

**HIGH COURT OF JUDICATURE FOR RAJASTHAN
BENCH AT JAIPUR**

S.B. Civil Writ Petition No.13488/2019

Eptisa Servicios De Ingenieria SL, Through Executive Director
And Authorized Representative Mr. Swarup Chakrabarti, Aged
About 46 Years S/o Sh. Khangendra Chakrabarti, R/o Flat No. H-
35, Ideal Enclave, Gopalpur Rajarhat, Kolkata -700136

----Petitioner

Versus

Ajmer Smart City Limited, RUDSICO, Ajmer Through The Chief
Executive Officer, Kings Edward Memorial Hall, Opposite Railway
Station Ajmer, Rajasthan.

----Respondent

For Petitioner(s)	:	Mr. Ajatshatru Mina, Adv.
For Respondent(s)	:	Mr. Rajendra Prasad, Senior Advocate with Mr. Anshuman Saxena, Adv.

HON'BLE MR. JUSTICE ASHOK KUMAR GAUR

Reportable:-

Order

23/05/2022

This writ petition has been filed by the petitioner, challenging the order dated 27.05.2019 passed by the Commercial Court No.1, Jaipur, wherein application filed by the petitioner under Section 34 (4) of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as 'the Act of 1996'), has been dismissed.

Learned counsel for the petitioner submitted that the arbitral award dated 02.02.2019 has been put to challenge by the respondent by filing application under Section 34 of the Act of 1996 in the Commercial Court.

Learned counsel for the petitioner submitted that the petitioner moved an application under Section 34 (4) of the Act of 1996 to adjourn the proceedings in the application filed by the

respondent and asked to give an opportunity to the Arbitral Tribunal to resume the arbitral proceedings or to take such other action as in the opinion of the Arbitral Tribunal was required to eliminate the grounds for setting aside the arbitral award.

Learned counsel for the petitioner submitted that by filing application under Section 34 (4) of the Act of 1996, the petitioner pleaded that the arbitral award was passed on 02.02.2019 in favour of the petitioner while recording the findings in paras 50 & 54 of the award.

Learned counsel for the petitioner submitted that the petitioner pointed out before the court below that while passing the impugned award, the Arbitral Tribunal inadvertently did not take into account certain important facts such as:-

(i) the award of the Arbitral Tribunal omitted the adjudication on each issue to give findings on the issue separately.

(ii) Omitted to explain the words where "bare minimum principles of natural justice" and in "hyper technical ground" used in paragraph 50, while setting aside the impugned termination order dated 09.06.2017.

(iii) Omitted the reasons for providing INR Rs.4,80,00,000/- against loss of business, reputation & goodwill and omitted to assign explanation for setting aside the counter claim of the respondent-applicant in the appeal.

Learned counsel for the petitioner submitted that the power given to the Commercial Court under Section 34 (4) of the Act of 1996 was required to be exercised and the very object of the Act of 1996 was to give finality to the award and as per Section 34 (4) of the Act of 1996, the Arbitral Tribunal was required to be given

an opportunity to eliminate the grounds for setting aside the award under the provisions of Section 34 of the Act of 1996.

Learned counsel for the petitioner submitted that on the basis of judgment passed by the Apex Court in the case of **Kinnari Mullick & Anr. Vs. Ghanshyam Das Damani (AIR 2017 SC 2785)**; only three procedural formalities were to be considered while granting a relief under Section 34 (4) namely (i) a request by a party; (ii) the award must not have been set-aside under Section 34 (iii) there must exist grounds on which the award may be set-aside under Section 34.

Learned counsel for the petitioner submitted that while deciding the application by impugned order dated 27.05.2019, the court below has wrongly come to the conclusion that the petitioner was a respondent before the Court and he had not filed any objection against the impugned award.

Learned counsel for the petitioner submitted that the Tribunal has further committed an error in law by holding that precedent condition to move an application under Section 34 (4) is that a party must be aggrieved by the impugned award and had challenged the award under Section 34 for the deficiency in arbitral award.

Learned counsel for the petitioner submitted that the Tribunal has wrongly recorded a finding that bare perusal of the award passed by the Arbitral Tribunal showed that each issue had been taken separately and the contentions and issues were decided and all these aspects were required to be looked into at the time of final arguments.

Learned counsel for the petitioner submitted that the court below has not kept in mind the law laid down by the Apex Court in

the case of **Kinnari Mullick & Anr. Vs. Ghanshyam Das Damani** (supra) and in the cases of **Som Datt Builders Limited Versus State of Kerala (2009) 10 SCC 259** and **Dyna Technologies Private Limited Vs. Crompton Greaves Limited (2019) 20 SCC 1**.

Learned counsel for the petitioner submitted that the bare perusal of the award passed by the Arbitral Tribunal showed that the findings which have been recorded in paras 50 & 54, do not discuss and give the reasoning as why the principles of natural justice was not followed and why action of the termination order dated 09.06.2017, was termed as a hyper technical ground.

Learned counsel for the petitioner submitted that the very purpose of filing application under sub-Section (4) of Section 34 of the Act of 1996 will be frustrated if the party concerned will not be given an opportunity to request the Arbitral Tribunal for eliminating the grounds for the purpose of setting aside the arbitral award.

Learned counsel for the petitioner further submitted that the very purpose of filing an application under Section 34 (4) is to resort to record reasons on the finding already given in award or to fill up the gaps in the reasoning of the award.

Learned counsel for the petitioner submitted that as per law laid down by the Apex Court, all three conditions were fulfilled by the petitioner by moving an application and as such the court below could not have dismissed the application on the reasons assigned in the impugned order.

Learned counsel for the petitioner submitted that scope of Section 34 (4) of the Act of 1996 has been recently considered by

the Apex Court in the case of **I-Pay Clearing Services Private Limited Vs. ICICI Bank Limited (2022) 3 SCC 121**.

Learned counsel for the petitioner submitted that as per law laid down in the case of I-Pay Clearing Services Private Limited Vs. ICICI Bank Limited (supra), the discretion vested with the Court for remitting the matter to the Arbitral Tribunal ought to have been exercised and on bare reading of the award if there is any inadequate reasoning or certain gaps in the reasoning are required to be filled, if such application is filed, then it needs to be allowed.

Learned Senior Advocate-Mr. Rajendra Prasad appearing for the respondent submitted that the order passed by the court below does not require any interference by this Court under a writ petition filed under Article 227 of the Constitution of India.

Learned Senior Counsel submitted that if there is an inherent lack of jurisdiction then only this Court under Article 227 of the Constitution of India can exercise the jurisdiction.

Learned Senior Counsel also raised an objection that the present writ petition filed by the petitioner is not maintainable and proper remedy for the petitioner was to either file an appeal under Section 37 of the Act of 1996 or to take recourse under Section 13 of the Commercial Courts Act, 2015 (hereinafter referred to as 'the Act of 2015').

Learned counsel-Mr. Ajatshatru Mina appearing for the petitioner submitted that the objection raised by learned Senior Counsel-Mr. Rajendra Prasad is not sustainable as the petitioner had earlier filed D.B. Civil Misc. Appeal No.3255/2019 before this Court and Division Bench of this Court on 25.07.2019 granted permission to the counsel for the petitioner to withdraw the appeal

with liberty to file writ petition and accordingly the appeal was dismissed as withdrawn with liberty to file the writ petition.

Learned counsel for the petitioner submitted that the aforesaid decision of the Division Bench was based on a judgment passed by Bombay High Court where miscellaneous appeals have not been held maintainable and the only remedy prescribed was by way of filing writ petition.

This Court, does not deem it necessary to further dilute upon the issue of filing of the writ petition or the appeal which could have been filed by the petitioner under Section 13 of the Act of 2015 or under Section 37 of the Act of 1996.

Learned Senior Counsel for the respondent on the merits of the matter, submitted that in view of the judgment passed by the Apex Court in the case of **I-Pay Clearing Services Private Limited Vs. ICICI Bank Limited** (supra), the writ petition filed by the petitioner is liable to be dismissed.

Learned Senior Counsel for the respondent submitted that the reliance placed by learned counsel for the petitioner on the judgments i.e. Kinnari Mullick & Anr. Vs. Ghanshyam Das Damani (supra); Som Datt Builders Limited Versus State of Kerala (supra) and Dyna Technologies Private Limited Vs. Crompton Greaves Limited (supra), have all been considered by the Apex Court and the Apex Court has found that all these judgments were distinguishable and were of not any assistance to explain the scope of Section 34 (4) of the Act of 1996.

Learned Senior Counsel for the respondent submitted that the Apex Court after interpreting the scope of Section 34 (4) of the Act has come to the conclusion that on application being filed under Section 34 (4) of the Act of 1996, it is always not obligatory

for the Court to remit the matter to the Arbitral Tribunal and discretionary power under Section 34 (4) is to be exercised where there is inadequate reasoning or to fill up the gaps in the reasoning in support of findings, which are already recorded in the award.

Learned Senior Counsel for the respondent submitted that under the guise of additional reasons and filling up the gaps in the reasoning, no award can be remitted to the Arbitrator where there are no findings on the contentious issues in the award.

Learned Senior Counsel for the respondent submitted that under the guise of either additional reasons or filling up the gaps in the reasoning, the power conferred in the Court under Section 34 (4) cannot be relegated to an Arbitrator and in absence of any finding on the contentious issues, no amount of reasons can cure the defect in the award.

Learned Senior Counsel for the respondent submitted that bare perusal of the award passed by the Arbitral Tribunal reveals that as many as 15 issues were framed on the basis of pleadings, as raised by the claimant in his claim petition and two issues were framed in the counter claim.

Learned Senior Counsel submitted that though issues were framed by Arbitral Tribunal separately, however, the issues have not been decided separately and findings have been recorded in respect of only two issues that too by deciding the issues by giving common finding on the different issues.

Learned Senior Counsel for the respondent submitted that the arbitral award has already been put to challenge and it is for the appropriate court to decide objection under Section 34 of the Act.

Learned Senior Counsel further submitted that the reasons assigned by the court below while deciding the application filed by the petitioner may not be absolutely correct in the eyes of law, however, as per judgment of the Apex Court in the case of **I-Pay Clearing Services Private Limited Vs. ICICI Bank Limited** (supra), now it is no more *res integra* that application can be filed under Section 34 (4) but the court concerned has to decide the said application after considering the entire pleadings of the parties and the issues raised before it.

I have heard the submissions made by learned counsel for the parties.

This Court before giving its findings in respect of issues involved in the present writ petition, deems it proper to quote the main grounds raised by the petitioner in the application filed under Section 34(4) of the Act of 1996, which is reproduced as hereunder:-

- "7. That it is pertinent to mention herein that while passing the impugned award the Arbitral Tribunal inadvertently:
- a. Omitted the adjudication on each issue give findings on the issues separately.
 - b. Omitted to explain the words "bare minimum principles of natural justice" and "hyper technical ground" used in paragraph 50 while setting aside the impugned award dated 09.06.2017 as bad in law.
 - c. Omitted to provide the reason for awarding INR 4,80,00,000/- against loss of business, reputation and goodwill.

d. Omitted to assign explanation for setting aside the counter claim of the applicant/respondent.

This Court further finds that the grounds which were raised in support of the application, are narrated as under in brief:-

(i) The Arbitral Tribunal inadvertently omitted the adjudication on each issue to give findings and separate findings have been recorded. The Arbitral Tribunal omitted to explain the words "bare principles of natural justice" and "hyper technical grounds" in paragraph 50 of the award. Omitted to provide the reasons for awarding INR 4,80,00,000/- against loss of business, reputation and goodwill. Omitted to give explanation for setting aside the counter claim, omitted to assign reasons for rejecting the counter claim of the applicant and all these inadvertent omission makes the award susceptible to be set aside.

(ii) The Court should exercise its discretion under Section 34 (4) of the Act of 1996 to give the Arbitral Tribunal an opportunity to eliminate the grounds to set aside the impugned award.

(iii) The judgment passed by the Apex Court in the case of Kinnari Mullick & Ors. Vs. Ghanshyam Das Damani (supra) permitted to file an application on the request of a party and the award was not set aside and further there existed grounds on which award was liable to be set aside under Section 34.

This Court finds that the order dated 27.05.2019 has been passed by the court below by placing reliance on a judgment passed in **Union of India Vs. Madan Mohan Jain & Sons & Ors. 2019 (1) WLN 189 Raj.** and further the judgment passed

in the case of **Macdermott International Inc. Vs. Burn Standard Co. Ltd. 2006 (11) SCC 181.**

This Court finds that after decision given by the Commercial Court on 27.05.2019, the Apex Court has now considered the scope of Section 34 (4) of the Act of 1996 in the case of **I-Pay Clearing Services Private Limited Vs. ICICI Bank Limited** (supra), the relevant discussion by the Apex Court is quoted as hereunder:-

"19. As contended by learned senior counsel for the appellant, it is true that Section 34(4) of the Act is couched in a language, similar to Article 34(4) of the UNCITRAL Model Law on International Commercial Arbitration. In the case of AKN & Anr. v. ALC & Ors., by considering legislative history of the Model Law, it was held by Singapore Court of Appeals that remission is a 'curative alternative'. In the case of Kinnari Mullick and Anr. v. Ghanshyam Das Damani, relied on by learned senior counsel for the appellant, the question which fell for consideration was whether Section 34(4) of the Act empowers the Court to relegate the parties before the Arbitral Tribunal after setting aside the arbitral award, in absence of any application by the parties. In fact, in the said judgment, it is held that the quintessence for exercising power under Section 34(4) of the Act is to enable the Tribunal to take such measures which can eliminate the grounds for setting aside the arbitral award, by curing the defects in the award. In the judgment in the case of Dyna Technologies Pvt. Ltd. v. Crompton Greaves Ltd., it was a case where there was no inquiry under Section 34(4) of the Act and in the said case, this Court has held that the legislative intention behind Section 34(4) of the Act, is to make the award enforceable, after giving an opportunity to the Tribunal to undo the curable defects. It was not a case of patent illegality in the award, but deficiency in the award due to lack of reasoning for a finding which was already recorded in the award. In the very same case, it is also clearly held that when there is a complete perversity in the reasoning, then the same is a ground to challenge the award under Section 34(1) of the Act. The case of Som Datt Builders Limited v. State of Kerala is also a case where no reasons

are given for the finding already recorded in the award, as such, this Court held that in view of Section 34(4) of the Act, the High Court ought to have given Arbitral Tribunal an opportunity to give reasons.

20. The aforesaid case law cited by the learned counsel appearing for the appellant, is distinguishable on facts and would not render any assistance in this case. When it is the specific case of the respondent that there is no finding at all, on point no.1 viz. "whether the contract was illegally and abruptly terminated by the respondent?", remission under Section 34(4) of the Act, is not permissible. In our view, Section 34(4) of the Act, can be resorted to record reasons on the finding already given in the award or to fill up the gaps in the reasoning of the award. There is a difference between 'finding' and 'reasons' as pointed out by the learned senior counsel appearing for the respondent in the judgment in the case of Income Tax Officer, A Ward, Sitapur v. Murlidhar Bhagwan Das. It is clear from the aforesaid judgment that 'finding is a decision on an issue'. Further, in the judgment in the case of J. Ashoka v. University of Agricultural Sciences and Ors., this Court has held that 'reasons are the links between the materials on which certain conclusions are based and the actual conclusions'. In absence of any finding on point no.1, as pleaded by the respondent and further, it is their case that relevant material produced before the Arbitrator to prove 'accord and satisfaction' between the parties, is not considered, and the same amounts to patent illegality, such aspects are to be considered by the Court itself. It cannot be said that it is a case where additional reasons are to be given or gaps in the reasoning, in absence of a finding on point no.1 viz. "whether the contract was illegally and abruptly terminated by the respondent?"

21. Further, Section 34(4) of the Act itself makes it clear that it is the discretion vested with the Court for remitting the matter to Arbitral Tribunal to give an opportunity to resume the proceedings or not. The words "where it is appropriate" itself indicate that it is the discretion to be exercised by the Court, to remit the matter when requested by a party. When application is filed under Section 34(4) of the Act, the same is to be considered keeping in mind the grounds raised in the application under Section 34(1) of the Act by the party, who has questioned the award of the Arbitral Tribunal and the grounds raised in the application filed under Section 34(4) of the Act

and the reply thereto. Merely because an application is filed under Section 34(4) of the Act by a party, it is not always obligatory on the part of the Court to remit the matter to Arbitral Tribunal. The discretionary power conferred under Section 34(4) of the Act, is to be exercised where there is inadequate reasoning or to fill up the gaps in the reasoning, in support of the findings which are already recorded in the award. Under guise of additional reasons and filling up the gaps in the reasoning, no award can be remitted to the Arbitrator, where there are no findings on the contentious issues in the award. If there are no findings on the contentious issues in the award or if any findings are recorded ignoring the material evidence on record, the same are acceptable grounds for setting aside the award itself. Under guise of either additional reasons or filling up the gaps in the reasoning, the power conferred on the Court cannot be relegated to the Arbitrator. In absence of any finding on contentious issue, no amount of reasons can cure the defect in the award. A harmonious reading of Section 31, 34(1), 34(2A) and 34(4) of the Arbitration and Conciliation Act, 1996, make it clear that in appropriate cases, on the request made by a party, Court can give an opportunity to the arbitrator to resume the arbitral proceedings for giving reasons or to fill up the gaps in the reasoning in support of a finding, which is already rendered in the award. But at the same time, when it prima facie appears that there is a patent illegality in the award itself, by not recording a finding on a contentious issue, in such cases, Court may not accede to the request of a party for giving an opportunity to the Arbitral Tribunal to resume the arbitral proceedings. Further, as rightly contended by the learned counsel appearing for the respondent, that on the plea of 'accord and satisfaction' on further consideration of evidence, which is ignored earlier, even if the arbitral tribunal wants to consciously hold that there was 'accord and satisfaction' between the parties, it cannot do so by altering the award itself, which he has already passed."

This Court finds that now application under Section 34 (4) of the Act of 1996 is required to be decided by the Court, by exercising its discretionary powers and same powers cannot be exercised under the guise of additional reasons and filling up the

gaps in the reasoning and as such award cannot be remitted to the Arbitrator/Arbitral Tribunal and particularly if there are no findings on the contentious issues in the award.

This Court finds that the petitioner in his application has mentioned that there are no findings on each issue separately by the Arbitral Tribunal and findings which have been recorded by ignoring the material available on record, which can be a ground for setting aside the award itself.

This Court finds that under the guise of additional reasons and fill up the gaps in the reasoning, no award can be remitted to the Arbitrator, where there are no findings on the contentious issues in the award. This Court further finds that if there are no findings in contentious issues in the award or if any findings are recorded ignoring the material evidence on record, the same are acceptable grounds for setting aside the award itself. Under the guise of either additional reasons or to fill up the gaps in the reasoning, the power conferred with the Court can only be relegated to an Arbitrator and in absence of findings on contentious issues, no amount of reason can cure the defect in the award.

The aforesaid principle which has been laid down by the Apex Court, needs to be applied in the present facts of the case. The petitioner has specifically pleaded in his application that findings on contentious issues have been recorded separately.

This Court further finds that the ground of challenge of award by the respondent is also on the separate issues not being decided by the Arbitral Tribunal by giving findings and reasons.

This Court finds that the facts of the present case do not warrant that matters should be reverted back to the Arbitral

Tribunal now to give its own additional reasoning or to fill up the gaps in the reasoning.

This Court finds that in the present facts of the case, the petitioner while filing an application under Section 34 (4) of the Act of 1996, seeks a prayer to eliminate the grounds for setting aside the award as per pleas raised by him in his application.

The submission of learned counsel for the petitioner that as per law laid down by the Apex Court in the case of I-Pay Clearing Services Private Limited Vs. ICICI Bank Limited (supra), the court below should have remitted to Arbitral Tribunal for recording reasons on the finding already given in the award or to fill up the gaps in the reasoning in the award, as there is a difference between finding and reasoning and as such if the reasons are not coming forward in the Arbitral Award, the proper course was to allow application of the petitioner under Section 34 (4) of the Act of 1996, this Court is afraid to accept submission of learned counsel for the petitioner to hold that the prayer sought by the petitioner in his application was only with regard to the reasons required to be furnished because findings were already recorded by Arbitral Tribunal.

This Court finds that the order dated 27.05.2019, though has been passed on different reasoning of not allowing the application of the petitioner, however, in view of law laid down by the Apex Court in the case of I-Pay Clearing Services Private Limited Vs. ICICI Bank Limited (supra), the application so filed by the petitioner cannot be allowed.

This Court, accordingly without interfering in the order dated 02.02.2019, finds that the application filed by the petitioner under Section 34 (4) of the Act of 1996 is not liable to be entertained.

This Court finds that the writ petition lacks merit and the same is accordingly dismissed.

(ASHOK KUMAR GAUR),J

Ramesh Vaishnav/86

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RAJASTHAN HIGH COURT



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