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Patent Illegality of Arbitration Award

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ABSTRACT

The arbitral award, however, is the final determination made by the arbitral tribunal [as per Section 2(d)]. The term Patent illegality is one of the grounds invoked for setting aside an arbitral award. The word 'Patent Illegality' is nowhere defined under the Arbitration and Conciliation Act, 1996.

In ONCG v. Saw Pipes, 2003 (2) Arb.LR 5 (SC), the Indian Supreme Court established the idea of "patent illegality," which falls under the purview of Indian public policy, the breach of which entitles Indian courts to annul an arbitration ruling. The customary grounds for annulling arbitration under Article 34 of the Model Law or Article V of the New York Convention are in addition to this. The phrase "patent illegality" exclusively refers to domestic and international arbitrations with India as their seat and are governed by Part I of the Indian Arbitration Act. It can be stated that patent illegality would be regarded as the contravention of the Arbitration Act.

An award may be patently illegal if it is contrary to the substantive provisions of law of the arbitration act.

In Patel Engineering Ltd. vs. North Eastern Electric Power Corporation Ltd., the Hon'ble Supreme Court stated that if an order of an arbitrator is found to be perverse or irrational or his view is not fair that any reasonable person would take, in that case, the ground of patent illegality can be invoked.

In order to succeed in a challenge against an arbitral award, it must be shown that the award of the arbitrator suffered from perversity or an error of law or that the arbitrator has otherwise misconducted himself. Merely showing that there is another reasonable interpretation or possible view on the basis of the material on the record is insufficient to allow for the interference by the court.

Keywords: Arbitration, Validity, Patent.

I. INTRODUCTION

The arbitral award, however, is the final determination made by the arbitral tribunal [as per Section 2(d)]. The term Patent illegality is one of the grounds invoked for setting aside an arbitral award. The word 'Patent Illegality' is nowhere defined under the Arbitration and

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Conciliation Act, 1996.

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II. PATENT ILLEGALITY AS A GROUND TO SET ASIDE AN ARBITRAL AWARD

Arbitration law stands on two platforms. Firstly, party autonomy and secondly, finality of award. Arbitration has provided a clean and effective dispute settlement mechanism. Arbitration on national as well as international platforms have undertaken steps so as to reduce judicial intervention and judicial review. In the *Ramesh Chander Arora v Kashmeer Saree Kendra*, the courts did not look into the 1996 Act that is followed today but looked into the jurisprudence of India's arbitration and utilized the previous act, the 1940 Act and revived the debate as to whether "patent illegality" could be utilized to establish the exception of "public policy".

Proving patent illegal to any arbitral award can be ground to set aside an arbitral award. In *Delhi Airport Metro Express Private Limited v. Delhi Metro Rail Corporation Limited* established the extent and scope of perversity or patent illegality as a ground available for annulment of an award granted by an arbitral tribunal.

The ground of patent illegality is a ground available under the statute for setting aside a domestic award, if the decision of the arbitrator is found to be perverse, or, so irrational that no reasonable person would have arrived at the same; or, the construction of the contract is such that no fair or reasonable person would take; or, that the view of the arbitrator is not even a possible view.

Having emerged from the stable of public policy, patent illegality is now a separate and self-

sufficient tool for challenging domestic awards under Section 34 of the Arbitration and Conciliation Act.

In order to succeed in a challenge against an arbitral award, it must be shown that the award of the arbitrator suffered from perversity or an error of law or that the arbitrator has otherwise misconducted himself. Merely showing that there is another reasonable interpretation or possible view on the basis of the material on the record is insufficient to allow for the interference by the court.

Patent Illegality Before 2015 Amendment Act;

In *Oil & Natural Gas Corporation*, the Supreme Court had to decide whether Section 34 of the Arbitration and Conciliation Act granted courts the authority to annul an arbitral tribunal's ruling that was obviously unlawful. As stated by the Supreme Court, permitting a blatantly unconstitutional award to stand would only serve to further injustice. In light of this, it determined that Section 34(2)(b)(ii) of the statute, which states that an award may be revoked if it contradicts with Indian public policy, should be interpreted more broadly than it was in *Renusagar Power Co Ltd v General Electric Co.* (AIR 1994 SC 860). The Supreme Court emphasized however, that the illegality must go to the core of the case and that if the infraction is of a small nature, the award will not be against public policy because of the potential misuse of this new theory.

The hon'ble court determined that an award is patently illegal if:

- The Contract Act of 1872 or the Transfer of Property Act of 1882, the Arbitration and Conciliation Act, or the terms of a contract are violated, or
- there is a sequential error that adversely affects the interests of the parties.

Oil & Natural Gas Corporation moved away from India's support for arbitration by extending the definition of "public policy" beyond what was intended by the act.

The Supreme Court went into considerable detail in its later ruling in "*Associate Builders v. Delhi Development Authority ((2015) 3 SCC)*", which also repeated the definition and tenets of patent illegality outlined in *Oil & Natural Gas Corporation*. The court held that the construction of a contract's terms is primarily up to the arbitrator, unless the arbitrator interprets the contract in a way that no fair-minded or reasonable person would reach the same conclusion, sounding a warning about whether an award that violates a contract will be patently illegal." Although a limitation of the *Oil & Natural Gas Company* interpretation may have been anticipated, *Associate Builders* only made clear the scope of the court's ability to intervene in contract

interpretation.

Patent illegality after 2015 Amendment Act;

The 2015 Amendment Act went into effect in response to the Law Commission's recommendations, giving Section 34(2A) of the act statutory effect.

In *Ssangyong Engineering and Construction Company Ltd ((2019)15 SCC 131)*, the Supreme Court expanded on the concept of perversity and explained the law as it was stated in *Associate Builders*. “The court ruled that what was excluded from "the essential policy of Indian law," as stated in Section 34 of the act, cannot be accessed through a loophole created by patent illegality. In other words, a statute violation that is not connected to public policy or the public good and does not meet the criteria for a breach of fundamental policy cannot be deemed to be patently illegal.” *Ssangyong* upheld the other grounds outlined in *Associate Builders* despite concluding that a simple violation of Indian substantive law is no longer sufficient to invalidate an arbitral award.

More recently, in *Patel Engineering*, where the Supreme Court gave a practical illustration of the patent illegality test, the justification for an award from the viewpoint of a reasonable person was examined.

III. ARBITRAL AWARD IS IN CONFLICT WITH PUBLIC POLICY

Public policy notion

Public policy is the legal theory that contends that “no person or institution may legitimately engage in any activity that has a tendency to harm the public or is inimical to the public good.” It is sometimes referred to as the law's policy or public policy in reference to the administration of the law. Public policy refers, to any matter that affects the general welfare and interest of the population. The term "public policy" refers to the principles and standards that the legislature or a court deem to be of the utmost significance to the State for the good of all of society. In other words, it is an effort on the part of the government to address a problem that has an impact on the entire populace. Through implementing laws, regulations, and rulings, the government develops public policy.

India's stakeholders are in a condition of uncertainty and disarray as a result of the prolonged period of time it required to develop its law about the legality of an arbitral judgement. “The situation has improved and the parties' reliance on adjudicatory procedures employed after the arbitration hearings has decreased as a result of the most recent amendments made by the legislative branch and the judiciary.” The enactment of stringent petition admission

requirements in connection with final awards ensures that the integrity of the proceedings is upheld, that the parties do not repeat the steps, and that the parties' agreement is granted finality.

The 1996 Arbitration and Conciliation Act's provisions:

In accordance with the provisions of Section 34 (2) (b) (ii) of the Arbitration and Conciliation Act, 1996, an arbitral award may only be set aside by a court if the court determines that the arbitral award is against Indian public policy.

Explanation 1 (i): Therein makes it clear that a decision is contrary to Indian public policy only if it was made as a result of fraud, corruption, or a violation of Sections 75 or 91 of the Act. According to Explanation 1 (ii), an award is only in violation of Indian law's fundamental principle if it also violates the country's public policy. According to Explanation 1(iii), an award is only in violation of India's public policy if it goes against the most fundamental principles of morality and justice.

Insights and prior opinions on numerous public policy issues:

1. The Supreme Court declared in *Renusagar Power Co v. General Electric Co* in 1984 “that a simple violation of Indian law would not be enough to trigger the hurdle of public policy.”
2. In *ONGC v. SAW Pipes*, “the Supreme Court broadened the definition of "Public Policy of India," holding that awards that went against the spirit or purpose of a contract or statute legislation were in fact against India's public policy.” It proceeded by describing the award as obviously unconstitutional and asserting that its illegality constitutes a breach of Indian public policy.
3. The Supreme Court stated in “*Phulchand Exports Ltd v. O. O. O. Patriot (2011)* that the inclusion of the phrase "public policy of India" in Section 48 broadened its meaning and that the expression's scope and intended meaning under Sections 34 and 48 were identical.”
4. The Supreme Court ruled in “*Lal Mahal v. Progetto Grano Spa (2013)*, that the phrase "public policy of India" does not encompass the justification of "patent illegality." It further said that this basis was only applicable under Section 34 of the Act.”

However, the 2015 Amendment Act made it clear that the "Patent Illegality" ground would not apply to international commercial arbitrations; in other words, Section 48 of the Act's provisions for foreign awards could not be refused on the basis of "Patent Illegality."

5. A perverse decision is no longer a basis for challenge under the "public policy of India,"

according to the Supreme Court's 2019 judgement in “*Ssangyong Engg. & Construction Co v. National Highway Authority of India*. A strange decision, however, amounts to blatant illegality that is seen on the award's face.” A finding based on materials obtained without the consent of a party amounts to a determination based on "no evidence," and as such is considered perverse and subject to review for "patent illegality apparent on the face of the award."

IV. CONCLUSION

In conclusion, it can be proven that the Parliament's implementation of the goals and objectives of the Arbitration and Conciliation Act of 1996 is of utmost importance, and that using blatantly illegal behavior as a basis for public policy would directly violate the fundamental principles of the aforementioned Act. The two fundamental tenets of arbitration—the finality of the decision and the need for little judicial interference—would be destroyed. Additionally, it fails to take the required actions to advance Conflict Resolution Mechanisms and opposes the development of Arbitration in the court. Hence, the argument that something is patently illegal cannot be used and must be rejected by a court of law or by the legislature.
