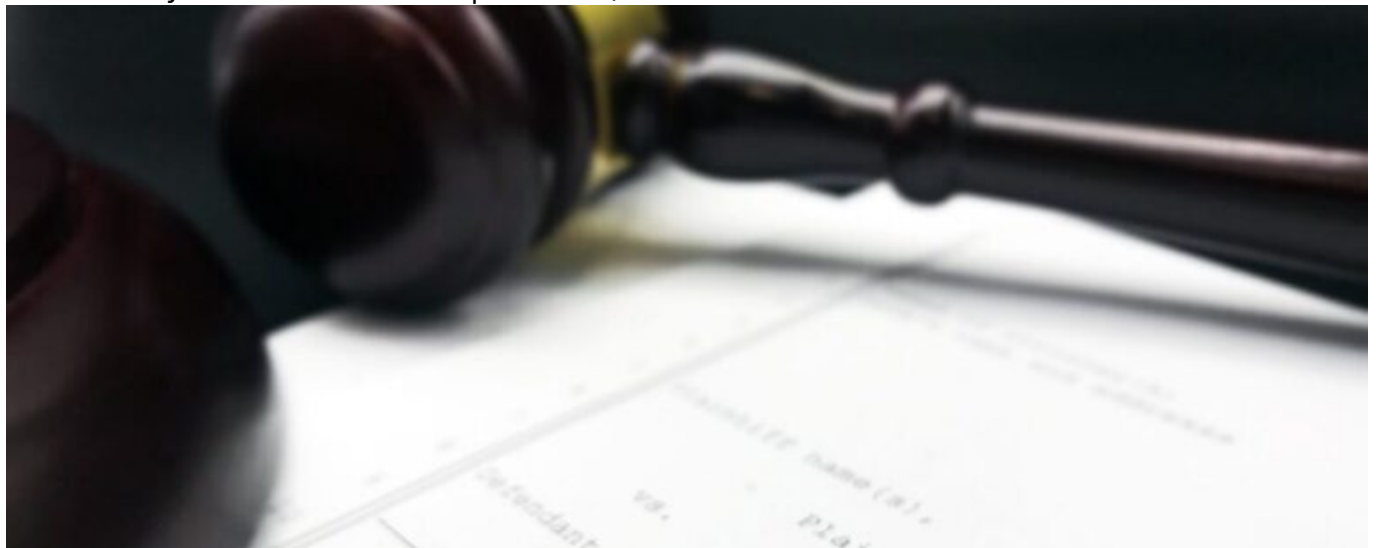


Court Can Appoint New Arbitrator With Parties Consent After Setting Aside Arbitration Award

written by Gaurav Purohit | June 1, 2021



The Arbitration and Conciliation Act, 1996 (“Act”) is a relatively new and incomplete piece of law in itself. The Act does not comprehend various arbitration-related aspects, especially the various scenarios post setting aside arbitration award. In the case of Jagdish Kishinchand Valecha vs. SREI Equipment Finance Limited and Anr.[1], a unique question related to re-initiation of arbitration after dismissing the arbitration award came under consideration before the Calcutta High Court. (“Court”).

The question involved was about whether a Court can appoint an Arbitrator different from the Arbitrator who had passed the arbitration award which had been Setting Aside Arbitration Award. The Court, by upholding the party autonomy, held that the parties can unanimously decide to change the Arbitrator who will adjudge the dispute afresh.

Facts - Setting Aside Arbitration Award

In the present case, the petitioner has challenged an arbitration award passed by the Arbitrator under Section 34 of the Act, on grounds of violation of natural justice. The counsel appearing for the petitioner has challenged the award primarily on the grounds that the petitioner was not being given an opportunity to represent himself in the arbitration proceedings.[2] Counsel for the petitioner also pointed out several procedural lapses made by the Arbitrator during the arbitration proceedings.

Petitioner was also not satisfied with the award passed, so it requested the Hon’ble Court to appoint a fresh Arbitrator to judge the issue anew. It should be noted that in this case, both parties desired this outcome. However, in the Act, no such provision for the appointment of a new Arbitrator to decide the matter anew was/is available.

Judgment and Analysis

While delivering the judgment, the Court examined various provisions of the Act to reach a conclusive answer. The Court said that Section 11 in the present case will be of no relevance as both the parties agreed to appoint a fresh Arbitrator i.e., Section 11 comes into play only when both the parties fail to agree on the choice of Arbitrator and then court is requested to appoint an Arbitrator. The Court also examined the scope of Section 34 of the Act. Under the application made under Section 34(4) of the Act, the Court can remand the matter to remove the defects which can be the grounds to Setting

Aside Arbitration Award.

The term 'resume' is used in Section 34(4) of the Act which means that the Arbitrator who has passed the award will continue the hearing. Thus, this provision will also not be relevant to the present case because here parties want to appoint a fresh Arbitrator. Under Section 34 of the Act, the Court is empowered to adjudge only whether to Setting Aside Arbitration Award or uphold the award. In the present case, the Court has to chalk out a procedure by which it is Setting Aside Arbitration Award and transmit the dispute to a new Arbitrator.

Since both the parties approached the court under Section 34 of the Act, the Court decided to delve first into the legality of the award. The petitioner argued that there was gross violation of natural justice as the petitioner was not given the opportunity to present its case before the Arbitrator. Counsel for the respondent refuted the petitioner's argument by saying that the petitioner had participated in the proceedings and had sufficient opportunity to make its case before the Arbitrator.

The Court went one step further and checked the background of the Arbitrator. It was found that the Arbitrator had been engaged as counsel for the respondent group of companies in several other instances, including as a consultant for the respondent. The Court found such previous relations of the Arbitrator with the respondent a violation of Section 12 of the Act wherein the Arbitrator has to disclose its direct or indirect relationship with the parties. Thus, the Court setting aside arbitration award.

To find the answer to the question raised above, the Court examined a few judgments passed by various courts in related but not similar matters. In the case of McDermott International Inc. v. Burn Standard Co. Ltd. the Supreme Court held that under Section 34 of the Act, the Court cannot correct errors of the Arbitrator in the arbitral award, it can only quash the arbitral award, thereby leaving the parties free to begin the arbitration proceedings again if so desired.

In the Supreme Court directed the judicial authority in Delhi to appoint another independent Arbitrator to continue with the proceedings. In the Sulaikha Clay Mines Vs Alpha Clays the Division Bench of the Kerala High Court opined that the Court has the power to remit the award to a different Arbitrator despite no such power being provided under Section 34(4) of the Act. The Court in that decision was reluctant to remit the matter to the same Arbitrator in view of the unequal treatment meted out to the parties.

After going through all relevant judgements, the Court observed that the Act aims to keep party autonomy a top priority during the entire dispute resolution process and beyond. The Court also referred to Section 89 of the Code of Civil Procedure, 1908 which encourage party autonomy. The Court said that *the basic premise is that the parties who have come to the Court cannot be without a remedy when they have agreed that the matter should go before a different Arbitrator.*

The 1996 Act does not curtail the power of a Court to mould the relief in fit cases provided the relief is not repugnant to the law as existing on that date. [6] Keeping all the relevant legal and factual provisions in mind, the Court held that a different and independent Arbitrator should be appointed to decide the claim of the award holder afresh.

Conclusion

In light of the aforesaid facts of the present, the Court has allowed the

parties to get their dispute adjudged by a separate Arbitrator. However, many questions related to the re-initiation of arbitration proceedings remain open. Surprisingly, many jurisdictions like Singapore and United Kingdom are silent on this aspect. It is high time that the Indian Parliament should step-in and codify the re-initiation of arbitration proceedings.

The legislature should clearly codify to what extent can arbitration proceedings be restored and under what circumstances. By adding a sub-section to Section 34 of the Act, courts can be empowered to allow the parties to appoint a new Arbitrator to adjudge the matter afresh. This will provide much relief to the parties involved in arbitration and speed up the dispute resolution process.

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- [\[1\]](#) Calcutta High Court, AP/103/2021
 - [\[2\]](#) Para 3 of Supra
 - [\[3\]](#) (2006) 11 SCC 181
 - [\[4\]](#) (2005) 12 SCC 235
 - [\[5\]](#) AIR 2005 Ker 3
 - [\[6\]](#) Para 17 of Supra 1
 - [\[7\]](#) Setting Aside Arbitration Award
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