

Analysis of Section 34 of the Arbitration and Conciliation Act – Setting Aside of Arbitral Award and Courts’ Interference: An Evaluation with Case Laws

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This paper discusses in detail Section 34 of the Arbitration and Conciliation Act, 1996, and tries to understand the extent to which courts can interfere with the arbitration process since it is something that must be discouraged else it would be the end of the independence of the arbitration. The paper also delves into the finality of arbitral awards and in what cases it may be set aside as in cases of public policy.

Introduction

Settling a dispute by referring it to a third person was well known in ancient and medieval India. If any of the parties to the dispute was not satisfied with the decision, he could go on an appeal to the Court of law and ultimately to the King itself.¹ The modern law of arbitration evolved in the form of Regulations framed by the East India Company whereby the courts were empowered to refer the suits to arbitration.

The first Indian Arbitration Act of 1899 was based on the English Arbitration Act of 1889. Then came the Indian Arbitration Act, 1940, and finally the Arbitration and Conciliation Act, 1996 (the “Act”) was enacted by Parliament based on the UNCITRAL Model Law on International Commercial Arbitration, 1985.²

Prior to the enactment of the 1996 Act, Section 30 of the Indian Arbitration Act, 1940, contained rather broad grounds for setting aside an arbitral award. In contrast, Section 34(2) of the Act sought to restrict the grounds for challenging an award. Setting aside procedures are provided so as to act as a check on the powers of the arbitrators, to prevent them from going beyond their scope of authority. However, there is another school of thought which advocates that provision for setting aside of an arbitral award should never be envisaged. The parties should stick to their award and any mistake, however inflated it may be and an award however unreasonable it may be, should be treated the same as a final judgment.

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¹ P.C. Rao & W. Sheffield, *Alternative Dispute Resolution* (Delhi: Universal Law Publishing Co. Pvt. Ltd., 1997) at 33.

² K.D. Kerameus, “Waiver of Setting Aside Procedures in International Arbitration” 41(1) *The American Journal of Comparative Law* (1993), <http://links.jstor.org/sici>

Court cannot reassess the evidence even if arbitrator committed error.³ The Court has no jurisdiction to substitute its own valuation of conclusion on law/fact.⁴ It cannot sit in appeal over the conclusions of arbitrator and reexamine or reappraise evidence which had been already considered by the arbitrator.⁵ To investigate misconduct, Court may see simply the record before the arbitrator but not examine it.⁶

It is further stated by proponents of this school that Arbitrators are judges of fact as well as law and has jurisdiction and authority to decide wrong as well as right, and thus, if they reach a decision fairly after hearing both sides, their award cannot be attacked.⁷ However erroneous his decision may be, it cannot be interfered with by any Court.⁸

Furthermore, where reasons have been given by the arbitrator, the Court cannot examine the reasonableness of reasons. If the parties have selected their own forum, the deciding forum must be conceded the power of appraisal of evidence. If arbitrator failed to appreciate the oral and documentary evidence brought on record in the arbitral proceedings, it was held in a case that “the arbitral award is not open to challenge on ground that the arbitral tribunal has reached a wrong conclusion or has failed to appreciate facts/evidence. Thus, it had been well settled that the parties constitute the arbitral tribunal as the sole and final judge of the dispute arising between them and they bind themselves as a rule to accept the arbitral award as final and conclusive and thus, the award is not liable to be set aside on the ground that facts/law is erroneous. This is outside scope of Section 34 of the Arbitration and Conciliation Act.⁹

³ *Eastern and North East Frontier Railway Cooperative Bank Ltd. v. B. Guha & Co.* AIR 1986 Cal 146, *Uttar Pradesh State Electricity Board v. Searsole Chemicals* (1995) 2 Arb LR 320, *National Electric Supply and Trading Corporation Pvt. Ltd. v. Punjab State* AIR 1963 Punj 56.

⁴ *Francis Klein Pvt. Ltd v. Union of India* 1995 2 Arb LR 298.

⁵ *State of Orissa v. R.N. Mishra* AIR 1984 Ori 42, *Swaran Singh v. University of Delhi* AIR 1994 Del 290, *Samyukt Namrata v. Delhi Development Authority* 1986 2 Arb LR 48, *Sarabjit Singh v. State of Punjab* AIR 1985 P&H 179, *New Snow View Transport Pvt. Ltd* AIR 1994 NOC 311 (H.P.), *R.S. Builders v. Delhi Development Authority* AIR 1995 Del 10, *Shivlal Prasad v. Union of India* AIR 1975 MP 40.

⁶ *Jagdish Chander v. Hind Vegetable Oils Corporation* AIR 1990 Del 204, *Eastern and North East Frontier Railway Cooperative Bank Ltd. v. B. Guha & Co.* AIR 1986 Cal 146.

⁷ *Yeshwantrao Ganpatrao v. Dattarayao Ramachandranrao* AIR 1948 Nag 162 (DB).

⁸ *Bharu Kure Jat v. Tara Lal* AIR 1962 Punj 173.

⁹ *Laxmi Mathur v. Chief General Manager, MTNL* 2000 (2) Arb LR 684 (Bom).

In addition, it has been laid down in a catena of cases that the appraisal of evidence by arbitrator is not a matter that the Court can question or consider.¹⁰ It is not for the Court to take upon itself the task of being the judge of evidence by arbitrator since it is possible that the court may come to a totally different conclusion altogether based on same facts which is not a ground to stay arbitral award. Arbitrator has final say on evidence production and the Court cannot enquire about which document is important, which should be accepted and how should the necessary evidence be appreciated.¹¹ It cannot be challenged on ground of inadequacy or inadmissibility or impropriety of evidence. But it may be noted that the total absence of evidence or the failure to consider material documents or admission of parties in arriving at a conclusion are good grounds for challenge since these amount to judicial misconduct.¹²

Unless the arbitrator disregards principles of natural justice in the arbitration proceedings such as being radically wrong or vicious in proceedings or disregarding the fundamental rules of evidence, the Court cannot interfere.¹³

Therefore, finality should always be the price to be paid by the defeated litigants in adjudication and arbitration alike.¹⁴ After all, as soon as a judgment becomes final and no appeals are provided for, does not the judgment become sacrosanct? It has also been argued that the reason for this unequal treatment and partial subjugation is that arbitration is yet to be recognised as an autonomous institution, separate

¹⁰ *Haji Ebrahim Kassim Cochinwalla v. Northern Indian Oil Industries Ltd.* AIR 1951 Cal 230, *Life Insurance Corporation (LIC India) v. M.L. Dalmia & Co. Ltd.* AIR 1972 Cal 295, *Polo Singh & Co. v. Union of India* 1995 (2) Arb LR 303, *State of Punjab v. Amarnath Agarwal* 1993 103 Pun LR 1, *State of Rajasthan v. Puri Construction Co. Ltd.* 1994 6 SCC 485.

¹¹ *Shankarlal Majumdar v. State of West Bengal* AIR 1994 Cal 55.

¹² *West Bengal Industrial Infrastructure Development Corporation v. Star Engineering Co.* AIR 1987 Cal 126 (Arbitrator is the sole judge of the quality and sufficiency of evidence and the courts are not allowed to interfere) *Natwarlal Shamaldas & Co v. Minerals and Metals Trading Corporation India Ltd.* AIR 1982 Del 44, *Bungo Steel Furniture Pvt. Ltd. v. Union of India* AIR 1967 SC 378.

¹³ *Des Raj & Sons v. Union of India* 1984 Arb LR 156, *Krishna Gopal Prasad v. Chandiprasad Duryandhanprasad* AIR 1953 Nag 309 (DB), *Louis Dreyfuss Co v. S. Balasubbaraya Chettiar & Son* AIR 1961 Mad 186, *Baldev Singh Sardool Singh v. Union of India* AIR 1965 J&K 28 (An award is not open to challenge on grounds that the arbitrator has reached a wrong conclusion or has failed to appreciate facts) *Hindusthan Tea v. Sashikant & Co.* AIR 1987 SC 81, *Uttam Singh Duggal v. Union of India* AIR 1988 MP 191, *D.K. Sharma v. Union of India* 1987 2 Arb LR 6.

¹⁴ *Supra* note 2, at 35.

and independent from the judiciary. “It has been to a varying degree tolerated by the State and tentatively incorporated into a somehow cohesive system of the overall administration of justice.”¹⁵ Setting aside measures have made the judges an important player in determining the validity and enforceability of the arbitration.¹⁶

Throughout this essay, it is argued that even though recourse to arbitration was made to keep the dispute resolution system simple and less technical, arbitration was never meant to be unresponsive to the canons of justice and fair play. Therefore, if the arbitrator does not follow the principles of natural justice, the aggrieved party must be provided with recourse, for justice should not only be done swiftly, but it must appear to have been done. The argument on finality of a final decree does not hold water. There are provisions in the Civil Procedure Code for review and revision. Similarly, the notion that by providing for setting aside procedures arbitration is subjugated by the adjudication is erroneous. Arbitration and adjudication are nothing but various means of seeking justice. So if one method fails to provide for justice then the other means should be resorted to. Both should be seen as complementing each other rather than fighting for supremacy over each other.

Setting Aside

Not everyone takes defeat in their stride. So whenever an arbitral award goes against one of the parties to the dispute, he seeks ways of setting it aside. An award can be set aside only on the grounds mentioned in Section 34 of the Act. The purpose of setting aside is to modify in some way the award in part or wholly.¹⁷

Salient Features of Section 34

1. It prohibits any recourse against arbitral award other than the one provided for in Sub-section (1) of Section 34.
2. It limits the grounds on which the award can be assailed in Sub-section (2) of Section 34.
3. It promises a fairly short period of time in Sub-section (3) of Section 34 within which the application for setting aside may be made.
4. It provides for remission of award to the arbitral tribunal to cure defects therein.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ A. Redfern & M. Hunter, *Law & Practice of International Commercial Arbitration* (London: Sweet & Maxwell, 2004) at 404.

Limitation

Sub-section (3) of Section 34 specifies a three-month time-period within which the application for setting aside an award has to be made, beginning with the day when the applicant receives the award. The proviso to the sub-section provides that if the applicant can show that he was prevented by sufficient cause from making the application within three months, a further period of 30 days can be given to him for filing the application but not thereafter.

A question arose in *Union of India v. Popular Construction Company*¹⁸ whether the provisions of Section 5 of the Limitation Act are applicable to an application challenging an award under Section 34 of the Act? The court while arriving at the decision took into account the history and the objective of the Act and also the intention of the legislature. One of the objectives of the Act was to minimise Court's intervention in arbitral process. Of the various provisions in the Act, this objective can be easily discernible in Section 5 of the Act. Also the intention of the legislators can be made out from the expression "but not thereafter" appearing in the proviso to Section 34(3).¹⁹ It was held that this expression meant an express exclusion within the meaning of Section 29(2) of the Limitation Act, and would therefore bar the application of Section 5. If the Court admits the application for setting aside the award after the expiration of limitation period provided in the Act, and then it will be tantamount to be making the phrase "but not thereafter" wholly otiose.²⁰

It is submitted that the above decision needs reconsideration. Although the Act was framed to render justice to the litigants as expeditiously as possible but in doing so one should not lose sight of practicalities of life that may prevent an honest litigant from knocking at the doors of the Court of law. For instance, when a person is prevented *bona fide* from challenging a blatantly perverse award in time on account of a terminal illness or a situation in which proceedings are *bona fide* instituted before a court without jurisdiction or under provisions of a repealed statute. Does the proviso to Section 34(3) wholly shut out such persons from seeking justice?²¹ Procedural law should not defeat the right provided by the

¹⁸ MANU/SC/0613/2001.

¹⁹ *Supra* note 10.

²⁰ *Id.*

²¹ M.V. Sundararaman, "Finality of Domestic Arbitral Awards", 3(2) Company Law Journal (2003), at 46.

substantive law. The Supreme Court has time and again observed that the absence of any remedy provided by the statute should not frustrate the demands of justice. In such a scenario, it is the duty of the court to devise procedures by drawing analogy from other systems of law and practice.²² No doubt that due regard should be given to the objective of the Act and to intention of the legislatures but while doing so the overall aim of the justice system of providing redressal to the aggrieved party should not be subverted. This will ensue if a narrow interpretation is given to Section 34(3). An award obtained by fraud or corruption would be given finality. The provision of the Act has to be interpreted in such a manner so as to further the goals and values of our society.

Justice D.R. Dhanuka (Retd.) is of the view that the provisions of Section 4 of the Limitation Act apply automatically if the court is closed. Section 29(2) of the Limitation Act provides that where any special or local law prescribes period of limitation, the provisions contained in Sections 4 to 24 shall apply only in so far as they are not expressly excluded by such special law. Section 34 of the Act does not expressly exclude Section 4 of the Limitation Act. In all such cases, the relevant application is deemed to have been filed on the last day when the court was closed for vacation, although it was factually filed on the first day of the court's reopening.²³

It is submitted that the view of the Court in the aforesaid case is erroneous. When the Court is closed for vacation it is not possible for the litigant to file an application. If the ratio of the judgment is followed, the applicant would be punished for no fault of his own. This definitely was not the intention of the legislature.

Public Policy

The Act provides that if the arbitral award is in conflict with the public policy of India it can be set aside. The term “public policy” has not been defined in the Act. A simple attempt to describe it is contained in the Legal glossary of the Ministry of Law, Justice and Company Affairs, Government of India, namely that public policy is “a set of principles in accordance with which communities need to be regulated to achieve the good of the entire community or public”.²⁴ Clearly, the term public policy is very open-

²² *Supra* note 13, at 47.

²³ Justice D.R. Dhanuka (Retd.), “Critical Study of Recent Judgments Pertaining to Arbitration Law”, 5(2) *Company Law Journal* (2005), at 42.

²⁴ P. Anklesaria, “Scope of the expression public policy in domestic and foreign awards” 9 *AIR* (2005) at 310.

ended, depending on some socio-cultural notions prevailing in the society and impossible to straightjacket.²⁵ It is not possible to classify the elementary inclusive and exclusive distinctiveness of public policy.

In England, public policy is interpreted to mean firstly, anything which does not go against the fundamental conceptions and morality of the English system, secondly which does not prejudices the interests of the country or its relations with foreign countries and lastly, which is not against the English conception of human liberty and freedom of action.²⁶ Thus we could see that there are distinctive and limited heads of public policy in England.

In one of its earlier decisions in *Gherulal Parekh v. Mahadeodas Maiya*²⁷, the Apex Court gave a narrow interpretation of public policy. It held that within public policy of India, lay certain determinate specified heads and that it would not be prudent to begin search for new heads. However, in *Central Inland Water Transport Corp. Ltd. v. Brojo Nath Ganguly*²⁸, the Supreme Court promoted a wider stance by interpreting the term public policy on the pillars of public conscience, public good and public interest.

Again in *Renusagar Power Co. Ltd. v. General Electric Co.*²⁹, the concept of public policy with respect to foreign awards was construed in a narrow manner. The Court held that the award would be considered as being in conflict with public policy of India if it was shown contrary to (i) fundamental policy of Indian law; or (ii) the interests of India; or (iii) justice or morality. By the latest judgment of Supreme Court in *ONGC v. Saw Pipes*³⁰, the Court gave a wide interpretation to the term public policy. The Apex Court held that in a case where the validity of award is challenged, there is no necessity of giving a

²⁵ O.P. Malhotra, *The Law and Practice of Arbitration and Conciliation* (New Delhi: Lexis Nexis Butterworths, 2002) at 786.

²⁶ *Supra* note 17, at 787.

²⁷ AIR 1959 SC 781.

²⁸ AIR 1986 SC 1571.

²⁹ MANU/SC/0195/1994.

³⁰ AIR 2003 SC 2629.

narrow interpretation to the term public policy of India. On the contrary, wider meaning is required to be given so that the patently illegal award passed by the tribunal could be set aside.

Need for Reconsideration

Subsequent to the decision in *Saw Pipe* case, the question that needs to be answered is what exactly did the Court mean when it stated that an award would also be contrary to public policy if it were “patently illegal”? Before that one has to know what “illegality” means in the arbitration context. Illegality in arbitration context has threefold meaning. Firstly, the illegal nature of the underlying contract, secondly its subject matter and lastly, the circumstances surrounding the entering into of the contract or the arbitration agreement.³¹ But the Apex Court in *Saw Pipe* case gave a whole new dimension to the term illegality in arbitration context by equating it to mean “error of law”.³²

Arbitration is a consensual adjudication process. This implies that parties have agreed to accept the award given by the arbitrator even if it is wrong, as long as proper procedures are followed by him. Therefore, Courts can not interfere with the enforcement of award on the ground of error of law or error of fact. If the Courts are given the power to review on the ground of error of law or error of fact then it will defeat the objectives of the Act and will also make arbitration the first step in the process which will lead to the highest Court of the land by way of successive appeals.³³

The Supreme Court itself has held in *Rajasthan State Mines and Minerals Limited v. Eastern Engineering Enterprise*³⁴ that the Court cannot interfere with the decision of an arbitrator on the ground that his decision is based on error of law or fact.

The author differs from the view of the Apex Court. The Act clearly does not provide for the appeal to a court on the merits of an arbitral award. If the wording of the Act is seen, a court hearing an application

³¹ Darwazeh and R.F. Linnane, “Set-aside and enforcement proceedings: The 1996 Arbitration Act under threat”. 7(3) *Int. A.L.R.* (2004).

³² *Id.*

³³ *Supra* note 17, at 763.

³⁴ *Id.*

to set aside an award under the Act is precluded from reviewing even indirectly the merits of the award since set-aside is no longer possible for errors of law or fact.

The Act only provides for specific heads under Section 34 on which appeals can be made to the Court to set aside the award. If the legislators wanted to include “error of law” as a ground for setting aside the award, they would have provided for it in Section 34 itself. There are two legislative proposals before the Indian Parliament which clearly show that the legislature did not intend to include “error of law” as a public policy ground under Section 34(2)(b)(ii) of the Act. Both the April 2001 Bill and December 2003 Bill have proposed amendments to the 1996 Act as follows:

“34A(1) In the case of an arbitral award made in an arbitration other than an international arbitration (whether commercial or not), recourse to the following additional grounds can be had in an application for setting aside an award referred to in sub-section (1) of section 34, namely--
(a) that there is an error which is apparent on the face of the arbitral award giving rise to a substantial question of law; ...”³⁵

These proposed amendments unequivocally show the intention of the legislature not to include “error of law” as a separate ground for setting aside domestic awards under the Act.³⁶ In fact, the Court’s interpretation of public policy is so broad that it potentially opens the floodgates to more and more challenges of arbitral awards before the Indian courts. Arguably, it is precisely this judicial review of the merits of the case that Section 34 of the Act as well as the corresponding UNCITRAL Model Law provisions were intended to prevent in order to ensure the finality of arbitral awards on the merits. The ratio of the judgment is not in line with the objective of the Act. Some authors advocate a middle path. As per them there is need to adopt the so-called “error apparent on the face of record” test as an “all weather” solution.³⁷ However, such a solution is unnecessary given the exhaustive nature of the grounds given in Section 34.

Judicial Responses

³⁵ (1999) 9 SCC 283.

³⁶ *Id.*

³⁷ A. Kurup, “Reposing faith in the arbitral process: A restrained exercise of judicial discretion when construing the ‘public policy of India’”, 4(3) *Company Law Journal* (2003), at 147.

In *Parsons & Whittemore Overseas Co. v. Société Générale de l'Industrie du Papier*³⁸, the Second Circuit Court held that “to read the public policy defense as a parochial device protective of national political interests would seriously undermine the Convention's utility”. Similarly, in *Biltz Scherk v. Alberto-Culver*³⁹, the US Supreme Court warned that “we cannot have trade and commerce in world markets and international waters, exclusively on our terms, governed by our laws and resolved in our Courts.”⁴⁰ The Supreme Court in *Renusagar Power Co. Ltd v General Electric Co*⁴¹ interpreted public policy restrictively. The Court held that the phrase “public policy” must be construed in the sense in which the

doctrine of public policy is applied in the field of private international law; and that enforcement of a foreign award would be contrary to public policy if it was contrary to (a) fundamental policy of Indian law; (b) the interests of India; or (c) justice and morality. It is submitted that the *Saw Pipes* case was decided in the context of an Indian award, and therefore should not apply to recognition and enforcement proceedings for foreign awards pursuant to Section 48 of the Act.

Given that the provisions on public policy with regard to the setting aside and the recognition and enforcement of awards in Sections 48(2)(b) and 34(2)(b)(ii) essentially mirror each other, it is unclear whether the Court will in the future apply its broad interpretation of public policy to the enforcement of foreign arbitral awards. This uncertainty is compounded by the Supreme Court's decision in *Bhatia International v. Bulk Trading SA*⁴² where Part I of the Act was made applicable to Part II, unless expressly excluded by the parties.

Authors around the world have proposed the concept of “international public policy” so that domestic policy considerations do not act as a hindrance in the enforcement of international arbitral award. The concept envisages including the broader public interest of honesty and fair dealing.⁴³ The

³⁸ 508 F. 2d 969 (2nd Cir., 1974), as cited in A. Sheppard, “Public policy and the enforcement of arbitral awards: Should there be a global standard, 1(1) Transnational Dispute Management (2004), taken from <http://transnational-disputemanagement.com/samples/freearticles>.

³⁹ *Id.*

⁴⁰ (1974) 41 L Ed 2d, 270.

⁴¹ *Id.*

⁴² MANU/SC/0195/1994.

⁴³ *Id.*

International Law Association (ILA) floated a still narrower concept of “transnational public policy”, or “truly international public policy”. It is said to “comprise fundamental rules of natural law, principles of universal justice, *jus cogens* in public international law, and the general principles of morality accepted by what are referred to as civilized nations”.⁴⁴ These definitions are helpful but they are yet to be widely accepted.

Another idea which has been floated around is that the international arbitration community should reach a broad consensus as to which “exceptional circumstances” would justify a national court denying enforcement of a foreign arbitral award.⁴⁵

There is still a long way to go before we arrive at a global standard of public policy, but it is hoped that the ILA Recommendations represent a broad consensus, and if applied will lead to greater consistency in the interpretation and application of public policy as a bar to enforcement of international arbitral awards.

The interpretation of public policy in domestic arbitration should be different from that of international arbitration. The reason for this is that domestic policies should not influence the outcome of international arbitration. Public policy in international arbitration should be interpreted so as to bring it in line with the interpretations given to it worldwide. Consequently this will bring in uniformity and predictability in the enforcement of foreign awards. Barriers to foreign arbitral awards are barriers to foreign trade, and barriers to foreign trade are barriers to economic development.

However, the role of Courts has been drastically reduced in arbitral proceedings. A party cannot approach Courts for setting aside an arbitral award except on very limited grounds. The grounds to set aside an award have been reduced considerably and have been specified minutely without an omnibus ground as “or is otherwise invalid” as in Section 30 of the Arbitration Act, 1940.⁴⁶ This has been done so as to lessen the burden on Court and this would lead to settlement of disputes without resorting to cumbersome Court procedures.⁴⁷

⁴⁴ *Supra* note 9, at 420.

⁴⁵ A. Sheppard, “Public policy and the enforcement of arbitral awards: Should there be a global standard, 1(1) *Transnational Dispute Management* taken from <http://transnational-dispute-management.com/samples/freearticles>

⁴⁶ See generally Arbitration Act, 1940, Section 30.

⁴⁷ P.C. Markanda, *Law Relating to Arbitration and Conciliation*, 2nd Edition, 1997, Wadhwa Publishers, Delhi.

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P.C. Markanda, *Law Relating to Arbitration and Conciliation*, 2nd Edition, 1997, Wadhwa Publishers, Delhi.