

FAO No. 1383 of 2017

[1]

**IN THE HIGH COURT OF PUNJAB & HARYANA
AT CHANDIGARH**

FAO No. 1383 of 2017 (O&M)

Date of decision: 1st March, 2023

Markfed Refined Oil and Allied Industries

Appellant

Versus

M/s Savi Engg. Private Limited and another

Respondents

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CORAM: HON'BLE MR. JUSTICE AVNEESH JHINGAN

Present: Ms. Ananya Ahluwalia, Advocate for the appellant.
Mr. Amit Jain, Senior Advocate with Mr. Aeshma Jain,
Advocate for respondent No.1.

AVNEESH JHINGAN, J (Oral):

CM No. 4506-CII of 2017

For the reasons mentioned in the application, the delay in filing the appeal is condoned.

CM stands disposed of.

Main appeal

1. This appeal is filed aggrieved of decision dated 30.1.2016 modifying the award.

2. The brief facts are that the on 5.11.1993 the appellant placed an order for supply of machinery/equipments, its erection, commissioning and handling for expanding the capacity of 30 TPD to 50 TPD. The terms and conditions agreed between the parties provided for dispute resolution through arbitration mechanism. The dispute between the parties was referred to the arbitrator. The proceedings culminated in award dated

22.12.2004. The objections under Section 34 of the Arbitration and Conciliation Act, 1996 (for short, 'the Act') filed by respondent No. 1 (hereinafter referred to as ' the respondent') were partially accepted and the award modified.

3. Learned counsel for the appellant submits that the District Judge erred in modifying the award.

4. Learned counsel for the respondent defends the impugned order.

5. The issue that while dealing with objections under Section 34 of the Act, the award could not be modified is no longer *res integra*. In

Kinnari Mullick and another v. Ghanshyam Das Damani, (2018) 11 SCC

328, the Supreme Court held:

*“No power has been invested by the Parliament in the Court to remand the matter to the Arbitral Tribunal except to adjourn the proceedings for the limited purpose mentioned in sub-section 4 of Section 34. This legal position has been expounded in the case of **McDermott International Inc. (supra)**. In paragraph 8 of the said decision, the Court observed thus:*

“8....parliament has not conferred any power of remand to the Court to remit the matter to the arbitral tribunal except to adjourn the proceedings as provided under sub-section (4) of [Section 34](#) of the Act. The object of sub-section (4) of [Section 34](#) of the Act is to give an opportunity to the arbitral tribunal to resume the arbitral proceedings or to enable it to take such other action which will eliminate the grounds for setting aside the arbitral award.”

[Emphasis supplied]

14. In any case, the limited discretion available to the Court under [Section 34\(4\)](#) can be exercised only upon a written application made in that behalf by a party to the arbitration proceedings. It is crystal clear that the Court cannot exercise this limited power of deferring the proceedings before it suo

moto. Moreover, before formally setting aside the award, if the party to the arbitration proceedings fails to request the Court to defer the proceedings pending before it, then it is not open to the party to move an application under [Section 34\(4\)](#) of the Act. For, consequent to disposal of the main proceedings under [Section 34](#) of the Act by the Court, it would become functus officio. In other words, the limited remedy available under [Section 34\(4\)](#) is required to be invoked by the party to the arbitral proceedings before the award is set aside by the Court.”

6 In ***Radha Chemicals v. Union of India, 2019(1) Apex Court Judgments (SC) 330***, the Supreme Court held:

*“5. This court in a series of judgments culminated in **Kinnari Mullick and another v. Ghanshyam Das Damani, (2018) 11 SCC 328** held that the court while deciding a Section 34 petition has no jurisdiction to remand the matter to the Arbitrator for a fresh decision. It is, therefore, clear that the learned Single Judge's judgment is contrary to this judgment as a result of which both the judgments of the Single Judge as well as the Division Bench have to be set aside.”*

7. The 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***, after considering its earlier decisions in ***Kunnari Mullick's case (supra)*** and ***Dakshin Haryana Bijli Vitran Nigam Ltd. v. Navigant Technologies Pvt. Ltd., 2021 SCC Online 157***, held that there is no power under Section 34 of the Act to modify the arbitral award. The relevant portion is quoted below:

*“39. As has been pointed out by us hereinabove, **McDermott (supra)** has been followed by this Court in **Kinnari Mullick (supra)**. Also, in **Dakshin Haryana Bijli Vitran Nigam Ltd. v.***

Navigant Technologies Pvt. Ltd., 2021 SCC OnLine SC 157, a recent judgment of this Court also followed McDermott (supra) stating that there is no power to modify an arbitral award under [Section 34](#) as follows: -

(f) In law, where the Court sets aside the award passed by the majority members of the tribunal, the underlying disputes would require to be decided afresh in an appropriate proceeding.

Under [Section 34](#) of the Arbitration Act, the Court may either dismiss the objections filed, and uphold the award, or set aside the award if the grounds contained in sub-sections (2) and (2A) are made out. There is no power to modify an arbitral award.

40. It can therefore be said that this question has now been settled finally by at least 3 decisions of this Court. Even otherwise, to state that the judicial trend appears to favour an interpretation that would read into [Section 34](#) a power to modify, revise or vary the award would be to ignore the previous law contained in the 1940 Act, as also to ignore the fact that the 1996 Act was enacted based on the UNCITRAL Model Law on International Commercial Arbitration, 1985 which, as has been pointed out in Redfern and Hunter on International Arbitration, makes it clear that, given the limited judicial interference on extremely limited grounds not dealing with the merits of an award, the ‘limited remedy’ under [Section 34](#) is co- terminus with the ‘limited right’, namely, either to set aside an award or remand the matter under the circumstances mentioned in [Section 34](#) of the Arbitration Act, 1996. ”

8. In view of the decisions cited above, the impugned order is set aside. The matter is remitted back for deciding the objections under Section 34 of the Act afresh, in accordance with law.

9. The appeal is allowed.

10. Considering that the award is of the year 2004, the court concerned shall make an endeavour to decide the objections expeditiously.

[AVNEESH JHINGAN]
JUDGE

1st March, 2023
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1. Whether speaking/ reasoned
- :
- Yes / No
2. Whether reportable
- :
- Yes / No