REIGNING IN AN UNRULY HORSE: PUBLIC POLICY AND ARBITRAL AWARDS UNDER INDIAN LAW

By
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I. Introduction

At the very beginning, it is necessary to understand that it is not possible to define the phrase 'public policy' in a comprehensive manner, because the fact of the lack of a precise definition of the phrase sets the stage for the ensuing discussion, while helping us appreciate the dicey circumstances that may spring up because of the same. The Interim Report of the International Law Association states that it is notoriously difficult to provide a precise definition public policy, in context of enforcement of arbitral awards.[1]

With regard to the above, it may be found that the doctrine of public policy has been expounded upon, elucidated and illustrated, but not succinctly defined. It has been described as an 'unruly horse', 'untrustworthy guide' and a 'variable quality'. Different Courts of the country have stated that that the term public policy is not capable of a precise definition and whatever tends to injustice of operation, restraint of liberty, commerce and natural or legal rights; whatever tends to the obstruction of justice or to the violation of a statute and whatever is against good morals can be said to be against public policy. All those principles of law that ensure justice, fair play and bring transparency and objectivity and promote probity in the discharge of public functions would also constitute public policy. Conversely, any deviation, abrogation, frustration or negation of the salutary principles of justice, fairness, good conscience, equity and objectivity will be opposed to public policy.[2] These decisions have also pointed out that the concept of public policy is capable of expansion and modification.[3]

Public policy is necessarily variable. It may be variable not only from one century to another, not only from one generation to another but even in the same generation.[4] According to Justice Story, 'public policy' is in its nature so uncertain and fluctuating, varying with the habits and fashions of the day, with the growth of commerce and the usages of trade, that it is difficult to determine its limits with any degree of exactness.[5] The public policy of one country may not be so in another and may even diverge substantially, though the underlying basic principles of public policy are founded upon the prevailing and just opinions of the public good, which by themselves are relative or variable.

Though there is considerable support in judicial dicta for the view that Courts create no new heads of public policy, there is also no lack of judicial authority for the view that the categories of heads of public policy are not closed and that there remains a broad field within which Courts can apply a variable notion of policy as a principle of judicial legislation or interpretation founded on the current needs of the community.[6]

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1. International Law Association, *Interim Report on Public Policy as a Bar to Enforcement of International Arbitral Awards* (London Conference, 2000).

2. *Board of Control for Cricket in India v. Cricket Association of Bihar*, (2015) 3 SCC 251.

3. *P. Rathinam v. Union of India*, (1994) 3 SCC 394.

4. *Percy H. Winfield*, *Essay on Public Policy in the English Common Law*, 42 Harvard Law Review 76 (1928).

5. *Edward J. Gould*, *Public Policy Applied to Wills*, 41 American Bar Association Journal 60 (1955).

6. *Murlidhar Aggarwal v. State of Uttar Pradesh*, (1974) 2 SCC 472.

While domestic and international arbitration are structurally different and should not be conflated[7], one of the common threads that run between both, is the impact of public policy on the enforcement of arbitral awards, whether domestic or foreign. Public policy has been a popular and debatable ground, based on which, parties to arbitration resist enforcement of arbitral awards. It has equalled a Pandora's box, across jurisdictions. The Supreme Court of India has, while discussing public policy as a ground to set aside arbitral awards, held that what would constitute public policy is a matter that is dependent upon the nature of transaction and nature of statute. For the said purpose, the pleadings of the parties and the materials brought on record would be relevant to enable the Court to judge what is in public good or public interest, and what would otherwise be injurious to the public good at the relevant point, as contradistinguished from the policy of a particular Government.[8]

II. Public Policy under International Instruments of Arbitration

The Convention on the Execution of Foreign Arbitral Awards, 1927 (the Geneva Convention) stated that to obtain recognition or enforcement of an award, it shall be necessary, *inter alia*, that such recognition or enforcement of the award is not contrary to the public policy or to the principles of law of the country in which it is sought to be relied upon.

Article V(2)(b) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1959 (the New York Convention), states that the 'recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:…(b) The recognition or enforcement of the award would be contrary to the public policy of that country'.

The United States Court of Appeals, Second Circuit, considered the public policy defence of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards. It said that enforcement of foreign arbitral awards maybe denied on the basis of public policy only where enforcement would violate the forum States most basic notions of morality and justice. While commenting on the difference in the language of Geneva Convention and New York Convention on this point, it observed that New York Convention language signifies a narrowing of the defence. The general pro enforcement bias informs the New York Convention. Explaining the supersession of Geneva Convention, it points towards narrow reading of public policy defence. An expansive construction of this defence would vitiate the convention's basis effort to remove pre-existing obstacles to enforcement. It was concluded that the convention's public policy defence should be construed narrowly.[9]

III. Public Policy under the Indian Arbitration Law

It is well-known that the Arbitration and Conciliation Act, 1996 ('*the 1996 Act*'), that is the law on arbitration in India, is based on the UNCITRAL Model Law on International Commercial Arbitration, 1985 ('*the Model Law*'), that was adopted with the aim of assisting States to modernise their domestic laws on arbitration, while taking into consideration the needs of international commercial arbitration. Article 34(b)(ii) of the Model Law that provides that an arbitral award may be set aside if it contravenes public policy. While the Model Law

7. American Bar Association, International Arbitration in a Globalized World (2017).

8. *McDermott International Inc. v Burn Standard Co. Ltd.*, (2006) 11 SCC 181.

9. *Parsons and Whittemore Overseas Inc. v. RAKTA*, 508F 2d 969 (1974).

exhaustively lists the grounds on which an arbitral award may be set aside, there are two grounds which a Court may consider out of its own initiative, one of which is violation of public policy, which is to be understood as serious departures from fundamental notions of procedural justice.[10]

The 1996 Act is the comprehensive and integrated successor of the Arbitration Act, 1940, and the Foreign Award (Recognition and Enforcement) Act, 1961. While the Arbitration Act, 1940 made no reference to public policy, the Foreign Award (Recognition and Enforcement) Act, 1961, which was based on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (popularly known as the New York Convention, 1958), incorporated the provision relating to public policy. Section 7(1)(b)(ii) of the Foreign Award (Recognition and Enforcement) Act, 1961, stated that, "An award given by International Arbitral Tribunal may not be given enforcement under this act if the Court dealing with enforcement of award is of view that it is contrary to public policy of the country." The provision was carried forward by the 1996 Act, which consists of two parts-Part-I governs arbitrations taking place in India and Part-II governs enforcement of foreign arbitral award.

Section 34 of the 1996 Act specifies grounds on which a domestic arbitral award and a domestic arbitral award arising from an international commercial arbitration, may be set aside by the Court, one of which is the arbitral award being contrary to the public policy of India. Sections 48 and 57 of the 1996 Act lay down certain exceptions, in the occurrence of which, enforcement of foreign awards, may be refused by Courts in India, one of which is that the enforcement of such an award is not contrary to the public policy or the law of India.

Section 34(2)(b) that contained a provision relating to public policy, as legislated originally, read as follows :

"*34. Application for setting aside arbitral award.*—(1) * * *

(2) An arbitral award may be set aside by the Court only if—

x x x x x

(*b*) the Court finds that—

(*i*) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

(ii) the arbitral award is in conflict with the public policy of India.

Explanation.—Without prejudice to the generality of sub-clause (ii) it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption or was in violation of Section 75 or Section 81."

Section 48(2)(b), that contained a provision relating to public policy, as legislated originally, read as follows:

"*48. Conditions for enforcement of foreign awards.*—(1) x x x x

(2) Enforcement of an arbitral award may also be refused if the Court finds that—

x x x x

(b) the enforcement of the award would be contrary to the public policy of India.

Explanation.—Without prejudice to the generality of clause (b) of this section, it is hereby declared, for the avoidance of any

10. UNCITRAL, *Explanatory Note By The Uncitral Secretariat on the 1985 Model Law on International Commercial Arbitration as Amended in 2006*, § 46 (2006).

> doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption."

IV. Judicial Interpretations of Public Policy

At the outset, it is desirable to notice that the concept of public policy and its judicial interpretation have flown form the old Act which is now obsolete, into the new Act and its interpretations. Thus, there is a conflation of case law and precedents that have been laid down under both the Acts. Certain precedents laid down, in this regard, under the old Act continue to be good law under the new Act, interpretations under which have only taken forward the concept.

Among the earliest instances of judicial decisions that delved into the doctrine of public policy under the arbitration law in India, was the landmark *Renusagar Power Electric Co. v. General Electric Co. (Renusagar)*[11], which was decided under the Foreign Award (Recognition and Enforcement) Act, 1961. The enforcement of a foreign award would be refused on the ground that it is contrary to public policy if such enforcement would be contrary to (i) fundamental policy of Indian law; or (ii) the interests of India; or (iii) justice or morality. The Court also held that it is the fundamental principle of law that orders of Courts must be complied with for any action which involves disregard for such orders would adversely affect the administration of justice and would be destructive of the rule of law and would be contrary to public policy.

Article V(2)(b) of the New York Convention of 1958 and Section 7(1)(b)(ii) of the Foreign Awards Act do not postulate refusal of recognition and enforcement of a foreign award on the ground that it is contrary to the law of the country of enforcement and the ground of challenge is confined to the recognition and enforcement being contrary to the public policy of the country in which the award is set to be enforced. The Supreme Court came to the conclusion that in respect of foreign awards the defence of public policy should be construed narrowly and the contraventions should be something more than the contravention of the law of India. It was also held that the doctrine must be construed in the sense as applied in the field of private international law, which means, if it is "contrary to the fundamental policy of Indian law."[12] However, the three heads that were laid down had not been explained or elaborated upon, in the judgment, thereby leaving the scope for further interpretation. Each of the heads enumerated by the judgment merit discussion in detail :

A. Fundamental Policy of Indian Law

In *ONGC v. Western Geco International Limited (Western Geco)*[13], the Supreme Court interpreted the 'fundamental policy of Indian law', *i.e.*, the first head of public policy as stated in *Renusagar*, and determined that three 'distinct and fundamental juristic principles' form a part and parcel of fundamental policy of Indian law :

> First, the Court or adjudicating authority must adopt a 'judicial approach' when determining the rights of a citizen. This implies that it cannot act in an 'arbitrary, capricious or whimsical manner';
>
> second, the Court or quasi-judicial authority must determine rights and obligations of parties in accordance with principles of natural justice which encompasses that the authority deciding the matter must apply its mind to the attendant facts; and

11. AIR 1994 SC 860.

12. *Indu Malhotra, O.P. Malhotra* on The Law & Practice on Arbitration and Conciliation (3rd Ed. 2014).

13. (2014) 9 SCC 263.

third, a decision which is perverse or so irrational that a reasonable person could not have reached such a conclusion may not be strained in a Court of law. The Court also held perversity or irrationality to be against the 'fundamental policy of Indian law'. It was, therefore, held that an award could be set aside if it was found to be perverse or irrational. The perversity or irrationality of the decision was to be tested on the touchstone of the 'Wednesbury Principle of reasonableness'[14].

The Law Commission of India, in its Supplementary Report[15] to its 246th report, critiqued the judgment in *Western Geco's* case (supra), as undermining attempts to bring the Act in line with international practices and opined that it adversely affected the choice of India as seat for international arbitrations, as well as impacting negatively, the domestic arbitration continuing in India. It was understood that setting aside an award on the basis that no reasonable person could have arrived at it (and the incorporation of the Wednesbury Principle), permitted the review of an arbitral award on merits, which is against the principal objects of the Act and international practice of minimisation of judicial intervention.

As an extension to the ratio of *Western Geco's* case (supra), it is useful to refer to the decision of the Apex Court in *Associate Builders v. Delhi Development Authority (Associate Builders)*[16], in which it was held that a decision would be perverse where a finding is based on no evidence, or an arbitral Tribunal takes into account something irrelevant to the decision it arrives at, or it ignores vital evidence in arriving at its decision.

With regard to this, it may be worthwhile to note that the Supreme Court, in the case of *Vijay Karia v. Prysmian Cavi E Sistemi SRL (Vijay Karia)*[17], after reproducing certain principles that were discussed by the Delhi High Court in *Cruz City 1 Mauritius Holdings v. Unitech Limited (Cruz City)*,[18] with respect to the contravention of a provision of law, agreed with the same. It was held that contravention of any provision of an enactment is not synonymous to contravention of fundamental policy of Indian law. The expression 'fundamental policy of Indian law' refers to the principles and the legislative policy on which Indian statutes and laws are founded. The expression 'fundamental policy' connotes the basic and substratal rationale, values and principles which form the bedrock of laws in our country. The Court berated the appellants for having indulged in "a speculative litigation with the fond hope that by flinging mud on a foreign arbitral award, some of the mud so flung would stick."

The Delhi High Court had pertinently mentioned that a foreign award may be based on foreign law, which may be at variance with a corresponding Indian statute. And, if the expression 'fundamental policy of Indian law' is considered as a reference to a provision of the Indian statute, the basic purpose of the New York Convention to enforce foreign awards would stand frustrated. One of the principal objectives of the New York Convention is to ensure enforcement of awards notwithstanding that the awards are not rendered in conformity to the national laws. Thus, the objections to enforcement on the ground of public policy must be such that offend the core values of a member State's national

14. A reasoning or decision is Wednesbury unreasonable or irrational if it is so unreasonable that no reasonable person acting reasonably could have made it. It was laid down in the case of *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation*, (1948) 1 KB 223.

15. Law Commission of India, *Supplementary to Report No.246 on amendments to Arbitration and Conciliation Act, 1996,* § 6 (2015).

16. (2015) 3 SCC 49.

17. 2020 SCC OnLine SC 177.

18. 2017 SCC OnLine Del. 7810.

policy, which it cannot be expected to compromise. The expression 'fundamental policy of law' must be interpreted in that perspective and must mean only the fundamental legislative policy and not a provision of any enactment.

In fact, the Law Commission of India, in its 246th Report[19], suggesting a narrow interpretation, provided that a mere violation of law of India would not be a violation of public policy in cases of international commercial arbitrations held in India.

B. Interests of India

The second head of public policy, as laid down in *Renusagar's* case (supra), is the 'interests of India'. It was held that arbitral awards that are against the interest of India can be set aside or refused enforcement on the ground that they were against the interests of India. The Supreme Court, in *Associate Builders's* case (supra), had held that this concerns itself with India as a member of the world community in its relations with foreign powers. It was opined that this ground would need to evolve on a case-by-case basis.

C. Justice and Morality

The third head public policy, as laid down in *Renusagar's* case (supra), deals with justice and morality. Enforcement of arbitral awards may be denied on this basis only where the enforcement would, violate the forum State's most basic notions of morality and justice, if an award is against justice or morality. These are two different concepts in law. An award can be said to be against justice only when it shocks the conscience of the Court.

The word 'immoral' is a very comprehensive one. Ordinarily, it takes in every aspect of personal conduct deviating from the standard norms of life. It may also be said that what is repugnant to good conscience is immoral. Its varying content depends upon time, place and the stage of civilization of a particular society. In short, no universal standard can be laid down and any law based on such fluid concept defeats its own purpose. The provisions of Section 23[20] of the Indian Contract Act, 1872, indicate the legislative intention to give it a restricted meaning. Its juxtaposition with an equally illusive concept like public policy, indicates that it is used in a restricted sense, otherwise there would be overlapping of the two concepts. In its wide sense, what is immoral may be against public policy, for public policy covers political, social and economic ground of objection. Decided cases and authoritative text-book writers, therefore, confined it, with every justification, only to sexual immorality. The other limitation imposed on the word by the statute, namely, "the Court regards it as immoral", brings out the idea that it is also a branch of the common law like the doctrine of public policy, and, therefore, should be confined to the principles recognized and settled by Courts. The Supreme Court has recorded that, "precedents confine the said concept only to sexual immorality and no case has been brought to our notice where it has been applied to any head other than sexual immorality."[21]

19. Law Commission of India, Report No.246, *amendments to Arbitration and Conciliation Act, 1996* (2014).

20. *Section 23-What consideration and objects are lawful, and what not.*—The consideration or object of an agreement is lawful, unless— The consideration or object of an agreement is lawful, unless—" it is forbidden by law; or is of such a nature that, if permitted, it would defeat the provisions of any law; or is fraudulent; or involves or implies, injury to the person or property of another; or the Court regards it as immoral, or opposed to public policy. In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.

21. Pollock & Mulla, *The Indian Contract Act, 1872* (15th Ed., 2018)

The only type of morality the Indian Courts dealt with are those of sexual morality.[22] If morality has to go beyond the scope of the restrictive sexual morality, then the agreement must not be illegal, but the enforcement of the same must be against the prevailing mores. In other words, the agreement is not an illegal agreement but if it is to be enforced then it would be contrary to the prevailing customs and conventions of the society in which it is sought to be enforced.

It has been held that whenever an award is challenged as being against justice, the Court should not interfere with the award unless the award is of such a nature that it shocks the conscience of the Court. What shocks the conscience of the Court, was said to be something that depends upon the facts and circumstances of case, which by itself is capable of opening a can of worms, because of its relative nature. Nevertheless, shocking the conscience of the Court does seem to be a sky-scraping benchmark for most challenges.

D. Patent Illegality

In *ONGC v. Saw Pipes Ltd. (Saw Pipes Ltd.)*[23], a judgment under the 1996 Act, a new ground of 'patent illegality' was incorporated, among those already spelled out in *Renusagar's* case (supra), for setting aside an award under the head of public policy. It was opined that an award which is, on the face of it, patently in violation of statutory provisions, cannot be said to be in public interest and such award is likely to adversely affect the administration of justice. It was held that the award could be set aside on the grounds of public policy if it was patently illegal, but only if such illegality "went to the root of the matter" and was "so unfair and unreasonable that it shocks the conscience of the Court".

While interpreting Section 28(3) of the Act, it was made clear that it is open to the Court to consider whether the award is contrary to the substantive provisions of law or against the specific terms of contract and if so, interfere with it on the ground that it is patently illegal and opposed to the public policy of India.

The decision of the Court which, although in the context of a purely domestic award, had the unfortunate effect of being extended to apply equally to both awards arising out of international commercial arbitrations as well as foreign awards, given the statutory language of the Act.[24]

The decision was amply criticized, stating that it had virtually set at naught the entire Arbitration and Conciliation Act of 1996. The Division Bench decision of the Court has altered the entire road-map of Arbitration Law and put the clock back to where we started under the old 1940 Act[25]. It is important to note that later, the Law Commission of India, in its 246th report, recommended an amendment to Section 28(3) of the Act, intending to overrule the effect of the ruling of the Court that any contravention of the terms of the contract would result in the award falling foul of Section 28 and consequently, be against public policy.

However, in the case of *Shri Lal Mahal Ltd. v. Progetto Grano Spa (Shri Lal Mahal)*[26], the Supreme Court clarified the application of the new ground of patent illegality and held that it would apply only to domestic arbitral awards, and not to foreign arbitral awards. Initially, though the Court agreed

22. (2015) 3 SCC 49.

23. (2003) 5 SCC 705.

24. Law Commission of India, Report No.246, *Amendments to Arbitration and Conciliation Act, 1996* § 35 (2014).

25. Speech delivered by Sr. Adv. *Fali Nariman* on Legal Reforms in Infrastructure on 2.5.2003, as cited in the 246th Report of the Law Commission of India.

26. (2014) 2 SCC 433.

that in view of the decision in *Saw Pipes Ltd.'s* case (supra), the expression "public policy of India" used in Section 48(2)(*b*) has to be given a wider meaning and the award could be set aside, "if it is patently illegal"[27], it changed its stance in the *Shri Lal Mahal*' case, in which it was held that for the purposes of Section 48(2)(*b*), the expression "public policy of India" must be given a narrow meaning and the enforcement of foreign award would be refused on the ground that it is contrary to the public policy of India if it is covered by one of the three categories enumerated in *Renusagar's* case (supra).

It was opined that although the same expression, 'public policy of India', is used both in Section 34(2)(*b*)(*ii*) and Section 48(2)(*b*) and the concept of public policy in India is same in nature in both the sections but, its application would differ in degree insofar as the two sections are concerned. The application of the doctrine of the public policy of India for the purposes of Section 48(2)(*b*) was said to be more limited than the application of the same expression in respect of the domestic arbitral award.

Later, in *Associate Builders's* case (supra), the Supreme Court elaborated on patent illegality, while making a reference to the provisions of the Act and explained the three aspects that would amount to patent illegality, that were hitherto unexplained :

Firstly, it was held that a contravention of the substantive law of India would result in the "death knell of an arbitral award". It was added that such illegality must go to the root of the matter and cannot be of a trivial nature. The Court explained that a contravention of the substantive law of India was essentially a contravention of Section 28(1)(*a*) of the Act, which mandates that in arbitrations, other than international commercial arbitration, situated in India, the Arbitral Tribunal shall decide the dispute submitted to arbitration in accordance with the substantive law for the time being in force in India.

Secondly, a contravention of the provisions of the Arbitration Act itself was held to be patent illegality as the statute is the primary law in force for the regulation of arbitration in India.

Thirdly, it was held that a contravention of Section 28(3) of the Act would amount to patent illegality. The said provision holds that the Arbitral Tribunal shall decide the dispute in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.

The Court was careful to add a caveat, with which the third constituent must be understood. It was held that when an Arbitrator construes a term of the contract in a reasonable manner, it will not mean that the award can be set aside on this ground. Construction of the terms of a contract is primarily for an Arbitrator to decide unless the Arbitrator construes the contract in such a way that it could be said to be something that no fair-minded or reasonable person could do.

It has been held that a possible view by the Arbitrator on facts must necessarily pass muster as the Arbitrator is the ultimate master of the quality and quantity of evidence to be relied upon. Once it is found that the Arbitrator's approach is not arbitrary or capricious, the Arbitrator has the last word on the facts, even if the award is based on "evidence that does not measure up in quality to a trained legal mind".

V. Arbitration and Conciliation (Amendment) Act, 2015

The phrase 'public policy' has not been defined in the Arbitration and Conciliation

27. *Phulchand Exports Ltd. v. O.O.O. Patriot*, (2011) 10 SCC 300.

Act, 1996, because of which, the phrase carried its inherent ambiguity into the interpretation of the concept with respect to arbitral awards, thereby lending Courts the liberty to interpret it in an expansive manner. The catena of decisions of the Supreme Court regarding the constituents of public policy led to a conundrum that threatened the arbitral process by expanding the scope for excessive judicial intervention. To be able to understand the stumbling blocks that were inadvertently created by the Court, it is useful to refer to a study[28] that made a comparison between the grounds on which an award could be set aside under the Arbitration Act, 1940 and those available under the Arbitration and Conciliation Act, 1996. It is startling to realise that the nine grounds that have been incorporated through judicial pronouncements on public policy are all very similar to the grounds on which awards could be set aside under the old legislation, thereby making no effective change or contribution to the new regime, that is aimed to be 'arbitration-friendly'.

To allow public policy to be a ground of judicial decision, would lead to the greatest uncertainty and confusion. It is the province of the statesman and not the lawyer, to discuss, and of the Legislature to determine what is best for the public good and to provide for it by proper enactments.[29] Subsequent to the decisions of the Supreme Court in the range of cases discussed above, an explanation to the clause of public policy was inserted by the Arbitration and Conciliation (Amendment) Act, 2015 (*Amendment Act*). The intention of the amendment seems to have been to minimise curial intervention in international commercial arbitration matters, while ensuring a very limited judicial interference in matters of enforcement of foreign awards, apart from re-structuring and limiting the interpretation of public policy with respect to domestic arbitral awards.

The explanation has tried to restrict the expansive interpretation of the doctrine of public policy, by mentioning that 'an award is in conflict with the public policy of India, only if—

(i) the making of the award was induced or affected by fraud or corruption or was in violation of Section 75 or Section 81; or

(ii) it is in contravention with the fundamental policy of Indian law; or

(iii) it is in conflict with the most basic notions of morality or justice.'

Section 28(1)(a) of the 1996 Act mandates that for domestic arbitrations seated in India, the arbitral Tribunal must decide the dispute in accordance with the substantive law of India.

As a result, the additional ground of patent illegality as an exception against the enforcement of domestic arbitral awards was retained in the legislation. In fact, according to the amendment, patent illegality has been removed from the scope of 'public policy' and has been made an entirely new ground on which only domestic arbitral awards may be challenged.

However, the controversial ratio of *Saw Pipes's* case (supra), as far as enforcement of foreign awards is concerned, was put to rest by the amendment, which made the doctrine of patent illegality beyond the scope of Indian Courts while deciding on the enforcement of foreign awards. Patent illegality is, therefore, no longer a ground under which the enforcement of a foreign award may be resisted in India. Further, according to Section 34(2-A), patent illegality, as a ground, is not available to set aside

28. *Ashish Dholakia*, *Grounds to Challenge Arbitration Awards: Will Amendments to the Arbitration Act Bring "Acche Din"?* 7 SCC J-1 (2015).

29. *Gherulal Parakh v. Mahadeodas Maiya*, AIR 1959 SC 781.

arbitral awards arising out of international commercial arbitrations, *i.e.*, international arbitrations seated in India.

By the Amendment Act, Section 48 was amended to delete the ground of 'contrary to the interest of India', for refusing enforcement of foreign awards- a ground which the Law Commission in its report, had described as vague and capable of interpretational misuse[30]. In this regard, it is interesting to know that while dealing with the contention of the party opposing enforcement of the award, that its actions had been dictated by the severance of diplomatic ties between the United States and Egypt, the Second Circuit of the United States Court of Appeals stated that 'to read the public policy defence as a parochial device protective of national political interests would seriously undermine the Convention's (New York Convention, 1959) utility. This provision was not meant to enshrine the vagaries of international politics under the rubric of public policy.[31] It may be understood that the scope of challenging the enforcement of foreign awards in India, citing such similar reasons that could have been covered by the ground of "contrary to the interest of India", has now been avoided.

The Courts will recognise only public policy as embodied in the Constitution, the laws and judicial decisions. There may be matters of public policy which are not embodied in laws or judicial decisions or the Constitution. The Courts will not take cognizance of such matters. But what is contrary to law may not necessarily be contrary to public policy. It is only when a law embodies public policy that its violation will lead to an action which is contrary to public policy.[32] As a word of caution, it was also added by way of Explanation 2 that the test as to whether there is a contravention of the fundamental policy of Indian law shall not entail a review on the merits of the dispute, thereby nullifying the effect of the ratio of *Western Geco.*

It may be noticed that the same explanation features in Sections 34, 48 and 57 of the 1996 Act. Hence, it may be understood that the exception of public policy is, therefore, uniformly applicable to both, domestic and international arbitrations, as well as to the enforcement of foreign awards. Each of the categories enumerated by the explanation merit discussion in some detail :

A. Fraud and Corruption

The first category envisages a two-fold specification. One relates to awards induced or affected by fraud or corruption as opposed to public policy. Fraud and corruption apart from being immoral acts, are also barred by law.

It is well known that fraud vitiates every solemn proceeding in any civilised system of jurisprudence. It is also widely accepted that fraud cannot be put in a strait jacket and it has a wide connotation. It is a settled proposition of law that a judgment or decree obtained by playing fraud on the Court is a nullity and *non-est* in the eye of law. Under Indian law, fraud is defined in the Indian Contract Act, 1887 and has been given a wide scope. The Supreme Court defined fraud as "an act of deliberate deception with the design of securing something by taking unfair advantage of another.[33] It is an intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or to surrender a legal right. Fraud has been described as a false representation of a matter of fact, whether by words or by conduct, by false or misleading allegations, or by concealment of that which should have been disclosed, which deceives and is intended to deceive

30. Law Commission of India, Report No.246, *Amendments to Arbitration and Conciliation Act, 1996* § 37 (2014).

31. *Parsons and Whittemore, supra* note 9.

32. (1990) 1 Bom. CR 561.

33. *S.P. Chengalvaraya Naidu v. Jagannath*, (1994) 1 SCC 1.

another so that he shall act upon it to his legal injury.[34]

The allegation of fraud at any stage of the arbitral proceedings, because of its pervasive nature, may have a considerable impact on the credibility of the arbitral award arising out of such proceedings. In relation to concealment as fraud, it was held by the Supreme Court that the facts concealed must have a causative link and if the facts so concealed are disclosed after the passing of the award, and have a causative link with the facts constituting or inducing the award, such facts are relevant and the award may be set aside as induced or affected by fraud.[35]

B. Violations of Sections 75 and 81

The other part relates to an award in violation of Sections 75 and 81 of the 1996 Act. Though the sections are grouped under Part-III of the Act, that governs the process of conciliation, the provisions of confidentiality[36] and inadmissibility of evidence in other proceedings, respectively, are inserted in the arbitration law. It is trite that arbitration is a private and confidential affair. The requirement of confidentiality of the arbitral proceedings extends to the arbitral award as well, except where its disclosure is necessary for purposes of its implementation and enforcement.[37] Further, the violation of the requirements[38] of Section 81 will vitiate the award, which will be liable to be set aside as being in conflict with the public policy of India, because the process of arbitration is fiduciary in nature and the parties make statements and produce documents before the arbitral Tribunal with the intention of resolving disputes in good faith and therefore, admissions, suggestions and views made by the parties or the proposals of the Arbitrator must not be used against the either party in any other arbitral or judicial proceedings. The intent of the Legislature behind incorporating this provision seems to be to encourage the parties to engage themselves in a forthright and fruitful manner, without fearing any subsequent repercussions.

While such provisions may be employed to assist effective domestic arbitration, a doubt may be expressed with regard to their usefulness and necessity in relation to international commercial arbitrations and enforcement of foreign awards. The introduction of the said provision through the amendment seems to have increased the scope for curial interference in matters of international commercial arbitrations and enforcement of foreign awards, which may eventually turn out to be an obstruction for India being chosen as a seat of arbitration. It is interesting to note that prior to the amendment, violation of Sections 75 and 81 of the 1996 Act was not expressly mentioned as being against public policy with respect to the enforcement of foreign award, but was only introduced subsequently.

C. Fundamental Policy of Indian Law

The next clause refers to the fundamental policy of Indian law. It is seen that there

34. *State of A.P. v. T. Suryachandra Rao*, (2005) 6 SCC 149.

35. *Venture Global Engineering v. Satyam Computer Services,* SC SLP No.9238 of 2010.

36. Section 75-Notwithstanding anything contained in any other law for the time being in force, the conciliator and the parties shall keep confidential all matters relating to the conciliation proceedings. Confidentiality shall extend also to the settlement agreement, except where its disclosure is necessary for purposes of implementation and enforcement.

37. *Indu Malhotra, O.P. Malhotra* on *The Law & Practice on Arbitration and Conciliation* (3rd Ed. 2014).

38. Section 81-The parties shall not rely on or introduce as evidence in arbitral or judicial proceedings, whether or not such proceedings relate to the dispute that is the subject of the conciliation proceedings,- (a) views expressed or suggestions made by the other party in respect of a possible settlement of the dispute; (b) admissions made by the other party in the course of the conciliation proceedings; (c) proposals made by the conciliator; (d) the fact that the other party had indicated his willingness to accept a proposal for settlement made by the conciliator.

has been a substantial change in the approach of the Court after the amendment has been effected. The Supreme Court, in *Ssangyong Engineering and Construction Company Limited v. National Highways Authority of India (Ssangyong)*[39], significantly altered the constituents of the fundamental policy of India, keeping in mind the amendments that were brought in, according to the recommendations of the Law Commission of India.

It was held that 'fundamental policy of Indian law' would henceforth be relegated to what had been laid down in *Renusagar's* case (supra), in which it was held that a contravention of the provisions of the Foreign Exchange Regulation Act, 1973, would be contrary to the public policy of India in that the statute is enacted for the national economic interest to ensure that the nation does not lose foreign exchange which is essential for the economic survival of the nation. It was also held that disregarding orders passed by the superior Courts in India and the binding effect of the judgment of a superior Court being disregarded would be violative of the fundamental policy of Indian law. However, it has to be kept in mind that, in the light of the facts of the case, it was also held that the recovery of compound interest on interest, being contrary to statute only, would not contravene any fundamental policy of Indian law, which may be taken to mean that the contravention must amount to a breach of some legal principle or legislation which is so basic to Indian law that it is not susceptible of being compromised.

With regard to the above, it may be worthwhile to note that the Foreign Exchange Regulation Act, 1973, has since been replaced by the Foreign Exchange Management Act, 1999 (FEMA), with respect to which it has been held in the case of *Vijay Karia,* that a rectifiable breach under FEMA can never be a violation of the fundamental policy of Indian law. It was held that even if the Reserve Bank of India were to take action under FEMA, the non-enforcement of a foreign award on the ground of violations of FEMA Rules or Regulations would not arise as the award does not become void on that count.

It was further held that the expansive interpretation laid down in *Western Geco's* case (supra), has been done away with, because under the guise of interfering with an award on the ground that the Arbitrator has not adopted a judicial approach, the Court's intervention would be on the merits of the award, which cannot be permitted post amendment. However, as far as principles of natural justice are concerned, it was observed that they are fundamental juristic principles that have been enshrined in Sections 18 and 34(2)(*a*)(*iii*) of the Act, and thereby, continue to be grounds of challenge of an award.

A seemingly discordant note seems to have been struck in the case of *National Agricultural Co-operative Marketing Federation of India v. Alimenta S.A. (NAFED)*[40], in which the Apex Court held that enforcement of a foreign award in violation of an export policy and the Government order to that effect would be against the public policy as envisaged in Section 7 of the Foreign Awards Act, 1961. It is pertinent to mention here that the Supreme Court in *Shri Lal Mahal Limited's* case (supra), while relying on *Renusagar's* case (supra), held that that the expression 'public policy of India' in Section 48(2)(b) of the Arbitration and Conciliation Act, 1996, has the same import as that of expression 'public policy' in Section 7(1)(b)(ii) of the Foreign Awards Act, 1961. As a addition, it must be recollected that the Court in cases like *Ssangyong's* case (supra) and *Vijay Karia's* case (supra), has held that contravention of any provision of an enactment is not synonymous to contravention of fundamental policy of Indian law and the objections to enforcement on the ground of public policy must be such

39. (2019) 15 SCC 131.

40. 2020 SCC OnLine SC 381.

that offend the core values of a member State's national policy, which it cannot be expected to compromise. However, in the light of the law already laid down, the judgment in *NAFED* may be treated like an aberration, resulting from the complex factual matrix of the case.

The general enforcement bias of the Courts may be recognised from the words of the High Court of Delhi in *Cruz City's* case (supra), in which the Court opined that where public policy considerations are to be weighed, it is not difficult to visualise a situation where both permitting as well as declining enforcement would fall foul of the public policy. Thus, even in cases where it is found that the enforcement of the award may not conform to public policy, the Courts may evaluate and strike a balance whether it would be more offensive to public policy to refuse enforcement of the foreign award - considering that the parties ought to be held bound by the decision of the forum chosen by them and there is finality to the litigation - or to enforce the same; whether declining to enforce a foreign award would be more debilitating to the cause of justice, than to enforce it. In such cases, the Court would be compelled to evaluate the nature, extent and other nuances of the public policy involved and adopt a course which is less pernicious.

D. Morality and Justice

The last clause refers to a conflict with the most basic notions of morality or justice, with regard to which it was held that only those awards that shock the conscience of the Court can be set aside on this ground, as has been discussed in detail in the preceding section.

VI. Conclusion

Public policy, as discussed, is fluid and has no concrete parameters, that determine its scope and usage. As a result, its interpretation by the Courts has been tottering, which has been used by parties to arbitral proceedings as a weapon to avoid the enforcement of awards. As witnessed, some judicial pronouncements and legislation have tried to tame the unruly horse that public policy is, with considerable success, paving a way for the enforcement of commercial awards, the ease of which, *inter alia*, will significantly improve the ease of investment and trade in India, apart from projecting India as one of the most viable seats of arbitration in the developing countries. It may be hoped that the restrictive interpretations of public policy as have been laid down, will stand the test of time, assisted by certain legislative changes, as has been discussed, in order to invigorate the regime of arbitration in India, by adhering to international standards, which would ultimately help in popularising India as one of the preferred seats for international commercial arbitrations.

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STUDY OF LEGAL POSITION AGAINST THE ORDER PASSED BY THE MAGISTRATE IN Cr.MP No.920/2020 IN CRIME NO.553/2020 OF I TOWN PS, NANDYAL, IN ABDUL SALAM AND HIS FAMILY SUICIDE CASE

By

—**ROZEDAR SRA**, Advocate*

After the suicide of the deceased *Abdullah* alongwith his other family members, the I Town PS Nandyal registered a case in Crime No.553/2020 for the offences under

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