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UPDATE

28 April 2022

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Whether '*setting aside*' of an arbitral award under S 34 of the 1996 Arbitration Act, includes '*modifying*' such award?

A. The UNCITRAL Model Law

The UNCITRAL Model Law on International Commercial Arbitration, 1985, (the "**1985 Model Law**") with amendments, has served as the blueprint for the Indian Parliament in enacting the Arbitration and Conciliation Act, 1996 (the "**1996 Act**"), which is a near adoption of the 1985 Model Law, albeit with some significant deviations and modifications. The 1985 Model Laws sets the tone that '*in matters governed by this law, no court shall intervene except where so provided in this law*'[1]. The main object of this provision is to determine whether the award has become final and binding and is enforceable in law. Article 34 of the 1985 Model Law further provides the basis for annulment of arbitral awards. It is focused primarily on procedural and jurisdictional issues.

B. Scheme of the 1996 Act

S 34 of the 1996 Act is modelled on Article 34 of the 1985 Model Law, with minor contextual variations. The avowed object of the legislature is to curtail judicial intervention in the arbitral process. The approach of the court when dealing with a challenge to an arbitral award under S 34, has to reflect the consciousness of the legislative intent to restrict and curtail the extent of the judicial intervention in arbitral proceedings and enforcement of the awards. The 1996 Act provides for limited judicial intervention, which is of a supervisory nature to ensure that the award is not vitiated by procedural irregularities, lack of due process, jurisdictional errors, or is not contrary to the public policy of India. The 1996 Act does not permit a relook at the substantive reasoning of the merits of the award, as the object of arbitration is to avoid re-litigation of an arbitral award.

Chapter VII of the 1996 Act provides for recourse against an arbitral award. The use of the term 'recourse' for setting aside arbitral awards, though of recent vintage, is well established. In common law jurisdictions, it is customary to speak of an 'appeal' against an award. This means either an appeal to an appellate body, or an appeal to the relevant court in order to vary, or remit it to give the tribunal an opportunity to resume the arbitral proceedings, which in its opinion will eliminate the grounds for setting aside the arbitral award.

The expression 'recourse' compendiously covers 'challenge' to an award before the court under S. 34 of the 1996 Act for setting aside or remitting the award, as well as an appeal under S 37(2)(a) against the order of the tribunal, wherein the arbitral tribunal does not have jurisdiction or arbitral tribunal is exceeding the scope of its authority[2]. If the award is set aside, it is a nullity as good as a dead letter in India and unenforceable under S 36 of the 1996 Act.

[1] 1985 Model Law, Article 5.

[2] The 1996 Act, sub-section (2) and (3) of S 16.

C. *Article 34 of the 1985 Model Law vis-à-vis S 34 of the 1996 Act*

S 34 of the 1996 Act occurs in Chapter VII under the title "Recourse against arbitral award". In the instant analysis, sub-sections (1) and (4) of S 34 are directly concerned with, wherein, either an application for setting aside an award can be made only in accordance with the grounds as specified in the sub-section (2) and (3) of the said section or through giving the arbitral tribunal an opportunity to resume the arbitral proceedings as in the opinion of arbitral tribunal will eliminate the grounds for setting aside the arbitral award, respectively. However, it is important to note here that, while S 34 of the 1996 Act is modelled on the Article 34 of the 1985 Model Law, but under Article 34 of the 1985 Model Law the title to the said Article reads "Application for setting aside as *exclusive* recourse against arbitral award". Having said that, the statutory scheme under S 34 of the 1996 Act is in keeping with the UNCITRAL Model Law and the legislative policy of minimal judicial interference in arbitral awards.

D. *The question arises – whether 'setting aside' of an arbitral award S 34 of 1996 Act, includes 'modifying' such award?*

The Hon'ble Supreme Court of India ("**SC**") in the case of *The Project Director, National Highways Nos. 45E and 220, National Highways Authority of India Vs. M. Hakeem and Ors.*[3], has interpreted the provision in light of literal interpretation and the intent of the legislature. The Arbitration and Conciliation Act, 1940 (the "**1940 Act**") was replaced by the 1996 Act which is based on the UNCITRAL 1985 Model Law, wherein the judiciary does not possess the power to modify the award. However, the 1940 Act had specific provisions with regard to '*power of Court to modify award*'[4] and '*power to remit award*'[5] by the judiciary. The legislative intent was to draw the 1996 Act to the tune of the UNCITRAL Model which came at a cost of doing away with the provisions of modification of the award by the judiciary.

In the instant case even after declaring the law and setting aside the Hon'ble Madras High Court judgment on law, the SC did not interfere with the judgment on facts. At the same time, it refused to exercise its jurisdiction under Article 136 of the Constitution of India, the Special Leave Petition in the instant case, in favor of the appellants, i.e., National Highway Authority of India, with respect to the facts of the matter, as, most of the awards in these cases were made 7-10 years ago, '*it would not, at this distance in time, be fair to send back these cases for a de novo start before the very arbitrator or some other arbitrator not consensually appointed, but appointed by the Central Government*[6].'

E. *Conclusion*

Despite being members of the UNCITRAL, Australia[7], Canada[8], Singapore[9], United States of America[10] and United Kingdom[11] have provisions in their respective Arbitration Acts which permit modifying/ varying and remitting an award by the judiciary unlike S 34 of the 1996 Act. To ameliorate an award, independent provisions have been inserted by these jurisdictions in their respective Arbitration Acts to serve and meet the ends of justice. Alongside setting aside of an award, the provisions allow room for judicial intervention to rectify the errors in an award.

The judiciary, being the *parens patriae* is duty bound to serve justice, albeit coupled with interpretation of the legislature in the scheme of the legislative intent since the judiciary itself cannot assume the role

[3] AIR 2021 SC 3471.
[4] 1940 Act, S. 15.
[5] 1940 Act, S. 16.
[6] *Ibid*., Sl. No. 4.
[7] Commercial Arbitration Act, 2017 (Aus), S 34A (7).
[8] Arbitration Act, 2020, (Can) S. 59(6).
[9] Arbitration Act, 2001, (Sing) S. 49(8).
[10] Federal Arbitration Act (USA), S. 11
[11] Arbitration Act, 1996, (UK), S 67(3), 68(3) and 69(7).

of law-making entrusted with the legislature. Judicial orders however empower legislative actions. To streamline the interpretative ambiguity in the law, the legislature ought to reconsider the inclusion of specific provisions to remedy a farce award passed by the arbitral tribunal. Mere setting aside of the award by the judiciary does not seem to do justice to the parties, thereby leaving the dispute unresolved overall. Restoration of the provisions with respect to modification and remission of the awards granted in specific circumstances as was contemplated under the 1940 Act appears to serve as a corrective measure more so *vis-à-vis* the interpretation of the statute and dispensation of justice to the disputing parties. The inclusion of these provisions does not appear to disbar the statute from following the 1985 Model Law since the other nation members of UNCITRAL contain specific provisions of modification and remission of award, as discussed above, while following the 1985 Model Law at the same time.

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