

## INTERPRETATION OF PUBLIC POLICY IN THE ARBITRATION AND CONCILIATION ACT, 1996: BEFORE AND AFTER 2015 AMENDMENT

**\*Ani Kumar**

### **Abstract**

*The meaning of 'Public Policy' in the Arbitration and Conciliation Act, 1996 changed over the years. The provision that provides for the grounds on which an arbitral award can be set aside by the Court is Section 34 of Arbitration and Conciliation Act, 1996. Public Policy as a term is not defined in the Arbitration and Conciliation Act, 1996, various meanings of the aforesaid term can be determined by several judgments which are discussed in the article. Till 2014, Public Policy was discussed on a narrow basis. Changes brought by the Arbitration and Conciliation (Amendment) Act 2015 extensively discussed the term 'Public Policy' in a broad manner. Earlier in certain judgments, courts went into the merits of the case, after the initiation of 2015 amendment the Courts are not allowed to go into the merits of the case. The amendment of 2015 retrenched the scope of 'Public Policy' and gave it a broader meaning as discussed through various judgments in the article.*

*Keywords: Public Policy, Fundamental Policy of Law, Arbitral Award.*

### **Introduction**

Arbitration is a form of alternative dispute resolution to settle the matter outside the court. The basic purpose of arbitration is to expeditiously resolve the disputes. In case of Arbitration, an arbitrator is appointed by mutual consent of the parties and an arbitral award is passed by the arbitrator. There are only limited grounds specified under Section 34 of the Arbitration and Conciliation Act, 1996 on which a court can intervene and set aside the arbitral award. If an arbitral award passed by the arbitrator violates 'Public Policy', it can be set aside by the Court. 'Public Policy' as an expression puts up certain restrictions upon the freedom of persons to contract.

### **Public Policy**

The term 'Public Policy' is not defined under the Arbitration and Conciliation Act, 1996. Whatever is injurious to the state or interest of the public will be categorised as 'Public Policy'. If the award is contrary to the violations of the law of the land, then the award can be set aside. Awards passed by the Arbitral Tribunal which violate public interest will be considered as opposed to Public Policy of India. Under Section 34 of the Arbitration and Conciliation Act, 1996 court may set aside an arbitration award if it conflicts with the public policy of India.

'Public Policy' is identical to the 'Policy of Law'. Therefore, any acts that are in contravention as to the interest of the public or state is stated to be against 'Public Policy' or against the "Policy of Law". Whatever leads to obstruction of justice or violation of a statute or is against the good morals when made the object of a contract would be against 'Public Policy'.

## **Judicial Pronouncements concerning Public Policy**

In *Renusagar Power Company Ltd. V. General Electrical Company*<sup>1</sup>, Public Policy was discussed and expressed in true sense.

Supreme Court opined that contravention of law will not suffice to be against 'Public Policy' and propounded three elements of 'Public Policy':

- 1) Fundamental Policy of Law.
- 2) Against the interest of India.
- 3) Against morality and justice.

The court propounded that contravention of law will not suffice to be against Public Policy.

The main issue raised in the case *Oil & Natural Gas Corporation Ltd V. Saw Pipes Ltd.*<sup>2</sup>, was whether the patent illegality can be used as a ground to set aside the award under Section 34 of Arbitration and Conciliation Act, 1996. The court held that an arbitral award would be 'patently illegal', if it is contrary to the substantive provisions of law. Patent Illegality as a

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\* New Law College, Bharati Vidyapeeth University, Pune

<sup>1</sup> AIR 1994 SC 860.

<sup>2</sup> AIR 2003 SC 2629.

ground for setting aside a domestic award was first propounded in this case. This case was criticised to a large extent as it gave the court the power to interfere with the arbitral award.

This opened the floodgate of litigation under Section 34 of Arbitration and Conciliation Act, 1996 as every award where there was an alleged error of application of statutory provisions could now be challenged.

In the case, *Oil & Natural Gas Corporation Ltd. V. Western Geco International Ltd.*<sup>3</sup>, the judgment given in the case of *Oil & Natural Gas Corporation Ltd. V. Saw Pipes Ltd.* was used to interpret Public Policy of India under Section 32 of the Arbitration and Conciliation Act, 1996. The court stated, the term public policy of India utilized in Section 34 in context is required to tend a wider meaning.

The Judgment of *Renusagar Power Company Ltd. V. General Electrical Company and Oil & Natural Gas V. Saw Pipes* were not elaborative on the concept of Fundamental Policy of the Law. Supreme Court gave three broad elements of Fundamental Policy of Law:

- 1) Judiciary should not act on a whimsical basis.
- 2) Principles of Natural Justice should be followed while delivering any judgment.
- 3) Wednesbury principles of reasonableness must be complied with (any decision passed by courts should not be perverse or irrational).

This Judgment expanded the scope of Public Policy. The judgment of *Oil & Natural Gas V. Western Geco International Ltd* gave wide power to interfere with the arbitral award as the Supreme Court went into the merits of the case.

In *Venture Global Engineering V. Satyam Computer Services Ltd*<sup>4</sup>, Supreme Court did not enforce the arbitral award. Satyam Computers was trying to enforce the award in Michigan and trying to evade.

The Court held that until parties expressly or impliedly do not exclude Section 34 of Arbitration and Conciliation Act, 1996. Then, section 34 of Arbitration and Conciliation Act, 1996 will be entertained in such matters.

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<sup>3</sup> (2014) 9 SCC 263.

<sup>4</sup> (2008) 4 SCC 190.

In *Associate Builders V. Delhi Development Authority*,<sup>5</sup> Supreme Court laid down the grounds of 'Public Policy' as:

'Fundamental policy of India' will include:

- a) To require no notice of the orders of the superior courts.
- b) Judicial approach.
- c) Principles of natural justice.
- d) Choice of an arbitrator cannot unreasonable to the extent that no sensible individual would arrive at a similar situation.

In this case, the Supreme Court also clarified the scope of interpretation of the idea of morality and justice.

The Supreme Court in the case *Patel Engineering V. North Eastern Electric Power Corporation*<sup>6</sup>, had restated the stand of law concerning "patent illegality" by stating that "patent illegality" is a ground available for setting aside the domestic award if:

- a) The arbitral tribunal found to be perverse, or so, irrational that no reasonable man would have arrived at the same.
- b) The establishment of the contract is such that no fair or reasonable person would take.
- c) The view of the arbitrator is not a possible view.

In *Shri Lal Mahal Ltd. V. Progetto Grano Spa*<sup>7</sup>, The Supreme Court gave a landmark judgment in which the court established a difference between section 48 of the Arbitration and Conciliation Act, 1996 concerning the enforceability of a foreign award in international commercial arbitration under the New York Convention Awards on the one hand and challenges to set aside the award under Section 34 of the Arbitration and Conciliation Act 1996, when the seat of arbitration is in India. The Supreme Court held that the expression "Public Policy" under Section 48 2(b) of the Arbitration and Conciliation Act, 1996 would

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<sup>5</sup> AIR 2015 SC 620.

<sup>6</sup> 2020 SCC OnLine SC 466.

<sup>7</sup> (2014) 2 SCC 433.

not include the ground of patent illegality and the decision given by the court in *Renusagar Power Co Ltd. V. General Electric Company* must apply to the expression “Public Policy” of Section 48(2)(b) of Arbitration and Conciliation Act, 1996.

In *Phulchand Exports Ltd. v. O.O.O. Patriot*<sup>8</sup>, The Supreme Court held that the expression “Public Policy” under section 34 and 38 of Arbitration and Conciliation Act, 1996 are the same and added that party can withstand enforcement of a foreign arbitral award on the grounds of “patent illegality”.

## **246<sup>th</sup> Law Commission Report**

The 246<sup>th</sup> Law Commission Report criticised both the judgments *Oil & Natural Gas v. Western Geco and Associate Builders V. Delhi Development Authority*. These judgments opened the floodgate of litigation.

## **Changes made after the initiation of Arbitration and Conciliation (Amendment) Act, 2015**

The Arbitration and Conciliation (Amendment) Act, 2015 had restricted the application to set aside the award under section 34 of Arbitration and Conciliation Act, 1996 because of Public Policy of India. The amendment act declared that the international arbitration award can be set aside on the grounds of public policy of India if the arbitral award is:

- a) Induced and affected by fraud and corruption.
- b) In contravention with the fundamental policy of Indian Law.
- c) In conflict with morality and justice.

Changes made by the 2015 amendment had been suggested by the 246<sup>th</sup> Report of the Law Commission of India in August 2014.

In this amendment, it was conceptualised that the court cannot look into the merits of the case if it is in contravention to the fundamental policy of the law. The scope of section 34 of Arbitration and Conciliation Act, 1996 was narrowed down.

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<sup>8</sup> (2011) 10 SCC 300.

The amendment act of 2015 made it understandable that the patent illegality as an additional ground is limited to domestic arbitration and cannot be applied in the award of international arbitration.

In the case of *Board of Cricket for Control in India V. Kochi Cricket Private Limited*<sup>9</sup>, the court held that the new amendments to the Arbitration and Conciliation Act, 1996 will apply to the arbitration-related proceedings, even if such proceedings were commenced before the date of new amendments came into force. Court also conceptualised that the amendments to the Arbitration and Conciliation Act, 1996 will not apply to arbitral proceedings that have already started.

In *Venture Global Engineering LLC v Tech Mahindra Ltd*<sup>10</sup>, the Court observed:

The Award of an arbitral Tribunal can be set aside only on the grounds specified in Section 34 of the Arbitration and Conciliation Act, 1996 and on no other ground. The Court cannot act as an Appellate Court to inspect the legality of Award, nor it can inspect the merits of the claim by entering in the factual arena like an Appellate Court.

## Conclusion

The amendment of 2015 retrenched the scope provided in the *Oil & Natural Gas Company Ltd. V. Saw Pipes Ltd.* and completely gave a new meaning to the public policy. The expression Public Policy is not defined under the Arbitration and Conciliation Act, 1996, anything which will be in contravention to the law of the land will be classified as Public Policy. 'Public Policy' as an expression is interpreted in varied forms in various judgments given by the court of law. Judgments concerning 'Public Policy' can be looked into as Judicial precedents by the court while delivering a judgment in a case pertaining to setting aside of an arbitral award.

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<sup>9</sup> (2018) 6 SCC 287.

<sup>10</sup> (2018) 1 SCC 656.