An Evaluation of Section 34 of the Arbitration and Conciliation Act with Special Emphasis on Judicial Intervention

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Abstract The topic “An Evaluation of Section 34 of the Arbitration and Conciliation Act, 1996 with special reference to Judicial Intervention” is a topic of significance because Section 34 of the Act gives an insight into the procedure for setting aside an arbitral award rendered by an arbitral tribunal which includes intervention of the Court for setting aside the award. Assistance of the courts is required for the smooth functioning of the arbitration system, however excessive intervention of the Court must be avoided in case of entertaining applications against arbitral awards as it would cause unnecessary delay in arbitral proceedings thus defeating the objective of the Act. The Arbitration Act of 1940 had failed to resolve the vagueness of the expression “public policy of India” and the grounds entitling setting aside of arbitral award were also not clearly defined hence giving an opportunity to the judiciary to give interpretations according to their understanding and thereby increasing the opportunity of judicial intervention in arbitral process. The Arbitration and Conciliation Act, 1996 and the amendments under the Arbitration and Conciliation (Amendment) Act, 2015 have given definite character to section 34 of the Act and resolved certain issues pertaining to it. This Paper makes an evaluation of Section 34 of the 1996 Act and the amendments thereto and the scope of judicial intervention. Moreover the amendments brought about by the amendment Act of 2015 have also been evaluated including the concept of “public policy of India.”

Key Words arbitration, setting aside arbitral award, section 34 of arbitration and conciliation act, 1996, public policy, patently illegal.

Introduction

Arbitration is a procedure for settlement of disputes where the parties concur to submit their disagreement to one or more arbitrators which make binding decisions. An Arbitration Award is a decision given in an arbitration proceeding by an Arbitration Tribunal and is said to be analogous to the judgement given by a court of Law. In International trade Arbitration is preferred because foreign arbitral award is simple to enforce than to enforce any judgement pronounced by a Court. However where the claim of a claimant fails, then an Arbitral award can be of non pecuniary character as neither of the parties have to pay any amount of money to either of the parties.

It was at the end of twentieth century that Arbitration began to be accepted as the common means of resolving commercial disputes. The Indian Arbitration Act, 1899 constituted the primary Indian law on Arbitration, which was based on the English Arbitration Act of 1889 and then it was replaced by the Indian Arbitration Act, 1940 which was eventually restored by the Arbitration and Conciliation Act, 1996 which is built on the basis of the UNCITRAL Model Law on International Commercial Arbitration, 1985.

With the rapid growth of globalisation and the removal of trade and political barriers, there is an increasing demand in the global economy for greater certainty, accuracy and flexibility
in the settlement of disputes thus creating new challenges for the arbitration institutions.

Though there are other methods for settlement of commercial disputes such as mediation and conciliation in which parties come to settlement according to mutual agreements however, one of the reasons why Arbitration is preferred in commercial sphere is because of the binding nature of the award. However, there are remedies available against arbitral awards on certain grounds which the aggrieved party can avail under Section 34 of the Arbitration and Conciliation Act, 1996.

**Setting Aside Arbitral Award**

The Arbitration Act of 1940 provide three kinds of remedies against arbitral awards namely, rectification, remission and setting aside of the Arbitral Award. however the present position is different in the sense that that now the remedies have been clubbed into two. Moreover the Arbitral Tribunal under the 1996 cannot review an Award on its own, the aggrieved party who has suffered on account of the Arbitral Award is required to challenge it according to the Law prescribed, and if the aggrieved party fails to apply under section 34 for setting aside the Award, then a de novo inquiry is not bound to arise on its own.

The Supreme Court has remarked that “an arbitrator is a judge appointed by the parties and as such an award passed by him is not lightly interfered with.” However, since the main aim of the Award is to render legitimate award in the interest of justice, hence the Court is vested with the power to keep a vigil on the Arbitrator’s actions. Keeping this aim in mind the law provides certain remedies against the Arbitral Awards.

Section 34 of the Arbitration and Conciliation Act, 1996 gives the Court or the Judiciary the power to intervene in the Arbitration process for the purpose of setting aside the Award rendered by the Arbitration Tribunal. This section deals with the procedure for the application and also the grounds for setting aside the arbitral Award. Moreover, a limitation period has also been set within which the application has to be filed with the Court.

**Grounds for Setting aside an Award**

Section 34 of the 1996 Act is in consonance to Article 34 of the UNCITRAL Model Law and also to section 30 of the Arbitration Act, 1940. However the scope of section 34 is limited in consideration to section 30 of the Arbitration Act, 1940. The basis on which an Award can be challenged under section 34 are limited, moreover the term “Public Policy of India” is devoid of any specific definition under the 1996 Act.

Section 34(2) (a) of the Arbitration and Conciliation Act, 1996 mentions certain grounds on account of which the Court can set aside the arbitral award, if the party proves that:

I. a party was under some incapacity,

II. the arbitration agreement is not valid in accordance with the Law to which the parties to the Agreement have subjected it

III. no proper notice of the appointment of the arbitrator or the proceeding had been given to it

IV. the dispute dealt by the arbitral award does not fall within the terms of the submission to arbitration, or the award contains a decision beyond the scope of the submission to arbitration.

V. the composition of the tribunal was not in accordance with the agreement of the parties

Moreover under section 34 (2) (b) of the Act the court may set aside the Award if:

I. the subject matter of the dispute cannot be settled by means of Arbitration

II. the Arbitral award is in conflict with the public policy of India.

1. *Indu Engineering and Textiles Ltd. v. Delhi Development Authority* (2001) 3 SCR 916

2. *P. Gopal Raju v. Secretary, Govt. of India, Ministry of Urban Development, New Delhi, AIR 2006 (NOC) 1566 (Kar)*

3. Section 34 (2) (a) of The Arbitration and Conciliation Act, 1996
Amendments brought in Section 34 under The Arbitration and Conciliation (Amendment) Act, 2015

The Arbitration and Conciliation (Amendment) ordinance, 2015 brings about significant modifications in the Act, with the object of speeding the arbitration procedure and reducing intervention by the courts thereby making India a more attractive destination for foreign investors and improving the ease of doing business in India. In Municipal Corporation of Greater Mumbai v. Prestress Products (India) it was held that the amended was made with the object of reducing judicial intervention.

Public Policy

The term “Public policy” found no definition in the Arbitration and Conciliation Act, 1996 and hence the term remained ambiguous. Due to the non precise definition of the term public policy, the term had a wide meaning thereby giving the courts the liberty to interpret it according to their understanding. The expression is taken to imply larger public interest or public good. However this gives an abstract explanation of the term without giving a precise meaning to it. Hence the explanation appended to sub- clause (ii) by means of the amendment Act has defined the scope and meaning of the expression where the arbitration award shall be contemplated to be against public policy if the award was persuaded by fraud or corruption or in violation of the fundamental policy of India Law or the basic notions of the policy morality and justice.

Hence to quote in Rail India Technical And Economic Services Ltd v Ravi Constructions the court opined that the enforcement of an arbitral Award is to be declined as being against public policy if it is against the fundamental policy of India Law, country’s interests and its sense of justice and morality.

The expression “Public policy” has been interpreted differently and the scope and meaning of the term has been a topic of debate amongst many practitioners and academicians. The first case where the scope of public policy was enumerated was in Renusagar Power Co. Ltd v. General Electric Co. where the Court gave a restricted meaning to the expression public policy in an international Commercial arbitration case where an award could be refused only when the award is against (1) fundamental policy of India (2) interest of India (3) justice or morality.

However the Supreme Court giving a broader meaning to the term “public policy” in ONGC Ltd v. Saw Pipes Ltd explaining the concept of “public policy of India” said that it has not been defined in the Act and is vague and is likely to be interpreted widely or narrowly depending on the context in which it is being use.

The Law commission in its 246th Report made suggestions so as to make the application for setting aside an arbitral award restricted on grounds of public policy and to apply only when the award was persuaded or affected by fraud or corruption, or was against the fundamental policy of Indian law or in contravention with the most basic notions of morality. The Law Commission was the first to suggest the amendment and its suggestion was thereby incorporated in the Amendment Act.

The amendment was brought into effect so as to limit the judicial intervention of Courts in Arbitration. This is so because the main idea for adopting arbitration as a means for settling disputes is speedy resolution of disputes and if Courts are involved in the process then it will only add to the pendency and cost of the parties to arbitration. Moreover the amendment has also appended explanation 2 to sub-clause (ii) by virtue of which when an aggrieved party applies for setting aside an arbitral award on grounds of fundamental policy of Indian Law the courts are now barred from going into the worth of the case.

Constitutional Validity of Section 34

In TPI v Union of India a writ petition was presented where the petitioner contended that

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8. (2001) 2 AD (Del) 21
There must be a right to challenge an arbitral award on merits and if it were not so then section 34 was to be rendered unconstitutional. However the Court dismissing the petition stated that the subject matter was not related to judicial review of a tribunal decision created under any statute or administrative action. Arbitration being an alternate form of dispute settlement, is chosen by parties by the free consent of the parties and the arbitrator’s determination is accepted by the parties by reciprocal agreement which varies from the common judicial medium otherwise available to the parties. The parties are not under any compulsion of any Statute which compels them to resort to arbitration if a dispute arises.

Hence in such an event where the parties have themselves chosen the arbitrator and the forum, there is no necessity to make a provision for appeal against the award rendered by the arbitrator. Here the legislature is authorised to set the grounds for challenging the award and the parties are to challenge the award only on those grounds. On the other hand if the Court is given the authority to re-examine the correctness of the award, the proceedings would be useless.

**Patently Illegal**

The Amendment to the Arbitration and Conciliation Act, 1996 has also included Section 2A which provides for patent illegality which is an additional ground for setting aside an arbitral award. This ground will be applicable only to arbitrations taking place in India and not to International Commercial Arbitrations as can be interpreted from the wording of the section which says “other than International commercial arbitration”.

“Error of Law apparent on the face of the record” in Administrative Law has been regarded as one of the grounds for invalidating a judicial or quasi judicial matter under the writ of certiorari. In Arbitration, if an arbitral award is inconsistent with any of the provisions of the Arbitration and Conciliation Act, 1996 then it would amount to a patent error on its face. Such decision or an award is a nullity and would not have any effect on law and hence can be declared as void, incapable of being enforced. Such award according to Lord RadCliff as held in *Smith v. East Elloe* “bears a brand of invalidity on its forehead.” Though this is a ground for setting aside an arbitral award by the Court, nevertheless the person against whom such award has been rendered can itself resist the execution of such an award.

The concept of public policy implies matters which are of common good to the people and in the interest of people. The notion as to what constitutes common good for people or what is in interest of people and what is harmful or injurious to the common people has been a matter of debate and has differed at different times. But an award that is patently in violation of a statute or a statutory provision and can be inferred on the face of the award, such award cannot be said to be in the interest of the common people or for the good of the people. Moreover such an award would apparently have negative impact on the administration of justice and hence it can set aside as patently illegal if it is contrary to:

a. fundamental policy of India
b. the interest of India
c. justice or morality
d. if it is patently illegal

A final decree can be disputed only on restricted number grounds such as lack of jurisdiction or nullity. But where the Appellate Court is exercising revisional jurisdiction, and a decree is challenged before such a court, then the jurisdiction of such court is broader in scope. Therefore where the credibility of an award has been questioned on ground of “public policy of India” a broader meaning is to be appended so that the award passed by the Tribunal which is patently illegal could be set aside as held in *Natural Gas Corp. Ltd v. SAW Pipes Ltd*.

The Supreme Court in *Associate Builder’s v. Delhi Development Authority* has elaborated as to what constitutes patent illegality. According to the Court patent illegality shall include:

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9. [1956] 1 All E.R. 855 CRL
10. AIR 2003 SC 2629 (264)
11. 2014 (4) ARBLR 307(SC)
I. fraud or corruption
II. contravention of substantive law
III. error of law by the arbitrator
IV. contravention of the arbitration and Conciliation Act, 1996 itself
V. the arbitrator fails to give consideration to the terms of the contract and usages of trade under section 28(3) of the Act
VI. arbitrator fails to give a reason for his decision.

Moreover a proviso is also appended to subsection 2A which states that if the court believes that there is an erroneous application of Law, this cannot be a sole basis for setting aside the award. Under the Act of 1996, an award can only be questioned under section 34 of the Act. Mere erroneous finding by itself cannot be the subject matter to the award passed, as held in *Shanska Cementation India Ltd, Mumbai v. Bajranglal Agarwal*12.

**Intimation of A Notice to the Other Party**

The Amendment has incorporated another subsection 5 which requires that an application can be made only after intimating a notice to the other party along with an affidavit by the applicant endorsing his compliance with the requirement of sending a notice. The main idea behind incorporating sub-section 5 is to intimate the party in whose support the award has been passed of the action which is being taken by the party filing an application for setting aside the award. Moreover this is also in consonance of the principle that a party to a suit shall have the right to receive a notice of any action being taken by the other party so as to prepare himself of such action.

**Time Limit for Disposal of Application**

Another significant incorporation is the addition of subsection 6 to section 34 which provides the time limit for disposal of the application. The main intention behind incorporating this sub section is to promote speedy resolution of disputes keeping in mind the number of cases arising in commercial arbitration. Hence subsection 5 provides for disposing the application as expeditiously as possible before the expiry of one year from the date on which a notice was given to the other party.

Hence the Courts are required to adhere to the time limit and dispose of the application as soon as possible thus keeping up the object of speedy resolution of disputes.

The main object of resolution of disputes through the process of arbitration is speedy resolution of disputes and this is the prime reason that people resort to arbitration rather than lengthy court proceedings. It is not an unknown fact that court proceeding in India take a long time for resolving disputes, and when a party brings an application under section 34 of the Act before the court for setting aside the award, the other party is again exposed to such a risk of delay. Hence keeping this situation in mind the amendment has been made where the Court has to dispose the application before the expiry of one year. Hence the maximum delay which the court can make in disposing the application is one year.

**Curtailment of Judicial Intervention**

One of the essential objectives in enacting the Arbitration and Conciliation act, 1996 was to restrict the scope of intervention by Courts. Moreover with the Arbitration and conciliation (Amendment) Act, 2015, judicial intervention has further been curtailed where the ambit of public policy has been limited and an award is considered in conflict with public policy of India if:

i. the making of the award was persuaded or affected by fraud or corruption

ii. it is against the fundamental policy of Indian Law

iii. it is in contravention with the most basic notions of morality or justice

These grounds have also been enumerated by the Supreme Court in the case of *McDermott*

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12. 2003 AIH 3735 (3741) (Bom)
In *Union of India v. Popular Construction Company*\(^{15}\) a question arose as to whether section 5 of the Limitation Act would be applicable under section 34 for applying for setting aside an arbitration award. The Court while arriving at a conclusion examined the past history and purpose of the act and also what was the intent of the legislature while framing the Law. One of the cardinal purpose of the Act was to reduce intervention by courts in the arbitration process. This objective is apparent in section 5 of the Arbitration and Conciliation Act, 1996. Moreover the intention of the legislature can be deduced from the wording of the proviso of section 34 (3) which says “but not thereafter”. Hence it was held that the expression would prevent the application of section 5 of the Limitation Act due to the apparent exclusion within the meaning of section 29 (2) of the Limitation Act.

Moreover the 2005 Amendment Act has substituted section 36 of the Act, by virtue of which if the time limit within which the applicant has to apply has expired, then the Award shall be enforced in the same manner as if it were a decree of a court under the Code of Civil Procedure, 1908.

The time limit for applying for setting aside the award has been provided to ensure speedy resolution of litigation. However making strict application of the limitation period may result in preventing an honest applicant from making an application for setting aside the award due to genuine impediments which might have prevented him from making an application within the prescribed time limit. Hence procedural Law should not be allowed to defeat the right granted by substantive law.

**Conclusion**

The main intention of the legislature while framing the Law on arbitration under the Arbitration and Conciliation Act, 1996 was to reduce intervention of courts and provide an alternate method for resolution of Commercial disputes which provide speedy justice delivery system. The amendments

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15. AIR 2001 SC 4010
brought under Section 34 of the Act under the Arbitration and Conciliation (Amendment) Act, 2015 have resolved many issues to a great extent and at the same time minimised judicial intervention, and has also clarified to a certain extent the term “public policy of India” which was not precise before the amendment and adding patent illegality as another ground. Another tool for curbing judicial intervention under section 34 after the amendment has been the insertion of subsection 6 which sets a time limit for courts to settle the dispute within a period of one year.

However one must keep in mind that though the Arbitration and Conciliation Act provides an alternative to litigation system however it is not a complete departure from the judicial machinery rather it co-exists with it. Keeping in mind the present situation of the appointment of Arbitrators, where most of them are government employees appointed by the Central Government and are usually retired judges, they are mostly adapted to the habit of conducting the proceeding strictly according to procedures and Law.

On the other hand, when the other side of the coin is analysed it is seen that the main purpose for the parties to choose Arbitration is to resolve their mutual legal rights and liabilities through an arbitral tribunal instead of a court of law. Hence it calls for limited or no intervention of the Courts. However since the main aim of the Award is to ensure delivery of legitimate award in the interest of justice, hence law permits the Courts to intervene in the arbitral proceedings to keep a vigil on the Arbitrator. Hence a balanced approach is required to bring out the true object of the Act.