

SCOPE OF CHALLENGE TO AN
ARBITRAL AWARD UNDER
SECTION 34 OF THE ARBITRATION
& CONCILIATION ACT, 1996

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Table of Contents

1. Introduction	2
2. The Statutory Law on ‘Setting Aside an Arbitral Award’ under Section 34 of the Act	3
(i) Grounds available for setting aside an arbitral award:	3
(ii) Severability of arbitral awards:	5
(iii) Limitation for Filing an Application under Section 34 of the Act:.....	5
3. Power to ‘Set Aside’ an Award or to ‘Modify’ an Award?.....	6
4. Whether the Parties Can Lead Evidence in an Application Under Section 34 of the Act?	8
5. Interpretation and Scope of the Term “Public Policy of India” Traced Through Judicial Pronouncements	9
(i) Judicial Interpretation of the words “Public Policy” and “Fundamental Policy of India” from the year 1993 to 2015, when the Act was amended to narrow the scope of the said words.....	9
(ii) The 246 th Law Commissions Report, 2014.....	15
(iii) The Arbitration and Conciliation (Amendment) Act, 2015.....	17
a. Effect of the Arbitration and Conciliation (Amendment) Act, 2015 w.r.t. Section 34 of the Act	17
b. Ambiguity in the Arbitration and Conciliation (Amendment) Act, 2015 w.r.t. the date of application of the amended Act.....	18
6. The Arbitration and Conciliation (Amendment) Act, 2019	19
7. Conclusion	20

SCOPE OF CHALLENGE TO AN ARBITRAL AWARD UNDER SECTION 34 OF THE ARBITRATION & CONCILIATION ACT, 1996

1. Introduction

Section 34 of the Arbitration and Conciliation Act, 1996 (“Act”) provides recourse to a court to an aggrieved party for setting aside an arbitral award. The Hon’ble Supreme Court recently in *South East Asia Marine v. Engineering and Constructions Ltd. (Seamec Ltd.)*¹ reiterated that a court can set aside an award only on the grounds mentioned under the Act.² It is trite law that the terms of a contract are sacrosanct to an arbitrator i.e. the arbitral tribunal while deciding and making an award shall, in all cases, take into account the terms of the contract. It was also observed by the Hon’ble Court that it is “settled law that where two views are possible, the court cannot interfere in the plausible view taken by the arbitrator supported by reasoning”³. In view of the same, the Hon’ble Court dealt with the issue of whether the Arbitral Tribunal’s (“Tribunal”) interpretation of the contract was reasonable and fair in light of Section 34 of the Act. The Hon’ble Court held that the interpretation of the contract as made by the Tribunal is **perverse**. It stated that the Tribunal’s interpretation is **not a possible interpretation** of the contract.

The scope of challenge under Section 34 can be summarized by discussing the decision of the Hon’ble Supreme Court in *Dyna Technologies Pvt. Ltd. v. Crompton Greaves Ltd.*⁴ The Hon’ble Court, in this case, cautioned that the courts must **not interfere with an award in a casual and cavalier manner, unless the court comes to a conclusion that the perversity of the award goes to the root of the matter without there being a possibility of alternative interpretation which may sustain the**

¹ C.A. No. 673 of 2012, 900 of 2012 (decided on May 11, 2020).

² *Dyna Technologies Pvt. Ltd. v. Crompton Greaves Ltd.*, 2019 SCC OnLine SC 1656; *Venture Global Engineering LLC & Ors. v Tech Mahindra Ltd. & Ors.*, (2017) 13 SCALE 91 (SC); *P.R. Shah, Shares & Stock Broker (P) Ltd. v. B.H.H. Securities (P) Ltd.*, (2012) 1 SCC 594.

³ *South East Asia Marine v. Engineering and Constructions Ltd.*, C.A. No. 673 OF 2012, 900 of 2012 (decided on May 11, 2020) ¶ 13; *Dyna Technologies Pvt. Ltd. v. Crompton Greaves Ltd.*, 2019 SCC OnLine SC 1656 ¶ 27.

⁴ 2019 SCC OnLine SC 1656 ¶ 26, 27.

arbitral award. It was further reiterated that the remedy under Section 34 is **not in the nature of an appeal.** That is to say that the courts under Section 34 of the Act only look at the legitimacy of the process of the decision and not the substantive correctness of the decision,⁵ i.e. examine the merits of the claim.⁶ Moreover, the principle of finality of awards should be kept in mind while interfering with an award. The Hon'ble Court also hastened to add that the courts **should not interfere with an award merely because an alternative view on facts and interpretation of contract exists.** Lastly, interpretation of contract falls within the jurisdiction of the tribunal, and a mere erroneous finding of fact or erroneous interpretation of evidence by the tribunal cannot be interfered with by the court^{7,8}

2. The Statutory Law on 'Setting Aside an Arbitral Award' under Section 34 of the Act

In an umpteen number of judgments, the Hon'ble Supreme Court and various High Courts have discussed the scope of challenge to an arbitral award under the Section. They have laid down the law on the instances in which the award can be set aside and in what instances it cannot. This article endeavours to summarise the evolution of the law on Section 34 of the Act.

(i) Grounds available for setting aside an arbitral award:

Section 34 of the Act provides for the following grounds to set aside an arbitral award :

- a. Incapacity of a party;
- b. Arbitration agreement not being valid;

⁵ Delhi Development Authority v. Bhardwaj Brothers, MANU/DE/1753/2014 ¶ 7.

⁶ Venture Global Engineering LLC & Ors. v. Tech Mahindra Ltd. & Ors., (2017) 13 SCALE 91 (SC); National Highways Authority of India v. Oriental Structural Engineers Pvt. Ltd., AIR 2015 Delhi 79.

⁷ Delhi Development Authority v. Bhardwaj Brothers, MANU/DE/1753/2014 ¶ 6.

⁸ National Highways Authority of India v. M/s. Lanco Infratech Ltd., MANU/DE/0609/2014.

- c. Party not given proper notice of arbitral proceedings;
- d. Nature of dispute not falling within the terms of submission to arbitration; or
- e. Composition of the arbitral tribunal or the arbitral procedure not being per the agreement, or the arbitral procedure was not per Part-I of the Act;
- f. The subject-matter of the dispute is not capable of settlement by arbitral process; or
- g. The arbitral award conflicts with the public policy of India.

Under the Act, it has been clarified that an arbitral award is in conflict with the public policy of India only in the following circumstances:

- a. the making of the award was induced or affected by fraud⁹ or corruption,¹⁰ or was in violation of section 75 or section 81; or
- b. it is in contravention with the fundamental policy of Indian law; or
- c. it is in conflict with the most basic notions of morality or justice.

It has also been clarified that the **courts need not go into the merits of the dispute** when the award is being challenged on the grounds of the fundamental policy of Indian Law.¹¹ It is also important to mention here that a **tribunal is a creature of contract**.¹² The tribunal while deciding and making an award in all cases is bound to **take into account the terms of the contract** as stated under **Section 28(3)** of the Act.¹³ It also needs to be highlighted that an award can be set aside under Section 34 of the Act if the **composition of the arbitral tribunal or the arbitral procedure was not in accordance with Part-I of the Act**, subject to an agreement between the parties agreeing not to follow a procedure laid down under the said Part. However, the parties cannot come to an agreement which is in contravention with the said Part of the Act.¹⁴

⁹ Mc. Dermott International Inc. v. Burn Standard Co. Ltd., (2006) 11 SCC 181.

¹⁰ Konkan Railway Corporation Ltd. v. Mehul Construction Co., (2000) 7 SCC 201.

¹¹ The Arbitration and Conciliation Act, s. 34(2)(b) Explanation 2 (1996).

¹² SBP & Co. v. Patel Engineering Ltd. & Anr., (2005) 8 SCC 618 ¶ 45.

¹³ The Arbitration and Conciliation Act, s. 28(3) (1996).

¹⁴ The Arbitration and Conciliation Act, s. 34(2)(a)(v) (1996).

(ii) Severability of arbitral awards:

The proviso to Section 34(2)(a)(iv) provides for the severability of an arbitral award. Where the award is being challenged on the grounds of the decision made by the tribunal on disputes not falling within the scope of arbitration, then the decision on the matters falling within the scope of arbitration will be separated from those not falling under the scope, if possible. Thereafter, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside.

The case of severability of the Award came before the Hon'ble Apex Court in *Rashtriya Chemicals & Fertilizers Ltd. v. M/s. Chowgule Brothers & Ors.*¹⁵, where the impugned award had quantified the claim comprising of amount on account of escalation of the rates consequent upon statutory increases in the wages of Mormugao Dock Labour Board during the extended period of the contract, the amount on account of escalation in the wages of other categories of workers, and amount of Rs. 8,63,953/- towards the final payment due and payable to the claimant with interest @ 18% p.a. The Hon'ble Apex Court observed that the amount awarded in the first two heads could not be established being beyond the terms of the contract. However, it upheld the award passed under the third head. The Hon'ble Apex Court separated the inadmissible part from the admissible part i.e. the valid part of the award was saved by severance from the invalid part.

(iii) Limitation for Filing an Application under Section 34 of the Act:

Section 34(3) provides that an application for setting aside an arbitral award must be made within 3 months of receiving the award or disposition of an application under Section 33 of the Act for correction and interpretation of award by the tribunal.

¹⁵ *Rashtriya Chemicals & Fertilizers Ltd. v. M/s. Chowgule Brothers & Ors.*, AIR 2010 SC 3543.

The proviso to **Section 34(3)** allows the party a further period of 30 days after the expiry of 3 months if the court is satisfied that the party was prevented by a sufficient cause from making the application. No application for setting aside the award can be entertained by the court after the expiry of these additional 30 days.

Further, as per the provisions of Section 29(2) of the Limitation Act, 1963, the provisions of Limitation Act are excluded in the Act of 1996 to the extent of which is covered by the Act of 1996 as under Section 34(3) of the Act. To this extent, the applicability of Section 5 of the Limitation Act will stand excluded.¹⁶ However, there is no provision in the Act of 1996 which excludes the operation of Section 14 of the Limitation Act, and as such the benefit of Section 14 of the Limitation Act is available even in cases/objections under Section 34 of the Act.¹⁷

3. Power to 'Set Aside' an Award or to 'Modify' an Award?

Initially, the Hon'ble Supreme Court in *ONGC v. Western Geco International Ltd.*¹⁸ dealt with the scope of the court's power to interfere with an award when it came to a Section 34 Application. The Hon'ble Court held that the court can set aside (in whole or part), modify and change an arbitral award. The Hon'ble Court observed as follows:

30. ...the adjudication even when made by an arbitral tribunal that enjoys considerable latitude and play at the joints in making awards will be open to challenge and may be cast away or modified depending upon whether the offending part is or is not severable from the rest.

The decision of the Hon'ble Supreme Court in this regard is respectfully criticised because, as mentioned in the Supplementary Report to the 246th Law Commission Report, the aim of the Act is to *inter alia* ensure minimum intervention of the

¹⁶ National Aluminium Co. Ltd. v. Pressteel & Fabrications (P) Ltd., (2004 (1) SCC 540.

¹⁷ Gulbarga University v. Mallikarjun S. Kodagali & Anr., 2008 (13) SCC 539.

¹⁸ 2014 (9) SCC 263.

courts¹⁹. It is to be noted that the 246th Report of the Law Commission which was published prior to the said judgment had the objective to reduce extensive judicial intervention in arbitration matters.²⁰

However, this power of modification of award by the courts was not remedied by the Arbitration and Conciliation (Amendment) Act of 2015 and has been followed by the Apex Court in its subsequent judgments. In 2018, the Hon'ble Supreme Court in *M.P. Power Generation Co. Ltd. and Ors. v. Ansaldo Energia SPA and Ors.*²¹, relying on *Western Geco (supra)* observed that “the Court has the power to **modify the offending part of the award in case it is severable from the rest according to the said judgment**”. More recently, in 2019, the Hon'ble Supreme Court in *Hindustan Construction Company Limited and Ors. v. Union of India*²² made a reference to the issue and noted that the authority on the issue is *National Aluminum Co. Ltd. (NALCO) v. Pressteel & Fabrications (P) Ltd. and Anr.*²³ In NALCO, the Hon'ble Supreme Court while dealing with the issue that whether “for the purpose of challenging or seeking modification of an award, was the Supreme Court, or the principal Civil Court of original jurisdiction Under Section 2(e) of the Arbitration Act, 1996”?, the Hon'ble Court observed that “the Court which had jurisdiction to **modify and/or set aside the award was not the Supreme Court**”. Meaning thereby, the **courts have the power not only to set aside the arbitral award but also to modify it.**²⁴

In recent judgments of *Radha Chemicals v. Union of India*²⁵ and *Kinnari Mullick & Another v. Ghanshyam Das Damani*²⁶, the Hon'ble Apex Court has held that the court while deciding a Section 34 petition has no jurisdiction to remand the matter to

¹⁹ The Arbitration and Conciliation Bill, Statement of Objects and Reasons (1995); *Enercon (India) Ltd. & Ors. v. Enercon GMBH & Ors.*, (2014) 5 SCC 1.

²⁰ Supplementary to Report No. 246, Law Commission Report on Amendments to Arbitration and Conciliation Act, 1996 (Feb. 2015).

²¹ (2018) 16 SCC 661.

²² AIR 2020 SC 122.

²³ (2004) 1 SCC 540.

²⁴ Please note that the courts do not have the power to modify an arbitral award u/s 48 of the Act (*Ssanyong Engineering & Construction Co. Ltd. v. National Highways Authority of India*, 2019 SCC OnLine SC 677).

²⁵ 2018 (4) Law Herald (SC) 2913.

²⁶ (2018) 11 SCC 328.

the Arbitrator for a fresh decision. Further, it was held that the discretion of the Court under Section 34(4) to defer the proceedings for specified purpose is limited and can be invoked only upon request by the party prior to setting aside of the Award.

4. Whether the Parties Can Lead Evidence in an Application Under Section 34 of the Act?

In *Emkay Global Financial Service Limited v. Giridhar Sondhi*²⁷, the aspect of the scope of leading evidence in an application under section 34 of the Act was discussed by the Hon'ble Apex Court. In the said matter the objections filed under section 34 of the Act were rejected for want of jurisdiction. The order was appealed before the Hon'ble High Court of Delhi at New Delhi. The Hon'ble High Court referred the parties back to the Ld. District Judge with directions to first frame issues and then decide on evidence, including the opportunity to cross-examine witnesses who give depositions. This matter was then heard by the Hon'ble Supreme Court.

The Hon'ble Apex Court interpreted the words "furnishes proof" appearing in Section 34(2)(a) and observed that:

*An application for setting aside an arbitral award will not ordinarily require anything beyond the record that was before the Arbitrator. However, if there are matters not contained in such record, and are relevant to the determination of issues arising under Section 34(2)(a), they may be brought to the notice of the Court by way of affidavits filed by both parties. Cross-examination of persons swearing to the affidavits should not be allowed unless absolutely necessary, as the truth will emerge on a reading of the affidavits filed by both parties.*²⁸

²⁷ (2018) 9 SCC 49.

²⁸ (2018) 9 SCC 49.

Even earlier also in *Fiza Developers & Inter-Trade Pvt. Ltd. v. AMCI (India) Pvt. Ltd. & Anr.*²⁹, the Hon'ble Supreme Court dealt with the question of whether issues as contemplated under the Code of Civil Procedure, 1908 should be framed in challenge to the award under Section 34 of the Act and held:

...Applications under Section 34 of the Act are summary proceedings with provision for objections by the respondent-defendant, followed by an opportunity to the applicant to "prove" the existence of any ground under Section 34(2). The applicant is permitted to file affidavits of his witnesses in proof. A corresponding opportunity is given to the respondent-defendant to place his evidence by affidavit. Where the case so warrants, the court permits cross-examination of the persons swearing to the affidavit. Thereafter, the court hears arguments and/or receives written submissions and decides the matter. This is of course the routine procedure. The court may vary the said procedure, depending upon the facts of any particular case or the local rules. What is however clear is that framing of issues as contemplated under Rule 1 of Order 14 of the Code is not an integral part of the process of a proceeding under Section 34 of the Act.

5. Interpretation and Scope of the Term "Public Policy of India" Traced Through Judicial Pronouncements

(i) Judicial Interpretation of the words "Public Policy" and "Fundamental Policy of India" from the year 1993 to 2015, when the Act was amended to narrow the scope of the said words

- a. As early as in the year 1993, the Hon'ble Supreme Court in *Renusagar Power Co. Ltd. v. General Electric Co.*³⁰ laid down that the arbitral award can be set aside if it is contrary to:

²⁹ (2009) 17 SCC 796.

³⁰ 1994 Supp (1) SCC 644.

- i. the fundamental policy of Indian law;
- ii. the interests of India; or
- iii. justice or morality.

The Hon'ble Supreme Court in the case adopted a **narrower meaning** to the expression "public policy", confining judicial review of the arbitral award only on the aforementioned three grounds.

- b. Thereafter, the Hon'ble Supreme Court in 2003 in *Oil & Natural Gas Corporation Ltd v. Saw Pipes Ltd.*³¹ gave a wider meaning to the term "public policy" and held as follows:

*...in our view, the phrase 'Public Policy of India' used in Section 34 in context is **required to be given a wider meaning**. It can be stated that the concept of public policy connotes some **matter which concerns public good and the public interest**. What is for public good or in public interest or what would be injurious or harmful to the public good or public interest has varied from time to time. However, the **award which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public interest**. Such award/judgment/decision is likely to adversely affect the administration of justice. Hence, in our view in addition to narrower meaning given to the term 'public policy' in Renuagar's case (supra), it is required to be held that the award could be set aside if it is **patently illegal**. Result would be - award could be set aside if it is contrary to: -*

- (a) fundamental policy of Indian law; or*
- (b) the interest of India; or*
- (c) justice or morality, or*
- (d) **in addition, if it is patently illegal**.*

31. ...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

³¹ 2003 (5) SCC 705.

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.

An apparent shift was noticed from the narrower meaning assigned to the expression "public policy" given in *Renusagar (supra)* to the much wider approach as taken in *Saw Pipes (supra)*. In *Saw Pipes (supra)*, the Hon'ble Supreme Court, apart from the three grounds stated in *Renusagar (supra)*, added another ground thereto for the exercise of the court's jurisdiction in setting aside the award i.e. if it is **patently illegal**.

c. The Hon'ble Supreme Court on 4 September, 2014 in *ONGC v. Western Geco International Ltd.*³², further expanded the scope of the term "public policy". It answered the question of what would constitute the "**Fundamental Policy of Indian Law**". The relevant paragraphs of the judgment are as under:

26.Without meaning to exhaustively enumerate the purport of the expression "Fundamental Policy of Indian Law", we may refer to three distinct and fundamental juristic principles that must necessarily be understood as a part and parcel of the Fundamental Policy of Indian law. The first and foremost is the principle that in every determination whether by a Court or other authority that affects the rights of a citizen or leads to any civil consequences, the Court or authority concerned is bound to adopt what is in legal parlance called a 'judicial approach' in the matter.

28.Equally important and indeed fundamental to the policy of Indian law is the principle that a Court and so also a quasi-judicial authority must, while determining the rights and obligations of parties before it, do so in accordance with the principles of natural justice. Besides the celebrated 'audi alteram partem' rule one of the facets of the principles of natural

³² 2014 (9) SCC 263.

justice is that the Court/authority deciding the matter must apply its mind to the attendant facts and circumstances while taking a view one way or the other.

*29. ...No less important is the **principle now recognised as a salutary juristic fundamental in administrative law that a decision which is perverse or so irrational that no reasonable person would have arrived at the same will not be sustained in a Court of law.***

The Hon'ble Court held that in its opinion without conferring an exhaustive meaning, the **scope of fundamental policy** meant:

- i. Adopting a '**judicial approach**' which involves the application of judicial mind by the authority and bodies,
- ii. Adhering to the principles of **natural justice**,³³ and
- iii. That a **decision which is perverse or so irrational that no reasonable person would have arrived at the same** will not be sustained in a Court of law.

The Hon'ble Court further held that if the arbitrators failed to make an inference which should have been made, or have made a *prima facie* wrong inference, then "*the adjudication even when made by an arbitral tribunal that enjoys considerable latitude and play at the joints in making awards will be open to challenge and may be cast away or modified...*"

- d. The Hon'ble Supreme Court of India on 25 November, 2014 in *Associate Builders v. Delhi Development Authority*³⁴ clarified the scope of interpretation of the "**most basic notions of morality and justice**" in relation to the concept of "**public policy**" and "**fundamental policy of Indian law**". The relevant paragraphs of the judgment are as follows:

³³ Mc. Dermott International Inc. v. Burn Standard Co. Ltd., (2006) 11 SCC 181.

³⁴ 2015 (3) SCC 49.

18. In construing the expression "public policy" in the context of a foreign award, the Court held that an award contrary to

1. The fundamental policy of Indian law

2. The interest of India

3. Justice or morality,

would be set aside on the ground that it would be contrary to the public policy of India.

It went on further to hold that:

a contravention of the provisions of the Foreign Exchange Regulation Act would be contrary to the public policy of India in that the statute is enacted for the national economic interest to ensure that the nation does not lose foreign exchange which is essential for the economic survival of the nation (see para 75). Equally, disregarding orders passed by the superior courts in India could also be a contravention of the fundamental policy of Indian law, but the recovery of compound interest on interest, being contrary to statute only, would not contravene any fundamental policy of Indian law (see paras 85,95).

The Hon'ble Court also laid down the important Juristic Principles in addition to the two fundamental principles which form part of the fundamental policy of Indian law, which are as follows:

- i. Judicial Approach - "judicial approach" demands that a decision be fair, reasonable and objective. On the obverse side, anything arbitrary and whimsical would obviously not be a determination which would either be fair, reasonable or objective".
- ii. Principle of Natural Justice- "The Audi Alteram Partem principle which undoubtedly is a fundamental juristic principle in Indian law is also contained in Sections 18 and 34 (2) (a) (iii) of the Arbitration and Conciliation Act".

- iii. Perverse/Irrational decision- “...decision which is perverse or so irrational that no reasonable person would have arrived at the same is important and requires some degree of explanation”,
- iv. The interest of India- “The next ground on which an award may be set aside is that it is contrary to the interest of India. Obviously, this concerns itself with India as a member of the world community in its relations with foreign powers. As at present advised, we need not dilate on this aspect as this ground may need to evolve on a case by case basis”.
- v. Justice- “if an award is against justice or morality. These are two different concepts in law. An award can be said to be against justice only when it shocks the conscience of the court” .
- vi. Morality- “This Court has confined morality to sexual morality so far as section 23 of the Contract Act is concerned, which in the context of an arbitral award would mean the enforcement of an award say for specific performance of a contract involving prostitution. "Morality" would, if it is to go beyond sexual morality necessarily cover such agreements as are not illegal but would not be enforced given the prevailing mores of the day. However, interference on this ground would also be only if something shocks the court's conscience”.
- vii. Patent Illegality- “ ...It must be remembered that under the explanation to section 34 (2) (b), an award is said to be in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption. This ground is perhaps the earliest ground on which courts in England set aside awards under English law. Added to this ground (in 1802) is the ground that an arbitral award would be set aside if there were an error of law by the arbitrator” .

The Hon’ble Supreme Court clarified the scope of interpretation of most basic notions of morality and justice through this judgment. Accordingly, an award could

be set aside under the **ground of justice** when the award would be such that it would **shock the conscience of the court**. Further, an award **against morality** was considered to be something that was **against the essential customs of the day that would shock the conscience of the court**.

In *MSP Infrastructure Ltd. v. Madhya Pradesh Road Development Corporation Ltd.*³⁵, the Hon'ble Supreme Court has observed that the Public Policy of India means the policy of the Union i.e. Central Law, however, in *M/S Lion Engineering Consultants v. State of M.P. & Ors.*³⁶ the Hon'ble Apex Court has overruled the same to hold that 'Public Policy of India' refers to the law in force in India whether state law or central Law.

In conclusion, in the period from 1993 to 2015, the decisions of the Hon'ble Supreme Court in *ONGC Ltd. v. Saw Pipes*³⁷ and other judgments including *Associate Builders v. Delhi Development Authority*³⁸ and *ONGC v. Western Geco International Ltd.*³⁹ led to an **expansive definition of public policy** which virtually enabled courts to entertain any and every challenge on the "fundamental policy of Indian law"; and it was left to be exploited for refusing enforcement to foreign awards, and allowing domestic awards to be reviewed on merits.

(ii) The 246th Law Commissions Report, 2014

The highlights of the Law Commission Report published on 05.08.2014 can be summed as follows:

- i. The Arbitration and Conciliation Act, 1996 suffered from the **automatic stay of awards** when a challenge was filed against an award under Section 34, and

³⁵ (2015) 13 SCC 713.

³⁶ 2018 SCC OnLine SC 327.

³⁷ 2003 (5) SCC 705.

³⁸ 2015 (3) SCC 49.

³⁹ 2014 (9) SCC 263.

these issues were finally addressed in the Law Commission of India's 246th Report. In addition to the same, a Supplementary Report before the 246th Report on 05.08.2014 in view of the *Western Geco (supra)* was also prepared.

- ii. The Supplementary Report noted that *Western Geco (supra)* was undermining the efforts of the Law Commission of India to bring the Act in sync with the International Laws and practice.
- iii. The Commission's Supplementary Report stated that the amendments to Section 34 of the Act were suggested on the assumption that other terms such as the "fundamental policy of Indian law" or conflict with "most basic notions of morality or justice" would not be widely construed.
- iv. **The broad interpretation as given by the Hon'ble Supreme Court to "fundamental policy" under *Western Geco (supra)* was not in accordance with Section 34, as per the amended Arbitration Act, 2015.**
- v. **It had the effect of nullifying the decision of *Saw Pipes (supra)* wherein it was held that any contravention of the terms of the contract would be held as against the public policy of India.**
- vi. The Commission was further of the opinion that *Western Geco (supra)* would discourage the possibility of International Arbitration coming to India and Domestic Arbitration staying in India, due to the expansive definition of the term "Public Policy", however, a narrow definition to the same would be helpful to the International as well as domestic arbitrations.
- vii. The Commission's Report stated that public policy ground cannot have the same scope under Section 48 of the Act as Section 34 of the Act. The Report further stated that even though grounds of court intervention in a domestic

award ought to be wider, the same was recognized by introducing “patent illegality” in Section 34(2A) by the 2015 Act without making the same amendment to Section 48 of the Act.

(iii) The Arbitration and Conciliation (Amendment) Act, 2015

After taking into account the findings and proposals made by the Law Commission the Arbitration and Conciliation (Amendment) Act, 2015 came into effect from 23.10.2015.

a. Effect of the Arbitration and Conciliation (Amendment) Act, 2015 w.r.t. Section 34 of the Act

i. “Public policy of India” is to be understood as follows:

- 1) Expansion of Section 34 of the Act by the judgments of *ONGC Ltd. v. Saw Pipes Ltd.*⁴⁰ and *ONGC Ltd. v. Western Geco International Ltd.*⁴¹ has been done away with; and the law laid down in the case of *Renusagar Power Co. Ltd v. General Electric Co.*⁴² w.r.t. meaning of “fundamental policy of Indian Law” has been brought back.⁴³
- 2) The terms “Justice and Morality” would mean “most basic notions of morality and justice”.⁴⁴
- 3) The ground of “interest of India” can no longer be obtained.
- 4) Explanation 2 was added to Section 34(2)(b)(ii) to nullify the effect of the *Western Geco* judgment.⁴⁵ The said explanation states that the courts must not go into the merits of the case while dealing with the issue of whether the award is in contravention of the fundamental policy of Indian Law.

⁴⁰ (2003) 5 SCC 705.

⁴¹ (2014) 9 SCC 263.

⁴² 1994 Supp (1) SCC 644.

⁴³ See *Associate Builders v. Delhi Development Authority*, 2015 (3) SCC 49 ¶ 18, 27.

⁴⁴ See *Associate Builders v. Delhi Development Authority*, 2015 (3) SCC 49 ¶ 36-9.

⁴⁵ See *Associate Builders v. Delhi Development Authority*, 2015 (3) SCC 49 ¶ 28-9.

- 5) The ground of “Patent Illegality” with inbuilt exceptions has been introduced under Section 34 of the Act. Such illegality should go to the root of the matter and is not merely an erroneous application of law. i.e. *“what is not subsumed within the fundamental policy of Indian Law, namely, the contravention of a statute not linked to public policy or public interest, cannot be brought in by the backdoor when it comes to setting aside an award on the ground of patent illegality”*⁴⁶. It is to be noted here that a finding of the Tribunal based on no evidence at all, or a finding of the Tribunal ignoring any vital evidence, or a finding of a Tribunal based on documents not known to the parties, will amount to a patently illegal award.
- ii. There has been a removal of the automatic stay of an award effected by filing a challenge under Section 34 of the Act.
- b. Ambiguity in the Arbitration and Conciliation (Amendment) Act, 2015 w.r.t. the date of application of the amended Act

There was ambiguity after the 2015 Amendment Act in relation to whether the provisions of the amended Act were applicable to the arbitrations and court proceedings that commenced on or before the 23 October 2015. The Hon’ble Supreme Court in *BCCI v. Kochi Cricket Pvt. Ltd.*⁴⁷, dealt with the said issue. More specifically, the question before the Hon’ble Supreme Court was what will happen to the petitions filed under Section 34 of the Act that had been filed before the commencement of the Amendment Act, which were governed by Section 36 of the old Act? Would Section 36, as substituted, apply to such petitions?

The Hon’ble Supreme Court *inter alia* held that **Section 36 introduced by way of the 2015 Amendment would apply even to awards in cases where a petition under**

⁴⁶ Ssangyong Engineering & Construction Co. Ltd. v. National Highways Authority of India, 2019 SCC OnLine SC 677 ¶ 38.

⁴⁷(2018) 6 SCC 287.

Section 34 of the Act had already been filed as on or before 23.10.2015 (i.e. Cut-off Date), thereby doing away with the grant of an automatic stay due to the mere pendency of a petition under Section 34 of the Act as on the Cut-off Date.⁴⁸

6. The Arbitration and Conciliation (Amendment) Act, 2019

The latest insertion of Section 87 to the Act by the Arbitration and Conciliation (Amendment Act), 2019 provided that the 2015 Amendment would be applicable only to the arbitral proceedings which commenced on or after 23.10.2015 (i.e. the Cut Off Date) and to such court proceedings which emanate from such arbitral proceedings. Moreover, Section 15 of the 2019 Amendment also omitted/deleted Section 26 of the 2015 Amendment.

The insertion of Section 87 by the Arbitration and Conciliation (Amendment) Act, 2019 nullified the decision of the Hon'ble Supreme Court in *BCCI v. Kochi Cricket (supra)*, and restored the position prevalent prior to the commencement of the 2015 Amendment i.e. **automatic stays on arbitral awards where the petition challenging an arbitral award was filed under Section 34 of the Act before 23.10.2015.**

Thereafter, the Hon'ble Supreme Court on November 27, 2019, in the *Hindustan Construction Company Limited & Another v. Union of India & Anr.*⁴⁹, struck down the insertion of Section 87 of the Arbitration Act and deletion of Section 26 of the 2015 Amendment as being manifestly arbitrary. This led to the restoration of the position as decided by the Supreme Court in the *BCCI v. Kochi Cricket (supra)* that Section 36 of the Act introduced by way of the 2015 Amendment would apply even to awards in cases where a petition under Section 34 of the Act had already been filed as on or before 23.10.2015 (i.e. Cut-off Date), thereby doing away with the grant of an automatic stay due to the mere pendency of a petition under Section 34 of the Act as on the Cut-off Date.

⁴⁸BCCI v. Kochi Cricket Pvt. Ltd., (2018) 6 SCC 287.

⁴⁹2019 SCC OnLine SC 1520.

Recently, the Hon'ble Supreme Court in *Ssangyong Engineering & Construction Co. Ltd. v. National Highways Authority of India*⁵⁰ observed that substantive changes have been brought to the meaning of "public policy of India", and therefore, the amended Section 34 will apply only to those Section 34 applications that have been filed on or after 23.10.2015, notwithstanding the date of initiation of arbitration proceedings.⁵¹

7. Conclusion

Section 34 of the Arbitration and Conciliation Act, 1996 has gone through various changes over the years. The legislature to ensure that India is recognised as a friendly and attractive destination for parties both in India and abroad, to enhance the efficacy and speed of dispute resolution and to resolve the concern of potential of judicial interference brought in amendments to the Act in 2015 and 2019. These amendments have been respected by the judiciary and form the current law on scope setting aside a domestic arbitral award in India. Hence, the challenge to a domestic award under Section 34 of the Act is limited to the grounds mentioned under the Act. Further, the term public policy of India is to be construed strictly; and the court cannot go into the merits of the case to set aside the award on the basis of the fundamental policy of Indian law.

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⁵⁰2019 SCC OnLine SC 677.

⁵¹*Ssangyong Engineering & Construction Co. Ltd. v. National Highways Authority of India*, 2019 SCC OnLine SC 677 ¶ 15.

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