Supreme Court Sets Aside Award For "Non-Application of Mind"

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The judgement of the Supreme Court in ***ONGC* v. *Western Geco International Ltd.* (2014) 9 SCC 263 ("Western Geco")** continues to create havoc in the arbitration jurisprudence of India.

To elaborate, the Supreme Court explained in ***ONGC* v. *Saw Pipes Ltd.* (2003) 5 SCC 705 ("Saw Pipes")** that an award can be set aside under Section 34(2)(b)(ii) on the ground that it violates the public policy on India, if the award is inconsistent with: **(a)** fundamental policy of Indian law; or **(b)** the interest of India; or **(c)** justice or morality; or **(d)** if it is patently illegal.

Subsequently, in *Western Geco.*, the Court further elaborated on the expression **'fundamental policy of Indian law'**, holding that it refers to the principles providing basis for administration of justice and enforcement of law in this country which included judicial approach, i.e. not acting arbitrarily or whimsically and acting in a fair, reasonable and objective manner without taking into account any extraneous consideration, following the principles of natural justice, i.e. taking a decision by due application of mind and by recording reasons and taking rational decision which can be decided on the touchstone of *Wednesbury.*

Thus, as the law stands in India at present, **"Public Policy of India"** can be construed as:

(a) Fundamental policy of Indian law which includes:

- Violation of principles of natural justice
- Perversity or irrationality of decisions
- If on facts proved before them the arbitrators fail to draw an inference which ought to have been drawn or if they have drawn an inference which is on the face of it, is untenable resulting in miscarriage of justice.

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(b) The interest of India; or

(c) Justice or morality; or

(d) If it is patently illegal.

The Supreme Court has recent relied on the decision of Western Geco to set aside an award dated 29th June, 2003, passed by Retired Justice B.K Behera in the case of **State of Orissa ("State") v. M/s. Samantary Constn. Pvt. Ltd. ("Contractor") 2015 SCC OnLine SC 856.**

Facts of The Case:

The parties entered into an agreement for the construction of a barrage vide Agreement dated 11th February, 1986. Despite extension of the contract, the work could not be completed in time. Thus, vide letter dated 21st April, 1988, the contract was terminated. The Parties went into arbitration and the vide award dated 29th June, 2003, the arbitrator allowed the claims of the Contractor amounting to Rs. 6.99 crore and the counter claim of the State to the extent of Rs. 1.37 crores.

The present matter revolves around a claim of Rs. 68,44,332 (as calculated up to 31st October, 1989) made by the Contractor for hire charges for machinery and equipment (Item no. 18 in the Claim Statement). This claim was upheld by the Tribunal and quantified at Rs. 3 crore in accordance with hire charges as per Government rates, since the Tribunal reasoned that the seizure of the machinery and other equipment was illegal as termination of contract itself was illegal. The Tribunal increased the amount of the claim since the Contractor had calculated the claim only till 31st October, 1989, but the claim was for the entire period for which the Contractor was deprived of the machinery and the equipment.

This award was challenged under Section 34 and the District Judge reduced the award with respect to Item no. 18 to Rs. 6,844,332. In appeal, the High Court reversed the judgement of the District Judge and upheld the arbitral award.

Decision

Subsequently, the matter went into appeal to the Supreme Court where the State argued that the claim based on hire charges could not be for indefinite period and could in no case exceed the price of the machinery and other equipment. The Court accepted the arguments of the State and set aside the award with respect to Item no. 18. In the interest of preventing further delay, the court assessed the claim and awarded Rs. 50 lakhs under Item no. 18.

The Court reasoned that there was a *"non-application of mind in awarding the amount of Rs. 3 crores towards the hire charges… We are conscious that we are not to substitute our opinion for that of the Arbitrator but since this part of the Award is out rightly perverse and not based on application of minds, we modify the award."*

Analysis

The Tribunal had awarded a certain amount based on evidence and reasoning. This amount had been confirmed by the High Court also. Therefore, the judgement of the Supreme Court that the arbitral award was out rightly perverse and not based on application of minds is dubious, if not downright erroneous.

This judgement is another example of the flaws in the Indian arbitration regime. The scope of **"public policy"** has been extended far too wide and the Courts now sit in appeal over an arbitral award. The result in inordinate delay(more than 12 years in the present case) and unnecessary interference in an arbitral award.