Appointment of New Arbitrators under Section 34 of the Arbitration and Conciliation Act

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In a recent order, a single judge of the Calcutta High Court in *Jagdish Kishinchand Valecha v. SREI Equipment Finance Ltd.* (13 April 2021) made an important clarification on the question of whether a court could appoint a different arbitrator, where an arbitral award made by the original arbitrator is set-aside under section 34 of the Arbitration and Conciliation Act, 1996 ("Act") on grounds of 'bias' or 'conflict of interest' on the part of the original arbitrator.

Answering the question in *affirmative*, the High Court held that where an arbitral award is set aside by a court in such cases while adjudicating a section 34 application and both parties mutually consent to the appointment of a different arbitrator, a court can appoint a new arbitrator to decide the claims afresh. In this post, we shall analyse the High Court's decision in *Valecha*.

Background

There was an arbitration agreement between Jagdish Kishinchand Valecha ("JKV") and SREI Equipment Finance Ltd. ("SREIFL"). A dispute arose between the two parties, which was referred to a sole arbitrator. This culminated into an award dated 5 October 2020 in favour of SREIFL. Subsequently, JKV filed for an application seeking setting aside of the arbitral award under section 34 of the Act.

Before the Court, JKV made several contentions to challenge the award, three of which have been mentioned in the High Court's Order. First, that he was not given an opportunity to represent himself in the arbitration proceedings. Notably, this situation would be covered under the ground in section 34(2)(a)(iii) of the Act. Second, that the arbitrator had previously acted as an arbitrator in other proceedings at the instance of SREIFL and also been engaged as a counsel or consultant for SREIFL's group of companies. Third, JKV had pointed out to several procedural lapses made by the arbitrator. These contentions would be covered under the ground in section 34(2)(a)(v) of the Act. Cumulatively, these factors not only showed a breach of the principles of natural justice, but they also raised concerns of bias and conflict of interest on part of the arbitrator.

Contrarily, SREIFL contended that JKV had participated in all the arbitration proceedings and had sufficient opportunity to represent himself before the arbitrator. It also challenged the other grounds raised by JKV. However, SREIFL did not contest the fact that the arbitrator had been previously involved with them in various positions, including that of a counsel or consultant. In the present proceedings, SREIFL had stated that the appointment of a different arbitrator to adjudicate the present dispute afresh was acceptable to it. Consequently, while the original arbitrator had already made an award, both the parties in the present dispute had agreed that a different arbitrator should be appointed to decide the claim between the parties afresh and that the dispute should not be remanded to the original arbitrator.

High Court's Analysis

The High Court in *Valecha* noted the fact that both SREIFL (who was the award-holder) and JKV (who was the award-debtor) were consenting to appointment of a different arbitrator to decide the claims in the present matter. First, the Court determined whether the grounds for setting aside an arbitral award under section 34 of the Act were met in light of the challenge made on contentions of 'bias' or 'conflict of interest'. Second, it examined the possibility of appointment of a different arbitrator after passing of an award as, under normal circumstances, the court when approached under section 34 only has the power to remand the matter back to the arbitrator who passed the award.

<u>Existence of Bias or Conflict of Interest</u>

Acknowledging that while SREIFL's contention that JKV did in fact participate before the arbitrator may be true, the High Court recorded that, before appointing a new arbitrator, the examination of whether there existed a perception of bias or conflict of interest needed to be made. Moreover, it was recorded to be an admitted position that the arbitrator in the present matter had been previously involved in various capacities in cases involving SREIFL.

Moving forward, the Court recorded that the 2015 amendments to the Act had sought to address such cases, where there were apprehensions of possible bias and conflict of interest on part of the arbitrator. Under Section 12 of the Act (as modified by the 2015 amendments), an arbitrator is statutorily bound to disclose in writing any relationship or interest (whether direct or indirect) that they may have with any of the parties or the subject-matter in dispute. Through the seventh schedule to the Act, an arbitrator is also explicitly bound to disclose their relationship with parties to the dispute. One of the fundamental objectives of these modifications made by 2015 amendments to the Act is to ensure that the arbitrator is both 'impartial' and 'independent'.

In the present case, as the arbitrator was previously involved in various capacities with one of the parties (i.e. SREIFL) in the past, the arbitrator's appointment was contrary to section 12(5) of the Act and, consequently, the award was liable to be set aside on the ground that the arbitrator was not impartial and independent.

Appointment of a Different Arbitrator

The High Court noted that in such a case where an arbitral award was liable to be set aside, but both the award-holder (i.e. SREIFL) and award-debtor (i.e. JKV) agreed to having a different arbitrator decide the matter afresh, finding a permissible statutory route to make such appointment of a new arbitrator was a difficult task. The Court also pointed out that in such a case the provision in section 11 of the Act (which provides for court's appointment of an arbitrator under exceptional circumstances) was irrelevant and would have no manner of application as it was premised on the condition that all the parties *fail* to agree on the choice of arbitrator.

The Court considered earlier precedents by the Supreme Court and High Courts. First, it considered the Supreme Court's decision in *Kinnari Mullick v. Ghanshyam Das Damani* (2017), where the Supreme Court had set aside an order of remand of arbitration proceedings under section 34(4) by the High Court and also granted liberty to the parties to pursue remedies available to them under the law. One could infer that the remedies available to the parties in *Kinnari Mullick* presumably included appointment of a new arbitrator, since the remand order was set aside and all legal remedies were available. Second, the Supreme Court in *McDermott International Inc. v. Burn Standard Co. Ltd.* (2006) had emphasized the limited supervisory role of judicial authorities in the matters of arbitration. Third, the Supreme Court in *Taruna Vaid v. Rakesh Kumar* (2005) had directed a lower court to appoint an independent arbitrator to continue with the proceedings. The High Court in *Valecha* noted that the facts in *Taruna Vaid* could be equated with the present case, as the appointment of a different arbitrator in that case was deemed essential to do complete justice between the parties.

Fourth, a division-bench decision of the Calcutta High Court in *State of West Bengal v. Bharat Vanjiyya Eastern Private Ltd.* (2019), while setting aside an arbitral award, granted liberty to a party to pursue its claim by reviving a pending suit or *any other means* available in *accordance with law*. Lastly, the Kerala High Court's Division-bench decision in *Sulaikha Clay Mines v. Alpha Clays* (2005) was discussed. In *Sulaikha*, a case in which there was no arbitration clause between the parties, the High Court was reluctant to remit the matter to the original arbitrator, due to its assessment of *unequal treatment* meted by the arbitrator to the parties earlier. After discussing the above-mentioned precedents, the High Court in *Valecha* recorded that the Act ensures party autonomy "*at all levels right through the dispute resolution process and even to the procedure for challenge to the award*". Consequently, it observed that the freedom of the parties to decide on the next action must be preserved in facts of the present case.

Importantly, the High Court noted that the statutory recognition to keeping all redressal-doors open for the parties after an arbitral award is set aside is secured in section 43(4) of the Act. Section 43(4) provides that: "***Where the Court orders that an arbitral award be set aside****, the period between the commencement of the arbitration and the date of the order of the Court shall be* ***excluded*** *in computing the time prescribed by the Limitation Act, 1963 (36 of 1963), for the* ***commencement of the proceedings (including arbitration)*** *with respect to the* ***dispute*** *so submitted*" [emphasis ours].

As the text of section 43(4) of the Act is of an *inclusive nature*, the High Court recorded that the remedies available

to the parties are not restricted only to those under the Act. Moving forward, the High Court referred to section 89 of the Code of Civil Procedure, 1908 ("CPC"), which provides for settlement of disputes outside the court. It noted that section 89 of CPC encourages judicial authorities to participate in formulation of the settlement terms between parties and to ensure that the process of settlement is a "collaborative exercise" before the dispute is referred to one of the alternative forums under section 89. Consequently, section 89 of the CPC enables a court to "*chart the future course of action where parties consent to a particular way forward*". In the present case, the court can formulate the correct action keeping in mind that parties who have come to the court cannot be left without a remedy, when they have agreed that the matter should go before a different arbitrator.

Outcome

On the basis of the above analysis, the Court set aside the arbitral award made by the original arbitrator under section 34 of the Act. Moreover, it held that a different and independent arbitrator should be appointed to decide the claims afresh. Consequently, it appointed a new arbitrator to decide afresh the claims between JKV and SREIFL.

Authors' Comment

In rare cases where a court sets aside an arbitral award on grounds of bias or conflict of interest by arbitrator, it faces a consequential conundrum becoming unable to remand the matter to the original arbitrator, which in effect led to cutting off legal recourse to arbitration for parties. Through the *Valecha* decision, the High Court has harmonized the Act with section 89 of the CPC and carved a statutory path which enables parties in such cases to again use recourse to arbitration before another arbitrator or arbitral tribunal.

While it might be apposite to say that the Court in *Valecha* took a view facilitating the most effective remedy in the matter, it must be pertinent to note the questions posed by this judgment. Section 34 of the Act has a narrow scope and the words thereunder do not give any power to the court to appoint any new arbitrator. At best the court may 'remand' or 'remit' the matter back to the arbitrator who passed the award so that the tribunal can *eliminate the grounds for setting aside the arbitral award*. The scope of section 34(4) is limited to the extent that it offers an opportunity to prevent the award from being set aside in matters where the defects or infirmities can be removed or eliminated by the arbitrator before the award is set aside. It might be significant to note that in the present matter the court has relied on *Taruna Vaid* where the Supreme Court was approached under article 227 of the Constitution and not under section 34 of the Act. This itself gives the Supreme Court in *Taruna Vaid* a wider scope for intervention as opposed to *Valecha*. In any case, the appropriate method under law would have been to suggest the parties to mutually decide an arbitrator or file a section 11 application under the Act.

Additionally, the judgment is silent on facts concerning challenge to the mandate of arbitrator, if any, at the initial stage of the arbitration. At the time of initiation of the arbitration, the parties alleging bias could have approached the court under section 11 of the Act for appointment of the arbitrator or any other suitable provision. The parties have not proved that the fact of bias came to their knowledge during or after the arbitration. This begs the question as to whether the parties can allege bias after having proceeded with the arbitration without any protest on the said ground. Perhaps, an argument of waiver can be raised to question the conduct of the parties. In the present matter, both the parties seem to have conspicuously agreed on the fact that the arbitrator was biased, making the entire arbitral proceeding infructuous.

– Anujay Shrivastava & Divyansha Agrawal