

ONGC Vs Western Geco

International, 2014 Judgment by

Supreme Court of India is a Setback

for International Arbitration in

India – Critical Study

Everyone knows India has been an arbitration friendly country and has been supporting international arbitration by signing of New York Convention on enforcement of Foreign awards in the year 1956 itself, by adopting a new arbitration law in the lines of UNCITRAL model law etc., Arbitration system is not new to India but the arbitrations could not be treated as an effective mechanism delivering the final results faster than the courts because of the substantial and excessive interference of courts in the past. The old arbitration Act of India Arbitration Act, 1940 was not able ensure speedy resolution of disputes. India was aware that a proper and speedy dispute resolution mechanism can create a favourable investment climate in a country.

In the year 1985 the **United Nations Commission on International Trade Law (UNCITRAL)**, a subsidiary body of the United Nations General assembly drafted and published a model Arbitration law, in consultation with member countries. The General Assembly of United Nations also by its resolution dated 11th December 1985 recommended to all member countries to consider adopting an arbitration law in the lines of the model law.

Arbitration and Conciliation Act, 1986 Minimises Court Interference than UNCITRAL Model Law:

India responded positively to the above said recommendation of the United Nations and enacted Arbitration and Conciliation Act, 1996 which is similar to the UNCITRAL Model law. Even though India reserved the rights to recognise foreign awards on reciprocation basis, 1996 Indian arbitration law further reduced the chances of Court interference, by not following the model law provisions as it is. For example model law

provides for a court intervention if the arbitration tribunal rejects the challenge to an arbitrator, by a party. But Indian Act does not provide court interference at that stage and allows losing party to raise that rejection by the arbitral tribunal as a ground while challenging the arbitral award. More over S.8 of the said 1996 Act does not allow courts to entertain an objection to the effect that the arbitration agreement is “**null and void inoperative or incapable of being performed**”, whereas the corresponding provision of the model law permits court to entertain an application.

Scheme of the 1996 Act and Court Interference:

As per the 1996 Act, the only recourse against any arbitral award passed in India (including International arbitral awards passed in India with seat in India) is 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 is able to establish that

(a)(1) A party to the arbitration was in some incapacity.

(2) The arbitration agreement is not valid under the law to which the parties have subjected themselves to or, failing any indication thereon, under the law for the time being in force in India or.

(3) One of the parties was not given proper notice with regard to the appointment of arbitrator or of the arbitral proceedings or was otherwise unable to present his case.

(4) the arbitral award dealt with issues not contemplated by or not falling within the terms of the reference/ submission to arbitration, or it contains decisions on matters which not submitted to arbitration (e) the composition of arbitral tribunal or the arbitration procedure was not in accordance with the arbitration agreement between the parties, unless such agreement was in conflict with a provision of this part from which the parties cannot derogate, or failing such agreement was not in accordance with this part of the Act (f) the courts finds the subject matter is in conflict of the public policy of India.

Even though the Arbitration and Conciliation Act,1996 minimised the interference of the Courts, parties are filing applications under S.34 (provision to challenge the arbitral awards) and trying their level best to enhance the scope of S. 34 and to make the courts to treat the challenge proceedings into a regular first appeal. In India the powers to entertain the challenge of the arbitral award, under S.34 of the Act lies with the District courts and High Courts having original Jurisdiction. The High Court judges comparatively have better understanding of the arbitration system and hence the admission of the applications seeking to challenge the award is lesser. But if the jurisdiction lies in a District court getting admissions of such applications are easier. Another difficulty is, till the applications seeking to set aside an arbitral award is pending in a court the award cannot be enforced. So to get an award enforced the application seeking to set aside the award has to be disposed of by the court.

Whether The Parties are allowed by the 1996 Act to Challenge the Arbitration Awards on the Merits of the Case?

In India like many common law countries, first appeal against a Court Judgment is a right of the party and hence it is mandatory that the first appellate court needs to once again look into the merits of the case and pass a reasoned judgment. But the above said 1996 Act does not allow the applications seeking to challenge the arbitral award to be dealt with like a regular first appeal. That is why it prescribes specifically the grounds under which such an application seeking to set aside the arbitral award can be filed. Hence the courts are expected to keep in mind the legislative restrictions imposed by the law makers while dealing with the applications seeking to set aside an arbitral award. The objective of such an important restriction includes but not limited to avoidance of 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.

Misinterpretation of Contractual Provision by the Arbitral Tribunal:

One of the popular grounds in seeking to set-aside an arbitral award in India is misinterpretation of the contract provisions by the arbitral tribunal. That means as per the aggrieved party the provisions of the contract ought to have been interpreted in a different manner. But courts of India have been consistently holding that the work of interpretation of contracts, falls within the exclusive domain of the arbitrator and hence the supervising court cannot interfere into that interpretation. Moreover it was also held by the Indian courts 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 and hence that ground cannot be a valid ground.

The following are some important Judgments which have 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 very recent Judgment delivered by the High Court of Delhi on 1st August 2014 in a case between **Delhi Development Authority Vs. M/s Bharadwaj brothers** FAO (OS) No. 285/2014, it was 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."

- 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 even if the view taken by the arbitral Tribunal was against the terms of the contract and 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 by the Supreme Court of India 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.

Interpretation of Term “Public Policy” by The Supreme Court Of India with Regard to Domestic Awards Which Includes International Arbitral Awards With Seat in India:

The term “**violation to Public policy of India**” is not defined anywhere in the 1996 arbitration Act of India. So far no judgment from any court of India clearly defines it. The term public policy is given a narrow meaning for the purpose of enforcement of foreign awards. But with regard to the same term while dealing with applications seeking to set aside the arbitral awards, the courts have taken a different view. Indian courts when they are not able to fit their reasoning for the interference into any of the grounds mentioned in S.34 of the Act, they give a liberal meaning to the terms public policy without understanding the fact that such liberal interpretations will full defeat the objective of the arbitration mechanism itself. Which is a threat to the finality of arbitral awards since courts can interfere into any award on the ground of public policy. When the trend of majority of the courts in India are friendly to the arbitration the Supreme Court of India unfortunately has delivered some judgments which would result in making an arbitration proceeding like a first step to litigation.. 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 merely a violation of Indian laws would not suffice to attract the bar of public policy in International arbitration context.
- 2) In **ONGC Vs SAW pipes (2003)** 5 SCC 705 the Supreme Court of India expanded the scope of public policy 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**”.

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