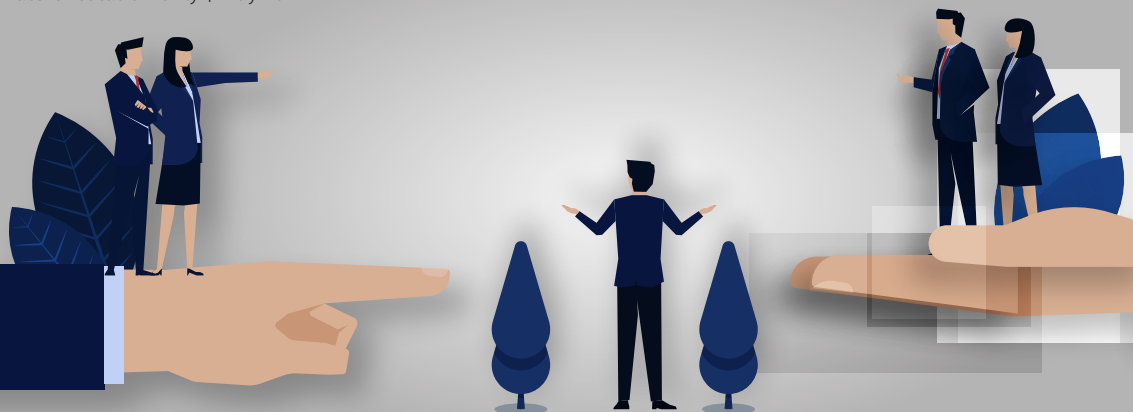




Arbitration Case Insights

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Supreme Court clarifies that the 2015 amendments to Section 34 apply to Section 34 petitions filed after 23 October 2015, even if the corresponding arbitration proceeding had commenced before such date¹

Brief Facts

The National Highways Authority of India (“Respondent”) and Ssangyong Engineering & Construction Co. Ltd. (“Appellant”) had entered into a construction contract, under which the Appellant was paid a monthly price adjustment as per the contractual formula. The formula applied the Wholesale Price Index (“WPI”) based on the year 1993-94. From 2010 onwards, the Union Ministry started publishing the WPI based on the year 2004-05.

In February 2013, the Respondent issued a policy circular (“Circular”) in which a new formula for determining indices was used by applying a linking factor based on the year 2009-10. This “linking factor” was introduced to connect the indices based on the year 1993-94 to those based on the year 2004-05. The Circular expressly stated that the stipulated process may be adopted “subject to the condition that the contractors [Appellant] furnish undertaking / affidavit that this price adjustment is acceptable to them...”

The Appellant opposed the Circular for being a unilateral modification to the contractual formula and submitted a conditional undertaking, expressly reserving its right to challenge the Circular as per the contract and other available legal remedies.

The dispute regarding the applicability of the Circular was referred to a Dispute Adjudicating Board (“DAB”) in accordance with the contract. The DAB held against the Appellant. Aggrieved, the Appellant referred the dispute to arbitration in 2013. The arbitral tribunal, by its majority award dated 2 May 2016 (“Award”), held that the Circular was applicable to the contract between the parties. The tribunal applied certain guidelines of the Ministry of Commerce and Industry (which, the tribunal clarified, were publically available even though they were not on record) in arriving at its conclusion that the linking factor is to be applied.

Issues

- (i) Whether the amendments made to Section 34 of the Act by the Arbitration and Conciliation (Amendment) Act, 2015 (“Amendment Act”) are applicable to applications filed under Section 34 to set aside arbitral awards made after 23 October 2015?
- (ii) Can the Award be set aside on the grounds specified under Section 34(2)(a)(iii) of the Act, i.e., the party making the application was unable to present its case?
- (iii) Can the Award be set aside on the grounds specified under Section 34(2)(a)(iv) of the Act, i.e., the Award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration or contains decisions on matters beyond the scope of the submission to arbitration?
- (iv) Can the Award be set aside on the grounds under Section 34(2)(b)(ii), i.e., the Award is contrary to the public policy of India, specifically on the ground that the Award is in conflict with the most basic notions of justice under sub-clause (iii) in Explanation 1 to the provision?

Judgment

Issue (i): The Supreme Court considered its decision in *BCCI v. Kochi Cricket*,² where it was held that the Amendment Act was, as a whole, prospective in nature (except for clarificatory provisions) but the purpose of the amendment would be defeated if it was applied to only those Section 34 petitions which arose out of arbitration proceedings that had commenced after 23 October 2015. In the present case, the Court held that the explanations to Section 34(2)(b), which defined the scope of public policy, could not be construed as merely clarificatory amendments, given that earlier law had been substantively changed. Accordingly, the Court held that the amended Section 34 would apply prospectively to petitions filed after 23 October

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2015, irrespective of the fact that the corresponding arbitration had commenced before this date.

Issue (ii): The Court held that the Award was liable to be set aside under Section 34(2)(a)(iii) as the tribunal had applied the Union Ministry's guidelines, despite them not being placed on record, and the Appellant had not been given an opportunity to comment on their applicability or interpretation.

Issue (iii): The Court held that the fact that the contract had been "re-written" by applying a different formula would not give rise to a ground under Section 34(2)(a) (iv), which applies only when the award decides matters beyond the arbitration agreement or matters beyond the disputes referred to the tribunal. The fact that the tribunal had travelled beyond the contract in its Award was an error in jurisdiction and would fall under the ground of patent illegality. However, as the present case pertained to an international commercial arbitration, this ground would be inapplicable.

Issue (iv): The Court held that re-writing of the contract was a violation of "public policy", based on the "most basic notions of justice". The Court held that this ground is "attracted only in very exceptional circumstances when the conscience of the Court is shocked by infraction of fundamental notions or principles of justice". The Court noted that the contractual formula had been unilaterally changed by the Circular. The tribunal had created a new contract and breached a fundamental principle of justice that a unilateral addition or alteration to a contract cannot be foisted on an unwilling party. The Court held that such action "shocks the conscience of this Court" and set aside the Award.

Analysis

Different High Courts had given conflicting decisions on the applicability of the Amendment Act to arbitration-related court proceedings that were pending on 23 October 2015. The Supreme Court, in *BCCI (supra)*, had left open the possibility that individual provisions of the Amendment Act that were clarificatory, declaratory, or procedural could have retrospective application (such as Section 36). The present decision has clarified that the amended Section 34 applies prospectively and would only apply to Section 34 petitions filed after 23 October 2015, even if the corresponding arbitration proceedings had commenced before this date.

Although the Court has restricted the ground of an award being contrary to "most basic notions of justice" to "very exceptional circumstances" and has cautioned that "under no circumstances can any Court interfere with an arbitral award on the ground that justice has not been done in the opinion of the Court", it has not provided any guidelines on the situations in which this ground can be invoked.

Further, to do "complete justice" between the parties, the Court invoked its power under Article 142 of the Constitution to uphold the minority award of the tribunal, so as to avoid the matter being referred to arbitration afresh, which would cause delay and defeat the Act's objective of speedy dispute resolution. The Court's action is contrary to settled jurisprudence that Section 34 is an annulment procedure, under which an award can either be upheld or set aside. Further, the power under Article 142 only vests in the Supreme Court. Therefore, a High Court cannot set aside a majority award and give effect to a minority award, even though the objectives of the Act would equally be satisfied in that case.

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1 Authored by Ila Kapoor, Partner, and Ritika Sinha and Juhi Gupta, Associates; Ssangyong Engineering and Construction Co. Ltd. v. National Highways Authority of India (NHAI), Civil Appeal No. 4779 of 2019, Supreme Court of India, 2019 SCC OnLine SC 677, judgment dated 8 May 2019.

Quorum: RF Nariman and Vineet Saran, JJ.

2 (2018) 6 SCC 287.

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