

INTERNATIONAL JOURNAL OF LAW
MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

Volume 4 | Issue 6

2021

© 2021 *International Journal of Law Management & Humanities*

Follow this and additional works at: <https://www.ijlmh.com/>

Under the aegis of VidhiAagaz – Inking Your Brain (<https://www.vidhiaagaz.com/>)

This Article is brought to you for “free” and “open access” by the International Journal of Law Management & Humanities at VidhiAagaz. It has been accepted for inclusion in International Journal of Law Management & Humanities after due review.

In case of **any suggestion or complaint**, please contact Gyan@vidhiaagaz.com.

To submit your Manuscript for Publication at **International Journal of Law Management & Humanities**, kindly email your Manuscript at submission@ijlmh.com.

Modification of Arbitral Award: What Extent can a Court go to Modify the Award

TANIYA SINGH¹

ABSTRACT

India since the beginning has been a democratic state with well defined doctrine of separation of powers between the three bodies namely the legislature, the executive and the judiciary, and to keep a check on them the doctrine of rule of law also applies to the three bodies". There has been very rare instances in the history, where a tussle has taken place between the authorities, and enactment of the "127th amendment bill" is one such instance. The paper enunciates the pre-requisite knowledge regarding the previous amendments along with the case analysis in depth where the conflict of interest arose. Subsequently, the paper has listed the analysis of the "127th amendment bill" and its impact on public employment along with the shortcomings as well.

Keywords: 127th amendment bill, Constitution of india, public employment, shortcomings.

I. INTRODUCTION

The concept of arbitration is widely recognized all around the world. The Indian law of arbitration is contained in the *Arbitration and Conciliation Act 1996* (Act). While there are many aspects of arbitration where it deems fit for the court to interfere with the arbitration proceeding. For example, under section 11 of the act, if the parties fail to appoint an arbitrator and the time period of 30 days passes by, in that case the court can appoint the arbitrator² on behalf of the parties. There are many other section where the court feels compelled or obligated to interfere in the arbitration proceeding. One part where the interference of court has always been a controversy is the Section 34 of the Arbitration and Conciliation Act, 1996, which talks about the modification of an arbitral award.

II. SECTION 34 BEFORE THE AMENDMENT OF 2015

The arbitration act of 1940 provided with three remedies against the arbitral award so rendered. These three remedies were rectification, remission and setting aside of the Arbitral Award. Now we only have two remedies as these three were combined into two. Under the 1996 act,

¹ Author is a student at Amity Law School, Delhi, India.

² Devika Sharma, Appointment of arbitrators under section 11 by the Supreme Court: A time intensive phenomenon, SCC, Nov. 28 2020.

the court did not have the power to modify the award on its own discretion. The only way the award could be modified by the court is when one of the parties had to approach the court with the award so passed to get it modified and if the aggrieved party fails to appear under section 34 for setting aside the Award, then a de novo inquiry is not bound to arise on its own.³

Section 34 of the act gave the power to the parties to approach the court in case of not being satisfied by the award so passed by the arbitration tribunal. The court under the said section had the power to modify the award.⁴ Although there are certain specific grounds according to which the award can qualify to be modified by the court. Not just the grounds, this section also prescribes a limitation period within which the application has to be filed with the Court.⁵

Section 34(2) (a) of the Arbitration and Conciliation Act, 1996 mentions certain grounds on account of which the Court can set aside the arbitral award, if the party proves that:

- I. A party was under some incapacity,
- II. The arbitration agreement is not valid in accordance with the Law to which the parties to the Agreement have subjected it
- III. No proper notice of the appointment of the arbitrator or the proceeding had been given to it
- IV. The dispute dealt by the arbitral award does not fall within the terms of the submission to arbitration, or the award contains a decision beyond the scope of the submission to arbitration.
- V. The composition of the tribunal was not in accordance with the agreement of the parties.⁶

Moreover under section 34 (2) (b) of the Act the court may set aside the Award if , the subject matter of the dispute cannot be settled by means of Arbitration and the Arbitral award is in conflict with the public policy of India.

III. SECTION 34 AFTER THE AMENDMENT OF 2015

In *Municipal Corporation of Greater Mumbai v. Prestress Products (India)*⁷ it was held that the amended was made with the object of providing judicial interference. Before the said amendment, it was believed that there was a lot of interference from the side of the judiciary,

³ Prof.(Dr.) Bhavish Gupta and Ms. Shaheen Parween, An evolution of section 34 of the Arbitration and Conciliation Act with Special Emphasis on Judicial Intervention, d9d2Article-V(Pg. no.38-44).

⁴ Section 34 of arbitration and conciliation act, 1996

⁵ Prof.(Dr.) Bhavish Gupta and Ms. Shaheen Parween, An evolution of section 34 of the Arbitration and Conciliation Act with Special Emphasis on Judicial Intervention, d9d2Article-V(Pg. no.38-44).

⁶ Section 34 (2) (a) of The Arbitration and Conciliation Act, 1996

⁷ (2003) 4 RAJ 363 (Bom)

more than what was desired. This amendment helped to reduce the interference making India a appropriate and attractive destination for foreign investors to conduct business in India.

Section 32(2)(b)(ii) states that an arbitration award may be set aside by the court if the arbitral award is in conflict or direct contradiction with the public policy of India. There is no set definition of public policy but in the broader view, the doctrine of 'Public Policy' is equivalent to the 'policy of law' which means that whatever leads to obstruction of justice or violation of a statute or is against the good morals when made the object of contract would be against the public policy of India⁸.

The term "Public policy" found no definition in the Arbitration and Conciliation Act, 1996 and hence the term remained ambiguous.⁹ What constitutes being against public policy and thus grounds to set aside an award has raised questions for jurists. In fact in a leading case public policy was believed that is an untrustworthy and not reliable guide.¹⁰

IV. MADRAS HIGH COURT JUDGEMENT ON SCOPE OF INTERFERENCE IN MODIFICATION OF AN AWARD

(A) Case- M/s. J.K. Fenner (India) Limited Vs. M/s. Neyveli Lignite Corporation & Ors

1. Facts

The claimant had set up a lignite handling and storage system (LHS) for a thermal plant adhering to the contract provided by the respondent. The dispute started when the claimant asked for the payment for the work under various heads. As per the agreement between the parties for the payment terms, "*After successful completion of performance test for equipment and Certification of results by the purchases/Consultant - 10% to be paid.*"

After some delay, the claimant had finalized the setup and trial operation of the LHS. On 01st March 2004, the respondent had taken possession of the entire system and started operating and maintaining. Further, the Respondents had stopped the 10% refund of Rs.3,42,89,930 and alleged that the claimant had not finalized the performance guarantee test on the date agreed upon and the same was mentioned in the contract as well. The Claimant had submitted, that the amount due should be paid for the period as the respondent had taken over the entire LHS system back in March 2004 itself and yet the respondent was denied his payment.

⁸ Priyadarshini, Role of public policy under the Arbitration and conciliation act, 1996 , For setting aside of an arbitral award, Mondaq , 18 Mar 2020.

⁹ Prof.(Dr.) Bhavish Gupta and Ms. Shaheen Parween, An evolution of section 34 of the Arbitration and Conciliation Act with Special Emphasis on Judicial Intervention, d9d2Article-V(Pg. no.38-44).

¹⁰ *Gherulal Parakh v Mahadeo Das* (1959) Supp (2) SCR 206

The issue was taken up for Arbitration and the tribunal ruled in favour of the claimant and admitted that the equipment had functioned satisfactorily since March 2003. It also stated that the respondent's mere failure to issue a certificate could not stand in the way of reimbursing the retention money. The Arbitral Tribunal, therefore, directed that refund be paid to the claimant. The tribunal did not award interest from the date of the respondent's takeover of the LHS, i.e. from 1 March 2004 until the payment date. The tribunal refused to acknowledge the interest which was supposed to be paid and said that the payment shall be done from the day of this respected award. The tribunal declined to grant interest on the ground that the amount became payable only on the date of award.

2. Issues

- A. Can a court modify the Award of the Arbitrator under Section 34 of the Arbitration and Conciliation Act, 1996?
- B. Whether an Arbitral Tribunal has the power to refuse to grant the interest for the pre reference period and pendente lite interest on holding money on the basis that it is owed by the claimant?

3. Judgement

- For the first issue, Justice P.T. Asha considered her judgment authored in the matter of *Sterlite Technologies Limited vs BSNL*¹¹ wherein it was found that the court only has a supervisory position to test the fairness of the award and should not be called upon to correct the Arbitrator's errors.
- For the second issue, The Court found that there were grounds to change parts of the arbitral award before it went under appeal. This relates regarding the decision of the arbitral tribunal not to grant interest on sum that it considers to be owed to the original claimant.
- The Court considered that the arbitral tribunal could not have denied the award from claiming interest when it had learnt that the maintenance sum was owed to the Claimant. The sum, it brought up, was payable on the day the respondent assumed control over the LHS, and not on the day the arbitral tribunal settled the case.
- While going through the case the Hon'ble Court has established the arbitral tribunal's power to grant interests on the award. The Hon'ble Court continued to find that there

¹¹ OP Nos.200 of 2011 and 774 of 2012 dated 11.12.2019

was no legal basis in the arbitral tribunal's decision for not grant interest on the award which was passed in the claimant's favour.

- The Hon'ble Court relied on the Supreme Court judgment of *Hyder Consulting (UK) Limited Vs. Governor, State of Orissa (Supra)* regarding payment of interests wherein the Apex Court held that "*particularly in the light of the learned Arbitrators after examining the evidence on record concluding that the retention was wrong. Therefore, this Court is not called upon to once again appreciate the evidence.*"

Finally, the Original Petition was moderately allowed and the Award of Arbitral Tribunal for denying interest was set aside. The respondent was directed to pay interest on the retention money awarded @9% p.a from 01.03.2004 till the date of award and thereafter, @18% p.a payable till the date of payment of the retention money.

V. CONCLUSION

As per the observations made by the Hon'ble Court, there were limits as to what extend a court can interfere under Section 34 of the Arbitration and Conciliation Act, 1996 with regard to the modification of an arbitral award. The court witnessed that fair interpretation of Section 34 would lead to an unreasonable inference leading to the Arbitrator's Award being altered by the Court if it is not in sink to the factual evidence presented by the parties. The court also established the role of Arbitral Tribunal regarding grant of interest on retention money and found that the arbitral tribunal cannot negate grant of interest on award without any legal basis whatsoever. The court did provide the claimant with the justice so deserved.
