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Setting Aside of Arbitral Awards under the Arbitration and Conciliation Act 1996

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ABSTRACT

The arbitration landscape has been emerging greatly throughout the globe and India is a giant which should be well equipped in terms of laws in place. This paper will analyse one such aspect of the Indian arbitration law to understand how the setting aside of arbitral award takes place and how the efficiency of the same can be ascertained after having done a detailed analysis of the same. Some specific areas of this law will also be analysed to delve deeply into the fact as to how government initiatives so that it can be at par with the other laws around the world and the discrepancies do not crop out having similar issues in place like in the past. After the paper has done through analysis of the position of what and how the law stands and the court orders in this regard, a conclusion will be drawn accordingly to understand as to what should be the next step, which can be recommended in this regard. Not only these solutions need to address the problem at hand but also make sure that these loopholes can be covered, and the position of law is not at state of compromise at any given point in time. Having laid down the skeleton of the paper, the author will now get into the main aspects of analysis and conclusion of the topic.

Keywords: *arbitral awards, enforcement, setting aside, 1996 Act, grounds, limitation, conventions.*

I. INTRODUCTION

In order to set aside an arbitral award, Indian or foreign, the procedure given in the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the “1996 Act”) must be adhered to. Section 34 provides as to how are domestic award may be set aside while section 48 provides how a foreign award and its enforcement as well as recognition may be refused by the courts.

As per section 34 of the 1996 Act, the limitation period to challenge the award has also been prescribed and requires the award to be delivered to the parties so that the arbitration proceedings are brought to an end². The confusion over the terms of delivery and receipt have been discussed in several judgments and conclusion as to how the period of limitation must be calculated has been reached. In relation to foreign awards as well, certain controversies around

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² The Arbitration and Conciliation Act, 1996 S. 34 cl. 3, proviso, No. 26, Acts of Parliament, 1996 (India).

the limitation period for enforcement have been resolved by the courts which this paper seeks to address. The paper also delves into how the law enforcement often award which is rendered in a foreign jurisdiction while the parties belong to India have been dealt with by the Supreme Court. The paper finally concludes on how the interpretation given by courts to several controversial or unclear provisions of the Act effect India's position in the global arbitration landscape.

II. SETTING ASIDE OF DOMESTIC AWARDS AND THE CHALLENGES ON THE LIMITATION ASPECT

Parties do an arbitration cannot appeal against an arbitral award and the intention of the legislature behind the 1996 act is to promote alternative forms of dispute resolution reducing court intervention to the minimal. Arbitration procedures highly prioritised party autonomy and cannot be lightly interfered with by the courts as arbitrators are like judges which are appointed by the parties³. However, the courts do have authority to check on arbitration proceedings and arbitrator's conduct according to the procedure established under the 1996 act to facilitate the passing of a valid and legitimate award⁴. A party aggrieved by the award may apply to the tribunal itself for the removal of certain technical errors and defects in the award⁵, and for substantive reasons, it must satisfy the conditions under section 34 of the 1996 act.

(A) Grounds for setting aside an award

a party can apply to set aside an award if it can demonstrate that either of the parties were under incapacity to arbitrate, arbitration agreement is invalid, or proper notification for appointment of the arbitral proceedings or arbitrator was not given to the party making the application, or the award dealt with a dispute, or it does not come under the terms for submission to arbitration when there is dispute which is dealt by arbitral award, it contains the decision which is beyond the scope for the submission of arbitration, the configuration of the tribunal was not according to the arbitration agreement⁶. The court me also overturn and award if the award is in dispute because the subject matter is not arbitrary and it also disputes the public policy of India⁷.

³ *Indu Engineering and Textiles ITD V. Delhi Development Authority*, (2001) 3 SCR 91; *Municipal Corp of Greater Mumbai v. Prestress Products*, 2003 (3) Bom CR 117.

⁴ Aishwarya Padmanabhan, *Analysis of Section 34 of the Arbitration and Conciliation Act – Setting aside of Arbitral Award and Courts' Interference: an evaluation with Case Laws*, <http://manupatra.com/roundup/326/Articles/Arbitration.pdf>.

⁵ The Arbitration and Conciliation Act, 1996 S. 33 cl. 3, proviso, No. 26, Acts of Parliament, 1996 (India).

⁶ *Supra* Note 2

⁷ *Ibid*

(B) Limitation Period for setting aside the award

The court is not supposed to consider an application challenging an award if it is filed more than 3 months after the date from when the applying party has received the arbitral award⁸. If the court determines that there was adequate cause for delaying an application beyond the prescribed time, it may entertain an application for setting aside within an extended period of 30 days but not thereafter⁹. The time period to challenge an award must be adhered strictly or the party aggrieved is left with no remedy but to comply with the award's enforcement after the expiry of the limitation period under Section 34.

(C) Delivery and Receipt Conundrum: Calculation of limitation period

If one has been awarded damages, signed document of the award must be transferred to that party¹⁰. However, the calculation of limitation period, is in accordance with when the award is received by a party. Delivering a copy of the award confers rights on a party, and that party's right to exercise the rights expires at the end of limitation period, it is calculated from that date¹¹. Due to the foregoing, the award must be presented promptly in arbitration process. Section 3 of the act states that, a message presumed to have been received by the addressee on the date it was delivered. This leads to the question as to which should be considered as the delivery date, whether it should be the date when the award is actually delivered or when it is received by the lawyer all the parties.

A 3 judge bench of the Supreme Court¹², while dealing with problems of limitation under the procedure prescribed for challenge of arbitral awards held that limitation period starts only after a valid delivery of award takes place in line with section 31 (5). The delivery so prescribed is not a mere matter of formality but it takes effect when the parties have received the signed copy of the award. The delivery and the receipt of the award is an important stage, the court held, as it confers upon parties certain rights to challenge the award or get it corrected while it brings an end to certain other rights under the arbitration procedure and hence, is extremely important for the calculation of the limitation period for the purposes of the challenging or enforcing the award. Following this decision, *State of Maharashtra & Ors V. Ark Builders*¹³, it was held that the phrase "party making the application has received the arbitral award" read along with the requirement under section 31(5) of the Arbitration Act which needs the delivery

⁸ Ibid

⁹ Ibid

¹⁰ The Arbitration and Conciliation Act, 1996 S. 31 cl. 5, proviso, No. 26, Acts of Parliament, 1996 (India).

¹¹ *Union of India v. Tecco Trichy Engineers and Contractors*, (2005) 4 SCC 239.

¹² Ibid

¹³ (2011) 4 SCC 616.

of allocated copy of the award to be made to each party. Before the arbitral award may have any effect, the party that has received it must acknowledge receipt of the award in writing. The statute of limitation starts to run when the award is delivered by the tribunal and as and when the party receives it. It has also been held that the date of receipt of the award should not be included while calculating the 90 day time period under section 34 (3)¹⁴. Further, in cases where an award is presented, sent or left in premises occupied by party on non-working day, date on which the party receives the award is when it is successfully handed over to the party and not the mere date of the delivery to the office. And the set delivery must be done to the parties and not agents such as employees or advocates representing the parties¹⁵

III. GROUNDS FOR REFUSING IMPOSITION OF THE FOREIGN AWARDS

The grounds for refusal of the recognition and enforcement of foreign awards under the 1996 Act are similar to the grounds provided under Article 5 of the New York Convention. A foreign award may be refused to be enforced in the Indian territory, at the request of a party against whom it is invoked, if that party is able to show either or both parties were incompetent to arbitrate or the arbitration agreement was legally invalid, the award was beyond the scope of arbitration, the subject matter of a board was not arbitrable or a proper notice was not given to either of the parties or the principles of natural justice in terms of procedure were not being followed, or the composition of tribunal was not as per agreement and was not in accordance with the law of the seat of arbitration or award was against public policy or it has not yet become binding upon the parties all the award has been suspended by the courts or any other authority in the country of origin¹⁶.

Although the grounds for refusing the enforcement of a foreign award under Part 2 is the same as the one for the setting aside of a domestic award, it does not mean that the scope of interference of court under Part 1 and Part 2 of the act is similar. The scope of review in foreign awards is extremely limited. The words set aside or suspended¹⁷ cannot be interpreted as a means to challenge a foreign award on its merits. It is untenable to interfere with foreign awards and reverse the same on merits¹⁸. It is also not permissible under the New York Convention which is followed extensively by the Indian courts¹⁹.

¹⁴ State of Himachal Pradesh v. Himachal Techno Engineers, (2010) 12 SCC 210.

¹⁵ Benarsi Krishna Committee v. Karmyogi Shelters Private Limited (2012) 9SCC 496

¹⁶ The Arbitration and Conciliation Act, 1996 S. 44, No. 26, Acts of Parliament, 1996 (India).

¹⁷ Bhatia International v. Bulk Trading (2002) 4 SCC 105

¹⁸ J.M Hunter & R. Banerjee, Bhatia, BALCO and Beyond: One Step Forward, Two Steps Back? 24(2) National Law School of India Review 1, 5 (2013), <http://www.jstor.org/stable/44283758>

¹⁹ Bharat Aluminium Company v. Kaiaer Aluminium Technical Service 2012 (8) SCALE 333.

(A) Restraining period for seeking imposition of the foreign arbitration awards

Though, the 1996 act does not provide for any specific time limit within which an application for the recognition and enforcement of foreign arbitration must be made. There are several viewpoints on whether article 136 or article 137 of the limitation act would apply in the set context.

In one case it was held that the limitation period for enforcement of the award rendered in a foreign jurisdiction is the same as the limitation period for executing a foreign decree because the enforcement and execution proceedings are the same for such awards which would be 12 years from the date of delivery of the award²⁰. However, in another case, the limitation period was held to be 3 years from when the right to apply would accrue as per section 136 of the limitation act²¹. The confusion on this point was finally resolved by the Supreme Court²². The court relied on article 137 and held that in application for enforcement and recognition of awards under Part 2 of the act should be sought within 3 years of when the right to apply arises. It was further held that, article 136 would not apply to such cases as it only applies to a decree rendered by an Indian court. It was also explained that the foreign arbitral award would not become a foreign decree at any stage after the award is delivered. Only after the stages of section 47 and 48 under the 1996 act have been completed, a foreign award can be executed as a deemed decree, it cannot be executed a decree itself²³. Section 49 merely creates a legal fiction for the purposes of the 1996 act. And award holder may also supply for enforcement of a foreign arbitral award through a common petition as the legislative intent is to dispose of arbitration proceedings expeditiously²⁴. It has been emphasised from time to time that the quotes must tread carefully and not interfere with the enforcement of arbitration awards without adequate proof of satisfaction of the mentioned crowns according to section 48 of the 1996 act.

(B) Position of foreign seated arbitration awards between Indian companies - foreign or not?

The seat of arbitration i.e., the jurisdiction whose law is applicable to arbitration, is crucial since

²⁰ The Arbitration and Conciliation Act, 1996 § 48, No. 26, Acts of Parliament, 1996 (India); Vanya Verma & Aditya Patel, *The Critical Analysis of Enforcement of Foreign Arbitral Awards: A Legal Study*, 4(3) INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES 3559, 3566 (2021), <https://www.ijlmh.com/wp-content/uploads/The-Critical-Analysis-of-Enforcement-of-Foreign-Arbitral-Awards.pdf>.

²¹ The Arbitration and Conciliation Act, 1996 S. 48, No. 26, Acts of Parliament, 1996 (India).

²² Vanya Verma & Aditya Patel, *The Critical Analysis of Enforcement of Foreign Arbitral Awards: A Legal Study*, 4(3) INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES 3559, 3565 (2021), <https://www.ijlmh.com/wp-content/uploads/The-Critical-Analysis-of-Enforcement-of-Foreign-Arbitral-Awards.pdf>.

²³ Shri Lal Mahal Ltd. v. Progetto Grano Spa, (2014) 2 SCC 433.

²⁴ Imax Corporation v. E-City Entertainment, (2020) 1 AIR Bom 82.

it affects a number of key issues such as the party's right to appeal, the availability of interim relief and which court system has the final jurisdiction over the decision²⁵. The parties incorporated in the same jurisdiction may sometimes elect to seat their arbitration to be outside of their home jurisdiction for multiple reasons such as benefit provided under the laws of the other countries, judicial promptness or independence of arbitrations.

The controversy around the issue of legality of choice of a foreign seat when the parties are domestically situated in India and whether and award so passed could be enforced in India or not, what the resolved by the Supreme Court's judgment in the case of PASL Wind Solutions v. GE²⁶. The court addressed the following issues in the context of a scenario in which two Indian incorporated businesses have selected an arbitration seat outside India:

- whether a foreign award issued under the 1996 act is enforceable as a foreign award
- whether Indian courts could provide interim remedies with regard to such an award

The determination of what makes a foreign award under section 44 of the 1996 Act was considered by the court in light of whether it is based on the nationality of the parties all the nationality of the juridical seat of arbitration. The court held that the foreign seated arbitral awards acquired by Indian companies are legitimate and enforceable in the country where they were obtained and even in India. This decision has made it clear that international parent corporations may choose to arbitrate their Indian subsidiaries in countries where they are more familiar with the law and perpetuate a more pro party autonomy stance. It was further clarified that Indian parties can use interim measures under the Arbitration Act such as applying for asset preservation and preventing the award debtor from alienating property in this particular case, to enforce foreign seated awards in India, is encouraging. In light of this judgement, Indian parties attempting to enforce foreign seated awards in India now have some relief. As a result of the judgment, it seems that similar remedies are available in arbitral proceedings conducted in countries other than India²⁷.

IV. CONCLUSION

The discussion on setting aside of domestic and foreign arbitral awards, and the recent judicial trend has shown the willingness of courts to be more pro enforcement and less intrusive in the

²⁵ *Louis Dreyfous Commodities Suisse v. Sakuma Exports Limited*, (2015) 6 Bom CR 258

²⁶ *Government of India v. Vedanta Limited and Ors.*, 2020 SCC Online 749; *Bank of Baroda v. Kotak Mahindra Bank*, (2020) SCC Online 324.

²⁷ GARRY BORN, *INTERNATIONAL ARBITRATION: LAW AND PRACTICE* (Kluwer Law International, 2012) 105; SIMON GREENBERG, CHRISTOPHER KEE & ROMESH WEERAMANTRY, *INTERNATIONAL COMMERCIAL ARBITRATION: AN ASIA-PACIFIC PERSPECTIVE*, 54 (Cambridge University Press, 2011).

arbitration procedures. With the courts taking appro arbitration stance as well as the 2015, 2019 and 2021 amendment acts there is enough cause to anticipate that these best practices will be incorporated into Indian arbitration law in the not very distant future.

In order to attract foreign investment, fast growing economy needs a dependable and stable conflict resolution mechanism that is both trustworthy and stable. Because of the severe backlog of cases before the Indian courts, business actors both in India and overseas have established a strong preference for using arbitration to settle disputes. Arbitration in India has not always being followed by best international practices, despite being an initial signatory to the New York Convention. This has changed quite a lot as the grounds for setting aside the awards or refusing enforcement have not only been narrowed by legislative action, but the judiciary has also been cautious of over interference in the arbitration process. These decisions have been taken with an aim to align Indian arbitration laws with international law for most practices. The Indian arbitration jurisprudence and landscape is set out to grow in the coming years and our courts are prepared, to hear a number of cases involving the interpretation of the act's many changes and facilitate the legislative aim to make India a hub for arbitration.
