PATENT ILLEGALITY AS A GROUND TO SET ASIDE DOMESTIC ARBITRAL AWARDS

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INTRODUCTION

In accordance with section 34(2A) of the Arbitration And Conciliation Act of 1996, patent infringement is now a distinct cause for setting aside a domestic arbitral ruling. For there to be a patent error of law, there must be either an obvious error or an intentional disobedience of the statutory requirements. Visible objects that cannot be covered by a patent are referred to as "patent illegality." At the same time when public policy exclusions for storing away rewards grew more prevalent, the basis for illegal patent activity started to take form. According to "Section 34(2)(b)(ii)" of the Act, it is allowed to reject an Indian-seated arbitration ruling on the grounds that it is incompatible with India's national policy. This clause is included within the Act. This provision may be found in the first section of the statute. Patent Illegality is now a separate ground for setting aside domestic arbitral awards; it is mentioned in section 34 (2A) of the Act[1]. The Act mentions the ground but does not define it; therefore, in order to understand the concept of patent illegality judicial interpretation is required, the Supreme Court has defined the grounds in various judicial decisions by the Supreme Court of India. Patent Illegality for the first time came in Indian jurisprudence in the landmark case of the supreme court, “Oil and Natural Gas Corporation Ltd. v. SAW Pipes Ltd”. in which the term "public policy of India" was given a broader connotation.[2]

As a result of a series of court decisions and the 2015 Amendments to the Arbitration and Conciliation Act, the procedure for setting aside an arbitral award has evolved into a separate basis and process. This was not the case in the past. In spite of the fact that "Section 34(2A)" lists patent illegality as one of the reasons for annulling an arbitral judgment, the term "patent illegality" is not defined elsewhere in the 1996 Arbitration and Conciliation Act. If it is said that an award violates the substantive provisions of the law, the requirements of the Arbitration and Conciliation Act of 1996, or the terms of the contract, this issue may be used, based on the judicial interpretation of the problem. The 2015 Amendment, in accordance with the 246th

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[1] section 34 (2A) of the Act The Arbitration And Conciliation Act, 1996
[2] “Oil and Natural Gas Corporation Ltd. v. SAW Pipes Ltd. (2003) 5 SCC 705”

Law Commission Report, gave legal force to the defense of patent illegality. Domestic arbitral rulings may now be overturned by Indian courts for "patent illegality evident on the face of the award," according to the insertion of "Section 34(2A)" in 2015. The award could not be revoked on the grounds of blatant illegality, it was made clear, even if the law had been interpreted wrongly or the evidence had been reexamined. In this historical investigation, numerous instances of patent illegality have been taken into account throughout time, and the details are currently being examined.

CHRONOLOGICAL ANALYSIS AND SUMMARY OF JUDICIAL PRONOUNCEMENTS

"Oil and Natural Gas Corporation Ltd. V. SAW Pipes Ltd. (2003) 5 SCC 705"

This is the first case where Patent illegality was recognized in the jurisprudence of Indian Arbitration and conciliation, the Supreme Court of India gave "public policy of India" a broader connotation in this case. If the aforementioned award has violated the provisions of the Arbitration Act as well as provisions of the substantive law, then the question that has arisen is whether such an award on its face is so incorrect that it could be overturned on the grounds of 'Public Policy' under "Section 34" of the Act. This provision allows for awards to be overturned if they are deemed to be in violation of the public interest. This is the question that has been brought up in regard to this specific situation. In this case, the court found that if the legislative intent is determined by reading other sections of the Act with "Section 34," then it seems that both the letter and the spirit of the Act have been violated, resulting in a miscarriage of justice. As a consequence of the court's decision that "Section 34" of the Act can only be interpreted in conjunction with other provisions to achieve the legislative goal, then it appears that the legislative purpose is obtained by reading other provisions with this was the conclusion that the court came to. In the event that the Tribunal did not follow the process by giving appropriate regard to the conditions of the contract, this would indicate that the Tribunal acted outside the scope of its authority. As a consequence of this, the award would be blatantly unlawful, and it would be possible to overturn it in line with Section 34 on the basis of 'Public Policy' since it has a major impact on the rights of the party. In addition, one of the most contentious issues is how the phrase "public policy" should be defined and to what extent this term should be understood. The court concluded that "Public Policy" cannot be confined and must be read liberally after evaluating prior judgments and taking into account the spirit of the Constitution. As a consequence, the court decided to include "patent illegality" as a new element of "Public

Policy." "The late Mr. Nani Palkhiwala, a distinguished lawyer and jurist, also said that "if the arbitral tribunal does not administer justice, it cannot actually be representative of an alternative conflict settlement mechanism," and the court did not contest his allegations. Therefore, a court would be permitted to support the challenge to the award on the grounds that it clashes with India's national policy if the award had caused injustice. The Supreme Court overruled the lower court's ruling in this case on the grounds that the patent's illegality was against "public policy."

It was claimed that an arbitral decision may be nullified if it ran counter to the public policy of India, which can be understood to imply that it was contrary to the following:

1. " If the fundamental policy of Indian law is getting violated."
2. "the interest of India is getting violated."
3. "justice or morality"
4. "if it is patently illegal on the face of it."

"VENTURE GLOBAL ENGG. V. SATYAM COMPUTER SERVICES LTD.(2010) 8 SCC 660 "

Justice Sapre gave a statement that a breach of FEMA[3] is opposed to India's public policy bringing us back to the same discussion over whether patent illegality should be considered a violation of India's public policy. Supreme Court of India has emphasized in several instances, such as in "Associate Builders"[4], "Mc Dermott International"[5], and "Centro trade Minerals"[6], that patent illegality of a trifling character should not be held against public policy. Patents Illegality must be addressed at the root of the problem. In Explanation (2A) of Section 34(2), (b)(ii) of the Amended Arbitration and Conciliation Act, 1996, this idea seems to be supported.

"ASSOCIATE BUILDERS V. DELHI DEVELOPMENT AUTHORITY (2014) (4) ARBOR 307"

Supreme Court dealt with the concept of patent illegality and laid down that there are some heads when the ground of patent illegality can be invoked.

[3] " Foreign Exchange Management Act, 1999"
[4] " Associate Builders v. Delhi Development Authority (2014) (4) ARBLR 307"
[5] "McDermott International Inc. v. Burn Standard Co. Ltd, (2006) 11 SCC 181"
[6] " Centrotrade Minerals And Metal Inc. v. Hindustan Copper Ltd *2016 SC 1482"*

"Supreme court defined Patent illegality, It must go to the root of the matter. The public policy violation, indisputably, should be so unfair and unreasonable as to shock the conscience of the court. Where the arbitrator, however, has gone contrary to or beyond the expressed law of the contract or granted relief in the matter not in dispute would come within the purview of Section 34 of the Act."[7]

In the case of Associate Builders, which was decided not long after the Western Geco case, the Supreme Court reaffirmed the grounds for appealing a judgment under the Act, which is as follows: The fundamental policy of Indian law, which includes things like adhering to the terms of statutes, using the principles of "stare decisis", taking a "judicial approach", and adhering to natural justice and the "Wednesbury principles";

Some of the heads given by the supreme court of India.

1. "The interests of India;"
2. "Justice (when it shocks the conscience of the Court) or Morality (primarily limited to sexual immorality contained under Section 23 of the Indian Contracts Act)"
3. "Patent illegality affecting the root of the matter; and "
4. "Making of the award induced by means of fraud or corruption"

"Supreme court gave examples of "Patent Illegality" it would include:"

a) "fraud or corruption in the award. "

b) "a contravention of substantive law, which goes to the root of the matter; "

c) "error of law by the arbitrator;"

d)" a contravention of the Arbitration Act itself;"

e) "If the arbitrator fails to consider the terms of the contract and usages of the trade as required under Section 28(3) of the said Act; and[8]"

f) "if the arbitrator does not give reasons for his decision"

"SSANGYONG ENGINEERING & CONSTRUCTION CO. LTD. V. NATIONAL HIGHWAYS AUTHORITY OF INDIA (NHAI) (2019) 15 SCC131"

In this case, the Hon'ble Supreme Court of India ruled that the 2015 Amendment will take effect prospectively. In other words, it won't apply to arbitration processes that may have

[7] "Section 34 Arbitration and Conciliation Act, 1996"
[8] "Section 28(3) Arbitration and Conciliation Act, 1996"

started before that date; rather, it will only apply to section 34 petitions that have been submitted to the Court on or after October 23, 2015. And the highest court ruled that an arbitrator must disclose reasons for their decision if they violate Section 31(3) of the aforementioned Act, which would result in blatant illegality on the face of the award.[9] This judgment has resulted in three noteworthy developments in light of the 2015 Arbitration and Conciliation (Amendment) Act. First, it clarifies the parameters of the "public policy" ground for setting aside an award; second, it upholds the prospective applicability of the 2015 Act; and third, it adopts an unusual strategy for recognizing minority decisions. All of these developments are in light of the fact that the 2015 Act was amended.

This case's highest court showed patent illegality.

"Patent illegality" is inherently unlawful behavior, not an arbitral tribunal's misinterpretation of the law or an appeals court's reassessment of the facts. If

(a) an award is given without explanation,
(b) the arbitrator's interpretation of the contract is illogical;
(c) he decides issues outside the scope of the contract or his terms of reference; and
(d) he makes an erroneous decision based on a lack of evidence, a failure to consider important evidence, or documents used as evidence without the parties consent.

In this case, the SC also affirmed its findings in "**Board of Cricket Council of India v. Kochi Cricket Board**"[10] where the Indian Supreme Court decided a significant question on the validity of the 2015 changes to the 1996 Arbitration and Conciliation Act. It was decided that the 2015 Act modifying Section 34 is wholly prospective in character and shall apply to applications submitted on or after October 23, 2015 (the date of the 2015 Act's commencement), even if arbitration procedures were initiated prior to the said date.[11] This would enable parties to such arbitrations to likewise profit from the Supreme Court's decision in "Ssangyong ", eliminating the use of "public policy" and "patent illegality" to exploit domestic and international verdicts. The Court's ruling was positive. The ruling is encouraging since it is in keeping with the pro-arbitration policy pursued by the Supreme Court in its previous decisions. The Court cited the 246th Report of the Law Commission of India, which observed that the automatic stay against the enforcement of an arbitral award under the

[9] "Section 31(3) Arbitration and Conciliation Act, 1996"
[10] "Board of Cricket Council of India v. Kochi Cricket Board (2018) 6 SCC 287 "
[11]" Section 34 Arbitration and Conciliation Act, 1996 "

unamended Section 36, upon applying Section 34, was causing delays and rendering the arbitration environment in India ineffective. The Law Commission had proposed the addition of a new Section 85(2)(a), which divided proceedings into arbitral proceedings (now continuing before the arbitral tribunal) and court procedures, and made the revisions prospectively applicable, with specific exceptions. Intriguingly, the Court noted the proposed Section 87 of the Arbitration and Conciliation (Amendment) Bill, 2018 approved by the Cabinet of Ministers on 7 March 2018, which stipulates that the Amendment Act shall not apply to Court proceedings arising out of or in relation to arbitral proceedings that commenced prior to the Commencement Date, regardless of when such Court proceedings commenced. However, the Court refused to consider Section 87 of the proposed Bill for the interpretation of Section 26 of the Amendment Act for two reasons: first, the final form of Section 87 may differ from its proposed form, and second, a proposed Bill introducing a new provision of law cannot be the basis for interpreting an existing provision of law.

The Court has informed the Government of India that the immediate impact of the proposed Section 87 would be to "put all the significant amendments on hold.[12]" Citing the Statement of Objects and Reasons of the Amendment Act, the Court stated that the Amendment Act was enacted for the specific purpose of expediting case resolution and minimizing court intervention in arbitration in order to make India an investor-friendly jurisdiction and that this purpose must be carried out.

HOW THE AMENDMENT COMES INTO PLAY

“The 2015 Amendment Act granted the foundation of patent illegality legislative status, in accordance with the recommendations made in the 246th Law Commission Report. Patent illegality was introduced as a reason to set aside a domestic arbitral judgment under section 34(2A) of the Arbitration & Conciliation Act, of 1996**.[13]”**

“The Law Commission of India released its 246th Law Commission Report in August 2014, recommending modifications to Section 34 of the A&C Act and harshly criticizing the Saw Pipes decision. In recommending the reinstatement of Renusagar[14], the Law Commission also

[12] Section 87 Arbitration and Conciliation Act, 1996
[13] “Report No. 246 On Amendments To The Arbitration And Conciliation Act, 1996”
[14] "Renusagar Power Co. Ltd. v. General Electric Co., 1994 Supp (1) SCC 644”

commented on all of the Supreme Court's significant arbitration rulings, including Shri Lal Mahal[15], BALCO[16], Bhatia International" [17]

It is noteworthy that the coordinate Bench of the Supreme Court issued its decision in "Western Geco" in September 2014, only one month after the Law Commission Report's release, despite the harsh criticisms it made of the wide range of public policy. This happened only one month after the Report's publication. Even if it should go without saying, the "Western Geco" decision did exactly what the Law Commission had warned the court against doing. Following that, in November 2014, a decision in Associate Builders was made that reaffirmed the all-encompassing scope of public policy. This choice was made around two months after the first occurrence. This amendment strongly urged the legislature to embrace the reforms that the Law Commission had suggested, and it was extremely critical of the judgments that had been taken in "Western Geco" and Associate Builders. It's interesting to see the frustration and agony the Law Commission expressed when it stated in para. 6 of the supplement that "the Supreme Court's decision in Western Geco undermines the Commission's attempts to bring the Act into compliance with international practices and will discourage the possibility of international arbitration coming to, and domestic arbitration staying in India." In other words, the Commission's efforts to bring the Act in line with international standards are undermined by the Supreme Court's decision in "Western Geco."

After that, the legislature made the change in the Arbitration and Conciliation Act, of 1996 to include the Law Commission's recommendations. This new version of the Act went into effect in 2016. "Section 34(2)(b)(ii) has been updated to contain two explanations and a new ground thanks to recent modifications.[18] These changes were made possible by the inclusion of Section 34(2A). Provided that an award shall not be set aside merely on the ground of an erroneous application of the law or by reappreciation of evidence."[19]

As is obvious from a fast reading of the amendments made to Section 34(2)(b), the legislature has clarified in Explanation 1 what constitutes a violation of Indian national policy and has also backed legislative recognition for the subheads that were mentioned in "Renusagar" (ii). As a result of the Supreme Court's finding in the case of Shri Lal Mahal, this clause has also

[15] "Shri Lal Mahal Ltd. v. Progetto Grano SpA, (2014) 2 SCC 433"
[16] "Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc., (2012) 9 SCC 552"
[17] "Bhatia International v. Bulk Trading S.A., (2002) 4 SCC 105"
[18] "Section 34(2)(b)(ii) Arbitration and Conciliation Act, 1996"
[19] 34(2A) Arbitration and Conciliation Act, 1996"

protected foreign commercial arbitration decisions against challenges based on "patent illegality." We feel that the 2015 change to the Arbitration and Conciliation Act was long overdue and that it adequately restricted the power of the courts when confronted with a motion to vacate an arbitral judgment.

THE POST-AMENDMENT

Following the completion of the modification, it was agreed that subsection 2A of section 34 would constitute a distinct basis for setting aside a domestic arbitral ruling. It is now abundantly evident that the modification will be implemented after November 23, 2015, but not before. The explanation of section 34(2A) clearly mentions that mere erroneous application of law or reappreciation of evidence will be not counted as patent illegality.

AUTHOR'S ANALYSIS

The word "patent illegality" was originally defined by the Supreme Court in the case ONGC V. SAW Pipes [(2003) 5 SCC 705, which was the first time the term was used. The "Arbitration and Conciliation Amendment Act, 2015" amended Section 34 of the Arbitration and Conciliation Act, 1996 (henceforth referred to as the said Act) in order to prevent the extension of "public policy of India" by the Courts. This was done in order to make the "said Act" more accurate. The Arbitration and Conciliation Act from 1996 was analyzed and several revisions were suggested in the 246th Report that was published by the Law Commission in August 2014. Because India is dedicated to enhancing its legal structure in order to cut down on delays in the disposition of cases, the recommended amendments promoted and encouraged Alternative Conflict Mechanisms, such as arbitration, for the purpose of resolving disputes in a manner that is user-friendly, more cost-effective, and quicker. "The Law Commission suggested several significant amendments to Section 34 of the Act in its 246th Report. The new cause for annulling a domestic arbitral judgment under Subsection (2A), introduced by the Amendment Act, 2015, to Section 34, relates to such fundamental illegality but does not amount to a mere misapplication of the law, according to the Apex Court in the Ssangyong Engineering case. In order to be clear, the Court has ruled that it is not appropriate to set aside an award on the grounds of patent illegality where the legislation that was broken had nothing to do with public interest or policy and was not a part of the fundamental principles of Indian

law. The 2015 modification underlines that an appeal court's re-evaluation of the evidence cannot be justified by the award's obvious illegality.[20]

The Apex Court largely relied on the Associate Builders case in the Ssangyong Engineering case and found that if an arbitrator fails to offer an explanation for an award in contravention of Section 31(3) of the Act, the judgment is patently unconstitutional. The Apex Court also said in the Ssangyong Engineering case that international commercial arbitration would not be able to use Section 34(2A) patent illegality grounds The above points summarise the Apex Court's patent illegality finding in the Ssangyong Engineering case.[21]

CONCLUSION

"The 'Patent illegality' premise must be so harsh and irrational that it shocks the court's conscience in situations where the award is set aside on this basis," the Honorable Justice Sinha said in the case Mc Dermott International Inc. v. Burn Standard Co. Ltd. "The execution of patent illegality reasons under the public policy would be a clear violation of the Act's fundamental structure. It would undermine the two foundations of arbitration, which are the finality of the ruling and minimum court interference. In addition, it opposes the expansion of court-based arbitration and does not take the required measures to introduce Dispute Settlement Mechanisms. Therefore, the Illegal premise cannot be used and must be invalidated by a court of law or the legislature. The use of the Public Policy Doctrine in arbitration has been under close examination recently. The Public Policy Doctrine lacks a formal definition, thus the courts have interfered with the legislative process in an attempt to outline its boundaries. Positions that are opposed to one and even contradictory to one another have regularly evolved from this. As was previously indicated, there have been instances when even very small infractions of Indian law have been found to be against public policy. The courts are now able to consider challenges against arbitrators' rulings as a result of the application of the "patent illegality" concept. The arbitration procedure is fundamentally based on the premise that judicial participation in the settlement of legal disputes should be minimized. In the future, the doctrine of public policy has to be given a limited interpretation, and, more crucially, it needs to be clearly demarcated in regard to its breadth and extent in order to guarantee that India becomes a worldwide center of arbitration in the globe. By acting in this manner, India would

[20] "Section 34(2A) Arbitration and Conciliation Act, 1996."
[21] "Ssangyong Engineering & Construction Co. Ltd. v. National Highways Authority of India (NHAI) (2019)15 SCC1"

be able to realize its goal of becoming a global hub for arbitration on a scale comparable to that of the United Nations. However, it is of the utmost importance that the parameters of public policy be statutorily defined in order to ensure that the gaps and voids that currently exist in our Statute books with regard to the same do not prevent potential investors and litigants from easily conducting their business in India's thriving economic environment. This is because these gaps and voids could potentially prevent potential investors and litigants from being able to conduct their business. Recent judicial trends seem to indicate that the courts are applying a public policy that has an ever-decreasingly restricted and constrained range of application. The current trajectory in the legal system, on the other hand, implies that the system is getting more restricted and more constricted. Patent illegality in India is a cause for throwing aside domestic arbitral decisions, and there is a theory in international law that corresponds to this principle. This principle is known as the Manifest Disregard of Law Test, and it was stated in the Yusuf v. Toys and Hour, 1997 case. I believe that the removal of patent illegality from the purview of public policy and the establishment of patent illegality as a distinct cause for setting aside domestic arbitration verdicts have been advantageous for all parties concerned. This was achieved by eliminating patent illegality as a distinct reason for overturning domestic arbitration judgments. When it is clear that the issue at hand is one of patent illegality rather than a contentious issue comparable to public policy, it has not only lessened the burden that has been placed on the courts but also made it possible for parties who have been adversely affected to approach the courts more easily. This has two advantages: first, it has reduced the workload on the courts, and second, it has enabled parties who have been negatively impacted.