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Setting Aside of the Arbitral Award: Scope of Section 34

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ABSTRACT

Setting aside the Arbitral Award: Scope of Section 34" is a subject of importance because Section 34 of the Act provides an insight into an arbitral tribunal's procedure for setting aside an arbitral award that involves the Court's intervention to set aside the award. For the smooth functioning of the arbitration system, assistance from the courts is required, but excessive intervention by the Court in the case of entertaining applications against arbitral awards must be avoided, as it would cause an unnecessary delay in arbitral proceedings, thereby defeating the objective of the Act. The Arbitration Act of 1940 failed to resolve the vagueness of the term "public policy of India" and the grounds for setting aside the arbitral award were also not clearly defined, thus giving the judiciary the opportunity to interpret them in accordance with their understanding and thus to increase the opportunity for judicial intervention in the arbitral process. The Arbitration and Conciliation Act, 1996 and the amendments made under the Arbitration and Conciliation (Amendment) Act, 2015 gave Section 34 of the Act a definite character and resolved certain issues related to it. This paper assesses Section 34 of the Act of 1996 and its amendments and the scope of judicial intervention. In addition, the amendments brought about by the 2015 Amendment Act were also evaluated, including the concept of "India's public policy."

Keywords: *arbitration, setting aside arbitral award, section 34 of arbitration and concilaition act, 1996, public policy, patently illegal.*

I. INTRODUCTION

Section 34 of the Arbitration Act 1996 frequently comes under judicial focus, especially in view of the legislative policy that the judicial interference and super vision in the matters of arbitration should be minimal.

Arbitration as an alternative dispute resolution mechanism is very much necessary as per Indian scenario because there are about 90 lakh cases which are pending in all courts in our country. Thus arbitration and other dispute mechanism can take this Burdon and can provide

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with speedy justice in conflicts of commercial disputes.

II. SCOPE OF SECTION 34

1. Amendments

- *The 1940 act was repealed*
- *The Act of 1996 UNCITRAL Model Came into existence*
- *2015 and 2019 amendment (Important in terms of section 34)*

2. Section 34 reads Application for setting aside arbitral award

- There is no *suo moto* jurisdiction
- Recourse to a Court against an arbitral award may be **made only by an application for setting aside(Clause 1)**

Note – *The Proceedings under* ***section 34*** *are summary in nature, to ensure expeditious disposal of case.*

2.1. An arbitral award may be set aside by the Court only if

Note - *Only if means accept the grounds which are mentioned under 32(2), an award cannot be set aside*

- ***34 (2) (a)*** **the party making the application furnishes proof that** ***(establishes only on the basis of record of arbitral tribunal – 2019 amendment)***

2.1.1 Grounds

1. Incapacity –(Physical and Mental both)
2. arbitration agreement is not valid under the law
3. **Audi alteram partem** – *where a party not being given a notice*
4. the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration
5. Composition of Tribunal is not according to the terms of the agreement.

2.2 Arbitrability of a dispute

- **What matters are not arbitrable (34 2(b) 1**)
    - Section 8

- Right in Rem
- Criminal cases
- Status of an individual or a thing
- Matrimonial*(Sale, Custody, divorce)*
- Patent
- Insolvency

2.3 Public Policy

(b) the Court finds that—

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

(ii) the arbitral award is in conflict with the public policy of India.

It is a very unruly horse, and when once you get astride it you never know where it will carry you - ***Richardson v Mellish* (1824) 2 Bing 229, 252**

Courts have described the concept as an unruly horse, which could lead anywhere as well that *"with a good man at the saddle, the unruly horse can be tamed and jump over obstacles"*

The first pronouncement regarding the concept was in the case of ***Renusagar Power Co. v General Electric Co, AIR 1994 SC 860***

The Court held that the term 'public policy' under section 7 of the Foreign Awards Act 1961, meant exclusively the public policy of India. It further went on to hold that since the Act provided that the enforcement of a foreign award may be refused if it violates Indian law or public policy, the separation of the two grounds would indicate that there had to be more than a violation of Indian Law for there to be a contravention of public policy. The Court proceeded to lay down the scope of the public policy consideration as being restricted to: –

1. *The Fundamental Policy of Indian Law*
2. *The interests of India*
3. *Justice and Morality*

In the case of ***Oil and Natural Gas Corporation Ltd v SAW Pipes Ltd (2003) 5 SCC 705*** it was held that if the award passed by the Tribunal was patently illegal, or in direct conflict with a statutory provision, an enforcement of the award would be contrary to public policy.

In accordance with the Latest Judgment and 2015 Amendment, Justice Nariman's Judgement

in ***Associate Builders v Delhi Development Authority*** will be read in the light of such amendments.

The amendment which was carried out in 2015 was on the basis of ***246th Law Commission Report*** which was submitted by *Justice A P Shah.*

- ***Amendment 2015***

[Explanation 1.—For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, ***only if,—***

Note- *what they are clarifying is what would be the public policy which can be a ground for setting aside of an award*

(i) the making of the award was induced or affected by ***fraud or corruption*** *or was in violation of section 75 or section 81; or*

(ii) it is in contravention with the fundamental policy of Indian law; or

(iii) it is in conflict with the most basic notions of morality or justice.

Note – *Section 75 deals with the confidential matters and 85 deals which the statements that are made in conciliation or in any other dispute resolution mechanism.*

2.4 fundamental policy of Indian law

In ***Oil and Natural Gas Corporation v Western Geco AIR 2015 SC 363***, it was held that the 'fundamental policy of Indian Law', was a concept that included three basic principles:

- ***Firstly,*** that a 'judicial approach' was adopted in the making of the award,
- ***Secondl,y*** that the principles of natural justice were followed by the Tribunal and
- ***lastly,*** ,that the award was not so perverse and unreasonable that it offended the conscience of the Court. (Irrationality)

Note **-** To test whether the award was unreasonable, the Court applied the test of reasonableness, as was famously propounded in the *Wednesbury* case.

In ***Associate Builders v Delhi Development,*** the Court after analyzing its ruling in ***Western Geco,*** held that the term 'fundamental policy of Indian law' included in addition to: –

a) *Judicial approach;*
b) *Principles of natural justice;*
c) *Wednesbury reasonableness,*

d) the doctrine of stare decisis is followed.

e) Section 18 and section 34(2) (a) (3) of 1996 act will still hold

Explanation 2.—For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute.

2.5 Patent illegality

Patent illegality was removed from public policy and then made applicable only in respect of the domestic award

[(2A) An arbitral award arising out of arbitrations other than international commercial arbitrations, may also be set aside by the Court, if the Court finds that the award is vitiated by patent illegality appearing on the face of the award: Provided that an award shall not be set aside merely on the ground of an erroneous application of the law or by reappreciation of evidence.]

In ***Associate Builders v Delhi Development,*** the Court after analyzing its ruling in ***Western Geco,*** The Court has elaborated on the concept of 'patent illegality' as including the following:-

*(i) Violation of a statute that is the substantive law of India, including the Arbitration Act,;**(Section 28 (1) (a))***

*(ii) Error of law by the Tribunal**;***

*(iii) A failure to consider prevailing trade usages or terms of the contract;**(section 28(3))***

*(iv) An award without reasoning for the same being provided; **(Section 31(3))***

(v) Fraud or corruption.

Justice Nariman view

"Illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that award is against the public policy. Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court. Such award is opposed to public policy and is required to be adjudged void.

2.6 Other aspects

2.6.1. Automatic stay of the award in the application filed under section 36

Before 2015 amendment, once an application under ***section 34*** is filed the award is automatically stayed but that was changed after the amendment which was made under ***section 36*** in which it was made clear unless an order has been passed with the court has no automatic stay.

2.6.2 Applicability of 2015 amendments to the arbitration which was commenced prior to 2015 judgments.

In ***Board of Control for Cricket in India*** **v.** ***Kochi Cricket Pvt. Ltd. & Etc***[15] **("BCCI Matter"):** Applicability of 2015 Amendments to proceedings under Section 34 and Section 36 of the 1996 Act

The SC, speaking through Justice Rohinton Fali Nariman, in relation to proceedings under Section 34 and Section 36 of the 1996 Act, interpreted Section 26 of the Amendment Act. The judgement disposed of some matters mentioned in Second section, against which appeals were filed before the SC, as the same were tagged along.

The SC has observed and held as under:

Section 26 is divided into two parts, which are separate and distinct.

The first part, which states, "*Nothing contained in this Act shall apply to the arbitral proceedings commenced, in accordance with the provisions of section 21 of the principal Act, before the commencement of this Act unless the parties otherwise agree...*" is that:

> *(1) "the arbitral proceedings" and their commencement is mentioned in the context of Section 21 of the principal Act;*
>
> *(2) the expression used is "to" and not "in relation to"; and*
>
> *(3) parties may otherwise agree.*

So far as the second part of Section 26 is concerned, namely, the part which reads, "*...but this Act shall apply in relation to arbitral proceedings commenced on or after the date of commencement of this Act*" makes it clear that the expression "in relation to" is used; and the expression "the" arbitral proceedings and "*in accordance with the provisions of Section 21 of the principal Act*" is conspicuous by its absence. Since the word "to" is used in the first part, the first would cover only arbitration proceedings i.e. proceedings before an arbitrator. Likewise, the second part will cover proceedings which arise out of arbitral proceedings

before Court.

That the Amendment Act is prospective in nature, and will apply to those arbitral proceedings that are commenced, as understood by Section 21 of the principal Act, on or after the Amendment Act, and to Court proceedings which have commenced on or after the Amendment Act came into force.

On the impact of the Amendment Act on the proceedings under Section 36 of the 1996 Act in relation to proceedings under Section 34 of the 1996 Act, which have been filed before the commencement of the Amendment Act, the SC held that:

- Proceedings under Section 36 shall also be governed by the Amended Act as that execution of a decree pertains to the realm of procedure, and that there is no substantive vested right in a judgment debtor to resist execution, Section 36, as substituted, would apply even to pending Section 34 applications on the date of commencement of the Amendment Act.
- The words "has been" used in Section 36(2) in relation to filing of petition under Section 34 of the Act will be a factor suggesting that petitions under Section 36 post the Amendment Act will also be governed by the amended provisions.
- From a practical point of view, it is sheer unfair for the award holder as the un-amended provision granted an automatic stay to execution of an award before the enforcement process of Section 34 was over, which court noted that stay order could last for a number of years, and when such stay orders are passed without having to look at the facts of each case, it is clear that Section 36 as amended should apply to Section 34 applications filed before the commencement of the Amendment Act also for the aforesaid reasons.

2.6.3. Seat/venue/place saga

In ***Bharat Aluminium Co v Kaiser Aluminium Technical Service, Inc (2012) 9 SCC 552.,*** the constitution bench dealt with this aspect in a very detained manner and held in that the court with jurisdiction over the place where a cause of action arises is competent to hear a Section 34 application. **Paragraph 96 states that:**

In such circumstances, both the Courts would have jurisdiction, i.e., the Court within whose jurisdiction the subject matter of the suit is situated and the courts within the jurisdiction of which the dispute resolution, i.e., arbitration is located.

A plain reading of this paragraph indicates that in ***BALCO*** the Supreme Court allowed for

two courts to have jurisdiction over arbitration applications***: the court of the seat and the court of the cause of action.***

However, in ***BALCO*** the court went on to give detailed consideration to the English judgment in ***Roger Shashoua v Mukesh Sharma, [2009] EWHC 957 (Comm).***which clearly states that:

- the courts of the seat of an arbitration have exclusive jurisdiction over all proceedings arising from said arbitration; and
- The allowance of multiple venues is only a matter of convenience

BALCO even acknowledges that the terms 'seat' and 'place' are used interchangeably.

Note - *SC Reverts the View Taken In Roger Shashoua and BALCO*

The Supreme Court in ***Indus Mobile Distribution Private Limited v Datawind Innovations Private Limited*** **(2017) 7 SCC 678** observed that no uncertain terms, that the designation of a seat of arbitration is tantamount to conferment of exclusive jurisdiction on the appropriate court at the seat of arbitration.

(a) Antrix contrary to established law

In ***Antrix Corporation Ltd v Devas Multimedia Pvt Ltd, 2018 (4) ArbLR 66 (Delhi)*** the basis of **Paragraph 96 of *BALCO*** – the Delhi High Court held that the court which has jurisdiction over the place where a cause of action arises has concurrent jurisdiction with the courts in the place of arbitration.

(b) The Hardy Exploration conundrum

In ***BGS SGS SOMA JV v NHPC Ltd 2019 (17) SCALE 369***, The SC held that the decision in (*Hardy Exploration*) is incorrect in its conclusion that the 'venue' of arbitration need not be the juridical seat, unless there are 'concomitant factors' which indicate that the parties intended for the venue to also be the seat.

This was because *Hardy Exploration* ignores *Roger Shashoua*, *BALCO's* reliance thereon, and the Indian leg of the *Roger Shashoua* case (*Roger Shashoua & Ors v Mukesh Sharma & Ors* ((2017) 14 SCC 722)), all of which uphold that a venue of the arbitration is the juridical seat, in the absence of any significant contrary indicia. By allowing Indian law to apply to the arbitration agreement which designated Kuala Lumpur as the venue, *Hardy Exploration*, in effect, allowed a foreign award to be challenged under Section 34 of the Arbitration Act, undoing any progress made post-*BALCO*.

Therefore, the SC held, "*Hardy Exploration and Production (India) Inc. (supra), being contrary to the Five Judge Bench in BALCO (supra), cannot be considered to be good law*."

In ***BGS SGS SOMA JV v NHPC Ltd,*** the court decided key issues relating to the interpretation of arbitration clauses and the scope of appealable orders under the Arbitration and Conciliation Act 1996.

In particular, the Supreme Court held that:

- an appeal against an order transferring proceedings under Section 34 of the Arbitration Act is not maintainable under Section 37 of the act;
- the designation of a seat confers exclusive jurisdiction on the courts of said seat; and
- a place of arbitration – regardless of its designation as a seat, venue or place – is the juridical seat of arbitration unless there is an indication to the contrary

In the present case, the Supreme Court disagreed with ***Antrix's*** interpretation of ***BALCO*** and ***Section 42*** of the act in light of a holistic reading of the rest of the ***BALCO*** judgment and ***Roger Shashoua.*** Accordingly, in the present dispute, the courts of the place of arbitration had exclusive jurisdiction to hear the ***Section 34 application***.

- Through its decision, the Supreme Court has specifically declared that its earlier judgment in ***Antrix*** and **Hardy Exploration** was incorrect
- SC upheld ***Indus Mobile Judgement***

(c) Supreme Court Reopens the Issue of "Venue" versus "Seat"

In ***Mankastu Impex Private Limited v. Airvisual Limited 2020 SCC OnLine SC 301*** it was observed **"***It is well-settled that "seat of arbitration" and "venue of arbitration" cannot be used inter-changeably. It has also been established that mere expression "place of arbitration" cannot be the basis to determine the intention of the parties that they have intended that place as the "seat" of arbitration. The intention of the parties as to the "seat" should be determined from other clauses in the agreement and the conduct of the parties."*

III. CONCLUSION

The main objective of arbitration is to ensure the delivery of a legitimate award in the interest of justice, which is why the law allows the courts, in certain cases, to intervene in arbitral proceedings. In addition, the hearing of applications under Section 34 by the courts should not be reduced to mere endorsement that shies away from interference. In order to achieve the true objective of the 1996 Act, a balanced approach is required by the courts. The recent

decisions discussed above point in this direction, but further rulings that take into account the post-2015 amendment scenario are required to further clarify these issues. In order to reduce judicial interference, the courts must decide where to draw the line while at the same time delivering justice in a manner that upholds the spirit of Section 34 of the 1996 Act.

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IV. REFERENCES

- Under Section 30, the grounds for setting aside an award are as follows:
    - *An award shall not be set aside except on one or more of the following grounds, namely: -*
    - *that an arbitrator or umpire has misconducted [themselves] or the proceedings*
    - *that an award has been made after the issue of an order by the Court superseding the arbitration or after arbitration proceedings have become invalid under section 35;*
    - *that an award has been improperly procured or is other- wise invalid.*
- (1981) 4 SCC 634; also refer to *FCI v Joginderpal Mohinderpal* (1989) 2 SCC 347.
- The act sought to address complaints by foreign investors that despite its wealth of resources, the prospect of dispute settlement in India was too daunting. The model laws and rules were already being widely used internationally; thus, India joined the international consensus on their use.
- *P Anand Gajapathi Raju v PVG Raju* (2000) 4 SCC 539 at p541.
- Extent of judicial intervention: "Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except so provided in this Part".
- *Indu Engineering and Textiles Ltd v Delhi Development Authority* (2001) 3 SCR 916.
- Prior to the 2015 amendment.
- Prior to the 2015 amendment.
- A contract against public policy under Section 23 of the Contract Act 1872. It was interpreted by the Supreme Court in *Gherulal Parakh v Mahadeo Das* (1959) Supp (2) SCR 206, which stated that public policy is an untrustworthy guide. It is also noteworthy that the United Kingdom protested against the inclusion of the term by writing a note pointing out the difference between civil and common law countries. However, the United Nations Commission on International Trade Law agreed to retain public policy as a ground of challenge.

- In *Holman v Johnson,* Lord Mansfield stated that the principle of public policy is *ex dolo malo non oritur actio*. No court of law will lend its aid to a party which acts immorally or illegally.
- *Richardson v Mellish* [1824] 2 Bligh 229, 242.
- *Oil & Natural Gas Corporation Ltd v Saw Pipes Ltd* (2003) 5 SCC 705.
- *Renusagar Power Co Ltd v General Electric Co* (1994) SCC Supl (1) 644.
- *Oil & Natural Gas Corporation Ltd, supra.*
- *ONGC Ltd v Garware Shipping Corporation Ltd*, 2007 (13) SCC 434; *Delhi Development Authority v RS Sharma*, 2008 (13) SCC 80; *Phulchand Exports Ltd v OOO Patriot* (2011) 11 SCALE 475.
- *Centrotrade Minerals & Metals Inc v Hindusthan Copper Limited* (2006) (2) ARBLR 547.
- (2006) 11 SCC.181.
- Supplementary Report to Report 246, government of India.
- *Ibid*, Paragraph 10.2.
- (2014) 9 SCC 263, Paragraphs 35, 38 and 39.
- (2015) 3 SCC 49.
- Supplementary Report to Report 246, *supra*, Paragraph 10.6.
- *Explanation to Section 34 (2) (b)*
- *Explanation 1.— For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if—*

  i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or

  ii) it is in contravention with the fundamental policy of Indian law; or

  iii) it is in conflict with the most basic notions of morality or justice.
- *Explanation 2— For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute.";*

- *(2A) An arbitral award arising out of arbitrations other than international commercial arbitrations, may also be set aside by the Court, if the Court finds that the award is vitiated by patent illegality appearing on the face of the award: Provided that an award shall not be set aside merely on the ground of an erroneous application of the law or by reappreciation of evidence.*
- (2019) 3 SCC.
- Equal treatment of parties: "The parties shall be treated with equality and each party shall be given a full opportunity to present [their] case."
- Civil Appeal 673/2012.
- Special Leave Petition (C) 3584-85 of 2020 (*Patel Engineering Limited v North Eastern Power Corporation Limited*) Paragraph 22.

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