

# DETERMINING THE SCOPE OF S. 34(4) OF ARBITRATION AND CONCILIATION ACT, 1996: A CRITICAL ANALYSIS

- *Rishabh Shukla and Srishty Anand*  
*Both are 4th-year students of B.A.LL.B.*  
*(Hons.) at Maharashtra National Law*  
*University, Nagpur*

## Introduction

The Supreme Court in the recent judgment of *I-pay Clearing Services Private Limited v ICICI Bank Limited*<sup>1</sup> [“**I-pay**”] has concluded that there is no obligation on the Court under Section 34(4) of the Arbitration and Conciliation Act<sup>2</sup> [“**1996 Act**”] to remit a particular matter to the arbitral tribunal. Further, it is a discretion on the part of the Court to determine whether it would be befitting to remit the matter to the arbitral tribunal in order to provide an opportunity to the arbitrator to delineate the grounds for setting aside the arbitral award.

Section 34(1) of the 1996 Act provides for the recourse to challenge an arbitral award before a supervising Court. Section 34(2) of the Act lays down the grounds under which the award can be challenged before a court. Section 34(2) is the only remedy available to a party through an application under Section 34(1) of the 1996 Act, and if the party succeeds in bringing the arbitral award in the ambit of the limited grounds provided under Section 34(2), the arbitral award will be set aside. Further, the jurisprudence of Section 34(2) has undergone various amendments and judicial interpretation in order to ensure minimal judicial interference in the arbitration process as finality of arbitral awards and party autonomy are few of the most paramount features of the arbitration proceeding.

On the contrary, Section 34(4) of the 1996 Act is a remedial provision for the award holder, wherein if through an application a request is made by the award-holder, the proceedings under Section 34(1) can be adjourned in order to give an opportunity to the arbitrator to resume the arbitral proceedings or issue any direction/ reason/ instruction in order to decimate the grounds for setting aside the award.

---

<sup>1</sup> *I-pay Clearing Services Private Limited v ICICI Bank Limited* (2022) SCC Online SC 4.

<sup>2</sup> Arbitration and Conciliation Act, 1996, s 34(4).

This article seeks to explore the nuances of Section 34(4) of the 1996 Act, the nature of power provided to the court and gauge the efficiency and effectiveness it provides to the arbitration as a successful dispute resolution process.

### **Comparison between Section 16 of the Arbitration Act, 1940 and Section 34(4) of the 1996 Act**

A similar provision to Section 34(4) of the 1996 Act was provided under Section 16 of the then Arbitration Act, 1940<sup>3</sup> [“**1940 Act**”], wherein the supervising court had the power to remand the award back to the Arbitrator upon such term as it may determine.

The comparison between these two provisions becomes relevant as it reflects on the shift of Parliament’s intention towards minimum judicial intervention and increased party autonomy. The comparison also highlights on how the principles of minimum judicial intervention and party autonomy have made arbitration an effective and successful dispute resolution process.

However, the power to exercise Section 16 of the 1940 Act becomes operational only under three circumstances provided in Section 16 itself *viz.*

- (i) Where the tribunal had not considered any of the issues referred to arbitration or in cases where it took into consideration the issues which were not forming a part of the arbitration and such matters which could not be separated without considering the matter referred;
- (ii) Where the award became incapable of execution due to its indefinite nature;
- (iii) Where there was an objection to the legality of the award and such illegality was apparent upon the face of it.

The objective of Section 16 was to acquire a fresh award after an award was remanded to the tribunal.<sup>4</sup> The arbitrator had to then reconsider the terms of the award within a fixed time provided by the Court, failing which the award would become void.

The 1996 Act was the successor of the 1940 Act. The 1996 Act is a muchreformed act mainly based on the UNCITRAL Model Law on International Commercial Arbitration [“**Model Law**”]. Section 34(4) of the Model Law lays down that the Court shall upon the request of the party discontinue the proceedings under Section 34(1) for the time as it may determine and shall provide

---

<sup>3</sup> The Arbitration Act, 1940, s 16.

<sup>4</sup> *MMTC v Viconvass Agency*, (2009) 1 MLJ 199.

an opportunity to the Arbitrator to resume the proceeding and take such steps as it may deem fit to eliminate the defects in the award.

The fundamental difference between Section 16 of the 1940 Act and Section 34(4) of the 1996 Act is that as per Section 16, the Court can remand the award back to the Arbitrator in order to seek a fresh award upon such terms as it may determine whereas the latter stipulates that the Court can only use its discretion when deciding whether to remit the matter to the Tribunal. Subsequently, it is the Tribunal which will have wider powers to deliberate on the terms on which the award has to be modified.<sup>5</sup> Further, the power conferred upon the Court under Section 34(4) is limited and subject to various conditions. These conditions have been discussed in detailed in the following parts of the article.

### **Pre-requisites to invoke Section 34(4) of the 1996 Act**

The scope and conditions for invoking Section 34(4) have been elucidated in various judicial precedents. Initially there was an conundrum as to whether an arbitral award can be remitted to the tribunal under Section 34(4) after the award has already been set aside.

This was answered by the Supreme Court in the case of *Kinnari Mullick & Ors. v Ghanshyam Das Damani*,<sup>6</sup> [“**Kinnari Mullick**”] which held that the provision prescribes that the Court may remit the matter to the arbitral tribunal wherever appropriate as the arbitral tribunal has dealt with the issues of the parties on merit at length. Further, it would be in the interest of justice to give an opportunity to the Arbitrator to take necessary steps to eliminate the grounds for setting aside the awards; however, the power under this provision cannot be exercised in a case where the award has already been set aside. Therefore, a party, in order to claim a remedy under Section 34(4), is required to file an application under Section 34(4) before the award is set aside by the Court.

The Court in *Kinnari Mullick*<sup>7</sup> further observed that an application in writing must be filed under Section 34(4) to request the Court to remit the matter to the Tribunal. The Court itself doesn't have the power to exercise Section 34(4) of the 1996 Act in a *suo moto* manner.

---

<sup>5</sup> *I-pay Clearing Services Private Limited v ICICI Bank* (2022) SCC Online SC 4.

<sup>6</sup> *Kinnari Mullick & Ors. v Ghanshyam Das Damani* (2018) 11 SCC 328.

<sup>7</sup> *Ibid.*

### **Determining the scope of section 34(4): a judicial analysis**

A detailed discussion on the scope of Section 34(4) has recently taken place in the case of *I-Pay*<sup>8</sup> where, the Supreme Court, while hearing an application to set aside an award under Section 34(1) of the 1996 Act, had decided to reject an application under Section 34(4) in order to remit the matter to the Arbitrator. The Apex Court dealt with the following issues;

1. Whether the Court can remit the arbitral award to the Arbitrator in cases where no finding on any of the contentious issues is provided in the Award?
2. Whether the Court under Section 34(4) can use their discretion to reject an application to remit the matter to the Tribunal and set aside the award?

The Apex Court noted that remission under Section 34(4) is only allowed in cases where the Arbitrator has left a gap in the reasoning for the findings in the award or where it has not recorded reasons for the findings in the award. However, in cases where the Court has not provided a finding on any of the claims of the parties, the award cannot be relegated to the Tribunal under the said provision.

The Supreme Court further noted that on the reading of Section 34(4), the phrase “*when it is appropriate*” is of significance in order to determine the power of the Court to use its discretion. On reading the provision it becomes quite apparent that the Court where it finds it necessary may use its discretion to reject an application under Section 34(4) and set aside the arbitral award. Under Section 34(4), the Court shall provide one chance to the arbitral tribunal to fill in the gaps in the reasoning for the findings in the award or to record reasons for the findings where it is necessary but in cases where the award itself suffers from *patent illegality* such as in cases where the Tribunal has not provided any finding for any of the contentions raised by the parties.

The next judgment in this regard is *MMTC v Vicinivass Agency*<sup>9</sup> where the Madras High Court had provided a comprehensive interpretation to determine the scope of Section 34(4) of the 1996 Act and its departure from Section 16 of the 1940 Act. The issue for consideration before the Court was whether Section 34(4) of the 1996 Act provides the power to the Court to remand the matter to the Arbitrator in order to seek a fresh award. The Court provided a broader interpretation to Section 34(4) as the said provision does not itself provide substantive grounds to remand the award

---

<sup>8</sup> *I-pay Clearing Services Private Limited v ICICI Bank Limited* (2022) SCC Online SC 4.

<sup>9</sup> *MMTC v Vicinivass Agency* (2009) 1 MLJ 199.

in contrast to Section 16 of the 1940 Act where three specific grounds were provided to remand the award to the arbitral tribunal.

The Court further observed that it cannot *suo moto* refer the matter back to the Arbitrator, rather there are certain conditions that have to be fulfilled *viz:* (i) a written application under Section 34(1) is to be filed requesting the Court to set aside the award; (ii) the Court finds it appropriate that the application under Section 34(1) provides valid grounds to set aside the award and (iii) that the party is obligated to file an application under Section 34(4) in order to provide an opportunity to eliminate the defects in arbitral award.

Finally, the Court held that it can remit an award under Section 34(4) in cases where a party was not provided with the chance to present its case i.e., to take note of such documents which the Tribunal relied upon.

In the case of *Geojit Financial Ltd v Kritika Nagpal*<sup>10</sup>, the Bombay High Court observed that the arbitral tribunal may be given an opportunity under Section 34(4) to cure defects in the award in cases where it has failed to address an issue or a claim in support of which the respective parties have presented arguments and evidences.

### **Under what grounds a Court can remit an award under Section 34(4)**

One of the most remarkable differences between the 1940 Act and the 1996 Act is the minimal judicial intervention that the latter provides for an efficient dispute resolution mechanism. The element of minimal judicial intervention can certainly be noted in the diversion taken from Section 16 of the 1940 Act and in the interpretation of Section 34(4) of 1996 Act. Section 34(4) has put limitations in the role of the Court in order to uphold the principle of party autonomy and provide an efficient and quick dispute resolution. Therefore, based on the principles of minimal judicial intervention and party autonomy, neither can the Court itself make amends to an arbitral award, nor can it decide terms of modifying the award while remitting an award to Arbitrator. Further, the Court can only set aside an award within the purview of two sets of grounds provided under Section 34(2).

The first set of the provision, i.e., Section 34(2)(a) describes incapacity of the parties to arbitrate; invalidity of the arbitration agreement and default in service of notice of appointment of the arbitrator as relevant grounds to set aside an arbitration award. Further, in such cases where award

---

<sup>10</sup> *Geojit Financial Ltd v Kritika Nagpal* (2012) SCC Online Bom 1375.

deal with such issues which were not part of the pleading or submissions of the parties is also a relevant ground to set aside an arbitration award.

Section 34(2)(b) further elaborates that if the Courts find the nature (subject-matter) of the dispute is incapable of settlement by arbitration or the award passed is against the public policy of India, then it shall set aside the award. The grounds provided under Section 34(2)(b) are of substantive nature, and the Court cannot remit the award under Section 34(4) if it finds that there exist any of the defects provided under Section 34(2).

In the case of *Dyna Technologies Pvt. Ltd v Crompton Greaves Ltd.*<sup>11</sup>, the Supreme Court while dealing with certain improprieties and inadequacy in the reasoning of the award, pointed out certain grounds where an application to set aside an arbitral award can be processed, such as where the arbitral award has provided for inadequate reasoning, or there is an infirmity in the reasoning, the award qualifies to be challenged under Section 34 of the 1996 Act. Further, Section 34 implicitly provides for setting aside such arbitral award which are unintelligible.

However, the Court was mindful of the fact that where the arbitrator has left a gap in the reasoning of the arbitral award or has not provided any reasoning to any of the findings in the award, the Court may remit the award to the arbitral tribunal under Section 34(4) in order to cure the defects in the award and make it enforceable. However, if there exists any perversity in the reasoning of the findings, then such a defect does not qualify to be cured under Section 34(4) and the award shall be set aside.

## **Conclusion**

Section 34(4) of the 1996 Act is a key instrument in maximising the efficiency of arbitration as a dispute resolution process and plays an important role in decimating the interference of the Courts and providing more power to arbitral tribunal to efficaciously provide a successful and effective resolution to the reservations and disagreements of the parties. The intention behind diversion from Section 16 of the 1940 Act and incorporating those changes in Section 34(4) of the 1996 Act reflects the Parliament's intention of prioritising the principle of minimal judicial intervention. Further, the provision is also indicative of the fact that the courts only have a supervisory role at a minimal level and unnecessary judicial interventions should be avoided. The idea of remitting the award to the arbitral tribunal also indicates that the Courts are not the appropriate authority to make any changes in the arbitral award. Rather, it is the arbitral tribunal which has dealt with the

---

<sup>11</sup> *Dyna Technologies Pvt. Ltd v Crompton Greaves Ltd* (2019) 20 SCC 1.

issues of the parties on merit at length and therefore, the Tribunal should be provided with an opportunity to make such amends to cure the defect. Finally, the scope of Section 34(4) is to be decided in light of the arbitration-friendly principles in order to provide more boost to arbitration in India.