



JSA Prism Dispute Resolution

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Supreme Court lays down circumstances under which a Court under S.34 (4) of the Arbitration Act can allow the arbitrator to resume the arbitral proceedings to give reasons or fill up the gaps in the reasoning in support of a finding already rendered in the award.

In the recent case of *I-Pay Clearing Services Private Limited Vs ICICI Bank Limited*¹, the Supreme Court (“SC”) has held that Section 34(4) of the Arbitration and Conciliation Act, 1996 (“the Act”) can be resorted to record reasons on the finding already given in the award or to fill up the gaps in the reasoning of the award and the discretionary power conferred under Section 34(4) of the Act, is to be exercised where there is inadequate reasoning or to fill up the gaps in the reasoning, in support of the findings which are already recorded in the award. The Court also held that under the guise of additional reasons and filling up the gaps in the reasoning, no award could be remitted to the Arbitrator, where there are no findings on the contentious issues in the award.

Background

I-Pay (the Appellant) had entered into an agreement with the ICICI Bank Limited (the Respondent) to develop various software application packages to manage Smart Card-based loyalty programs. However, because ICICI abruptly terminated the Service Provider Agreement, I-Pay claimed damages of Rs.95 crores against ICICI.

The Sole Arbitrator framed five points for determination, and Point No.1 was, “Whether the respondent illegally and abruptly terminated the contract?”. Accordingly, the Arbitrator passed an award in November 2017, directing the ICICI, *interalia*, to pay I-Pay an amount of Rupees Fifty Crores together with interest.

Aggrieved by the award, ICICI applied under Section 34(1) of the Act for setting it aside on the ground that the Arbitrator has awarded Rs.50 crores to I-Pay without recording any finding on Point No.1. ICICI also contended that the contractual obligations between the parties were closed mutually and amicably as there was accord and satisfaction between the parties.

In the arbitration petition filed by ICICI before the High Court, I-Pay filed a Notice of Motion under Section 34(4) of the Act, for adjourning the proceedings for three months and directing the Arbitrator to issue additional reasons in support of the award. The High Court, while dismissing the I-Pay’s motion, held that unless and until a finding is recorded on point no.1 first, the Arbitrator could not have proceeded to record findings on the claims made by the I-Pay, and as such, the defect in the award is not curable under Section 34(4) of the Act.

In the appeal against the above order before the SC, I-Pay contended that:

¹ CIVIL APPEAL NO. 7 OF 2022 decided on January 3, 2022

- though the issue was resolved by the Arbitrator by holding that there was no accord and satisfaction between the parties, however, the Arbitrator has omitted to give adequate reasons in support of point no.1 and therefore in view of settled legal position that lack of reasons or gaps in the reasoning, is a curable defect under Section 34(4) of the Act, award can be remitted to the arbitrator to give reasons.
- in support of the said plea that lack of reasons or gaps in reasoning in the award of the Arbitrator is a curable defect, I-Pay relied on the judgments of *Kinnari Mullick and Anr. v. Ghanshyam Das Damani*², *Dyna Technologies Pvt. Ltd. v. Crompton Greaves Ltd.*³ and *Som Datt Builders Limited v. State of Kerala*⁴.

On the other hand, ICICI argued that:

- as the Arbitrator has passed the award by ignoring important and relevant evidence on record, it suffers from perversity and patent illegality, which cannot be cured on remittal under Section 34(4) of the Act by the Arbitrator.
- Under guise of adding reasons, the Arbitrator cannot take contrary view against the award itself.
- The Arbitrator in resumption proceedings cannot change his award and the same would be contrary to provision under Section 34(4) of the Act and would amount to Arbitrator assuming the role of the Court, which alone is empowered to set aside the award.
- The findings recorded on the plea of 'accord and satisfaction' in the award without considering the entire evidence on record, constitute patent illegality, as such, same is to be considered only by the Court while considering the application filed under Section 34(1) of the Act.

Decision

The SC held that when it is the specific case of ICICI that there is no finding at all, on point no.1 viz. "whether the contract was illegally and abruptly terminated by the respondent?", remission under Section 34(4) of the Act, is not permissible. It further held that, Section 34(4) of the Act, can be resorted to record reasons on the finding already given in the award or to fill up the gaps in the reasoning of the award.

Relying upon the difference between 'finding' and 'reasons' as observed in *Income Tax Officer, A Ward, Sitapur v. Murlidhar Bhagwan Das*⁵, the Court held that:

- in absence of any finding on point no.1, and the Arbitrator's failure to consider the relevant material produced by ICICI to prove 'accord and satisfaction' between the parties, it amounts to patent illegality, and such aspects are to be considered by the Court itself.
- it cannot be said that it is a case where additional reasons are to be given or gaps in the reasoning, in absence of a finding on point no.1.
- further, the words "where it is appropriate" in Section 34(4) of the Act makes it clear that it is the discretion vested with the Court for remitting the matter to Arbitral Tribunal to give an opportunity to resume the proceedings or not.
- when an application is filed under Section 34(4) of the Act, the same is to be considered keeping in mind the grounds raised in the application under Section 34(1) of the Act by the party, who has questioned the award of the Arbitral Tribunal and the grounds raised in the application filed under Section 34(4) of the Act and the reply thereto.
- merely because an application is filed under Section 34(4) of the Act by a party, it is not always obligatory on the part of the Court to remit the matter to Arbitral Tribunal. The discretionary power conferred under Section 34(4)

² (2018) 11 SCC 328

³ (2019) SCC ONLINE SC 1656

⁴ (2009) 10 SCC 259

⁵ AIR 1965 SC 342

of the Act, is to be exercised where there is inadequate reasoning or to fill up the gaps in the reasoning, in support of the findings which are already recorded in the award.

- Under guise of additional reasons and filling up the gaps in the reasoning, no award can be remitted to the Arbitrator, where there are no findings on the contentious issues in the award. If there are no findings on the contentious issues in the award or if any findings are recorded ignoring the material evidence on record, the same are acceptable grounds for setting aside the award itself. Under guise of either additional reasons or filling up the gaps in the reasoning, the power conferred on the Court cannot be relegated to the Arbitrator.
- In absence of any finding on contentious issue, no amount of reasons can cure the defect in the award.

On the above findings, the SC dismissed the appeal holding that on the plea of ‘accord and satisfaction’ on further consideration of evidence, which is ignored earlier, even if the arbitral tribunal wants to consciously hold that there was ‘accord and satisfaction’ between the parties, it cannot do so by altering the award itself, which he has already passed.

Comment

This judgment provides helpful guidance to the Courts as to under what circumstances an Application under S.34 (4) can be entertained and allowed. It also lays down the relevant considerations which a court dealing with the application under S.34(4) must consider. The Court has rightly agreed to ICICI’s contention that since the Arbitrator had passed the award by ignoring essential and relevant evidence on record, it suffers from perversity and patent illegality, which cannot be cured on remittal under Section 34(4) of the Act by the Arbitrator.

The decision harmoniously construes Section 31, 34(1), 34(2A) and 34(4) of the Act. Accordingly, it holds that in appropriate cases, on the request made by a party, the Court can allow the arbitrator to resume the arbitral proceedings for giving reasons or filling up the gaps in the reasoning in support of a finding, which is already available rendered in the award. But at the same time, the Court also cautions that when it prima facie appears that there is patent illegality in the award itself—by not recording a finding on a contentious issue—in such cases, the Court may not accede to the request of a party for allowing the Arbitral Tribunal to resume the arbitral proceedings.

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