



GRAVITAS LEGAL

## **Courts power under Section 34 of the Arbitration and Conciliation Act, 1996**

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Through this article, we aim to discuss the power of the courts in India to modify the arbitral awards and the recent pronouncement of the Apex Court clarifying the position.

### **Conflicting Dictum**

In *Oil & Natural Gas Corporation Ltd. v. Western Geco International Ltd.*<sup>1</sup>, it was held that when an arbitral tribunal draws an erroneous inference on facts, the award can be “cast away or modified”. Similarly, in *Gayatri Balaswamy v. ISG Novasoft Technologies Ltd.*<sup>2</sup>, the Madras High Court held that the courts have an inherent power under Section 34 to modify the arbitral award. The classic example of modification of an award was the matter of *Dyna Technologies Pvt. Ltd. v. Crompton Greaves Ltd.*<sup>3</sup> wherein the Madras High Court set aside the tribunal's award relating to one of their claims. The Supreme Court in appeal, modified the award on the ground of it being unintelligible and thus, unsustainable. Likewise, in *Oriental Structural Engineers Pvt. Ltd. v. State of Kerala*, the interest percentage awarded for delayed payment charges was revised by the Supreme Court by merely citing *justice and equity* as the reason for such modification.<sup>4</sup> This was also followed by the Delhi High Court in *V4 Infrastructure Pvt. Ltd. v. Jindal Biochem Pvt. Ltd.*, wherein the interest percentage on delayed payment was altered as the interest awarded was higher than the prevailing banking rate of interest, hence, irrational.<sup>5</sup> In another recent judgment, the High Court of Madras granted an alternative relief prayed for in the Arbitration which was not granted by the tribunal.<sup>6</sup>

Conversely, there are numerous pronouncements providing a diametrically opposite interpretation. Like, the Supreme Court in *McDermott International Inc. v. Burn Standard Co. Ltd.*<sup>7</sup>, held that the Arbitration Act provides for a limited supervisory role of the courts, and

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<sup>1</sup> (2014) 9 SCC 263

<sup>2</sup> 2015 (1) ArbLR354 (Madras)

<sup>3</sup> 2020 (5) SCJ 501

<sup>4</sup> (2021) 6 SCC 150

<sup>5</sup> FAO (OS) (COMM) 107/2018, CMs. 20269/2018, 49639/2019, FAO (OS) (COMM) 108/2018, CMs. 20272/2018 and 49347/2019 decided on April 05, 2020

<sup>6</sup> *M/s J.K. Fenner (India) Ltd. v. M/s Neyveli Lignite Corporation* 2020 (5) CTC 579

<sup>7</sup> (2006) 11 SCC 181

envisaged minimal judicial involvement only in exceptional circumstances like fraud, violation of principles of natural justice, bias, etc. and excludes correcting mistakes of the arbitrator. Further, it was decided that in extraordinary situations the only power envisaged in the appellate court is to quash the award leaving parties with no other option but to re-arbitrate.<sup>8</sup> Nonetheless, in this case itself, the Supreme Court modified the award by invoking its power under Article 142 of the Constitution to do complete justice. The Mc Dermott ruling has been relied upon in multiple verdicts like in *Kinnari Mullick v. Ghanshyam Das Damani<sup>9</sup> and Dakshin Haryana Bijli Vitran Nigam Ltd. v. Navigant Technologies Pvt. Ltd.*<sup>10</sup>, which have continued to refute the existence of the courts power to modify an award. Moreover, the Delhi High Court in *Cybernetics Network Pvt. Ltd. v. Bisquare Technologies Pvt. Ltd.*<sup>11</sup> clarified that under the purview of Section 34(4), a court has no power or authority to deal with claims already dealt with by the tribunal. It was held that this would imply that the court acts as an appellate court, which is contrary to the statutory scheme of Arbitration and more specifically Section 34. A similar view was also pronounced by the Delhi High Court in *Puri Construction P. Ltd. v. Larsen and Toubro Ltd.*<sup>12</sup> and *Angel Broking Ltd. v. Sharda Kapur*<sup>13</sup>, wherein it was observed that the courts do not have any authority to modify, remit or vary the arbitral award or to grant additional/alternative reliefs, that the tribunal did not grant.

### **No power to modify**

Considering all the varying pronouncements, the Supreme Court of India in *The Project Director, National Highways Nos. 45E & 220, National Highways Authority of India v. M. Hakeem & Anr.*<sup>14</sup> thoroughly studied the scope and authoritatively dictated that no power exists under Section 34 of the Arbitration and Conciliation Act, 1996 to modify an arbitral award.

This landmark judgment related to the award passed under the National Highway Act, 1956 without considering the sale deeds and by placing reliance solely on the guiding value of the land. Subsequently, the lower court in a petition under Section 34 revised the award by holding the compensation to be abysmally low. Pursuant thereto, the Madras High Court upheld the modified award. The parties then filed an appeal.

The Apex Court explained that Section 34 encapsulates very limited grounds for setting aside an award. It was highlighted that this is even more apparent from Section 34(4), under which the proceedings can be adjourned to provide the tribunal an opportunity to eliminate the grounds for setting aside of the award. Further, the marginal note of the provision was also considered, and it was emphasized that “*recourse*” could only be made by an application to the court for *setting aside* of the award.<sup>15</sup> Additionally, the principle of minimal judicial interference was reiterated and stressed upon, and it was held that modification and alteration of an award is contradictory not only to Section 34 but also to the main purpose of arbitration.

It was also pointed out that the statutory scheme of Section 34 is modelled on the UNCITRAL Model Law which does not provide any power to the Courts to modify an award.

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<sup>8</sup> *ibid*

<sup>9</sup> (2018) 11SCC 328

<sup>10</sup> AIR 2021 SC 2493

<sup>11</sup> 2012 (129) DRJ7

<sup>12</sup> 2015 SCC OnLine Del 9126

<sup>13</sup> 2017 (164) DRJ 78

<sup>14</sup> 2021 (4) CTC 582

<sup>15</sup> *ibid*

As a result of the foregoing, the Supreme Court explicitly ordered that:

*“Quite obviously if one were to include the power to modify an award in Section 34, one would be crossing the Lakshman Rekha and doing what, according to the justice of a case, ought to be done. In interpreting a statutory provision, a Judge must put himself in the shoes of Parliament and then ask whether Parliament intended this result. Parliament very clearly intended that no power of modification of an award exists in Section 34 of the Arbitration Act, 1996. It is only for Parliament to amend the aforesaid provision in the light of the experience of the courts in the working of the Arbitration Act, 1996, and bring it in line with other legislations the world over.”<sup>16</sup>*

## **Conclusion**

Given the changeable views of various courts of India, the recent decision of the Apex Court has been recognized for clarifying that no power exists under the Section 34 of the Arbitration and Conciliation Act, 1996 to modify an arbitral award. Accordingly, this pronouncement has reaffirmed and recognized that the main objective of Arbitration is to resolve disputes without any judicial intervention.

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<sup>16</sup> *ibid*