

A five judge bench of Supreme Court allows modification of an Arbitral Award in limited circumstances

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Introduction

On 30 April 2025, a five-judge Constitution Bench comprising of Chief Justice Sanjiv Khanna, Justice B.R. Gavai, Justice Sanjay Kumar, Justice Augustine George Masih and Justice K V Viswanathan of the Hon'ble Supreme Court of India, while answering a reference, in *Gayatri Balasamy v M/s ISG Novasoft Technologies Limited*, 2025 SCC OnLine SC 986 put a quietus to the longstanding controversy surrounding the powers of the court under Section 34 and Section 37 of the Arbitration and Conciliation Act, 1996 (Arbitration Act), to partially modify or vary an arbitral award. The Court passed a common judgment and order in a group of seven matters.

The reference was necessitated on account of the view expressed by a two judge bench of the Hon'ble Supreme Court in *Project Director, National Highways No. 45 E and 220 National Highways Authority of India v M. Hakeem and Another* (2021) 9 SCC 1, where the Bench took a view that a Court did not have the power to modify an Award under Section 34. The correctness of the view in *M Hakeem* was challenged by way of various review petitions as there were various instances where the Supreme Court had in fact modified an Award on earlier occasions (see *Vedanta Limited v Shenzhen Shandong Nuclear Power Construction Company Limited* (2019) 11 SCC 465, *J.C. Budhராஜா v Chairman* (2008) 2 SCC 444 and *Tata Hydroelectric Power Supply Company Limited v Union of India*, (2003) 4 SCC 172).

The above inconsistent views gave rise to the requirement of an authoritative pronouncement to settle the issue.

ISSUE INVOLVED

The primary issue involved for the consideration of the Hon'ble Supreme Court was "Are Indian courts jurisdictionally empowered to modify an arbitral award under Section 34 and Section 37 of the Arbitration Act? If so, to what extent?"

JUDGMENT

The Majority View (Hon'ble Chief Justice Sanjiv Khanna, Hon'ble Mr Justice B.R. Gavai, Hon'ble Mr Justice Sanjay Kumar, Hon'ble Mr Justice Augustine George Masih)

The Hon'ble Supreme Court, while answering in the affirmative and allowing modification under limited circumstances, formulated its analysis and conclusions in the following terms:

Power to Sever invalid portions from valid portions of the award

- The Court began its analysis by first analysing whether the expression 'recourse' appearing in Section 34(1) of the Act (i.e. "Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3)") and whether the power to set aside an award would also include the power to partially setting aside the award too. The Court referred to the doctrine of severability and held that the proviso to Section 34(2)(a)(iv) empowers a Court to set aside an arbitral award in part rather than in its entirety. Thus, the invalid

portion of the award could be severed from the valid portion of the award. The Supreme Court observed that such an interpretation would be practical and pragmatic and would prevent a valid determination being unnecessarily nullified. The Court, however, added the caveat that such partial setting aside of an arbitral award may not be feasible where the valid and invalid portions of the award were legally and practically inseparable, without any correlation between the valid and invalid portions of the award.

Power to Modify the award under Section 34 of the Act

- The Hon'ble Supreme Court distinguished between setting aside of an award and modification of an award and observed that the two have different consequences: setting aside of an award renders an award a nullity while modification of an award alters a specific part of the award. The Court while addressing the core question on the nature of the scope of the powers under Section 34 of the Act held that Section 34 does not restrict the range of relief that a Court can grant and the silence in the language of Section 34 (which does not include an express power to modify an award) would not be read as a complete prohibition.
- The Hon'ble Supreme Court was mindful that the resolution of disputes through arbitration was intended to provide a quicker and cost-effective alternative to court room litigation and that in the event that the courts were denied the ability to modify an award, it could lead to significant hardships in terms of escalated costs and further delays given that the arbitration would have to start *de novo*. Thus, parties would be forced to start a new arbitration process merely to affirm a decision that could be easily arrived at by the Court thereby rendering the arbitration process even more cumbersome than traditional litigation.

Power of the Court and Arbitral Tribunal pursuant to Section 34(3) of the Act

- The Court then pointed out the distinction between Section 33 of the Act and Section 34(4) of the Act and held that notwithstanding the power of the arbitral tribunal to correct the award on limited grounds, (such as correction of computational, clerical, or typographical errors) the Court reviewing an award under Section 34 also had the inherent power to modify an award as long as such modification of the award did not necessitate a merit based analysis and that such inherent power would only effectuate and advance the object of the legislation i.e. the 1996 Act and avoid hardships. The Court, however, pointed out that the key distinction between Section 33 and Section 34 was that under Section 34, the Court should have no doubt or uncertainty in modifying an award.
- The Court also elaborated on the power of the Court under Section 34(4) of the Act and held that it provided a second opportunity for a party to seek recourse through arbitration proceedings for reconsideration of specific aspects or limited circumstance / issues identified by the Court. While Section 34(4) did not authorize the arbitral tribunal to rewrite the award on merits or set it aside, the tribunal could cure the defect which necessitated the Court to refer the dispute to the arbitral tribunal under Section 34(4). The Court held that this was in contrast with the power of the Court to modify the award which was a narrow power to be exercised with certainty. The Hon'ble Supreme Court also overruled Kinnari Mullick v Ghanshyam Das Damani, (2019) 11 SC 328 to the extent that it held that the Court can only exercise the power to remit the dispute to the arbitral tribunal under Section 34(4) upon an application or request by a party in writing and that such a request must be made before the application under Section 34(1) is decided. The Court held that a request under Section 34(4) could also be made orally and even a Section 37 Court in its appellate jurisdiction could remand the matter back to the arbitral tribunal under Section 34(4). However, the power to remand the matter back to the arbitral tribunal was discretionary and to be exercised with caution only when the Court is satisfied that the remand to the arbitral tribunal would enable the arbitral tribunal to resolve the issues and remove the grounds for setting aside of the award.

Modifying Pre and Post Award Interest

- On the question of award of interest, the Hon'ble Supreme Court held that a Section 34 Court when faced with instances of violation of Section 31(7)(a) (dealing with pendente lite interest) a court could either set aside the rate of interest or remand the issue back to the arbitral tribunal under Section 34(4) of the Act. As for the post award interest in terms of Section 31(7)(b), the Court would retain the power to modify the interest where the facts justify such modification. The Court held that the standard rates stipulated under Section 31(7)(b) was to guide the arbitrator's discretion when it came to awarding the post award interest rate and the same could be scrutinized by Courts. Also, Section 34 Courts have the authority to intervene and modify the post award interest if the facts and circumstances justified such a change for compelling and well-founded reasons. The exercise of this power would prevent further

rounds of litigations, and the Court would not be forced to order a fresh round of arbitration because of erroneous interest rates.

Applicability of Article 142 of the Constitution

- The Hon'ble Supreme Court examined the applicability of Article 142 of the Constitution in respect of the Apex Court modifying an arbitral award and held that while exercising its powers under Article 142, the Hon'ble Supreme Court should be mindful of not rewriting the award or modifying the award on merits but the power could be exercised where it is required and necessary to bring a litigation to end, thus saving parties' money and time.

The Dissenting View (Hon'ble Mr Justice K.V. Viswanathan)

Hon'ble Mr Justice K.V. Viswanathan, while rendering a dissenting view has observed that modification and severance are two distinct concepts and do not emanate from the same genus. While modification is not permitted under Section 34, severance of the award falling foul of Section 34 is permissible. In the absence of an express statutory enablement, the power to set aside contemplated under Section 34 would not subsume within itself the powers to modify. The judgment rendered in Hakeem insofar as it observes that a Section 34 Court does not have powers to modify the award, is correct law, and the only exception is in regard to the powers to carry out corrections in clerical errors, computational errors, typographical errors and any other errors of similar nature. Inherent powers under Article 142 of the Constitution of India and Section 151 of the C.P.C, cannot be invoked to bypass substantive statutory powers. No modification of interest awarded can be allowed in exercise of powers of setting aside under Section 34.

The afore-discussed view was guided by two guardrails: (i) that the Arbitration Act under Section 5 contemplates minimum judicial intervention and (ii) party autonomy to consciously oust normal judicial process through contract, while adjudicating disputes via arbitration.

In conclusion, while the Hon'ble Court, by a majority of 4:1, allowed modification of arbitral award, it, however, expressly clarified that conferring such powers of modification would not empower a setting aside court to delve into the exercise of fact-finding or undertake a 'judicial scrutiny / review' qua merits of the arbitral award.

Comments

The issue of modification of awards has been debated since the inception of the Arbitration Act and increasingly, the view, that Indian courts (similar to other evolved arbitration friendly jurisdictions such as UK, USA and Singapore) ought to have the power to modify arbitral awards has gained support in the legal fraternity and academia. The reason is that the parties, after having gone through the rigmarole of arbitration proceedings and setting aside proceedings, are averse to de-novo starting arbitration proceedings pursuant to the award being set aside, when in fact the courts could simply modify the award and bring a quietus to the dispute between the parties. Having said this, a Court will certainly be careful in identifying the matters in which it can exercise its power to modify an award without reviewing the award on its merits, and should remain conscious that the power to modify an award under Section 34 is narrow in scope. While there is no doubt that the scope of a court's power to modify an award would continue to be litigated upon, it is nonetheless a very welcome decision with potential to save significant time and resources of parties who opt for arbitration as a dispute resolution mechanism.

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