



## The Supreme Court reinforces ‘patent illegality’ as a ground to challenge an arbitral award post 2015 Amendment<sup>1</sup>

### Brief Facts

Disputes arose between Patel Engineering Ltd. (“**Petitioner**”) and North Eastern Electric Power Corporation Ltd. (“**Respondent**”) with respect to payment of extra lead in item nos. 2.7 and 3.4 of the BOQ in the three identical contracts for different packages which were referred for arbitration before the Ld. Sole Arbitrator (“**Tribunal**”).

The Tribunal made three declaratory arbitral awards dated 29 March 2016 (“**Awards**”) in favour of the Petitioner. The Respondent filed three applications under Section 34 of the Arbitration and Conciliation Act, 1996 (“**Act**”) challenging the Awards before the Additional Deputy Commissioner (Judicial), Shillong, which were dismissed vide common judgment dated 27 April 2018 (“**Section 34 Judgment**”).

In the second round of litigation, the Respondent filed three appeals under Section 37 of the Act before the High Court of Meghalaya at Shillong (“**High Court**”) challenging the Section 34 Judgment. The High Court allowed the appeals and set aside the Section 34 Judgment and the Awards (“**Section 37 Judgment**”) on the ground that

the findings of the Tribunal suffered from the vice of perversity. The High Court held that the Tribunal arrived at the conclusion by considering irrelevant factors and by ignoring vital contract and therefore the same was considered as patently illegal. The Petitioner preferred Special Leave Petitions before the Hon’ble Supreme Court of India (“**Supreme Court**”) which were dismissed holding that the Court was not inclined to interfere in the matters (“**SLP-I**”).

Thereafter, the Petitioner filed review petitions before the High Court against the Section 37 Judgment on the ground that the High Court failed to consider the amendments made to the Act vide Arbitration and Conciliation (Amendment) Act, 2015 (“**2015 Amendment**”). The High Court dismissed the review petitions vide common order dated 10 October 2019 (“**Impugned Order**”) since the Petitioner failed to make out a case for review. The Petitioner filed Special Leave Petitions before the Supreme Court challenging the Impugned Order (“**SLP-II**”).

### Issues

- (i) Whether SLP-II was maintainable despite dismissal of SLP-I on merits?

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(ii) Whether the Section 37 Judgment suffered from error since the High Court relied upon the decisions of **Oil & Natural Gas Corporation Ltd. v. Saw Pipes Ltd.**<sup>2</sup> and **Oil & Natural Gas Corporation Ltd. v. Western Geco International Limited**<sup>3</sup>, which are no longer good law after the enactment of the 2015 Amendment?

## Judgment

The Supreme Court dismissed SLP-II *inter alia* on the grounds that:

### Issue (i)

The Section 37 Judgment was challenged before the Supreme Court vide SLP-I and after hearing the matter at length, SLP-I was dismissed by common order dated 19 July 2019 and no liberty was sought to file review before the High Court.

### Issue (ii)

The Section 37 Judgment referred to various judgments such as *Saw Pipes (supra)* and *Western Geco (supra)* but rightly followed the tests as set out in **Associate Builders v. Delhi Development Authority**<sup>4</sup> and **Ssangyong Engineering and Construction Company Limited v. National Highways Authority of India**.<sup>5</sup> The High Court in the Section 37 Judgment held that no reasonable person could have arrived at a different conclusion while interpreting the terms of the BOQ and the contract and any other interpretation of the said clauses would be irrational.

The Supreme Court further accepted the findings in the Section 37 Judgment that the Award suffered from the vice of irrationality and perversity since the view taken by the Tribunal was arrived at by considering irrelevant factors and by ignoring vital contract and as such the view was not even a possible view.

The Supreme Court also referred to judgment in **Board of Control for Cricket in India v. Kochi Cricket Private Limited and Others**<sup>6</sup> wherein the Supreme Court had held that the 2015 Amendment would apply to an application under Section 34 of the Act that is made after 23 October 2015. Accordingly, in the present case, since the Awards were made on 29 March 2016, the provisions of the Act, as amended by 2015 Amendment, were applicable.

## Analysis

The Supreme Court reached its well-founded conclusion after briefly discussing the history of the ground of '*patent illegality*'. The ground of patent illegality was first introduced in the judgment of *Saw Pipes (supra)* and the Supreme Court while giving a broad interpretation to public policy of India, held that an award would be patently illegal, if it is contrary to the substantive provisions of law, or provisions of the Act, or terms of the contract. Further, the Supreme Court in *Associate Builders (supra)* explained in detail the ground of patent illegality as a ground under public policy of India to set aside a domestic award.

Thereafter, upon recommendations of the 246<sup>th</sup> Law Commission Report, the ground of '*patent illegality*' for setting aside a domestic award was given statutory force by introducing Section 34 (2A) to the Act vide the 2015 Amendment. The ground was restricted for challenge to the domestic awards and cannot be invoked for international commercial arbitration seated in India. The Supreme Court also referred to the judgment in *Ssangyong Engineering (supra)*, reiterating that the broad interpretation of public policy of India in *Saw Pipes (supra)* and *Western Geco (supra)* was done away with. Further, the ground of '*patent illegality*' was no longer in the definition of public policy of India and

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was statutorily introduced vide Section 34 (2A) of the Act, which would apply to the applications for setting aside the award under Section 34 of the Act, made on or after 23 October 2015.

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1 Authored by Tejas Karia, Partner & Head-Arbitration, Gauhar Mirza, Principal Associate and Nishant Doshi, Associate; *Patel Engineering Ltd. v. North Eastern Electric Power Corporation Ltd.*, Special Leave Petition (Civil) No. 3584-3585 of 2020, Supreme Court, judgment dated 22 May 2020

**Coram:** R. Banumathi, Indu Malhotra and Aniruddha Bose, JJ.

- 2 (2003) 5 SCC 705.
- 3 (2014) 9 SCC 263.
- 4 (2015) 3 SCC 49.
- 5 (2019) 15 SCC 131.
- 6 (2018) 6 SCC 287.

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