



ELP Arbitration Weekly Alert

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SC RULES: UNDER THE GROUND OF PUBLIC POLICY, THE SUPREME COURT SETS ASIDE AN ARBITRAL AWARD AS UNILATERAL ADDITION OR ALTERATION OF CONTRACT BY THE ARBITRAL TRIBUNAL IS AGAINST THE "MOST BASIC NOTIONS OF JUSTICE". THE SUPREME COURT HOWEVER CLARIFIES THAT ONLY WHEN THE CONSCIENCE OF THE COURT IS SHOCKED BY SUCH AN INFRACTION CAN THE SAME BE A GROUND TO SET ASIDE AN AWARD.

[Ssangyong Engineering & Construction Co. Ltd. v. National Highway Authority of India¹](#)

¹ 2019 SCC OnLine SC 677

Facts

1. National Highway Authority of India (**Respondent**) awarded the project for construction of bypass on a highway in the State of Madhya Pradesh (**Project**) to Ssangyong Engineering & Construction Co. Ltd. (**Appellant**), a Korean company.
2. Pursuant to the Contract between the parties, the Respondent was obligated to make payments to the Appellant for the components used for executions of works under the Project. The parties agreed that the price adjustment for four of the components used in the Project would be calculated as per the formula in the Contract. As per the Contract, the base date for calculation of price adjustment was 29 September 2005. Under the formula in the Contract it was agreed that the Wholesale Price Index (**WPI**) which is published by the Ministry of Industrial Development (**Ministry**) would be applicable. Until 2010, the said WPI was based on the years “1993-94” (**Old Series**). On 14 September 2010, the Ministry ceased publication of WPI for the Old Series and commenced publication of WPI for the New Series “2004-05” (**New Series**).
3. The Appellant applied the New Series to compute price adjustment and began raising bills as per the New Series. From September 2010 to February 2013, the Respondent made 90% payments of the monthly invoices on this basis.
4. Thereafter, the Respondent issued a Policy Circular² dated 15 February 2013 (**Policy Circular**) whereunder a new formula for determining the indices was used by applying a “linking factor” which would connect the Old Series to the New Series. This naturally reduced the price adjustment available to the Appellant under the Contract.

Appellant challenges Policy Circular before Madhya Pradesh HC

5. The Appellant did not accept the Policy Circular and filed a writ petition (**Writ Petition**) before the High Court of Madhya Pradesh (**MP HC**) to challenge the validity of the Policy Circular. The MP HC observed that the Contract between the parties provided for a dispute resolution mechanism and accordingly the Writ Petition was disposed under an order dated 3 April 2013.
6. Thereafter, while the Respondent sought the consent of the Appellant to receive payment under the Policy Circular, the Appellant issued a conditional undertaking³ dated 17 May 2013 accepting payments under the Policy Circular while reserving its right to challenge the Policy Circular before the appropriate forum.

Appellant refers disputes to arbitration

7. The disputes were referred to the Dispute Adjudicating Board (**DAB**) in terms of the Contract. The majority members of the DAB held in favor of the Respondent and concluded that a certain “linking factor” shall be applied while computing the price adjustment.
8. Aggrieved by the suggestions of the DAB, the Appellant referred the disputes to arbitration. The Appellant submitted that application of the Policy Circular was dehors the Contract and claimed amounts towards the unpaid price adjustment along with interest.
9. The majority award dated 2 May 2016 (**Award**) held in favor of the Respondent and concluded that the Policy Circular was within the contractual stipulations and could be applied. The tribunal applied certain government guidelines of the Ministry (**Guidelines**) which stated that establishment of a linking factor to connect the Old Series with the New Series was imperative. A dissenting award (**Dissenting Award**) was also made wherein the Ld. Arbitrator stated that neither the Policy Circular nor the Guidelines could be applied as they were dehors the Contract.

Challenge to the Award

10. Aggrieved by the Award, on 30 July 2016, the Appellant filed an application under section 34 of the Act (**Section 34 Application**) before the Ld. Single Judge of the Delhi High Court (**Delhi HC**). The Delhi HC held in favor of the

² “Thus, payment on account of price adjustment may be made by adopting the above process subject to the condition that the contractors furnish undertaking/affidavit that this price adjustment is acceptable to them and they will not make any claim, whatsoever, on this account in future after this payment.”

³ “The above undertaking is without prejudice to the Contractor's right to challenge the said Circular dated 15.02.2013 as per provisions of contract and other legal remedies available to the Contractor before the appropriate forum.”

Respondent and upheld the Award through an order dated 9 August 2016. Aggrieved by the order of the Ld. Single Judge, the Appellant filed an appeal under section 37 of the Act before the division bench of the Delhi HC. By an order dated 3 April 2017 (**Order**), the division bench of the Delhi HC also held in favor of the Respondent. Thereafter, the Appellant filed an appeal before the Supreme Court.

11. The Appellant contended that since the award heavily relied upon Guidelines issued by the Ministry and which Guidelines were never tendered in evidence, the Appellant was deprived of its right to rebut the same and hence unable to present its case. The Appellant contended that the Award was thus liable to be set aside under section 34(2) (a) (iii). The Appellant further assailed the Award on the ground that by applying the new formula under the Policy Circular, which Policy Circular was not consented to by the Appellant, the arbitral tribunal had created a new contract. Thus, the Award, according to the Appellant was liable to be set aside as being in conflict with the public policy of India under section 34(2)(b)(ii) of the Act. Furthermore, the Appellant also challenged the award as being vitiated by patent illegality under section 34(2A) of the Act.
12. The Respondent resisted the challenge to the Award and also raised an objection as to the applicability of the Arbitration and Conciliation (Amendment) Act, 2015 (**Amendment Act**).

Findings of the Supreme Court

13. The Amendment Act, amended section 34 of the Act with effect from 23 October 2015. The Supreme Court referred to *BCCI*⁴ and held that the amendments made with reference to the grounds under section 34 were substantive in nature and could only be applied prospectively. Since the Section 34 Application was filed on 30 July 2016, i.e. after the coming into force of the Amendment, the amended section 34 was held applicable to the case. Thereafter, the Supreme Court examined the scope of section 34 of the Act, and the available grounds to review and set aside an arbitral award under the amended section 34 of the Act.
14. The Supreme Court observed that the Guidelines which weighed in on the tribunal while making the Award, were neither in evidence before the tribunal nor were they disclosed during the arbitration proceedings. Relying upon jurisprudence, the Supreme Court held that the Appellant would be directly affected by the Guidelines and therefore it ought to have been allowed to comment on the interpretation and applicability of the Guidelines. In the circumstances, the Supreme Court applied section 34(2)(a)(iii) of the Act and concluded that the Award ought to be set aside.
15. Upon assessing the factual matrix, the Supreme Court observed as follows:
 - a. The Policy Circular which was issued by the Respondent cannot unilaterally bind the Appellant without the Appellant's consent
 - b. the Policy Circular itself provides that an undertaking by the Appellant is a prerequisite to apply the price adjustment envisaged under the Circular
 - c. the undertaking given by the Appellant was conditional and without prejudice to its case that the Policy Circular was not applicable to the Contract
16. The Supreme Court concluded that the Award applied unilateral Policy Circular unilaterally and substituted a workable formula with a formula which was de hors the Contract, thereby creating a new contract for the parties. The Supreme Court held that neither can a unilateral addition or alteration of a contract be foisted upon an unwilling party, nor can a party be held liable to perform a bargain it did not enter into. In the circumstances, the Supreme Court concluded that the *most basic notions of justice* under the ground of public policy had been breached and the conduct of the Respondent shocked the conscience of the court.

Conclusion and Analysis

The Supreme Court allowed the appeal and set aside the Order. In the interest of time, the Supreme Court upheld the Dissenting Award instead of referring the matter a fresh arbitration. While the court set aside the majority award, the intent of the courts to further the objective of the Act i.e. speedy resolution of disputes has certainly come through.

The Supreme Court delved into a catena of decisions, leading authorities, Law Commission Reports and other resources to hold that the Amendment Act has modified the definition of *public policy* to reflect a narrow approach akin to the *Renusagar*⁵ position. In its decision, the Supreme Court has observed it would now be restricted to set

⁴ *Board of Control for Cricket in India v. Kochi Cricket (P.) Ltd.*, (2018) 6 SCC 287

⁵ *Renusagar Power Co. Ltd. v. General Electric Co.*, 1994 Supp (1) SCC 644

aside an award (i) induced or affected by fraud or corruption, (ii) contravening the basic notions of justice or morality, (iii) contravening the fundamental policy of Indian law. The Supreme Court has clarified that a mere contravention of the substantive law⁶ would not render the award susceptible to a challenge on the ground of being in conflict with the public policy.

Furthermore, the Supreme Court has stated that the finding that an award contravenes public policy of India as it violates the “*most basic notions of justice*” can only be applied in “*exceptional circumstances which shock the conscience of the courts*”. Further, the Supreme Court has cautioned that “*under no circumstances can any court interfere with an arbitral award on the ground that justice has not been done*” as such interference would be an intrusion into the merits of the dispute which in turn is against the tenets of section 34 of the Act.

The Supreme Court has rightly held that the Amendment Act has limited the scope of intervention by making significant changes to section 28, which when read with section 34 of the Act does not permit a court to review the merits of the matter. It has also held that the Amendment Act leaves construction of the contract to the tribunal and the court cannot sit in appeal over the same. Thus, the ground of non-judicial approach as developed in *ONGC Western Geco*⁷ has been done away with. However, perversity in awards may still cause such awards to be set aside provided the same fall within the parameters of *patent illegality*. The Supreme Court has clarified that what cannot be said to be against the fundamental policy of Indian law cannot be reagitated under the guise of patent illegality. However, an award without reasons, an award based on no evidence, an award based on documents taken behind the back of parties, etc. could be set aside under the ground of patent illegality.

While winding up its decision, the Supreme Court has clarified that the grounds available under section 34 of the Act to set aside an award must be applied carefully. Nonetheless, the present case is a welcome exception as it reaffirms that PSUs cannot unilaterally alter contractual terms to the disadvantage of private parties or parties with much lesser bargaining power.

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⁶ *ONGC Ltd. v. Saw Pipes Ltd.*, (2003) 5 SCC 705

⁷ *ONGC Ltd. v. Western Geco International Ltd.*, (2014) 9 SCC 263