



# Conundrum In The Power Of Review Vis-À-Vis Enforcement Of An Arbitral Award Under The Arbitration & Conciliation Act, 1996

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## ABSTRACT:

The word “review” has not been defined in statute book. However, loosely the word denotes “the act of looking, offer something again with a view to correct or improve”. In the literal or rather judicial sense it means re-examination or reconsideration. The basic philosophy imbibed in the concept of review is “*to err is human.*”

It is this error of human which is technically sought to be corrected in review. Yet in the realms of law the courts and even the statutes lean strongly in favour of finality of decision. However, exceptions both statutorily and judicially have been carved out to correct accidental mistakes or error, although conceptually, the courts have time and again clarified that a power of review is not an inherent power vested with the courts and it must be conferred by law either specifically or by necessary implication.<sup>(1)</sup>

It must be understood that a review is also not an appeal in disguise and has to be exercised within a certain parameters as it is the error which is sought to be corrected and not that the issue is being re-decided or issues are allowed to re-agitated. The mere possibility of two views on the subject is not a ground for review. The Apex court <sup>(2)</sup> setting parameters to the power of review held, that there are definite limits to the exercise of power of review. As to what was the definite limits within which the power of review can be exercised the Hon’ble Apex court in the case of Lily Thomas V/s Union of India<sup>(3)</sup> observed that the power of review can be exercised for correction of mistake but not to substitute a view. Thus, review although may not sound synonymous to correction of mistake, but it may also be not more than a power to correct an error, mistake or clarify such error or mistake crept to prevent miscarriage of justice.

Since, an endeavour is being made to understand the power of review by an Arbitral Tribunal, which are largely civil in nature, the power has to be traced from the code of civil procedure, which is a procedural law related to the administration of civil proceedings in India. Section 19 of the Arbitration & Conciliation Act, 1996 although say that the arbitral tribunal shall not be bound by the code of civil procedure, but the same cannot be read to mean that the Arbitral Tribunal is incapacitated to draw sustenance from any provisions of Civil procedure Code. The review provisions are contained in section 114 and Order XLVII rule 1 of the CPC. Both these provisions have been also given a restrictive interpretation, in as much as although section 114 CPC provides for a substantive power of review by a civil court and consequently by the appellate courts, however the words “subject as aforesaid” occurring in Section 114 clearly demonstrate that the words are of great significance as it denotes that any power of review is subject to such conditions and limitations as may be prescribed as appearing in section 114 CPC thereof and for the said purpose, the procedural conditions contained in Order XLVII of the Code must be also taken into consideration. Further, the use of the phrases “from the discovery of new and important matter or evidence which, after the exercise of due

diligence as not within his knowledge or could not be produced by him at the time when the decree was passed or made”, “on account of some mistake”, “error apparent on the face of the record” and “for any other sufficient reasons” appearing in Order 47 Rule 1 CPC, sufficiently limits the power to mistake, error apparent or “a reason sufficient”, which has to be a reason at least analogous to those specified in the rules. The “*ejusdem generis*” rule of interpretation would squarely apply for determining any such sufficient reasons to bestow a power of review to the learned courts. The Hon’ble Supreme Court<sup>(4)</sup> went a step ahead in delimiting the power of review by holding that the jurisdiction of review is limited and circumscribed by way of yardsticks, including as the interference only in grounds as to discovery of new or important matter or evidence which may be relevant or that the error apparent, on the basis of which review is sought, should be error which is evident *per se* from the records of the case and which does not required detailed examination.

**INDEX TERMS-** Review , jurisdiction, re-examination, implications, Arbitral Tribunal etc.

## 1. ABOUT ARBITRATION & CONCILIATION IN INDIA :

The Arbitration and Conciliation Act, 1996 (Principal Act) is a self-contained Code which seeks to attain the objectives of consolidating and amending existing laws relating to domestic arbitration, defining conciliation, enforcing UNCITRAL, creating a uniform system of regulation relating to arbitration and conciliation and the establishment of a unified legal framework for fair and effective settlement of disputes<sup>(5)</sup>. Part I of the principal Act deals with arbitrations where the seat is in India and has no application to a foreign-seated arbitration. It is, therefore, a complete code in dealing with appointment of arbitrators, commencement of arbitration, making of an award and challenges to the aforesaid award as well as execution of such awards. On the other hand, Part II is not concerned with the arbitral proceedings at all. It is concerned only with the enforcement of a foreign award, as defined, in India. Section 45 alone deals with referring the parties to arbitration in the circumstances mentioned therein. Barring this exception, in any case, Part II does not apply to arbitral proceedings once commenced in a country outside India and Part III deals with the Conciliation and Part-IV deals with certain supplementary provisions.

Coming back to the power of review to be found under the Arbitration & Conciliation Act, we cannot shrug aside that the expression 'review' is used in two distinct senses, namely (i) a procedural review which is either inherent or implied in a court or Tribunal to set aside a palpably erroneous order passed under a misapprehension by it, and (ii) a review on merits when the error sought to be corrected is one of law and is apparent on the face of the record. It is in the latter sense that the Courts have held that no review lies on merits unless a statute specifically provides for it. Obviously when a review is sought due to a procedural defect, the inadvertent error committed by the Tribunal must be corrected *ex debito justitiae* to prevent the abuse of its process, and such power inheres in every court or Tribunal.

## 2. THE ARBITRAL TRIBUNAL:

An Arbitral tribunal is empowered to exercise its power of procedural review in various circumstances. Section 23 of the Act dealing with the filing of statement of claim and defence by the parties and section 25 dealing with the right of the Arbitral Tribunal to regulate the same is one of such procedure. The Hon’ble Supreme Court of India in *Srei Infrastructure Finance Ltd. vs. Tuff Drilling Private Limited*<sup>(6)</sup>, held that in the event an arbitral tribunal terminates the proceedings under Section 25(a) of the Arbitration & Conciliation Act, 1996 ("A&C Act"), it can recall its order if sufficient cause is shown by the claimant for committing default in filing its statement of claim. The Supreme Court held that if the arbitral tribunal is empowered to condone default on sufficient cause being shown, this can be done by the tribunal recalling its order after the proceedings are terminated. Thus, the power of procedural review has been made loud and clear by the Hon’ble Supreme Court and obviously the same was with the underlying idea that the main objective of the Act was to make provisions for an arbitral procedure which is fair, efficient, expeditious, cost –effective and capable of meeting the autonomy of the parties to the litigation and most importantly to minimise the supervisory role of courts in the arbitral process.

The power of termination of an Arbitral proceedings could be found in section 32 of the Act; which inter-alia states:

- (1) The arbitral proceedings shall be terminated by the final arbitral award or by an order of the arbitral tribunal under sub-section (2).
- (2) The arbitral tribunal shall issue an order for the termination of the arbitral proceedings where—
  - (a) the claimant withdraws his claim, unless the respondent objects to the order and the arbitral tribunal recognises a legitimate interest on his part in obtaining a final settlement of the dispute,
  - (b) the parties agree on the termination of the proceedings, or
  - (c) the arbitral tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible.
- (3) Subject to section 33 and sub-section (4) of section 34, the mandate of the arbitral tribunal shall terminate with the termination of the arbitral proceedings.

The passing of an Arbitral Award is the ultimate culmination of the arbitral proceedings and that is how any arbitral proceedings is terminated ideally in the first instance. Section 32(1) of the Act also in as many words indicates that the arbitral proceedings shall be terminated by the final arbitral award and section 35 says that an arbitral award shall be final and binding between the parties and persons, of course subject to other provisions of the Act. The passing of the Arbitral Award is an ideal situation of termination of arbitral proceedings and with all its ups and downs, the fruits of any arbitral proceedings resulting in the arbitral Award can be utilized only on its enforcement. The enforcement of a domestic Award is mentioned in section 36 of the Act.

Although, section 32(3) of the Act says that the mandate of the arbitral tribunal shall terminate with the termination of the arbitral proceedings and the same is Subject to section 33 and sub-section (4) of section 34, however section 36 of the Act relating to enforcement of the Arbitral Tribunal does not anywhere mentions that the pendency of a section 33(1) Application before the Arbitral Tribunal is a bar to preferring the execution petition, but section 36 in as many word says that the time for making an application for enforcement of Arbitral award would start after the expiry of making an application to set aside the award under section 34 has expired.

This, brings us to section 34(3) of the Act, which relates to the limitation for filing of objections to the Arbitral Award, which says:

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral tribunal:

Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter.

Section 33 of the Arbitration and Conciliation Act, 1996 relating to “correction and interpretation of award; additional award” has a limited scope. This section is the statutory provision that allows for correction and interpretation of an award. However, it is pertinent to note that the request for correction or interpretation of an award does not reopen the proceedings. The evidence and arguments have already been verified, interpreted and understood. No proceedings are repeated. Only the examination of the arbitral award to that limited extent takes place. Only in a case of arithmetical and/or clerical error, the award can be modified and such errors only can be corrected as was recently held by the Apex Court<sup>(7)</sup>.

In view of the aforesaid proposition of law, firstly, it can be stated that the limited power vested with the Arbitral Tribunal is relating to a correction in computational error or any clerical or typographical errors in the Award. However, what happens, in case the correctional application filed before the Ld. Arbitral tribunal has although been titled to be filed under section 33(1) of the Act, but the same is in the nature of substantive review, because, although section 36 does not mentions about pendency of section 33 Application, but indirectly makes the said section relevant by mentioning section 34(3), which in turn mentions the pendency

of section 33 Application. Thus, in a classic case the pendency of a section 33 application can interdict the filing of an enforcement application under section 36 of the Act for ever, which cannot be the purview of law.

In any case as regards the merits of the section 33 Application, the Hon'ble Supreme Court has answered the said question authoritatively in the case of State of Arunachal Pradesh V/s Damani Construction Company<sup>(8)</sup>, while examining the scope of extension of time for filing objection under section 34(3) of the Arbitration & Conciliation Act, for reasons of pendency of an Application under section 33(1) of the Act. The Hon'ble Apex court in that case held that even if application is titled as under section 33 of the Act but same is beyond the scope of section 33 of the Act, and is in fact a review application, then the period spent of pendency of the application under section 33 of the Act will not be excluded for determining the limitation period for filing of objections under section 34 of the Act. (Please read Paragraph 8 & 9 of the Judgment). Further, seeking review of the Award in the garb of section 33 of the Arbitration & Conciliation Act, is not permissible. The Hon'ble Delhi High Court in Shayam Sunder vs Kotak Securities Ltd<sup>(9)</sup> has unambiguously held:

“...even if an application is titled as under Section 33 of the Act but the same is beyond the scope of Section 33 of the Act, and is in fact a review application, then the period spent of pendency of the application under Section 33 of the Act will not be excluded for determining the limitation period for filing of objections under Section 34 of the Act...”

As regards the time-period during which the said section 33 application ought to be decided. The legislature although has provided a fixed time and has given power to the Arbitral Tribunal to extend such time in terms of section 33(6) is necessary, however the same cannot be extended till perpetuity as the same cannot be purview of the 1996 Act, which has been framed for expeditious resolution of disputes, and various provisions have been incorporated in the Act to ensure that the arbitral proceedings are conducted in a time-bound manner. Various fixed time lines have been provided in the 1996 Act such as:

- (a) Section 8 provides that an application for reference of disputes to arbitration, shall be filed not later than submitting the first statement on the substance of the dispute;
- (b) Section 9(2) provides that where a Court passes an order for any interim measure of protection, the arbitral proceedings shall be commenced within a period of 90 days' from the date of such order;
- (c) Section 13 provides that where a challenge is made against an arbitrator, the same must be raised within 15 days' from the constitution of the tribunal, or after becoming aware of any circumstances mentioned in sub-section (3) of Section 12;
- (d) Section 16 (2) provides that a plea that the tribunal does not have jurisdiction, shall be raised not later than the submission of the statement of defence;
- (e) Section 34(3) provides a maximum period of 120 days' (with sufficient cause) after the receipt of the signed copy of award, to file objections before the Court.

### 3. THE PROCESS OF ARBITRATION :

Further, the 1996 Act was amended by the Arbitration and Conciliation (Amendment) Act, 2015 to incorporate further provisions for expeditious disposal of arbitral proceedings; like:

- (a) Section 11 has been amended to insert sub-section (13) which provides that an application made either before the Supreme Court, or the High Court, or person or institution designated by such Court, shall be disposed of as expeditiously as possible, and an endeavour shall be made to dispose of the petition within a period of 60 days' from the date of service of the notice on the opposite party;
- (b) Section 29A mandates that the arbitral proceedings must be completed within a period of 12 months from the date of completion of pleadings;
- (c) Section 34 was amended to insert sub-section (6) which provides that an application under Section 34 shall be disposed of expeditiously within a period of 1 year from the date on which the notice of filing objections is served upon the other party.

As far as Section 33(1) of the Arbitration & Conciliation Act is concerned, a limitation period of 30 days is prescribed for any party to file a correctional application. After the completion of 30 days, no party can request correction or interpretation. There is no concept of condonation of delay in preferring such application as has been held by several Judgement. Similarly, sub-section 33(2) of the Arbitration and Conciliation Act, prescribes a time cap on the passing of the interpretation by the arbitral tribunal if the request under section 33(1) is accepted. The arbitration tribunal has to provide the interpretation within 30 days of receiving the receipt of the request. The interpretation becomes part of the arbitral award. An additional award is not passed in this case. Sub-Section 33(3) deals with the power of Arbitral Tribunal to correct the error on its own initiative within 30 days. In the same breath, sub- Section 33(4) of the Arbitration and Conciliation Act states that in situations where a part of the proceedings has been left out, an additional award is given by the arbitration tribunal to make up for that loss. The additional award is supposed to have corrected the mistake by including the missed out part of the award. The ambit and scope of sub-section (4) of Section 33 of the Arbitration and Conciliation Act, 1996 was considered by the Supreme Court in *Mcdermott International Inc. v. Burn Standard Co. Ltd.*<sup>(10)</sup>, and it was held that sub-section 33(4) empowers the Arbitral Tribunal to make additional arbitral award in respect of claims already presented to the Tribunal in the arbitral proceedings but omitted by the Arbitral Tribunal provided:

- (i) There is no contrary agreement between parties to the reference
- (ii) A party to the reference, with notice to the other party to the reference, requests the arbitral tribunal to make the additional award
- (iii) Such request is made within 30 days from the receipt of the arbitral award;
- (iv) The arbitral tribunal considers the request so made justifies; and

Additional arbitral award is made within sixty days from the receipt of such request by the arbitral tribunal (sub-section 5).

The most significant power granted for extension of time for deciding a section 33 Application could be found in sub- Section 33(6) of the Arbitration & Conciliation Act, 1996, which inter-alia states:

The arbitral tribunal may extend, if necessary, the period of time within which it shall make a correction, give an interpretation or make an additional arbitral award under sub-section (2) or sub-section (5).

Firstly, for any extension of time for disposal of the section 33 Application, there ought to be a specific order by the Arbitral Tribunal expressing its desire to extend the time for making a correction in the Award because any extension of time may have rippling effect on the rights & liabilities of the parties, which by that time would had been decided by the substantive Arbitral Award. Secondly, the Legislature keeping in view of the object & spirit of enacting the Arbitration & Conciliation Act as a mechanism for expeditious disposal of dispute has provided for time-bound remedy to various provisions of the Act. Thus, time extension power to Arbitral Tribunal has been not given as a matter of course but as an exception as the word extension is followed by the word "if necessary". Thus, it was always intended that the time provided under section 33(2) & section 33(5) should be mandatorily followed by the Tribunal, however in case the Award is lengthy or due to other compelling circumstances in case the time of 30 days of 60 days is required to be extended, the Tribunal should not be bereft of the said power and as such section 33(6) was enacted to give power of extension of 30 days or 60 days to the Arbitrator.

Most importantly, Section 33(2) provides for 30 days for the Tribunal for correction or interpretation of the Award. Section 33(3) provides power to correct any error suo motto within 30 days and Section 33(5) provides for making an additional award within 60 days. Thus, section 33(6) relating to the power of extension of time, if necessary by the Tribunal has to be interpreted as per the principle of *ejusdem generis* rule. In any case, the said provision cannot be interpreted to give unlimited power of extension of time, which would defeat the very purpose for which the Act was enacted. If the total time granted by the legislature as per section 33(2) & 33(3) is for 30 days and as per section 33(5) is for 60 days, the time extension period has to be interpreted in a manner which is consistent with the time allowed of 30 or 60 days by the legislature and in any case cannot be extended to perpetuity by the Tribunal.

Further, there is another aspect of the matter, we all know that section 34(3) provides for limitation of 3 months for preferring an Application under section 34, however the said three months starts running from the date of disposal of a S. 33 application. In case, the application under section 33 is accepted then a party may prefer an Application under section 34 within further three months in view of section 34(3), however, if the

tribunal does not accept a S. 33 application and holds that it was not maintainable, then the time required to initiate such an application till the disposal of the same will not be excluded from the 3 months limitation period for preferring an application under section 34 as has been held by the Hon'ble Apex Court & the Hon'ble Delhi High Court mentioned supra and in that eventuality a genuine party having a formidable case on merits may lose a chance to file an objection under section 34 as the limitation prescribed under the Act are stringent and not condonable beyond three months plus 30 days for sufficient cause, which cannot be the intent of the legislature and which would also amount to utter chaos as genuine party would not be able to prefer an application under section 34 whereas a defaulting party can get an automatic stay on the enforcement during the pendency of section 33 application by filing frivolous and unnecessary applications.

The mischief of automatic stay during the pendency of an application under section 34 of the Act which is sought to be plugged by inserting section 36(2) of the Act by the 2015 amendment would be frustrated as the concept of automatic stay would still haunt and come to operate on an Arbitral Award during the pendency of an Application under section 33 of the Act. Thus, the time period for disposal of a section 33 Application has to be given a uniform and restrictive interpretation and section 33(6) of the Act providing the power to extend the time period has to be interpreted to provide for an time extension with an upper limit of three months, so that a party not finding a favour with the arbitrator with his section 33 Application can show sufficient cause and still prefer an Application for setting aside of the Award under section 34 of the Act within 30 days in view of the proviso to section 34(3) of the Act. In this view there would be no violence to any of the provisions of the Act as both section 33 and 36 can be interpreted harmoniously.

#### 4. CONCLUSION:

It cannot be lost sight of the fact that under the amendment of 2015 section 29A has been inserted to cap the entire Arbitral proceedings to twelve months and extendable by another six months with the consent of both the parties. Thus, after the lapse of such one and half year, the mandate of the Arbitral Tribunal would be terminated, unless the Court, either prior to the said lapse or after the lapse has extended the period as per section 29A(4) of the Act. Although section 32 and section 29A(4) are independent to each other as section 32 gives various instances when the arbitral proceedings can be terminated by the Arbitral Tribunal itself but section 29A(4) or for that matter section 14 or section 15 of the Act permits termination of mandate of an arbitral tribunal by operation of law for various reasons. Unfortunately neither section 14 nor section 15 takes care of an eventuality of pendency of a section 33 Application nor does the newly amended section 29A takes care of such a situation. Although it can be argued that the amended section 29A when takes care of the entire Arbitral Proceedings, the time for disposal of section 33 application ought to be included in the said time-period and in either case in the larger canvas section 29A(4) would come to rescue for such an Application.

Having said so, one thing is clear that although the legislature by a series of amendments and the judiciary by interpreting and delivering various judgments on the aspect have come a long way in streamlining the dispute settlement process through arbitration, yet there continues to exist a ambiguity with respect to certain aspects of the Arbitration and Conciliation Act, 1996. The amendments brought by the Amending Act of 2015 have definitely aided in making the existing law more stringent & reciprocative of India being an arbitration friendly nation, however, the existing conundrum relating to the review power and its time limit for adjudication by the Arbitral Tribunal under section 33 of the Act has to be clarified by a legislative amendment on similar lines of section 36(2) to aid the Courts in providing succour to the litigants, who notwithstanding a favourable arbitral Award in their favour is unable to bear the fruits for lack of enforcement.

#### REFERENCES:

- (1) Patel NarshiThakershi v. Pradyuman Singh ji Arjun Singh Ji-(1971) 3 SCC 844
- (2) Aribam Tuleswar Sharma vs. Aribam Pishak Sharma, AIR 1979 SC 1047
- (3) Lily Thomas vs. Union of India, (2000) 6 SC 224
- (4) State of west Bengal and others Vs Kamal Sengupta and another- (2008) 8 SCC 612
- (5) Preamble to the Arbitration and Conciliation Act, 1996
- (6) Srei Infrastructure Finance Ltd. vs. Tuff Drilling Private Limited (2018) 11 SCC 470
- (7) Gyan Prakash Arya V/s Titan Industries Limited, 2021 SCC Online SC 1100
- (8) State of Arunachal Pradesh V/s Damani Construction Company, (2007) 10 SCC 742
- (9) Shayam Sunder vs Kotak Securities Ltd., FAO No. 399/2017 delivered on 16.10.2017
- (10) Mcdermott International Inc. v. Burn Standard Co. Ltd., (2006) 11 SCC 181