Setting Aside of Arbitral Awards under section-34 of Indian Arbitration and Conciliation Act, 1996: An Ambiguity of Legal Interpretation.

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Abstract: *The topic "Sec.-34 of Arbitration and conciliation Act: An ambiguity of Legal Interpretation" is a topic of sincere concern and relevance in the field of legal interpretation of the grounds for setting aside of arbitral awards. The provision talks about the interference of court while entertaining any claim made against an arbitral award rendered by Arbitrational Tribunal. In this context the Arbitration Act of 1940 and Arbitration and Conciliation Act of 1996 has somehow failed to provide a specific dimension to the term 'Public Policy' along with the other grounds for setting aside of Arbitral Awards and as a result it gave a broad opportunity and instance for inducing interference of the Judiciary in entering the ambit of Arbitration. The various amendment made in Arbitration and Conciliation Act 1996 has somehow managed to provide a so called close end to the definition of 'Public Policy' but still it is an area which needs various modification in to make the practice of setting aside of Arbitral award an exception and not a regular practice. In this article the various amendments made in Sec.34 of Arbitration and Conciliation Act, 1996 has been evaluated along with highlighting the drawbacks and loopholes which are facilitating towards non execution of arbitral awards.*

Keywords: Arbitration, Setting aside of arbitral awards, Public Policy, Justice and Morality, Fundamental Policy of Indian Laws.

INTRODUCTION

Arbitration, a private dispute resolution process or a procedure and part of alternative dispute resolution mechanism, where a dispute in concern to any agreement between the parties is proposed for solution to one or more arbitrators, who after going through the facts and evidences makes binding decisions in relation to such dispute. The decision which is given by the arbitrator through arbitration tribunal is called an **'award'** and is cognate to the decision or judgment given

by a Court of law. In recent time as a result of dynamic growth of industrialization and globalization the excessive burden of judiciary that has been the consequence of large number of pending cases due to lengthy court procedures has resulted in making arbitration a time efficient and dependable way for dispute resolution not only in India but throughout the globe. Moreover, arbitration by providing flexibility to the procedure of dispute resolution also establishes a much extensive and wider room for negotiation between the parties having dispute. The main focus behind introducing arbitration as a dispute redressel mechanism was to provide a fast and speedy dispute resolving process as well as making it cost effective as compared to general court proceedings. But in recent time due to the influence of Courts in matters related to setting aside of arbitral awards, has somehow entered the ambit of legislation and consequently has hampered the primary objective of arbitration i.e. fast and speedy settlement of disputes outside the Court. The provisions for setting aside of arbitral awards as stated in Sec.-34 of the Arbitration and Conciliation Act, 1996 says:

"Sec.34. Application for setting aside arbitral award.—(1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and subsection (3).

(2) An arbitral award may be set aside by the Court only if—

(a) the party making the application furnishes proof that—

(i) a party was under some incapacity, or

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) 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:

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or

(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.

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 re-appreciation of evidence…**"**[1]

Earlier in the 18th Century as an effect of first Real Bills of Right, 1689 in England, the English Parliament for the first time proposed the mechanism of controlling a private tribunal by the Court of Kings bench. In this concern it was also proposed that from now the only ground for setting aside an arbitral award given by the bench would be – **Bribery and fraud**.

With the passage of time the necessity of law also changed and as a result in the later 20th century through various modification which happened in arbitrational law in both domestic and international aspect of arbitration, different provisions were adopted for setting aside of arbitral award including the ground of "award carrying an error of law apparent on its face"; Kent v. Elestob[2], which was basically a principle of administrative law.

The Indian Arbitration Act 1940 was amongst the initial statute for regulating arbitrational law in India which was later replaced by Arbitration and Conciliation Act of 1996, an act based on the UNCITRAL model of law on International Commercial Arbitration. Later the Arbitration and Conciliation Act 1996 does away with the domestic Act of 1940, Foreign arbitration Act of 1961, Geneva convention , New York convention and brings arbitration in one act constituting 4 parts - Domestic scenario , New York convention part, Geneva convention and Miscellaneous

[1] *Sec.34 of Arbitration and Conciliation Act,1996*
[2] *Kent v. Elstob,3 East, 13.*

Provisions. But the main deficit that continued behind non-execution of arbitral award given by the Tribunal is the inclusion of term **Public Policy** containing the word **Justice and Morality** and **Fundamental Policy of Indian Laws** along with **Patent illegality** which is somehow again creating confusion and extending the ambit of grounds for setting aside of arbitral awards.

AMBIGUITY OF 'PUBLIC POLICY

The ambiguity in term of interpretation of word Public Policy has led to a great extent towards failure in execution of Arbitral Awards. The Act of 1996 in Chapter VII- Recourse against Arbitral Awards inserted under section 34 (2) (b) (ii), the concept of **Public Policy**. Moreover in context with the provision of this Act in relation to setting aside of arbitral award, the Indian court for the first time confronted with the problem of interpretation of the term public policy. In the case of ***Renusagar Power Corporation Ltd v. General electric Company***[3](i.e. 2 years before the 1996 Act) laid down the so called narrow view of interpretation of term public policy as an award which is against-

a) Fundamental Policy of Indian Laws
b) Interest of law
c) Contrary to Justice and Morality (which covers a wide aspect of both justice and morality as it comprises of more or less everything that comes under the ambit of justice)

This Interpretation of the *Renusagar Power Co. Ltd V. General Electric Co.* was later in the year 1996 made the part of the Act as a provision for setting aside the arbitral award under the head of the public policy.

Later when the Act of 1996 came into force, the draft men of this act bodily lifted the Article 5 of New York Convention and inserted it as Section 34 and 48 of the Arbitration Act 1996 in context to both Domestic and International scenario respectively. Therefore it resulted in the beginning of a Renusagar era, where the term public policy was defined and construed by two vague statements namely **–'Fundamental Policy of Indian Law' and 'Justice and Morality'.**

Further it was also observed that the Renusagar case in its judgment established the criteria to differentiate between errors of law (mentioned in 1940's Act) and Fundamental Policy of Indian law, but it somehow failed to make a specific distinction between the public interest and other interest as in cases it is quite possible and obvious that there can be differences between public interest to that of government interest or individual interest.

Later on and in accordance with the recommendation made in 246th law commission report under the chairmanship of Hon'ble Justice A.P. Shah certain amendments were made in context to the interpretation of the term **public policy**, where a part of it dealing with justice and morality was

[3] *1994 SCC Supl. (1) 644.*

given a close end and confined to **basic notion of justice and morality** i.e. something that has shocked the entire notion of the legal system and also the term fundamental policy of Indian laws was interpreted under Explanation 2 as*" for the avoidance of any 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 disputes*[4]*."*

PERPLEXITY OF PATENT ILLEGALITY

The perplexity of term Patent Illegality has also resulted in enlarging the dimension of the grounds for setting aside of Arbitral Awards. The Hon'ble Supreme Court while interpretating the term public policy in ***ONGC Ltd. V. Saw Pipes Case***[5], expanded its meaning and held that the word public policy should be interpreted both narrowly and widely depending upon the facts and circumstances of the case and inserted a new head of "Patent Illegality"rather than dealing with the inconsistency of the word fundamental policy of Indian law and justice and morality. Through the amendment of arbitration and conciliation act 1996 the term patent illegality was inserted as section 2A of the Act which again induces an additional ground for setting aside of arbitral award on the contrary the term patent illegality was provision which is applicable only to the arbitration proceeding taking place in India and not in context to international commercial arbitration as the same can be observed from the language of 2A stating-" an arbitration award arising out of arbitration other than international commercial arbitration……"[6]Moreover the award which is in contravention to the provisions of arbitration and conciliation act 1996 is considered to be patently illegal and such an award cannot be enforced as it is considered to be null and void.

The Supreme Court *in* ***Associate Builders V. Delhi Development Authority***[7] in 2014 explained the dimension of patent illegality and state that **patent illegality** includes :

a) Fraud or corruption
b) Contravention of substantial law
c) Errors of law by Arbitrator
d) Contravention of Arbitrator and Conciliation Act of 1996
e) The Arbitrator fails to give consideration to the terms of contract and usages of trade under section. 28(3) of the Act
f) Arbitrator fails to give reasons for his decision

ILLUSION OF SEC.-28(3)

Moreover another obstruction which is being faced while restraining the dimension of the provisions relating to setting aside of arbitral award is the illusion created by Sec.- 28(3) which

[4] *Explanation 2 of Sec.34 of Arbitration and Conciliation Act,1996*
[5] *(2003) 5 SCC 705: AIR 2003 SC 2629*
[6] *Sec.2A of Arbitration and Conciliation Act, 1996*
[7] *2014 (4) ARBLR 307(SC)*

states that" *while deciding an making an award the arbitral tribunal shall in all cases take into account the terms of the contract and trade uses applicable to the transaction*[8]*"*, meaning thereby under the virtue of above provision an arbitration is restricted and confined by the laws of contract and trade usages while dealing with any matter of arbitration. The arbitration is not conferred with the power of ex aequoet bono(in accordance to what is just and good) in order to decide any arbitrational matter but can do where the parties have expressly so authorized him to do so and hence an arbitrator cannot decide any matter in accordance to what he feels to be right and just. As a result it is again providing and extending the grounds of setting aside of arbitral award as in cases where the arbitrator acts in accordance with what it observes to be right and just in deciding award, the same gets challenged on the ground of validity of contract as mentioned in Sec.-28(3) of the Arbitration and Conciliation Act, 1996.

"An arbitrator cannot act arbitrarily, irrationally, capriciously or independently of the contract. His sole function is to arbitrate in terms of contract. He has no power apart from what the parties have given him under the contract. If he has travelled outside the bounds of the contract, he has acted without jurisdiction. A conscious disregard of the law or the provisions of the contract from which has derived his authority vitiates the award[9]"

Since the arbitrator is bound by the terms if the contract as stated in section 20(3), in circumstances where the court and the arbitrator have varied opinion in the validity if the contract, it results in conflict with concern to the award declared and hence outgoes the award. Therefore this obligatory provision of mentioned above has created a broad vacuum in context of enforceability of arbitral award in this country and as a result of which the award are getting set aside much excessively then it would have had.

INSERTIOIN OF SCHEDULE -8

Moreover the incorporation of Schedule VIII by the 2019 Amendment of the Arbitration and Conciliation Act 1996 has inserted a provision in concern to conflict or constraints in the part of arbitrators. In the recent amendment a provision for the qualification and experience in case of appointment of arbitrators is given where the whole panel is consisting of arbitrators who are Indian nationals for both domestic and international arbitrators which according to the contemporary status of arbitrations is a major drawback or lacuna in the act as if India is planning to make itself a arbitration hub in order to attract person of foreign seat to this country, it will be very difficult to convince them to rely on a arbitration tribunal with only Indian nationals as arbitrators and no involvement of foreign expert or a neutral arbitrator from a different country other than the disputing countries. Therefore the provision of Schedule VIII is apparently resulting in increasing the possibility of an award getting set aside.

[8] *Sec.-28(3) of Arbitration and Conciliation Act,1996.*

[9] *Associated Engg. Co. v. Government of Andhra Pradesh, (1991) 4 SCC 93 : AIR 1992 SC 232 : 1991 (2) Arb LR 180.*

The Indian arbitration system and laws has always taken a meandering approach with various forward and backward thrust, where the forward thrust can be acclaimed as Renusagar case in 1994 while the backward thrust was the Saw Pipe Case in 2002. Nevertheless the various amendments which have been done to 1996 Act by and under the purview of 246th law commission report has approached arbitration in a positive manner. The amendment in concerned to section 34 where the ambit of justice and morality was construed to basic notion of justice and morality somehow managed to provide a close end to the undefined ambit of public policy as well as manage to fill the lacuna but still it is the field which needs various modification in order to establish arbitration as an undisputed conflict resolving mechanism.

RECOMMENDATION OF JUSTICE B.N.KRISHNA

Justice B. N. Krishna in his report titled "(HIGH LEVEL COMMITTEE TO REVIEW THE INSTITUTIONALISATION OF ARBITRATION MECHANISM IN INDIA)[10] has suggested various recommendation the most important of which-

1) Establishment of a arbitrational counsel that is a body to regulate the arbitration laws in India
2) The establishment of an specialist arbitration bar and to provide specific and specialized training to the judges in order to deal with the arbitration matter in a much more technically equipped way is still lacking
3) Here I will not fail to quote a very important recommendation to constitute a standing committee under the ambit of APCI (Arbitration Promotion Council of India) to review the development in Indian arbitrational law and practices and to recommend timely legislative and other changes to the government.

The commission shall comprises of-

- Leading arbitrators
- Arbitration practitioners
- Arbitration institutions
- Judges
- Representative from industrial bodies
- Expert from foreign jurisdiction.

4) Another recommendation was instead of waiting for the court to clear ambiguity in legislation through case laws, the legislature can be proactive to ensure that the arbitration counsel and act keeps pace with the development of arbitration."

[10] High Level Committee to Review The Institutionalization of Arbitration Mechanism in India,2019

CONCLUSION

At last it can be concluded that in making India a arbitration hub and to lower the burden of the court, it is very much essential for the arbitrational laws in India to amend and modify the award making panel along with to establish the award as a binding conclusion of any dispute which could only be questioned/reviewed on a well defined ground in order to curtail the excessive stepping of arbitration in the shoes of litigation. The absence of any well defined, complete and close ended definition of Public Policy including the terms like "basic notion of justice and morality" and " fundamental policy of Indian laws" along with patent illegality and provisions of Sec.-23(3) has created a huge loophole on the part of execution of arbitral awards. Interpretation of above mentioned terms should be done in a way to make this practice of setting aside of arbitral award an exception and not a regular routine and the presumption in such concern must be very clear that the award is unbiased and free from any kind of fraud.

Apart from this the limitation period 3 months and 1 month (in case sufficient cause is shown in case of delay) as mentioned in Sec.-34(3) in order to file petition for setting of arbitral award along with a grace period of 1 year in order to dispose the case made against an award is clearly enlarging the time limit for disposal of arbitrational dispute along with it is hampering the primary object of arbitration which was to provide expeditious dispute resolution mechanism.

Therefore there will be no doubt to say that arbitrational law in India needs a much more technical modification in context to both provisions including narrowing or confining the ambit of setting aside of an arbitral award and construction of an equipped and specialized panel of arbitrator on which both the domestic and foreign parties can rely upon and then only the main purpose of arbitration could be fulfilled. There are many stones in Indian Arbitrational Law which are still left unturned and hence it can be concluded that the ambiguity regarding interpretation of provisions of Sec.-34 can only be done away by turning up those stones in the light of a well defined interpration of the terms like Public Policy, Patent Illegality and Fundamental Policy of Indian Laws.