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SUPREME COURT OF INDIA ON GROUNDS OF SETTING ASIDE ARBITRAL AWARD**SUDHIR S. KOTWAL****ADVOCATE****CHAMBER NO. 2, MARUTI CHAMBERS, DISTRICT COURT****NASHIK****DR. ASMITA A. VAIDYA****PRINCIPAL****N. B. T. LAW COLLEGE****NASHIK****ABSTRACT**

This Article discusses the scope of Courts in interference with arbitral award passed by Arbitral Tribunal. It further discusses the provisions of section 34 & other related sections in Arbitration & Conciliation Act 1996. The major grounds such as jurisdiction of Arbitrator, misconduct of Arbitrator, Bias of Arbitrator, Non Speaking award etc. on which arbitration award can be set aside. The interpretations given by Supreme Court of India to the phrase "Public Policy of India" under the provisions Act 1996. The narrow & broad views expressed by the supreme court of India on scope for interference in setting aside arbitral award. I also referred some of the cases of Supreme Court of India throwing the light on the grounds of setting aside award.

KEYWORDS

Arbitration & Conciliation Act 1996, Arbitral Tribunal, Supreme Court of India, Public Policy of India. arbitration agreement, jurisdiction of arbitrator, misconduct of arbitrator, non speaking award, bias of arbitrator, setting aside arbitral award.

1. INTRODUCTION

In the field of arbitration, there are two areas which cover almost 40 per cent of the activities related to arbitration. First is the nomination of the arbitrator and the second area is related to challenging award of the arbitrator. These two areas cover 90 percent litigation on the issues pertaining to arbitration.

In India people have tendency to challenge every award passed by the Arbitrator. The approach of the arbitrator & conduct of arbitral proceeding is like suit before court. In fact to arrive at mutual settlement of dispute, is the aim of arbitration. Finality to award is in the commercial interest and growth of economy of any country. In case award is challenged in court it postpones its finality & winning party could not get the fruit of the arbitration award. Challenges to award prolong the execution of award & finality of award is kept on back seat and driving seat is occupied by court, this is contrary to the spirit, objective and concept of arbitration.

Section 34 of the Act restricts the grounds for challenging the award. Section 34 provides procedure to check the powers of arbitrator, to prevent them from going beyond the scope of their authority. This section does not allow the Court to interfere with the findings of the arbitrator award on merits. The Court cannot sit over the findings recorded by the arbitrator and to set it aside. The arbitral award cannot be set aside on merit as he is the judge chosen by the parties and the parties are bound to accept his verdict on the issue. It is the duty of the arbitrator to decide the dispute in terms of contract between the parties and if he decides a dispute in contravention of the terms of the contract, the award gets vitiated. In case of **Associated Engineering Co. Vs. Government of Andhra Pradesh**,¹ it was held that arbitrator cannot act arbitrary, irrationally, capriciously or independently of contract. His sole function is to arbitrate in terms of the contract. He has no power apart from what the parties have given him under the contract. If he travels outside the contract, he acts without jurisdiction but if he acts within parameters of the contract, the award cannot be interfered.

2. UNDER ARBITRATION AND CONCILIATION ACT, 1996 THE INTERVENTION OF COURTS IS ALLOWED WITH RESPECT TO FOLLOWING ISSUES:

- (a) Reference to arbitration (Sec. 8, 45 & 54)
- (b) Appointment of arbitration (Sec.1 1)
- (c) Interim measures (Sec. 9)
- (d) Challenge to arbitrators (Sec. 12, 13 & 14)
- (e) Challenging the arbitration awards (Sec. 34)
- (f) Seeking Courts assistance with regard to Witnesses (Sec. 27)
- (g) Contempt Proceedings (Sec. 27)
- (h) Enforcement of awards (Sec. 36, 49 & 58)
- (i) Appealable orders (Sec. 37 & 59)

3. As per the 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. 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 find the subject matter is not capable of settlement by arbitration
- (g) The arbitral award is in conflict of the public policy of India.

4. GROUNDS AVAILABLE U\S 34 & CORRESPONDING PROVISIONS IN THE ACT

The grounds made available for setting aside under are very limited. Sub- clauses of section 34 and certain other sections in the Act correspond with it as under. The reference is necessary as the corresponding section gives details on what grounds the applications to be made.

Section 34(2) (a) (i) - This section corresponds with section 14 of the Act. Incapacity of a party means incompetence to enter into an agreement. If a party is not capable of looking after its interest and is not represented by a person who can protect his interest, such a party lacks the **capacity to enter into the agreement**. An arbitral award on the basis of agreement entered into by such a party may be set aside. In terms of Section 11 of the Indian Contract Act 1872, Agreements entered in by A Minor, A Lunatic, an undischarged insolvent are void:

Section 34(2) (a) (ii) - This section corresponds with section 16 of the Act. If the **arbitration agreement** has not been valid under the law to which the parties subject themselves or under law for the time being in force and the parties did not choose proper law of arbitration, the reference there under and consequential award on the basis of such reference would be invalid and may be set aside. If a contract is illegal and void, an arbitration clause which is one of the terms thereof shall also be not enforceable. The plea about invalidity of the agreement may be raised before the tribunal itself questioning the jurisdiction of the arbitrator on that ground. If the plea is accepted by the tribunal, the other party can move the court under section 34(2) of the Act.

Section 34(2) (a) (iii) - This section corresponds with section 11 of the Act. A party to the arbitral reference has the **right to challenge the appointment of an arbitrator** if doubt arises as to the independence or impartiality or qualification/capability of the arbitrator. Section 12 gives a party right to challenge the arbitrator on the ground of existence of justifiable doubts as to his independence or impartiality of the Arbitrator. If a party is not given proper notice of appointment of the arbitrator, he would be deprived of his valuable right and would be entitled to apply for setting aside the arbitral award. Proper hearing in the clause implies notice to both the parties of the date, time and place of holding of such hearing. Each party must have opportunity to be present at the hearing along with his legal advisor, witnesses etc. and to present statement, documents, evidence and arguments, cross examine his opponent's witnesses in support of his case. If this is not followed; the award is vitiated and is liable to be set aside.

Section 34(2) (a) (iv) - This section corresponds with section 16 of the Act. Jurisdiction of an arbitral tribunal is limited by the terms of reference of arbitration agreement and if the tribunal has exceeded its **jurisdiction**, the award to the extent to which it is beyond the scope of the arbitral tribunal's jurisdiction is invalid and the award is liable to be set aside. In terms of the proviso to sub section 2(a) (iv), if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside. The Supreme Court has categorically time and again held that traveling beyond the reference is without jurisdiction.

Section 34(2) (a) (v) - This section corresponds with section 28 of the Act. Chapter III & V of the Act from Section 10 to section 15 and 18 to 27 deals with **composition of arbitral tribunals** and Arbitral proceedings. Section 10 deals with number of Arbitrators, section 11 deals with manner of appointment of arbitrator, section 12 deals with grounds for challenging the appointment of arbitrator(s). Section 13 deals with the procedure to challenge the appointment of an arbitrator. Section 14 prescribes when mandate of an Arbitrator shall terminate; section 15 deals with termination of mandate and substitution of arbitrator. Section 18 provides equal treatment of parties. Section 19 talks about determination of rules of procedure to be followed by the Arbitral Tribunal. Section 23 deals with the statements of claim and defense, section 24 deals with hearings and written proceedings. Chapter IV (Sections 16 and 17) prescribes the jurisdiction of the Arbitral Tribunal and Interim measures to protect the subject matter of arbitration during the course of arbitration.

Section 34(2) (b) (i) In terms of sub section (i) (ii) of the Act, certain matters where the law gives certain **powers to court**, to set aside award. In case the subject matter of the dispute is not capable of settlement by arbitration under the law for the time being in force it can be set aside by the court. e. g. the dispute pertaining to possession/recovery of rent under the Rent Control Act. Insolvency proceedings including whether a person can be adjudged as an insolvent, winding up proceedings under the Companies Act, and the question whether a will is genuine or not cannot be referred to arbitration. Similarly, criminal matters (except compoundable matters) cannot be referred to arbitration.

Section 34(2) (b) (ii) - Explanation under (b)(ii) states that an award is in conflict with the **public policy of India**. The explanation to section 34(2) (b) (ii) specifically excludes arbitration award induced or affected by fraud or corruption or was in violation of section 75 or section 81 of the Act. Section 75 talks of confidentiality. Section 81 debars the parties relying on any evidence arising out of conciliation proceeding. Any violation of those provisions has been made as ground for challenge of the award. According to section 23 of Contract Act 1972, contracts opposed to public policy are not enforceable, however, what is public policy or what is against the public policy has not been defined in the Contract Act 1972. The Courts have from time to time laid down in their judgment as to what is opposed to public policy. If contract is made contrary to public policy, its performance cannot be enforced either at law or in equity. The award is in conflict with the **public policy of India** is very debatable issue before all the courts and in different circumstances. The supreme court of India tried to define it in several judgments.

The decision of arbitrator is termed as "arbitral award". After making the arbitral award, the proceeding is terminated and the award is binding on the parties claiming under them. Section 34 of the Act speaks about provisions relating to setting aside of arbitral award. If an application is made to a Court, the Court has power to set aside the arbitral award on fulfillment of certain conditions. An application for setting aside of award has to be made within three months from the date on which the party making that application had received the arbitral award.

5. Section 37 of the Act deals with appeal that will lie from certain orders of the arbitral tribunal. The Act defines the Court under section 2(1)(e) as the Principal Civil Court of original jurisdiction in a district & includes the High Court having original jurisdiction for the purpose of the Act. The award can be challenged in appropriate Court by way of an application for setting aside the award on the grounds mentioned in section 34 of the Act. Sub section (3) prescribes the time limit within which application has to be made to the Court and on expiry of the time limit prescribed the award become final.

6. GROUNDS OF OBJECTION TO THE ARBITRATION AWARD

The SC has time to time stated that it should be specific. In this respect, it is not sufficient to say that arbitrator had exceeded his authority or that the award was uncertain and not final but the particular objection must be stated. The objection should be specific as to in what respect the award was not certain and not final and also give facts showing that arbitrator had exceeded his jurisdiction. The Supreme Court in case of **Oil & Natural Gas Commission v. M.C. Clelland Engineers S.A.** 2 held that mere bald statements without setting out the details as to how the impugned award is erroneous are insufficient for a Court to set aside the award. When the party takes up the plea of limitation and or time barred claims, it must do so with precision. It is held in the case of **State of Kerala v. Som Datt Builders Ltd.** 3 that, it is obligatory on the part of arbitral tribunal to state reasons in support of his award. Lack of reasons makes an award legally flawed. Section 31(3) of the Act mandates that reason must be stated by the Arbitral Tribunal upon which the award is based. In case of **State of Maharashtra v. Hindustan Construction Ltd.** 4 the party has filed application for amendment for incorporation of additional grounds under section 34 or memo of appeal under section 37, if filed after expiry of limitation under section 34(3) it was held that this will not be invariably applicable to such application. However, the Court can grant leave if amendment is required in the interest of justice and this provision does not denude the court for its power to grant leave. In the case of **Sanshin Chemicals Industry v. Oriental Carbons**, 5 it is that held that, a decision on matter which does not in any matter relate to dispute concurring the agreement is not an award or interim award liable to appeal under section 34. Even an interim award which settled a dispute on merit can be set aside under this section. Interlocutory decisions of arbitral tribunal, like those on a challenge under section 12(3) r/w section 13 or on a plea under section 16(2) or (3) are not awards but an award made under section 13(4) can be set aside in accordance with section 34. Similarly, award made under section 16(5) can be set aside.

7. There are two views in respect of interference with the award passed by the arbitrator. **One view** advocates that provisions for setting aside an arbitral award should never be envisaged. The party should strictly strict to the award passed by the arbitrator and any mistake committed by the arbitrator though unreasonable; the award should be treated as a final judgment. The Court cannot reassess the evidence even if the arbitrator has committed an error. The Court has no jurisdiction to substitute its own views in conclusion of facts and law. He cannot sit in appeal over conclusions of the arbitrator and re-examine or re-appreciate which the arbitrator has already considered. The Court has to see only the misconduct if any, committed by the arbitrator but not to examine the award on merit. This view further states that arbitrators are judges of fact and law and have jurisdiction and authority to decide wrong as well as right, if they reached a decision fairly after hearing both the sides the award cannot be set aside.

8. The **Second view** states that if the award passed by the arbitrator is contrary to law or the arbitrator has failed to consider material documents on record or disregarded the fundamental rules of evidence then Court can interfere in the award. The award can also be set aside on re-appreciation of the evidence before the arbitrator. If the arbitrator does not follow the principles of natural justice, the party should be given recourse for setting aside the award. The judgments of the Supreme Court on several issues on which arbitral award can be set aside are discussed below.

i) Public Policy of India

In the historic ruling of **Renusagar Power Co. v. General Electrical Corporation**,⁶ the Supreme Court construed the expression "public policy" in relation to foreign awards in narrower sense and in order to attract to bar of public policy the enforcement of the award must invoke something more than the violation of the law of India. 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." The question before the Court was unjust enrichment is bar for enforcement of foreign award. The Court held that even if it is assumed that unjust enrichment is contrary to public policy of India, it would not bar enforcement of award because the unjust enrichment must relate to the enforcement of the award and not to its merit in view of the limited scope of inquiry in proceedings for the enforcement of foreign award. The unjust enrichment to merit of the award i.e. with regard to quantum awarded by arbitral tribunal it would be beyond the scope of objection that can be raised under section 7(1)(b)(ii) of the Foreign Award Act. Thereafter in case of **Oil & Natural Gas Corporation v SAW Pipes** ⁷ it is held that the award contrary to provisions of substantive law or Act or terms of contract - Can be set aside. The phrase 'public policy of India' to be given wider meaning. Award could be set aside if it is contrary to fundamental policy of Indian law, interest of India, justice or morality or is patently illegal.

In case of **Patel Engineering** case, the Supreme Court has sanctioned further court interventions in the arbitral process. It was held that the Chief Justice, while discharging this function, is entitled to adjudicate on contentions preliminary issues such as the existence of a valid arbitration agreement and the Chief Justice's findings on these preliminary issues would be final and binding on the arbitral tribunal. In the case of **Central Inland Water Transport Corporation Ltd. Vs. Brojo Nath Ganguli**,⁸ laid down that, "Public policy Connotes some matter which concerns the public good and the public interest. The concept of what is for the public good or in the public interest or what would be injurious or harmful to the public good or public interest has varied from time to time." In **Gherulal Parakh v. Mahadeodas Maiya**,⁹ The Supreme Court favored narrow view when it said "....though the heads are not closed and though theoretically it may be permissible to evolve a new head under exceptional circumstances of a changing world, it is admissible in the interest of stability of society not to make any attempt to discover new heads in these heads". After referring to the various decisions of English and American Courts and quoting classic text books on International commercial arbitration, the Supreme Court went on to very rightly, gave narrow interpretation to the world public policy. In **P. Rathinam v. Union of India**,¹⁰ said that the concept of public policy is, however illusive, varying and uncertain. It has also been described as "untrustworthy guide", "unruly horse" etc. The term **public policy** is not capable of a precise definition and whatever tends to injustice of operation, restraint of liberty, commerce and natural or legal rights; whatever tends to the obstruction of justice or to the violation of a statute and whatever is against good morals can be said to be against public policy. In the case of **Delhi Transport Corpn. v. D.T.C. Mazdoor Congress**,¹¹ the phrases "public policy", opposed to public policy" or "contrary to **public policy**" are incapable of precise definition. It is valued to meet the public good or the public interest. What is public good or in the public interest or what would be injurious or harmful to the public good or the public interest vary from time to time with the change of the circumstances. New concepts take the place of old ones. In case of **Venture Global Engineering v/s Satyam Computer Services Ltd.**¹², the court held that, award in conflict with **public policy** if induced by fraud or corruption The concept of public policy as given in the Explanation to S. 34(2) (b)(ii) has virtually adopted the International standard, namely if anything is found in excess of jurisdiction and depicts a lack of due process, it will be opposed to public policy of India. When an award is induced or affected by fraud or Judgments on Section 34 of Arbitration Act. In case of **Phulchand Exports v/s O.O.O. Patriot**,¹³ the Supreme Court held that the meaning given in *Saw Pipes* to the expression 'public policy of India' in Section 34 must be applied to the same expression occurring in Section 48(2) (b) of the Act. Therefore, if the award was patently illegal, it would be deemed to be against public policy and therefore, serve as a ground on which the Indian court could refuse to enforce even a foreign award. In case of **Shri Lal Mahal Ltd v Progetto Granpo Spa**¹⁴ the supreme court restricts the grounds on which the enforcement of foreign awards can be refused and takes away the ground of patent illegality, which is otherwise available to challenge a domestic award.

9. Misconduct of Arbitrator is one of the grounds for setting aside arbitral award. In case of **State of Punjab v. Ex-Constable Ram Singh**,¹⁵ The word 'misconduct' though not capable of precise definition, on reflection receives its connotation from the context, the delinquency in its performance and its effect on the discipline and the nature of the duty. It may involve moral turpitude, it must be improper or wrong behavior; unlawful behavior, willful in character; forbidden act, a transgression of established and definite rule of action or code of conduct but not mere error of judgment, carelessness or negligence in performance of the duty; The Supreme Court in case of **Food Corporation of India v. Joginderpal Mohinderpal**,¹⁶ held that "It is difficult to give an exhaustive definition what may amount to misconduct on the part of the arbitrator. It is not misconduct on the part of an arbitrator to come to an erroneous decision, where his error is one of the fact or law, In case of **Baldev Singh v. State of Punjab**¹⁷ the Supreme Court held that, "Misconduct" has not been defined in the Act. The word "misconduct" means wrong or improper conduct, unlawful behavior, misfeasance, wrong conduct, misdemeanor etc. In case of **K.P. Poulouse Vs. State of Kerala and another**,¹⁸ the Arbitrator has misconducted the proceedings by ignoring the two very material documents to arrive at a just decision to resolve the controversy between the Department and the contractor. In case of **Delta Distilleries Ltd. Vs. United Spirits Ltd.**,¹⁹ the party concerned, in support of its claims had done the quantification on theoretical basis which the court held as hypothetical. In case of **DDA Vs. Durga Chand Kaushish**,²⁰ it is observed by the S.C. If the contract clause gives two interpretation in that case not only intention to be seen, but also to see the meaning which gives effect & meaning to the entire contract. The word creating uncertainty to be ignored.

10. The **Bias of Arbitrator** is a valid ground for setting aside award In case of **ABP Pvt. Ltd. Vs. Union of India**,²¹ the supreme court held that, It is well settled that mere apprehension of bias is not enough and there must be cogent evidence available on record to come to the conclusion. In the case of **State of Punjab Vs. V.K. Khanna**²² it was held that, "The test therefore, is as to whether there is a mere apprehension of bias or there is a real danger of bias and it is on this score that the surrounding circumstances must and ought to be collated and necessary conclusion drawn there from. In case of **Kumaon Mandal Vikas Nigam Ltd. Vs. Girja Shankar Pant**²³ The court observed that, The word "bias" in popular English parlance stands included within the attributes and broader purview of the word "malice" which in common acceptation means and implies "spite" or "ill will" In case of **Bihar State Mineral Development Corporation vs. Encon Builders (I) Pvt.Ltd.**²⁴ the Managing Director terminated the work, he was also named as the Arbitrator in the agreement. The Supreme Court held that the case in hand not only satisfies the test of real bias but also satisfies the real danger as well as suspicion of bias. In case of **State of Gujarat Vs. R.A. Mehta**,²⁵ it was held "Bias can be defined as the total absence of pre-conceived notions in the mind of the Authority/Judge,

11. The **Non Speaking Award** is another ground, It was held in **Bijendra Nath Srivastava v. Mayank Srivastava**²⁶, that the arbitrator is under no obligation to give reason in support of the decision reached by him, unless the arbitration agreement or deed of settlement so required. If the arbitrator or umpire chooses to give reasons in support of his decision, then it would be open to the court to set aside the award upon finding an error of law. In the case of **State of Kerala v/s M/s. Somdatt Builders Ltd.**²⁷ it is held that requirement of giving reasons in support of award under section 31(3) is not an empty formality. It guarantees fair and legitimate consideration of the controversy by the arbitral tribunal. In the case of **K. Mohd. Zakir v/s Regional Sports Centre**,²⁸ it is held that Court should not interfere unless reasons given are outrageous in their defiance of logic or arbitrator has acted beyond jurisdiction. In the case of **Union of India v/s M/s. Harbans Singh Tuli**,²⁹ it is held that setting aside of award on the ground that **award was unreasoned** is not available to petitioner as he failed to produce relevant records before arbitrator and also failed to cross examine the witness who filed affidavit on behalf of claimants, making it impossible for arbitrator to give detailed reasons. In the case of **M/s. Markfed Vanaspati and Allied Industries v/s Union of India**³⁰ The scope of interference in a nonspeaking award is extremely limited. The Court cannot probe into the mental process of the arbitrator. The Court should endeavor to support a non- speaking arbitration award provided it adhered to the

parties' agreement and was not invalidated due to arbitrator's misconduct. In the cases of **State of A.P. v. Rayanim**,³¹ **New India Civil Erectors v. ON.G.C.**³² **Sudarshan Trading Co. v. Govt. of Kerala**³³ it was held that in case of a non-speaking award, it is not open to the court to probe into the mental process of the arbitrator where he has not provided the reasoning for his decision and in such a case the attempt of the court should always be to support the award with the letter of law. In the case of **Rajasthan State Mines & Mineral Ltd. v. Eastern Engineering Enterprises** ³⁴, it is held that in a non-speaking award the jurisdiction of the court is limited. It is not open to the court to speculate where no reasons are given by the arbitrator as to what impelled the arbitrator to arrive at his conclusion. It is also not possible to admit to probe the mental process by which the arbitrator has reached his conclusion where it is not disclosed by the terms of the award. The similar view has been taken in the following cases namely, **State of Bihar & others v. Hanuman Mal Jain**³⁵ **P.V. Subba Naidu & Others v. Govt. of A.P. & others**³⁶; **Star Construction and Transport Co. & others v. India Cements Ltd.**³⁷ and **D.D. Sharma v. Union of India.** ³⁸ Upon a review of the above cases, the Supreme Court in **Markfed Vanaspati v. Union of India** ³⁹ observed as follows: "The decided cases of this court demonstrate that this court has consistently taken the view that scope of interference in a non-speaking award is extremely limited. The Court cannot probe into the mental process of the arbitrator. The court should endeavor to support a non-speaking arbitration award provided it adheres to the parties' agreement and was not invalidated due to arbitrator's misconduct. There are other points also which are important such as illegality apparent in the face of award, The award passed against morality & justness, the limitation for setting aside award & amendment in the pleadings etc.

12. CONCLUSION

There is little scope for interference in the award passed by the Arbitrator as per the provisions of Arbitration & conciliation Act 1996. It says that there must be specific reasons which are required to be pleaded & proved in the application. It is not permissible for Court to interfere with Arbitrator's view merely because another view of the matter is possible. It is not permissible for Court to re-appreciate evidence placed before Arbitrator. Arbitrator is the best Judge of quality as well as quantity of evidence and it will not be for Court to take upon itself the task of being a Judge of evidence before Arbitrator. The Indian arbitration law is consistent with the model law of arbitration. The Supreme Court has interpreted the law restricting the scope for interference in the arbitral award.

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