 & 12) Also see *Numaligarh Refinery Ltd. v. Daelim Industrial Co. Ltd.*, (2007) 8 SCC 466; (Para No. 24) *National Highways Authority of India v. ITC Cementation Ltd.*, (2015) 14 SCC 21. (Para No. 25) and *State of Orissa v. M/s. Samantary Construction Pvt. Ltd. & Anr.*, 2015 SCC OnLine SC 856. (Para No. 17)

¹⁰⁷ (2019) 15 SCC 131. (Para No. 27) Also see *P.R. Shah, Shares and Stock Brokers Pvt. Ltd. v. B.H.H. Securities Pvt. Ltd. & Ors.*, (2012) 1 SCC 594. (Para No. 21)

¹⁰⁸ 2020 SCC OnLine SC 1030. (Para No. 47)

¹⁰⁹ *Maharashtra State Electricity Distribution Co. Ltd. v. Datar Switchgear Ltd.* (2018) 3 SCC 133. (Para No. 51)

¹¹⁰ *Dyna Technologies Pvt. Ltd. v. Crompton Greaves Ltd.*, 2019 SCC OnLine SC 1656. (Para No. 26)

award is in contravention of the fundamental policy of Indian law shall not entail a review of merits of the award. Therefore, interference of the court under Section 34(2)(b)(ii) does not entail a review on merits of the dispute and is limited to situations where the findings of the arbitral tribunal are arbitrary, capricious or perverse, or when the conscience of the court is shocked, or when the illegality is not trivial but goes to the root of the matter.¹¹²

Q. WANT OF STAMP DUTY, AS A GROUND FOR SETTING ASIDE AN AWARD

The issue of whether an award needs to be stamped or registered is relevant only when parties seek enforcement under Section 36 of the Arbitration Act, and not at the stage of challenge under Section 34.¹¹³

Stamp duty is not liable to be paid on a foreign award, as a foreign award is not contemplated within the expression “award” in Item 12 of Schedule I of the Indian Stamp Act, 1899.¹¹⁴

R. UPHOLDING/ CONSIDERATION OF MINORITY AWARD/ DISSENTING OPINION

Whilst the court’s power under Section 34 of the Arbitration Act is limited to setting aside an award under challenge on the basis of the grounds mentioned therein, the Supreme Court, has, in *Ssangyong (supra)* deviated from the said norm and in fact invoked Article 142¹¹⁵ of the Constitution of India, 1950 to uphold a minority award (which was based on the formula provided in the agreement between the parties). While observing that under the scheme of Section 34 of the Arbitration Act, the disputes that were decided by the majority award under challenge would have to be referred afresh to another arbitration once the said award would be set aside, the Court held that adopting the said procedure would cause considerable delay. It was further observed that the same would be contrary to the objectives of the Arbitration Act, namely, speedy resolution of disputes by the arbitral process.

¹¹² *M.M.T.C. Ltd. v. Vedanta Limited*, (2019) 4 SCC 163. (Para No. 11 & 12)

¹¹³ *M. Anusuya Devi & Anr. v. M. Manik Reddy & Ors.*, (2003) 8 SCC 565. (Para No. 4)

¹¹⁴ *Shriram FPC Ltd. v. Rioglass Solar SA*, (2018) 18 SCC 313. (Para No. 26) Also see *Naval Gent Maritime Ltd. v. Shivnath Rai Harnarain (I) Ltd.*, 174 (2009) DLT 391. (Para No. 18) *Vitol S.A. v. Bhatia International Ltd.*, 2014 SCC OnLine Bom 1058 (appeal pending before the Supreme Court); (Para No. 9 & 10) and *Narayan Trading Co. v. Abcom Trading Pvt. Ltd.*, 2012 SCC OnLine MP 8645. (Para No. 10 - 12)

¹¹⁵ 142. Enforcement of decrees and orders of Supreme Court and orders as to discovery, etc. - (1) The Supreme Court in the exercise of its jurisdiction may pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it, and any decree so passed or order so made shall be enforceable throughout the territory of India in such manner as may be prescribed by or under any law made by Parliament and, until provision in that behalf is so made, in such manner as the President may by order prescribe.

(2) Subject to the provisions of any law made in this behalf by Parliament, the Supreme Court shall, as respects the whole of the territory of India, have all and every power to make any order for the purpose of securing the attendance of any person, the discovery or production of any documents, or the investigation or punishment of any contempt of itself.

Interestingly, in the past, the Bombay High Court¹¹⁶ and the Delhi High Court¹¹⁷ have also upheld minority awards in challenge proceedings under Section 34, without however providing any express legal justification for the same. The Bombay High Court has in fact, while providing reasons for setting aside the majority award, *simpliciter* upheld the minority award passed in the arbitral proceedings. It appears that in the said case, the Court travelled beyond the realm of its powers under Section 34 of the Arbitration Act, and it could be argued that this is more so, in view of the lack of any reason, rationale or justification for the same.

S. MODIFICATION OF AN AWARD UNDER SECTION 34

The Supreme Court has, while reaffirming its earlier decisions (i.e., *Kinnari Mullick and Another v. Ghanshyam Das Damani*¹¹⁸, and *McDermott International Inc. v. Burn Standard Co. Ltd. and Ors.*,¹¹⁹) in the case of *Radha Chemicals v. Union of India*¹²⁰ held that while deciding a Section 34 petition, the court has no jurisdiction to remand the matter to the arbitral tribunal for a fresh decision. Further, it was held that the discretion of the Court under Section 34(4) to defer the proceedings for specified purpose is limited and can be invoked only upon request by the party prior to setting aside of the award.

T. SEVERABILITY OF AWARDS

The judicial discretion vested in the court under Section 34 of the Arbitration Act includes the power to apply the doctrine of severability and to set aside an award partly or wholly depending on the facts and circumstances of the given case. Where the matters submitted to arbitration can clearly be separated from matters not referred to arbitration and the arbitral tribunal's decision on such matters, as envisaged under Section 34(2)(a)(iv) of the Arbitration Act, there is an absolute duty on the court to invoke the principle of severability.¹²¹

U. CAN A PARTY LEAD EVIDENCE IN A PROCEEDING UNDER SECTION 34

Answering the aforesaid question in the negative, the Supreme Court in *M/S. Canara Nidhi Limited v. M. Shashikala*¹²² clarified that an application for setting aside an award will not ordinarily require anything beyond the record that was

¹¹⁶ *Oil and Natural Gas Corporation Ltd. v. Interocean Shipping (India) Pvt. Ltd.*, 2017 (5) ArbLR 402 (Bom). (Para No. 122)

¹¹⁷ *Oil & Natural Gas Corporation Ltd. v. Schlumberger Asia Services Ltd.*, 2006 (91) DRJ 370 (DB). (Para No. 70 - 72)

¹¹⁸ (2018) 11 SCC 328. (Para No. 13)

¹¹⁹ (2006) 11 SCC 181. (Para No. 12)

¹²⁰ Order dated 10th October 2018 passed in Civil Appeal No. 10386 of 2018. (Para No. 4 - 7)

¹²¹ *R.S. Jiwani and Ors. v. Ircon International Ltd., A Government of India and Ors.*, 2010 (1) Bom CR 529. (Para No. 37, 38)

¹²² (2019) 9 SCC 462. (Para No. 9)

before the arbitral tribunal. Only those matters which are not contained in the record before the arbitral tribunal and are relevant for the determination of issues arising under Section 34(2)(a), may be brought to the notice of the court by way of affidavits filed by both parties. Cross-examination of persons swearing to such affidavits would be an exception and would not be allowed unless absolutely necessary.

V. SECTION 34 PROCEEDINGS ARE SUMMARY IN NATURE

Challenge proceedings under Section 34 of the Arbitration Act are in the nature of summary proceedings, with provision for objections by the defendant/respondent, followed by an opportunity to the applicant to “prove” the existence of any ground under Section 34(2) of the Arbitration Act.¹²³

The scope of enquiry for such proceedings is restricted to a consideration of whether any of the grounds mentioned in Section 34(2) or Section 13(5)¹²⁴ or Section 16(6) of the Arbitration Act, which are specific in nature, are made out to set aside the award. These proceedings should be decided only with reference to the pleadings and the evidence placed before the arbitral tribunal and the grounds specified under Section 34(2) of the Arbitration Act.¹²⁵ Framing of issues, as contemplated under Rule 1 of Order 14 of the Code of Civil Procedure, 1908, is not an integral part of these proceedings.¹²⁶ In *Emkay Global Financial Services Ltd. vs. Girdhar Sondhi*¹²⁷, the Supreme Court clarified that an application for setting aside an arbitral award will not ordinarily require anything beyond the record that was before the arbitrator. However, if there are matters not contained in such record, and are relevant to the determination of issues arising under Section 34, they may be brought to the notice of the Court by way of affidavits filed by both parties. Cross-examination of persons swearing to the affidavits should not be allowed unless absolutely necessary, as the truth will emerge on a reading of the affidavits filed by both parties.

¹²³ *Fiza Developers and Inter-Trade P. Ltd. vs. AMCI (I) Pvt. Ltd. and Ors.*, (2009) 17 SCC 796. (Para No. 4, 11, 14)

¹²⁴ **13. Challenge procedure.** — ... (5) Where an arbitral award is made under sub-section (4), the party challenging the arbitrator may make an application for setting aside such an arbitral award in accordance with section 34.

¹²⁵ *Canara Nidhi Limited v. M. Shashikala and Ors.*, (2019) 9 SCC 462. (Para No. 9)

¹²⁶ *Fiza Developers and Inter-Trade P. Ltd. v. AMCI (I) Pvt. Ltd. and Ors.*, (2009) 17 SCC 796. (Para No. 7)

¹²⁷ AIR 2018 SC 3894. (Para No. 8, 22)

W. LIMITATION PERIOD FOR FILING AN APPLICATION UNDER SECTION 34

Disposal of application under Section 33¹²⁸

If a request under Section 33 of the Arbitration Act (i.e., for correction and/or interpretation of the award or for an additional award) has been made, the period of limitation for filing an application under Section 34 would commence ‘...from the date on which that request had been disposed of by the arbitral tribunal...’. While emphasising that it is the ‘date on which that request had been disposed’, the Supreme Court has clarified that an application can be ‘disposed of’ either by allowing it or dismissing it.¹²⁹

Availability of recourse to Limitation Act, 1963 to seek extension of time for filing an application

While Section 5¹³⁰ of the Limitation Act, 1963 does not provide any outer limit on the period of delay which can be condoned, Section 34 of the Arbitration Act, specifically provides (by using the following terminology – ‘*may entertain the application within a further period of thirty days but not thereafter*’) an outer limit of thirty (30) days for condoning any delay in filing an application under Section 34 of the Arbitration Act. Noting this difference, the Supreme Court has held that a party cannot seek recourse to Section 5 of the Limitation Act, 1963 to challenge an award under Section 34 of the Arbitration Act, after the expiry of the prescribed time for filing an application thereunder.¹³¹ Accordingly, if a petition is filed beyond the prescribed period of three months, the court has the

¹²⁸ **33. Correction and interpretation of award; additional award.** – (1) Within thirty days from the receipt of the arbitral award, unless another period of time has been agreed upon by the parties –

(a) a party, with notice to the other party, may request the arbitral tribunal to correct any computation errors, any clerical or typographical errors or any other errors of a similar nature occurring in the award;

(b) if so agreed by the parties, a party, with notice to the other party, may request the arbitral tribunal to give an interpretation of a specific point or part of the award.

(2) If the arbitral tribunal considers the request made under sub-section (1) to be justified, it shall make the correction or give the interpretation within thirty days from the receipt of the request and the interpretation shall form part of the arbitral award.

(3) The arbitral tribunal may correct any error of the type referred to in clause (a) of sub-section (1), on its own initiative, within thirty days from the date of the arbitral award.

(4) Unless otherwise agreed by the parties, a party with notice to the other party, may request, within thirty days from the receipt of the arbitral award, the arbitral tribunal to make an additional arbitral award as to claims presented in the arbitral proceedings but omitted from the arbitral award.

(5) If the arbitral tribunal considers the request made under sub-section (4) to be justified, it shall make the additional arbitral award within sixty days from the receipt of such request.

(6) The arbitral tribunal may extend, if necessary, the period of time within which it shall make a correction, give an interpretation or make an additional arbitral award under sub-section (2) or sub-section (5).

(7) Section 31 shall apply to a correction or interpretation of the arbitral award or to an additional arbitral award made under this section.

¹²⁹ *M/s Ved Prakash Mittal and sons v Union of India*, 2018 SCC OnLine SC 3181 (Para No. 6 - 8)

¹³⁰ **5. Extension of prescribed period in certain cases.** – Any appeal or any application, other than an application under any of the provisions of Order XXI of the Code of Civil Procedure, 1908 (5 of 1908), may be admitted after the prescribed period if the appellant or the applicant satisfies the court that he had sufficient cause for not preferring the appeal or making the application within such period.

Explanation. – The fact that the appellant or the applicant was missed by any order, practice or judgment of the High Court in ascertaining or computing the prescribed period may be sufficient cause within the meaning of this section.

¹³¹ *State of Himachal Pradesh & Anr. v. M/s Himachal Techno Engineers & Anr.*, (2010) 12 SCC 210. (Para No. 6, 7)

power to condone the delay only to an extent of thirty (30) days subject to sufficient cause being shown.

Further, an application under Section 34 of the Arbitration Act has to be made in 'in accordance with' Section 34(2) read with Section 34(3) of the Arbitration Act. Accordingly, an application filed beyond the period prescribed in Section 34(3), would not qualify as an application 'in accordance with' Section 34(3). The Supreme Court has in *Simplex Infrastructure Limited v. Union of India*¹³² observed that this intention of the Legislature is evinced by the fact that an extension of thirty (30) days after the expiry of three (3) months for filing such an application has been suffixed by the terminology 'but not thereafter' in the proviso to Section 34(3). Accordingly, it was inter alia held that Section 5 of the Limitation Act, 1963 will not apply to an application challenging an award under Section 34 of the Arbitration Act and that the benefit under Section 14¹³³ of the Limitation Act, 1963 can be extended only to the extent of the time period prescribed under Section 34 (3) of the Arbitration Act.

Further, the benefit available under Section 4¹³⁴ of the Limitation Act, 1963 is also not applicable to applications made under Section 34 of the Arbitration Act.¹³⁵

However, recently, a three-judge bench of the Supreme Court in *Chintels India Ltd. v. Bhayana Builders Pvt. Ltd.*¹³⁶ has held that an appeal under section 37 (1) (c) of the Arbitration Act would be maintainable against an order refusing to condone delay in filing an application under section 34 of the Arbitration Act.

¹³² (2019) 2 SCC 455, (Para No. 7 - 16)

¹³³ 14. **Exclusion of time of proceeding bona fide in court without jurisdiction.** — (1) In computing the period of limitation for any suit the time during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a court of first instance or of appeal or revision, against the defendant shall be excluded, where the proceeding relates to the same matter in issue and is prosecuted in good faith in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it.

(2) In computing the period of limitation for any application, the time during which the applicant has been prosecuting with due diligence another civil proceeding, whether in a court of first instance or of appeal or revision, against the same party for the same relief shall be excluded, where such proceeding is prosecuted in good faith in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it.

(3) Notwithstanding anything contained in rule 2 of Order XXIII of the Code of Civil Procedure, 1908 (5 of 1908), the provisions of sub-section (1) shall apply in relation to a fresh suit instituted on permission granted by the court under rule 1 of that Order, where such permission is granted on the ground that the first suit must fail by reason of a defect in the jurisdiction of the court or other cause of a like nature.

Explanation. — For the purposes of this section, —

(a) in excluding the time during which a former civil proceeding was pending, the day on which that proceeding was instituted and the day on which it ended shall both be counted;

(b) a plaintiff or an applicant resisting an appeal shall be deemed to be prosecuting a proceeding;

(c) misjoinder of parties or of causes of action shall be deemed to be a cause of a like nature with defect of jurisdiction.

¹³⁴ 4. **Expiry of prescribed period when court is closed.** — Where the prescribed period for any suit, appeal or application expires on a day when the court is closed, the suit, appeal or application may be instituted, preferred or made on the day when the court re-opens.

Explanation. — A court shall be deemed to be closed on any day within the meaning of this section if during any part of its normal working hours it remains closed on that day.

¹³⁵ *Assam Urban Water Supply and Sewerage Board v. Subhash Projects and Marketing Limited*, (2012) 2 SCC 624, (Para No. 12 - 14)

¹³⁶ Judgment dated 11th February 2021 passed in Civil Appeal No. 4028 of 2020. (Para No. 9, 12, 36, 37)

Whether the period of three months provided under Section 34(3) of the Arbitration Act is to be interpreted as three (3) months or ninety (90) days?

The Supreme Court has, in *State of Himachal Pradesh & Anr. v. M/s Himachal Techno Engineers & Anr.*¹³⁷ considered the aforesaid question and held that the limitation period (i.e., three (3) months) for filing an application under Section 34(3) of the Arbitration Act cannot be construed as ninety (90) days. In this regard, the Court noted that Section 34(3) and the proviso thereto prescribe limitation periods in different units. While Section 34(3) uses the terminology ‘months’, the proviso to the said section uses the terminology ‘days’. Being conscious of this stark difference of terminology within the same sub-section, the Court observed that despite having the choice of describing the periods of time in the same units, the Legislature consciously chose not to do so, thereby making its intention clear. Accordingly, in the instant case it was held that neither can the limitation period of three (3) months prescribed in Section 34(3) be interpreted/equated to mean ninety (90) days nor can a period of thirty (30) days (as prescribed in the proviso to Section 34(3)) be interpreted/equated to mean one month.

‘Receipt’ and effective service of the award

The Supreme Court has held that when the award is delivered/deposited or left in the office of a party on a non-working day, the date of such physical delivery is not the date of ‘receipt’ of the award by that party.¹³⁸ Delivery of an award has to be effective so as to qualify as ‘receipt’ of the said award by the party. Accordingly, it was held that the date of delivery of the award on a holiday cannot not be construed as ‘receipt’ of the award by the party. As a result, the date of receipt will be the next working day in such cases. It was further held that for the purpose of computing the time period of filing an application under Section 34, the limitation period would commence from the day after the receipt of the award by the party.

Observing that the delivery of the award by the arbitral tribunal and receipt of the same by the party sets in motion several periods of limitation (and the rights of the parties in connection thereto), the Supreme Court has held that the same is not a mere formality but a matter of substance.¹³⁹ It was further held that such delivery of the award to a party, to be effective, has to be ‘received’ by the party. For instance, it has been held in the context of a huge organization (like railways), a copy of the award has to be received by the person who has knowledge of the proceedings and who would be the best person to understand

¹³⁷ (2010) 12 SCC 210. (Para No. 6, 7)

¹³⁸ *State of Himachal Pradesh & Anr. v. M/s Himachal Techno Engineers & Anr.*, (2010) 12 SCC 210. (Para No. 6, 7)

¹³⁹ *Union of India v. Tecco Trichy Engineers and Contractors*, (2005) 4 SCC 239. (Para No. Page 3, 4)

and appreciate the award and also to take a decision in the matter of moving an application under sub-section (1) or (5) of Section 33 or under sub-section (1) of Section 34.

The Supreme Court has *inter alia* clarified that if a legislation mandates that a copy of the order/award is to be communicated, delivered, dispatched, forwarded, rendered or sent to the parties concerned in a prescribed manner and also prescribes a period of limitation for challenging the said order/award, then the period of limitation can only commence from the date on which the order/award was received by the party concerned in the manner prescribed by the said legislation.¹⁴⁰ Further, in *Benarsi Krishna Committee and Ors. vs. Karmyogi Shelters Pvt. Ltd.*¹⁴¹, the Supreme Court found that delivery of the award on the advocates of the party would not be regarded as effective delivery for the purpose of computing limitation. It was held that proper compliance with Section 31(5)¹⁴² would mean delivery of a signed copy of the award on the party itself and not on its advocate. Recently, a division bench of the Supreme Court in *Dakshin Haryana Bijli Vitran Nigam Ltd. V. M/s Navigant Technologies Pvt. Ltd.*¹⁴³, has *inter alia* clarified that the date on which a signed copy of the final award is received by the parties is the date from which the period of limitation for filing objections would start ticking.

X. SCOPE AND POWERS OF THE COURT UNDER SECTION 34(4) OF THE ARBITRATION ACT

Section 34(4) of the Arbitration Act enables the court to adjourn a challenge proceeding pending before it and give the arbitral tribunal an opportunity to resume the arbitral proceedings or take such other action as in the opinion of the arbitral tribunal will eliminate the grounds for setting aside the award. The conditions required to be satisfied for the court to exercise its power under this provision are:

- (i) there is a written request made by a party to the arbitral proceedings;
- (ii) the award has not been set aside; and
- (iii) the challenge to the award has been made in relation to deficiencies therein, which may be curable by allowing the arbitral tribunal to take such measures which can eliminate the grounds for setting aside the award.¹⁴⁴

¹⁴⁰ [The State of Maharashtra and Ors. v. Ark Builders Pvt. Ltd., \(2011\) 4 SCC 616](#), (Para No. 10)

¹⁴¹ [\(2012\) 9 SCC 496](#), (Para No. 15, 16)

¹⁴² Judgment dated March 2, 2021 passed in Civil Appeal No. 791 of 2021.

¹⁴³ 31. Form and contents of arbitral award—...(5) After the arbitral award is made, a signed copy shall be delivered to each party....

¹⁴⁴ [Kinnari Mullick and Anr. v. Ghanshyam Das Damani, \(2018\) 11 SCC 328](#), (Para No. 15) Also see [Geojit Financial Services Ltd. v. Kritika Nagpal, Appeal No. 35 of 2013 in Arbitration Petition No. 47 of 2009](#); (Para No. 14) [Raitani Engineering Works Pvt. Ltd. v. Union of India & Ors., 2015 SCC OnLine Gau 494](#); (Para No. 7) and [Bhaskar Industrial Development Ltd. v. South Western Railway, 2016 SCC OnLine Kar 8330](#), (Para No. 8)

The power under Section 34(4) of the Arbitration Act is inextricably intertwined with the grounds for setting aside the award under Section 34(2) of the Arbitration Act since the very object of Section 34(4) is to eliminate the grounds for setting aside the award. The Madras High Court has held that under this provision, there are no restrictions placed upon the arbitral tribunal and it can have a free play as the primary purpose is to eliminate the grounds of setting aside an award. The Court was also of the view that the arbitral tribunal may entertain additional evidence after resumption of proceedings or may even refuse to do anything further and leave it to the court to decide the matter on its own merits under Section 34(2). All that is required under Section 34(4) is the subjective satisfaction of the arbitral tribunal that the venture undertaken by it would eliminate the grounds for setting aside the award.¹⁴⁵ It remains to be seen whether the Madras High Court's expansive interpretation of the arbitral tribunal's discretion under Section 34(4) of the Arbitration Act is applied by other High Courts or affirmed by the Supreme Court.

Under this provision, the court can neither exercise the limited power of deferring the challenge proceedings before it *suo motu* nor can it remand the matter to the arbitral tribunal for a fresh decision.¹⁴⁶

The Supreme Court has held that the legislative intention of Section 34(4) of the Arbitration Act is to make the award enforceable, after giving an opportunity to the arbitral tribunal to undo curable defects. The power vested under the said provision, to cure defects, can be utilised in cases where the award does not provide any reasoning or if the award has some gap in reasoning or otherwise, and that can be cured so as to avoid a challenge based on the curable defects under Section 34 of the Arbitration Act.¹⁴⁷

Even in cases where the arbitral tribunal has overlooked a particular claim on which the parties have led evidence and addressed arguments or where some part of the award is required to be reconsidered by the arbitral tribunal, the power of the courts under Section 34(4) can be exercised, as these are grounds capable of elimination by the arbitral tribunal.¹⁴⁸

However, where there is complete perversity in reasoning,¹⁴⁹ the award is bad in law and in clear breach of the principles of natural justice, equity and fair play,

¹⁴⁵ M.T.C. v. Vicnivass Agency, 2009 (1) MLJ 199. (Para No. 16-25) Also see Suresh Prabhu v. Bombay Mercantile Co-op Bank & Ors., 2007 (5) BomCR 2015; (Para No. 9) Pratibha Tushar Sanghvi v. Paresh Vinodlal Jhaveri, 2014 SCC Online Bom 1281; (Para No. 25) and M/s. B.M.A. Commodities Pvt. Ltd. v. Koberi Mondal, 2014 SCC Online Bom 1877. (Para No. 72)

¹⁴⁶ Kinnari Mullick and Anr. v. Ghanshyam Das Damani, (2018) 11 SCC 328. (Para No. 15 – 16 & 18-20) Also see Radha Chemicals v. Union of India, Civil Appeal No. 10386 of 2018; (Para No. 5) Geojit Financial Services Ltd. v. Kritika Nagpal, Appeal No. 35 of 2013 in Arbitration Petition No. 47 of 2009; (Para No. 14) Raitani Engineering Works Pvt. Ltd. v. Union of India & Ors., 2015 SCC Online Gau 494; (Para No. 8) and Bhaskar Industrial Development Ltd. v. South Western Railway, 2016 SCC Online Kar 8330. (Para No. 8 & 9)

¹⁴⁷ Dyna Technologies Pvt. Ltd. v. Crompton Greaves Ltd., 2019 SCC Online SC 1656. (Para No. 38 - 40)

¹⁴⁸ Geojit Financial Services Ltd. v. Kritika Nagpal, Judgment passed by the Bombay High Court in Appeal No. 35 of 2013 in Arbitration Petition No. 47 of 2009. (Para No. 14) Also see BTP Structural (I) Pvt. Ltd. v. Bharat Petroleum Corp. Ltd., 2012 SCC Online Bom 639. (Para No. 23)

¹⁴⁹ Dyna Technologies Pvt. Ltd. v. Crompton Greaves Ltd., 2019 SCC Online SC 1656. (Para No. 35 & 37)

the award was passed without giving an opportunity to either of the parties,¹⁵⁰ or the parties have lost faith in the arbitral tribunal,¹⁵¹ sending the award back to the arbitral tribunal for the purposes of reconsideration/ rehearing is not contemplated under Section 34(4).

We have written on this topic earlier, and the same can be accessed on our blog website.¹⁵²

Y. PRIOR NOTICE FOR FILING AN APPLICATION UNDER SECTION 34 OF THE ARBITRATION ACT – DIRECTORY OR MANDATORY?

Section 34(5) of the Arbitration Act, introduced by the 2015 Amendment Act, provides that an application under Section 34 of the Arbitration Act shall be filed by a party only after issuing prior notice to the other party and such an application shall be accompanied by an affidavit by the applicant endorsing compliance with the said requirement. This requirement of issuing notice to the award holder, prior to filing of challenge proceedings, is directory and not mandatory in nature. The provision is procedural in nature, and no consequence has been provided for its non-compliance. It is not a condition precedent but only a procedural provision which, when read with Section 34(6) of the Arbitration Act, seeks to reduce the delay in hearing challenge proceedings.¹⁵³

Z. TIME LIMIT FOR DISPOSAL OF APPLICATION UNDER SECTION 34

Section 34(6) of the Arbitration Act provides that challenge proceedings under Section 34 of the Arbitration Act shall be disposed of expeditiously, and in any event, within a period of one (1) year from the date on which the notice under Section 34(5) of the Arbitration Act is served upon the other party. The time period for disposal of challenge proceedings, under Section 34(6) of the Arbitration Act, is directory and not mandatory, as no consequence is provided in Section 34(6) of the Arbitration Act, if the proceedings are not disposed of by the court within one year from the date of service of notice under Section 34(5) of the Arbitration Act.¹⁵⁴ However, every court must endeavor to stick to the time limit of one year from the date of service of notice to the opposite party.¹⁵⁵

¹⁵⁰ *BTP Structural (I) Pvt. Ltd. v. Bharat Petroleum Corp. Ltd.*, 2012 SCC OnLine Bom 639. (Para No. 23)

¹⁵¹ *Auto Craft Engineers v. Akshar Automobiles Agencies Pvt. Ltd.*, 2016 SCC OnLine Bom 5185. (Para No. 69)

¹⁵² <https://corporate.cyrilamarchandblogs.com/2020/05/section-34-4-of-arbitration-and-conciliation-act-1996-part-i/> and <https://corporate.cyrilamarchandblogs.com/2020/05/section-344-of-the-arbitration-and-conciliation-act-1996-a-fly-in-the-ointment-part-ii/>

¹⁵³ *State of Bihar and Ors. v. Bihar Rajya Bhumi Vikas Bank Samiti*, (2018) 9 SCC 472. (Para No. 19) Also see *Global Aviation Services (P) Ltd. v. Airport Authority of India*, 2018 SCC OnLine Bom 233; (Para No. 115 & 121) *Maharashtra State Road Development Corporation Ltd. v. Simplex Gayatri Consortium*, 2018 SCC OnLine Bom 805; (Para No. 40) and *Srei Infrastructure Finance Ltd. v. Candor Gurgaon Two Developers and Projects (P) Ltd.*, 2018 SCC OnLine Cal 5606. (Para No. 19)

¹⁵⁴ *Global Aviation Services Private Limited and Ors. v. Airport Authority of India and Ors.*, 2018 SCC OnLine Bom 233. (Para No. 136)

¹⁵⁵ *The State of Bihar and Ors. v. Bihar Rajya Bhumi Vikas Bank Samiti*, (2018) 9 SCC 472. (Para No. 27)

AA. SCOPE OF AMENDMENT OF AN APPLICATION UNDER SECTION 34 OF THE ARBITRATION ACT

Where the application under Section 34 of the Arbitration Act has been made within the prescribed time, the court has power to grant leave to amend such application (or an appeal therefrom), if the circumstances of the case are peculiar and warrant an amendment, and if this is required in the interest of justice.¹⁵⁶ The test for permitting such an amendment is whether the proposed grounds would warrant a fresh application under Section 34 of the Arbitration Act (i.e., whether the grounds which are sought to be brought in by way of an amendment would be new and independent grounds). If such new grounds do not have a foundation in the existing application, then the amendment is not permissible.¹⁵⁷

However, if certain facts were concealed, which have a causative link with the facts constituting or inducing the award, such facts become relevant for the purpose of deciding Section 34 proceedings. If such facts are discovered after the filing of challenge proceedings (under Section 34 of the Arbitration Act), they may be brought on record by way of an amendment.¹⁵⁸

¹⁵⁶ *State of Maharashtra v. Hindustan Construction Company Ltd.*, (2010) 4 SCC 518, (Para No. 25)

¹⁵⁷ *Prakash Industries Limited v. Bengal Energy Limited & Anr.* 2020 SCC OnLine Cal 971, (Para No. 11,12)

¹⁵⁸ *Venture Global Engineering v. Satyam Computer Services Ltd. and Ors.*, (2010) 8 SCC 660, (Para No. 19 – 33, 58 – 60)

¹⁵⁹ 226. Power of High Courts to issue certain writs - (1) Notwithstanding anything in article 32, every High Court shall have powers, throughout the territories in relation to which it exercise jurisdiction, to issue to any person or authority, including in appropriate cases, any Government, within those territories directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose.

(2) The power conferred by clause (1) to issue directions, orders or writs to any Government, authority or person may also be exercised by any High Court exercising jurisdiction in relation to the territories within which the cause of action, wholly or in part, arises for the exercise of such power, notwithstanding that the seat of such Government or authority or the residence of such person is not within those territories.

(3) Where any party against whom an interim order, whether by way of injunction or stay or in any other manner, is made on, or in any proceedings relating to, a petition under clause (1), without—

(a) furnishing to such party copies of such petition and all documents in support of the plea for such interim order; and

(b) giving such party an opportunity of being heard,

makes an application to the High Court for the vacation of such order and furnishes a copy of such application to the party in whose favour such order has been made or the counsel of such party, the High Court shall dispose of the application within a period of two weeks from the date on which it is received or from the date on which the copy of such application is so furnished, whichever is later, or where the High Court is closed on the last day of that period, before the expiry of the next day afterwards on which the High Court is open; and if the application is not so disposed of, the interim order shall, on the expiry of that period, or, as the case may be, the expiry of the said next day, stand vacated.

(4) The power conferred on a High Court by this article shall not be in derogation of the power conferred on the Supreme Court by clause (2) of article 32.

BB. CHALLENGE TO AN AWARD BY WAY OF A WRIT PETITION

Intervention by the High Courts under Articles 226¹⁵⁹ or 227¹⁶⁰ of the Constitution of India, 1950, to correct or set-aside awards passed by the arbitral tribunal is not permissible, since the aggrieved party has an avenue for ventilating its grievances against the award (including any orders passed during the course of the arbitral proceedings) under Section 34 of the Arbitration Act. Once the arbitration has commenced, parties must wait until the award is pronounced, unless a right of appeal is available at an earlier stage under Section 37¹⁶¹ of the Arbitration Act.¹⁶²

CC. CHALLENGE TO AN INTERIM AWARD

An interim award may be a final award on the matter(s) covered thereby but made at an interim stage. An interim award, being an award within the meaning of Section 2(1)(c)¹⁶³ of the Arbitration Act, can be challenged separately and independently under Section 34 of the Arbitration Act.¹⁶⁴

DD. THE EFFECT OF A MORATORIUM UNDER THE INSOLVENCY AND BANKRUPTCY CODE, 2016 (“CODE”) ON CHALLENGE PROCEEDINGS

Imposition of moratorium under Section 14¹⁶⁵ of the Code would not apply to proceedings which ensure the benefit of a corporate debtor, including

¹⁶⁰ 227. *Power of superintendence over all courts by the High Court* - (1) Every High Court shall have superintendence over all courts and tribunals throughout the territories interrelation to which it exercises jurisdiction.

(2) Without prejudice to the generality of the foregoing provisions, the High Court may—

(a) call for returns from such courts;

(b) make and issue general rules and prescribe forms for regulating the practice and proceedings of such courts; and

(c) prescribe forms in which books, entries and accounts shall be kept by the officers of any such courts.

(3) The High Court may also settle tables of fees to be allowed to the sheriff and all clerks and officers of such courts and to attorneys, advocates and pleaders practising therein:

Provided that any rules made, forms prescribed or tables settled under clause (2) or clause (3) shall not be inconsistent with the provision or any law for the time being in force, and shall require the previous approval of the Governor.

(4) Nothing in this article shall be deemed to confer on a High Court powers of superintendence over any court or tribunal constituted by or under any law relating to the Armed Forces.

¹⁶¹ 37. *Appealable orders*.— (1) Notwithstanding anything contained in any other law for the time being in force, an appeal shall lie from the following orders (and from no others) to the Court authorised by law to hear appeals from original decrees of the Court passing the order, namely:—

(a) refusing to refer the parties to arbitration under section 8;

(b) granting or refusing to grant any measure under section 9;

(c) setting aside or refusing to set aside an arbitral award under section 34.

(2) Appeal shall also lie to a court from an order of the arbitral tribunal—

(a) accepting the plea referred to in sub-section (2) or sub-section (3) of section 16; or

(b) granting or refusing to grant an interim measure under section 17.

(3) No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or take away any right to appeal to the Supreme Court.

¹⁶² *S.B.P. & Co. v. Patel Engineering Ltd.*, (2005) 8 SCC 618. (Para No. 44)

¹⁶³ 2. *Definitions*.— (1) In this Part, unless the context otherwise requires,—

...(c) “arbitral award” includes an interim award;...

¹⁶⁴ *Indian Farmers Fertilizer Co-Operative Limited v. Bhadra Products*, (2018) 2 SCC 534. (Para No. 29)

¹⁶⁵ 14. *Moratorium*— (1) Subject to provisions of sub-sections (2) and (3), on the insolvency commencement date, the Adjudicating Authority shall by order declare moratorium for prohibiting all of the following, namely:—

(a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;

proceedings under Section 34 of the Arbitration Act, which challenges an award in favour of the corporate debtor. In any event, continuation of proceedings under Section 34 of the Arbitration Act (being a step prior to the execution of the award) do not result in endangering, diminishing, dissipating or adversely impacting the assets of the corporate debtor, and therefore such proceedings are not prohibited under Section 14(1)(a) of the Code (even if they are against the corporate debtor). However, enforceability of an award against the corporate debtor will be covered by the moratorium under Section 14(1)(a) of the Code.¹⁶⁶

(b) transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;

(c) any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002);

(d) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.

Explanation.—For the purposes of this sub-Section, it is hereby clarified that notwithstanding anything contained in any other law for the time being in force, a license, permit, registration, quota, concession, clearances or a similar grant or right given by the Central Government, State Government, local authority, sectoral regulator or any other authority constituted under any other law for the time being in force, shall not be suspended or terminated on the grounds of insolvency, subject to the condition that there is no default in payment of current dues arising for the use or continuation of the license, permit, registration, quota, concession, clearances or a similar grant or right during the moratorium period;

(2) The supply of essential goods or services to the corporate debtor as may be specified shall not be terminated or suspended or interrupted during moratorium period.

(2A) Where the interim resolution professional or resolution professional, as the case may be, considers the supply of goods or services critical to protect and preserve the value of the corporate debtor and manage the operations of such corporate debtor as a going concern, then the supply of such goods or services shall not be terminated, suspended or interrupted during the period of moratorium, except where such corporate debtor has not paid dues arising from such supply during the moratorium period or in such circumstances as may be specified.

(3) The provisions of sub-section (1) shall not apply to—

(a) such transactions, agreements or other arrangements as may be notified by the Central Government in consultation with any financial sector regulator or any other authority;

(b) a surety in a contract of guarantee to a corporate debtor.

(4) The order of moratorium shall have effect from the date of such order till the completion of the corporate insolvency resolution process:

Provided that where at any time during the corporate insolvency resolution process period, if the Adjudicating Authority approves the resolution plan under sub-section (1) of section 31 or passes an order for liquidation of corporate debtor under section 33, the moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be.

¹⁶⁶ [Power Grid Corporation of India Ltd. v. Jyoti Structures Ltd., 246 \(2018\) DLT 485](#), (Para No. 8, 10, 14)

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