

## CASE STUDY: ONGC v. SAW PIPES LTD.

Anish Ghosh\*

### INTRODUCTION

ONGC v. Saw Pipes<sup>1</sup> is one of the most debated cases in recent Indian history. The debate in the case is centred on the Supreme Court's interpretation of the term 'public policy of India'. S. 34 of the Indian Arbitration and Conciliation Act, 1996 allows an arbitral award to be set aside, inter alia, on the ground of it being against the public policy of India.<sup>2</sup> In Saw Pipes the Supreme Court expanded the scope of the term by incorporating patent illegality within the ambit of 'public policy of India'.<sup>3</sup>

Many scholars have disagreed with the Supreme Court's decision. The critics argue that the Saw Pipes decision threatens the basis of arbitration as a dispute resolution process among private parties.<sup>4</sup> This is because of the enhanced scope for judicial intervention provided by the Saw Pipes decision. Further, arguments against the judgment include the ambiguity of the terms 'public policy of India' and 'patent illegality'.<sup>5</sup>

However, the Saw Pipes decision has its proponents as well. They argue that the quality of arbitral awards should not be neglected in the interest of a quick dispute resolution framework.<sup>6</sup> Further, they argue that the ambiguity in the terms should not be an embargo on their application as otherwise sound legal principles.<sup>7</sup>

This project aims to summarise the law relating to patent illegality being a ground for setting aside of arbitral awards as introduced by Saw Pipes. This is done through a survey of the literature on the subject.

The project tries to answer whether the position espoused by Saw Pipes is justifiable keeping in view the underlying principles of arbitration. The hypothesis suggested is that the decision is

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\* Student @ WBNUJS, Kolkata; Contact: +918697014554; Email: [anish.ghosh@nujs.edu](mailto:anish.ghosh@nujs.edu)

<sup>1</sup> Hereinafter, Saw Pipes

<sup>2</sup> S. 34 (2), Indian Arbitration and Conciliation Act, 1996

<sup>3</sup> *ONGC v. Saw Pipes Ltd.*, [2003] 3 SCR 691

<sup>4</sup> Daniel Matthew, *Situating Public Policy in the Indian Arbitration Paradigm: Pursuing the Elusive Balance*, 3 Journal of National Law University, Delhi 105 (2015-16)

<sup>5</sup> *Ibid*

<sup>6</sup> Sidharth Sharma, *Public Policy Under the Indian Arbitration Act: In Defence of the Indian Supreme Court's Judgment in ONGC v. Saw Pipes*, 26 Journal of International Arbitration 133 (2009)

<sup>7</sup> *Ibid*

indeed justifiable being based on sound legal reasoning.

## CHANGE IN LEGAL POSITION BROUGHT BY SAW PIPES

Prior to Saw Pipes, the case of Renusagar Power Co. Ltd. v. General Electric Co.<sup>8</sup> held the field. Renusagar laid down three criteria for restricting the enforcement of foreign awards on the ground of public policy. These criteria were (i) fundamental policy of Indian law (ii) interests of India, and (iii) justice and morality.<sup>9</sup> The position laid down in Renusagar is widely referred to as the narrow view to the interpretation of public policy.

Saw Pipes took a broader view to the interpretation of public policy. Along with the three heads of the Renusagar case, Saw Pipes added a fourth head of 'patent illegality'.<sup>10</sup> The Supreme Court reasoned that Renusagar was decided with regard to execution of a foreign award while Saw Pipes dealt with setting aside of a domestic arbitral award.<sup>11</sup> Therefore, the broadening of the scope of public policy was justified.

In Saw Pipes the Supreme Court tried to clarify what 'patent illegality' means. The court said that an award can be set aside on grounds of patent illegality when (i) arbitral award was contrary to Indian substantive law, and (ii) tribunal did not record proper reasons for its decision.<sup>12</sup>

## CRITICISMS OF SAW PIPES

Many legal scholars have condemned the Saw Pipes decision as being contrary to the objects of the Indian Arbitration and Conciliation Act, 1996. Fali S. Nariman went so far as to say that the decision "*virtually set at naught the entire Arbitration and Conciliation Act of 1996*".<sup>13</sup> The grievances of the critics are based mainly on the assumption that Indian arbitration law should be aimed at promoting the interest of foreign investors.<sup>14</sup> These critics claim that Saw Pipes adversely affects India's reputation as an attractive investment destination by allowing greater judicial interference in arbitration.

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<sup>8</sup> 1994 AIR 860

<sup>9</sup> *Ibid*

<sup>10</sup> *Supra* note 3

<sup>11</sup> *Ibid*

<sup>12</sup> *Ibid*

<sup>13</sup> Fali S. Nariman, Speech delivered in New Delhi on Legal Reforms in Infrastructure (May 2, 2003) (as cited in Pierre Tercier and Dilber Di Vitre, *The Public Policy Exception – A Comparison of the Indian and Swiss Perspectives*, 5 Indian Journal of Arbitration Law 7)

<sup>14</sup> Amelia C. Rendeiro, *Indian Arbitration and Public Policy*, 89 Texas Law Review 699 (2010-2011)

Perhaps the most prominent of the criticisms of Saw Pipes is that it goes against the provisions of the Arbitration and Conciliation Act, 1996.<sup>15</sup> These critics claim that S. 5 of the Indian Arbitration and Conciliation Act, 1996 stipulates that judicial authorities should restrict their interference in arbitral matters. They claim that Saw Pipes by broadening the scope of judicial interference is contrary to S.5 of the Act.

Another pervasive criticism of the Saw Pipes decision is that “public policy” and “patently illegal” are vague terms incapable of definition.<sup>16</sup> The advocates of this argument claim that since these terms are incapable of precise decision, they open the doors for judicial misuse of S. 34.

Other criticisms include that the broad interpretation of public policy in Saw Pipes would open the possibility for delay.<sup>17</sup> These critics claim that parties might challenge arbitral awards on frivolous grounds under public policy as a means to delay the enforcement of arbitral awards. A similar criticism is that Saw Pipes hinders the finality of arbitral awards by opening the doors for greater judicial intervention in such awards.<sup>18</sup>

Another interesting criticism is that the courts themselves cannot guarantee that justice is delivered in every single decision.<sup>19</sup> Therefore, the supervisory jurisdiction of the courts in itself is of little value. As a whole most of the critics of Saw Pipes see it as a retrograde judgment promoting a paternalistic role of Indian courts in arbitral matters.

## **IN DEFENCE OF SAW PIPES**

Even though the majority opinion in the judicial community is against Saw Pipes, some strong arguments in support of it have been made as well. For example, the claim that the decision is against S. 5 of the Arbitration and Conciliation Act has been rejected. The scholars in support of the decision note that S. 5 provides no blanket ban on judicial intervention.<sup>20</sup> But on the contrary expressly allows for intervention wherever the Act permits for the same. They argue that S. 34 being one such ground, Saw Pipes is in line with S. 5 of the Act.

Similarly, the supporters of Saw Pipes claim that just because ‘public policy’ and ‘patent

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<sup>15</sup> *Ibid*

<sup>16</sup> *Supra* note 6

<sup>17</sup> *Supra* note 13

<sup>18</sup> *Ibid*

<sup>19</sup> *Supra* note 4

<sup>20</sup> *Supra* note 13

illegally' are not concretely defined does not mean that they cannot be applied.<sup>21</sup> These proponents argue that mere difficulty in interpretation should not mean that a principle is not implemented. They argue that even constitutional principles like pith and substance and basic structure are indefinable but are still applied.<sup>22</sup> Even apart from this argument, the Supreme Court itself has clarified the meaning of 'patent illegality' in the later case of *Associate Builders v. DDA*<sup>23</sup> has clarified on the meaning of 'patent illegality'. The court in that case held that patent illegality means (i) contravention of India substantive law (ii) contravention of the Arbitration and Conciliation Act, and (iii) ignoring terms of the contract or failure to take into account usages of trade applicable to the transaction.<sup>24</sup>

As to the arguments against Saw Pipes on delay and finality, the proponents of the decision claim that ensuring justice is more important than either of these considerations. They claim that mere possibility of abuse is not a determining factor for the validity of a provision.<sup>25</sup> Further, they argue that finality of a decision is not as important as its legality.<sup>26</sup>

Proponents of Saw Pipes also claim that supervisory authority of courts should exist regardless of probability of mistake.<sup>27</sup> They claim that mere uncertainty in the decision-making process should not hinder the process of proper legal adjudication of disputes.

Even apart from the above defences of Saw Pipes, the basic premise of the criticisms of the Saw Pipes judgment can be challenged as well. The critics of Saw Pipes complain that Saw Pipes opens the door for judicial intervention. The evidence from court records since the enactment of the Indian Arbitration and Conciliation Act, 1996 provide no indication of such intervention. Since 1996 to 2007 only 151 arbitral awards have been challenged on the ground of public policy, this amount to 26.72% of total challenges to arbitral awards.<sup>28</sup> Even more interestingly only 14 of the challenged awards, amounting to a mere 2.47% of total awards challenged, were modified by the courts.<sup>29</sup> Such evidence clearly indicates that courts only rarely use public policy to alter arbitration awards and that fears of judicial intervention are misplaced.

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<sup>21</sup> *Supra* note 6

<sup>22</sup> *Ibid*

<sup>23</sup> 2014(4) ARBLR 307 (SC)

<sup>24</sup> *Ibid*

<sup>25</sup> *Supra* note 6

<sup>26</sup> *Ibid*

<sup>27</sup> *Supra* note 4

<sup>28</sup> Sumeet Kachwala, *The Indian Arbitration Law: Towards a New Jurisprudence*, 10 International Arbitration Law Review 13 (2007) (as cited in *supra* 14)

<sup>29</sup> *Ibid*

## CONCLUSION

The Supreme Court decision in *ONGC v. Saw Pipes* has been controversial. The judgment broadened the scope of public policy as a ground for setting aside an arbitral award by including patent illegality as a head under public policy. The judgment has received a lot of criticism since it was delivered. Most critics claim that the judgment is against the principle of party autonomy based on which the Arbitration and Conciliation Act, 1996 was enacted. However, proponents of the decision claim that ensuring the legality of arbitral awards is more important than providing a regulation-free framework for foreign investors.

This project suggests that the *Saw Pipes* decision is based on good legal reasoning. The decision is not violative of any section of the Arbitration and Conciliation Act, 1996. Further, *Saw Pipes* only expands on the concept of public policy which has been held to be a dynamic concept which needs to adapt to the times. This project suggests that in view of the correctness of the legal principles in *Saw Pipes*, the legal community should accept its reasoning instead of rejecting it.