

# When Courts Can Interfere in the Awards Passed By an Arbitral Tribunal as Per the Law in India?

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## **Introduction:**

India has been an arbitration friendly country right from the beginning, because arbitration was in practice in this country even before the codified law came into force. In the pre-court period the leaders of the communities and the elders of the families used to act as arbitrators and people used to obey the decision of those arbitrators. Hence arbitration system is not new to India but the interference of courts have been substantial and excessive in the past. Arbitration Act, 1940 was a big step forward in bringing a comprehensive law covering all important aspects of arbitration. But the above said 1940 Act had provisions which delayed the arbitration process and liberally allowed the courts to interfere into the arbitrations before and after the arbitral awards are passed.

In the year 1985 the United Nations Commission on International Trade Law (UNCITRAL), a subsidiary body of the General assembly brought in a model Arbitration law. The said law which is popularly known as UNCITRAL model law on International Commercial Arbitration helped many countries to improve their arbitration systems. Even though the objective of the said model law was to convince the member states to adopt a uniform International Arbitration law, which would help the international Trade and business in a big way, the model law also helped the member states to have a uniform domestic arbitration law. This is because as per the arbitration laws of many countries, the international arbitration which had the seat of one country can treat that international award at par with the domestic arbitral awards for the purposes of challenge and enforcement. Hence without achieving a uniform domestic and international arbitration system a complete arbitration friendly atmosphere cannot be

achieved. Hence the General Assembly of United Nations by its resolution dated 11<sup>th</sup> December 1985 recommended that all states give due consideration to the model law on International commercial Arbitration, in view of the desirability of uniformity of law of arbitral procedures and the specific needs of international commercial arbitration practice.

### **Arbitration and Conciliation Act, 1986:**

India responded swiftly to the recommendation of the United Nations and understood the importance of adopting the Model law to gain the confidence of the foreign investors. Hence India enacted Arbitration and conciliation Act 1996 in the lines of the above said UNCITRAL model law of Arbitration. The main intention of the 1996 Act can be stated as follows:

- (a) To recognise the importance of having a uniform arbitration law all over the World
- (b) To reduce the interference of the courts into the arbitral proceedings
- (c) To encourage Commercial disputes be resolved by arbitration.

Even though the interference of the Courts is reduced to a minimal level by the new 1996 Act, losing parties are filing applications under S.34 and trying their level best to enhance the scope of S. 34 and make the courts to treat the challenge proceedings like a regular first appeal. Since in majority of the places in India, the powers to entertain the challenge under S.34 of the Act lies with the District courts, initially the losing parties are able to delay the enforcement of arbitral awards for a longer time. Even though some High courts also, earlier admitted all such applications under S. 34 and treated the challenge proceedings like a regular appeal. Now many judges of the High

Courts and the Supreme Court of India have realised the importance of protecting the arbitration by exercising their powers to interfere sparingly. The settled law of India mostly recognises the finality of arbitral awards and restricts the scope of the challenge. Hence the author prepared this paper on the basis of the provisions of the Arbitration and conciliation Act, 1996 and various Judgements of the High Courts and Supreme Court of India.

### **SCHEME OF THE ACT AND COURT INTERFERENCE:**

It is important to note that the assistance of the courts is necessary for the smooth functioning of the arbitration system since the courts have statutory powers to execute and enforce an order. But at the same time courts should avoid entertaining applications against the arbitration proceedings because the court proceedings delay the arbitral process and consequentially the objective of the arbitration gets defeated. Hence the courts which are exercising the supervisory powers should exercise the powers with caution so that the arbitral process does not get affected. The Arbitration and Conciliation Act, 1996 gives scope to the Courts only with respect to the following issues:

- (a)** Reference to arbitration (S.8, 45 & 54)
- (b)** Appointment of arbitration (S.11)
- (c)** Interim measures (S.9)
- (d)** Challenge to arbitrators (S.12, 13 & 14)
- (e)** Challenging the arbitration awards (S.34)
- (f)** Seeking Courts assistance with regard to Witnesses (S.27)
- (g)** Contempt Proceedings (S.27)

- (h) Enforcement of awards (S.36, 49&58)
- (i) Appealable orders (S.37 and S.59)

## When Courts can interfere in the Arbitral awards?

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As per the 1996 Act, arbitral award includes final and interim awards passed by the arbitrator. Both interim as well as final awards can be challenged under S. 34. The Supreme Court of India confirmed the powers of the courts to entertain S.34 applications while dealing with the case (2006) 11 SCC 181 McDermott International Inc Vs. Burn Standards Co. Ltd., The Only recourse against any arbitral awards as per the act is by filing an application for setting aside arbitral awards under S. 34. As per S. 34 of the 1996 Act, an arbitral awards may be set aside by the Court only if the party making the application furnishes proof that

- (a) A party was in some incapacity
- (b) 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
- (c) the party making the application was not given proper notice of appointment of arbitrator or of the arbitral proceedings or was otherwise unable to present his case.
- (d) 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 not submitted to arbitration may be set aside
- (e) the composition of arbitral tribunal or the arbitration procedure was not in accordance with the agreement of 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.
- (f) the courts finds the

subject matter is not capable of settlement by arbitration (g) the arbitral award is in conflict of the public policy of India.

In the last 18 years thousands of applications were filed under S.34 in various courts of India. Even though High Court having original jurisdictions have not admitted all the applications, the district courts have generously admitted matters filed under S.34. Since the awards cannot be enforced till the application under S.34 is pending, hundreds of parties all over the world are not able to see the finality of the arbitral awards. Let us see below, what is the settled law with regard to interference by the courts in the arbitral awards.

## Whether the parties to the arbitration awards can challenge the award on the merits?

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Normally in any judicial system a first appeal against a Court Judgment is a right of the party and hence the first appellate court needs to once again look into the merits of the case and pass a reasoned judgment. This is because the parties never have the right to choose their judge or their qualification or knowledge on particular filed of business. But in the arbitration cases the parties choose their arbitrators, knowledge and qualification and hence there need not be another appreciation of merits of the case. That is why the UNICITRAL model law as well as Indian Arbitration & Conciliation Act, 1996 restrict the scope of the appeal against an arbitral award. The objective of such a restriction is to avoid wastage of time by once again looking into the merits of the case and re-appreciate the evidence and to ensure finality of an arbitral award.

The above-said restriction incorporated into of S.34 of the Arbitration and Conciliation Act, 1996 was challenged by way of a Writ Petition filed under Article 22d of the Constitution of India in TPI Ltd VS Union of India. The main ground of challenge was that a right to challenge an arbitral award on merits should not be denied to parties and in the absence of such a provision, Section 34 of the Arbitration and Conciliation Act, 1996 shall be unconstitutional. But the High Court dismissed the above said Writ Petition with an observation that arbitration is an alternate forum for redressal of disputes, and is selected by their own free will and they agree to the arbitrators decision by means of mutual agreement or contract, which gives a go by to the normal judicial forum otherwise available to the parties. That is because there is no compulsion or imposition by any statute compelling the parties to resort to arbitration if a dispute arises. That is also because the legislature has the power to specify the grounds on which the award can be challenged. Hence it was held that restrictions incorporated into S.34 of the Arbitration and conciliation Act, 1996 are constitutional and valid. Hence arbitral awards cannot be interfered by the courts on merits and their jurisdiction is confined to S.34.

## Whether a misinterpretation of a contractual provision or non-speaking arbitral award constitute valid a grounds of challenge under S.34 of Arbitration Act

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In many cases applications seeking to set-aside an arbitral award are filed complaining that the contract is misinterpreted by the arbitral tribunal. That means as

per the aggrieved party the contract ought to have been interpreted in a different way. Hence arbitrators are also confused by the parties and lawyers on the basis of various Judgments with regards to interpretation of contracts. But various courts of India have consistently held that the work of interpretation of contracts, falls within the domain of the arbitrator and hence the supervising court cannot interfere into that interpretation. Moreover it was also held that S.34 of the Arbitration and Conciliation Act does not contemplate 'misinterpretation of contract' as one of the grounds for challenging an arbitral awards.

Let us see some important Judgments which settled the law with regard to powers of the courts to go into the interpretation of a contractual provision made by an arbitrator.

**1)** In a recent Judgment delivered by the division bench of High Court of Delhi on 1<sup>st</sup> August 2014 in Delhi Development Authority Vs. M/s Bharadwaj brothers FAO (OS) No. 285/2014 held as follows:

“A Section 34 proceeding, which in essence is the remedy of annulment, cannot be used by one party to convert the same into a remedy of appeal. In our view, mere erroneous/wrong finding of fact by the arbitral tribunal or even erroneous interpretation of documents/evidence is non-interferable under S.34 and if such interference is done by the Court, the same will set at naught the whole purpose of amendment of the Arbitration Act.”

The above said judgement clearly states that the powers of the court U/S. 34 is limited and courts should not expand their own powers granted by the statute. Any such attempts by the courts while exercising their powers under S.34 or



S.37 of the Arbitration and Conciliation Act, 1996 shall frustrate the purpose of the above said Act itself.

- 2) The Supreme court in *Rashtriya Ispat Nigam Ltd., Vs Dewan Chand Saran* (2012) 5 SCC 306 refused to set aside an arbitral award under the 1996 Act on the ground that the view taken by the arbitral Tribunal was against the terms of the said that the tribunal had travelled outside its jurisdiction and the court could not substitute its view in place of the interpretation done by the tribunal. It was also reiterated that the Arbitral Tribunal is legitimately entitled to take the view which it holds to be correct one after considering the material before it and after interpreting the provisions of the agreement and if the arbitral tribunal does so its decision has to be accepted as final and binding.
- 3) The arbitral award is not a speaking award as held by the Supreme Court of India in a recent Judgment dated 04.09.2014 in *Anand Bros Vs Union of India* (2014)9SCC 212 that as per Section 31(3) of the arbitration and Conciliation Act, 1996 it is necessary that an arbitral award should be a speaking award disclosing the reasons for arriving at a decision, unless (a) the parties have agreed that no reasons are to be given or (b) the award is an arbitral award on agreed terms under Section.30 of the Act. But in *Markfed Vanaspathi Vs Union of India* (2007) 7SCC 679 the Supreme Court held that the interference by the courts on the basis of a non-speaking order is very limited.
- 4) *In Sumitomo Heavy Industries Lts. VS ONGC Ltd.* (2010) 11 SCC 296 it was held that the umpire has considered the fact situation and placed a construction of the clauses of the agreement which according to him was the correct one. One may at

*the highest say that one would have preferred another construction of clause 17.3, but that cannot make the award in any way perverse. Nor can one substitute one's view in such a situation, in place of the one taken by the umpire which would amount to sitting in appeal. As hold by this Court in Kwalitymfg Corpr. Vs Ventral ware housing corporation (2009) 5SCC 142 and SAIL Vs. Gupta brother steel tubes Ltd., (2009) 10 SCC 63 the court while considering the challenge to the arbitral amount does not sit in appeal over the findings on the decision of the arbitrator.*

### **ISSUES REGRADING LIMITATION:**

In some Contracts parties agree to reduce the limitation period to raise a dispute etc., such a contractual provision if followed by the arbitrator it is considered to be in conflict with public policy of India. This is because any contractual provision reducing the statutory limitation period is sit by S.28 of the Indian Contract Act. In Biba Sethi Vs Dyna Securities the arbitral tribunal relying on the National stock Exchange byelaws which prescribed 6 months as the limitation for making claims declared that the claims of the claimant are time barred. But the Delhi High Court while exercising the powers under S. 34 of the Arbitration and Conciliation Act, 196 set aside the arbitral award since it was found contrary to S. 28 of the Contract Act.

### **ARBITRABILITY OF DISPUTES:**

The next important issue which is taken as a ground in many S.34 application is the arbitrability of the issue in question. Even though mostly courts have taken arbitration friendly stand with regards to arbitrability of issues, there are some

issues which cannot be resolved by way of an arbitration. In case if an arbitral tribunal has passed an award regarding an issue which is not arbitrable the courts have set aside that award. The following are some examples for the same.

- 1) Bombay High Court in Indian Oil Corporation Vs. Artson Engineering Ltd., (2007), Mah LJ 825 held that the claims which were not notified to quality arbitration cannot be included in the claim later since they were included in the notice seeking arbitration. Hence the arbitral award granting those claims was set aside on the ground that the award dealt with claims not arbitrable.
- 2) In Booz Allen & Hamilton Inc. Vs SBI Home Finance Ltd., (2011) 5 SCC 531 Supreme Court of India held the following types of disputes are not arbitrable
  - i. Whether the issue could be solved by private forum selected by the parties or whether they could exclusively fall within the domain of public for a (courts).
  - ii. Whether the disputes are covered by the arbitration agreement.
  - iii. Whether the parties have referred the disputes to arbitration. It also held that matters which require a judgment in rem are not arbitrable and the example of non-arbitrable disputes are (i) disputes relating to rights and liabilities which give rise to or arise out of criminal offence (ii) matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights, child custody (iii) guardianship matters (iv) insolvency and winding up matters (v) testamentary matter (grant of probate, letters of administration and succession certificate) and (vi) eviction or tenancy matters governed by special statutes against eviction and only the

specified courts are conferred jurisdiction to grant eviction or decide the disputes.

Hence the arbitration tribunal should not give an award in matters which are not arbitrable. If any awards issued by a tribunal which has granted relief in matters which are exempted expressly by the parties from the arbitration clause and issues which are not arbitrable then the courts may set aside the award while exercising their jurisdiction under section 34 of the Arbitration and conciliation Act, 1996. For example the Supreme Court of India held that an arbitrator would have no power or Jurisdiction to order winding up of a Company Haryana telecom Ltd., Vs Sterlite Industries (India) Ltd., AIR 1999 SC 2354

## CAN ARBITRAL AWARDS BE SET ASIDE FOR WANT OF REGISTRATION OR STAMPING?

Supreme Court of India while handling a special leave petition related to S.34 of the Arbitration and Conciliation Act, 1996 in M. Anasuya Devi Vs. M. Manik Reddy (2003) 8 SCC 565 held that deficiency in stamping or registration are note with in the preview of S. 34 and hence cannot be set aside. But those issues can be raised only at the stage of enforcement of the said arbitral award U.S. 36.

### **PUBLIC POLICY**

Public policy is one issue which is a threat to the arbitral awards since courts can interfere into any award on the ground of public policy. In India Supreme Court of India has minimised the possibility of such unlimited interference by the courts, by its various judgments.

- 1) While handling *Renusagar Power Co Vs General Electric Company* 1994 Supp (1) SCC 644 the Supreme Court of India held that the courts while exercising their powers with regard to the enforceability of a foreign international award, the courts should give a narrow interpretation to the term “Public policy”. It also held that merely a violation of Indian laws would not suffice to attract the bar of public policy to enforce a foreign award in the context of International arbitration. Since the foreign awards Act is concerned with recognition and enforcement of foreign awards which are governed by the private International law, the expression in that Act “Public Policy” must be construed in the sense the doctrine of Public policy is applied in the field of Private international law. Applying the said criteria it was held that the enforcement of a foreign award would be refused on the ground that it is contrary to public policy if such enforcement would be contrary to (i) Fundamental Policy of Indian law or (ii) The interests of India or (iii) justice or morality. Even today this case is the settled law with regard to the enforcement of foreign arbitral awards. But with regard to the International arbitral awards passed in India (Indian seat) and domestic awards, the term “Public policy” is enhanced by the Supreme Court of India, beyond the reasonable limits.
- 2) In *ONGC Vs SAW pipes* (2003) 5 SCC 705 the Supreme Court of India expanded the scope of public policy by taking a wider view and held that Public policy means the statutory provisions of Indian law or even the terms of the contract. But it also held that “patent illegality” going into the root is necessary to come to a conclusion that an award is violative of “public policy”. In the said case it was held that patent illegality includes the violation of contractual principles and violation of contract

law. Hence the term “patent illegality” included by the Supreme Court into the definition of “Public policy” in addition to the Renusagar principles and substantially increased the scope of interference of the courts into the arbitration awards while exercising their jurisdiction of dealing with the challenge to International awards passed in India and domestic awards, under S.34 of the Act.

**3)** In a recent Judgment dated 04.09.2014 a three Judge Bench of Supreme Court of India in ONGC Vs Western Geo International Ltd (2014) 9 SCC 263 further has expanded the scope of “Public policy” including reasonableness, fundamental principles providing a basis for administration of Justice and enforcement of law in addition to the principles laid down by the above said SAW pipes judgment. Hence the term public policy as per the Western Geo Judgment includes all the following aspects:

**(i)** Judicial Approach (Judicial approach ensures the authority to act in a fair, reasonable and objective manner and not based on some extraneous considerations

**(ii)** Application of mind and recording reasons

**(iii)** Decision should not fall out of reasonableness if tested on the touch stone of Wednesbury principle of reasonableness

The above said ONGC 2014 judgment also states all such fundamental principles providing a basis for administration of justice and enforcement of law.

## **Conclusion:**

Even though India is rated as an Arbitration friendly country, in the issue of Court interference we need to go a long way. But the minds of the courts and legislature may change along with increased Institutional arbitrations, increased usage of expert witnesses, disclosure procedures with regard to conflict of interest of arbitrators, trained arbitrators, lawyers and trained Judges. The Law Commission of India has given many amendment proposals proposing to amend Arbitration and Conciliation Act, 1996, to the Government, including the proposal to reduce the scope of “Public Policy” in arbitral proceedings and if the government understands the seriousness and incorporate those proposed amendments into the existing law, that would really help the arbitration in India.



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