

**THE EXTENT AND SCOPE OF PERMISSIBLE JUDICIAL
INTERFERENCE UNDER THE PROVISIONS OF PART I OF THE
ARBITRATION AND CONCILIATION ACT, 1996**

- Akshita Chand¹

ABSTRACT

Arbitration is one of the best alternate dispute mechanisms. The paper refers to the judicial interference in Arbitration and Conciliation Act, 1996. Adopted from the UNITRAL model laws, the arbitration mechanism in India has been adopted. The extent of judicial intervention has been given in section 5 of the Arbitration and Conciliation Act, 1996. The Judiciary has also interpreted the clause and provided with grounds based on which the arbitral award can be interfered with. Before the enactment of the Act. The judiciary was interfering with the arbitral proceedings. The interference of the judiciary took away the main objective of arbitration. And hence, in order to curtail the same, the Act was enacted. The most interpreted section is Section 34 of the Arbitration and Conciliation act due to the term, Public Policy. With a balanced approach, the term has been interpreted to curtail the judicial intervention and keep the objective of the Act intact.

INTRODUCTION

With the increasing rates of development and globalisation, the number of disputes have also been increasing. Arbitration is a mechanism to get resolution against a dispute quickly. **“At all events, arbitration is more rationale, just and humane than the resort to the sword”²**. In the wake of the same thought, arbitration has been adopted in the Indian judicial system to resolve disputes. Also, in international level, UNCITRAL- United Nations Commission on International Trade law formed a model law for arbitration in 1985 which was later on adopted in India as Arbitration & Conciliation Act, 1996³. The laws of the model law have

¹ Student at Banasthali Vidyapith

² By Richard Cobden

³ THE ARBITRATION AND CONCILIATION ACT, 1996 ACT No. 26 OF 1996

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extensively used to comprehend Part I of the Act. Part I provides for the non-interference by courts in arbitral proceedings. The provisions for judicial intervention under the arbitral law have been given under section 5, 9, etc., and provisions related to arbitral awards. Section 5 deals with arbitral intervention before proceedings and section 9 provides for the same during the proceedings. Also, the most important section of the Act, section 34 is regarding arbitral awards. It lays own the grounds to challenge an arbitral award. Also, to improve the permissible judicial interference under part I has been discussed as below.

JUDICIAL INTERFERENCE

Judicial interference is somewhat needed in the arbitral proceedings as without it the proceedings of arbitration would be completely disrupted. Due to the lack of institutions and the need for a proper proceeding, the arbitration processes are needed to be taken into courts in order to continue them properly in accordance with the codes. Also, the arbitrators appointed by the courts are mostly retired judges as per section 11⁴ of the Act. And so, “it involves various procedures like involving issues, oral and documentary evidence, chief and cross examinations, etc.”⁵ This makes the procedures long and procure unnecessary adjournments. So with all this if the judicial interference of courts is curtailed, then the consequence would affect the parties as well as the system. We can observe that judicial interference has been allowed to a limited extent under various sections of the Arbitration and Conciliation Act, 1996. The scope and extent has been interpreted by various courts to make role of the court more clear and curtail the intervention by the judiciary.

SCOPE

The main objective of arbitration is to minimise the delaying and disposal of the case in timely and cost effective manner. The process needs to be done in the supervisory of courts as the arbitration process is somewhat inherently incompetent. The parties have been provided with autonomy and hence, there is a need for the judicial intervention to uphold the rule of law. From supervising the whole process to assist with the disposal of cases, judicial intervention has a wide scope. There are various provision provided in the act in order to support the judicial intervention in a limited manner. They are:-

⁴ Section 11. Appointment of arbitrators, THE ARBITRATION AND CONCILIATION ACT, 1996 ACT No. 26 OF 1996

⁵ <https://www.lexology.com/library/detail.aspx?g=be215633-4d9c-4416-bd69-18905093f3cc>

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Section 5

The extent of judicial intervention has been given in section 5 of the Arbitration and Conciliation Act, 1996 as follows:

“Extent of judicial intervention.—notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part”.⁶

“In **DDA v. R.S. Sharma and Co.**, it was observed that an arbitral award can be interfered with on the following grounds: (a) an award, which is (i) contrary to the substantive provisions of the law; or, the provisions of the Act of 1996; or (ii) against the terms of the respective contract; or (iii) patently illegal; or (iv) prejudicial to the rights of the parties; or (v) is open to interference by the Court under Section 34(2) of the Act of 1996; (b) the award could be set aside if it is contrary to: (i) fundamental policy of Indian law; or (ii) the interest of India; or (iii) justice or morality; or (iv) is so unfair and unreasonable that it shocks the conscience of the Court; or (v) is 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”.⁷

Section 8 Power to refer parties to arbitration where there is an arbitration agreement

The judicial authorities have the power to refer to an arbitration proceeding if there is no valid arbitration procedure found prima facie

Section 9 Interim measures, etc., by Court

As per the provisions of section 36 any party undergoing an arbitration process can apply for interim measures to a court which may pass an order for any interim measure as per clause 1 of section 9 enlists.

Section 11 Appointment of arbitrators

The judicial authority *i.e.* the high court or a supreme court can appoint the arbitrator as per the provisions of section 11 provide. Before the 2015 amendment of the arbitration and conciliation act, 1996 the arbitrators were appointed by the Chief Justice of India which extensively intervened with the arbitration proceedings ultimately not letting the aim of the

⁶Section 5, THE ARBITRATION AND CONCILIATION ACT, 1996 ACT No. 26 OF 1996

⁷ (2008) 13 SCC 80

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act to be fulfilled. The 246th law commission report “classified the appointment of arbitrators as administrative in nature and recommended that this be done by the Supreme Court or the High Court or be delegated to an Arbitral Institution”.⁸ Section 11 was amended and the delegation of authority to appoint was made possible. Also, a time limit of 60 days was prescribed and this system of assigning arbitrators has been accepted by the UNCITRAL Model Law.

Section 13(5)

It provides that, “Where an arbitral award is made under sub-section (4), the party challenging the arbitrator may make an application for setting aside such an arbitral award in accordance with section 34”.⁹

Section 14(2)

It provides that, if any arbitrator becomes de jure or de facto, or is not able to perform his duties without and undue delay, then the court is allowed to decide the termination of mandate.

Section 16(6)

This clause provides that, “A party aggrieved by such an arbitral award may make an application for setting aside such an arbitral award in accordance with section 34”.¹⁰

Section 27

The section provides that regarding the evidence to be taken in during the arbitral proceedings, the court is needed to assist the process. The court has the power to direct the submission of evidence such as, summons or commissions for examination of witnesses.

Section 34

Under chapter VII of the Arbitration and conciliation Act, 1996 the recourse against arbitral award is provided and in section 34, the application for setting aside arbitral award has been provided. Section 34 of the act is in consonance with the article 34 of model law which was created by UNCITRAL. “Section 34 of the Act gives an insight into the procedure for setting

⁸ <http://www.legalserviceindia.com/legal/article-5646-judicial-intervention-in-arbitration-an-over-step-in-arbitral-proceedings-.html>

⁹ Section 13(5), THE ARBITRATION AND CONCILIATION ACT, 1996 ACT No. 26 OF 1996

¹⁰ Section 16(6), THE ARBITRATION AND CONCILIATION ACT, 1996 ACT No. 26 OF 1996

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aside an arbitral award rendered by an arbitral tribunal which includes intervention of the Court for setting aside the award. Assistance of the courts is required for the smooth functioning of the arbitration system, however excessive intervention of the Court must be avoided in case of entertaining applications against arbitral awards as it would cause unnecessary delay in arbitral proceedings thus defeating the objective of the Act”.¹¹ It lays down the various grounds on the basis of which an arbitral award may be dropped. One of the grounds is that “the arbitral award is in conflict with the public policy of India”.¹² But, the term public policy has not been properly defined which ultimately increases the scope of judicial intervention. This term has been interpreted differently in various cases. The Apex court in the case, “**ONGC Ltd v. Saw Pipes Ltd**”¹³ explaining the concept of “public policy of India” said that it has not been defined in the Act and is vague and is likely to be interpreted widely or narrowly depending on the context in which it is being use”.¹⁴

CURTAILMENT OF JUDICIAL INTERVENTION

The judiciary has been intervening the arbitral proceedings extensively. This prevents the mains objective of the arbitration and conciliation act, 1996 which is to provide for a dispute resolution in a time and cost effective manner. And hence, the act was to curtail judicial intervention. “In **Renusagar Power Co. Ltd. v. General Electric Co.** (“**RENUSAGAR’S CASE**”), while discussing the scope of ‘public policy’, the Supreme Court categorically held that it would mean that an award is contrary to the (i) fundamental policy of Indian laws; or (ii) the interests of India; or (iii) justice or morality. This case gave a very narrower meaning to the expression ‘public policy’ by confining the judicial review of the arbitral award only on these three grounds”.¹⁵ Moreover, in the 2015 amendment of the act, it has been observed that the judicial intervention is to be curtailed in the cases where ambit of public policy is limited. The same has been established in the case of **McDermott International Inc. v. Burn Standars Co. Ltd.**¹⁶ Where the court gave the opinion that the intervention of the court is only allowed to supervise the proceedings under the Arbitration and Conciliation Act, 1996. Also, the court can only be involved or intervening the proceedings if there is fraud,

¹¹ An Evaluation of Section 34 of the Arbitration and Conciliation Act with Special Emphasis on Judicial Intervention Prof. (Dr.) Bhavish Gupta

¹²Section 34(2)(b)(ii), THE ARBITRATION AND CONCILIATION ACT, 1996 ACT No. 26 OF 1996

¹³ AIR 2003 SC 2629

¹⁴**ONGC Ltd v. Saw Pipes Ltd**, AIR 2003 SC 2629

¹⁵ 1994 Supp (1) SCC 644

¹⁶ (2006) 11 SCC 181

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bias, violation of natural justice, etc. on the part of parties concerned. The role of court is restricted to only act as a supervising authority. “In the case of **Ssangyong Engineering and Construction v. National Highways Authority of India** the Division Bench of Delhi High Court dismissing the petition filed by the applicant under section 34 of the Act, stated that a court is not to interfere with an arbitral award if a contract can be interpreted in two ways only on the ground that the court holds the other view. In this case the order of the single judge was challenged by the appellant where the single judge had dismissed the Appellant’s petition under Section 34 of the Arbitration and Conciliation Act, 1996 for setting aside the arbitral award. Here the Court also stated that the Arbitrator’s view could not be substituted by the Court’s own view”.¹⁷ In **ONGC Ltd. v. Western Geco International Ltd**¹⁸ (“ONGC Ltd.’s case”) the Supreme Court again tried to explain the said expression in the following words: “It is neither necessary nor proper for us to attempt an exhaustive enumeration of what would constitute the fundamental policy of Indian law nor is it possible to place the expression in the straitjacket of a definition”.

As a consequence of the above mentioned case, the Arbitration and Conciliation (Amendment) Act, 2015 was enacted which added section 34 (2A)¹⁹, which added another ground as ‘patent illegality appearing on the face of the award’. It was also intended to make the definition of ‘public policy in India’ resonate with the statement by the Supreme Court in the Renuagar’s case. It was observed in the Ssangyong case that “the expression ‘public policy of India’ inter alia contained in Section 34 of the Act of 1996 would mean the ‘fundamental policy of Indian law’ as explained in the Associate Builder’s case and as understood in Renuagar’s case”.²⁰

CONCLUSION

Observing the various alternate dispute resolution procedures, arbitration is one of the best ways to resolve disputes. The main intention of the arbitration proceeding is minimum intervention by the judiciary. It is to be noted that there needs to be proper amendments in the

¹⁷Ssangyong Engineering and Construction v. National Highways Authority of India, F.A.O. (OS) Comm. 82/2016

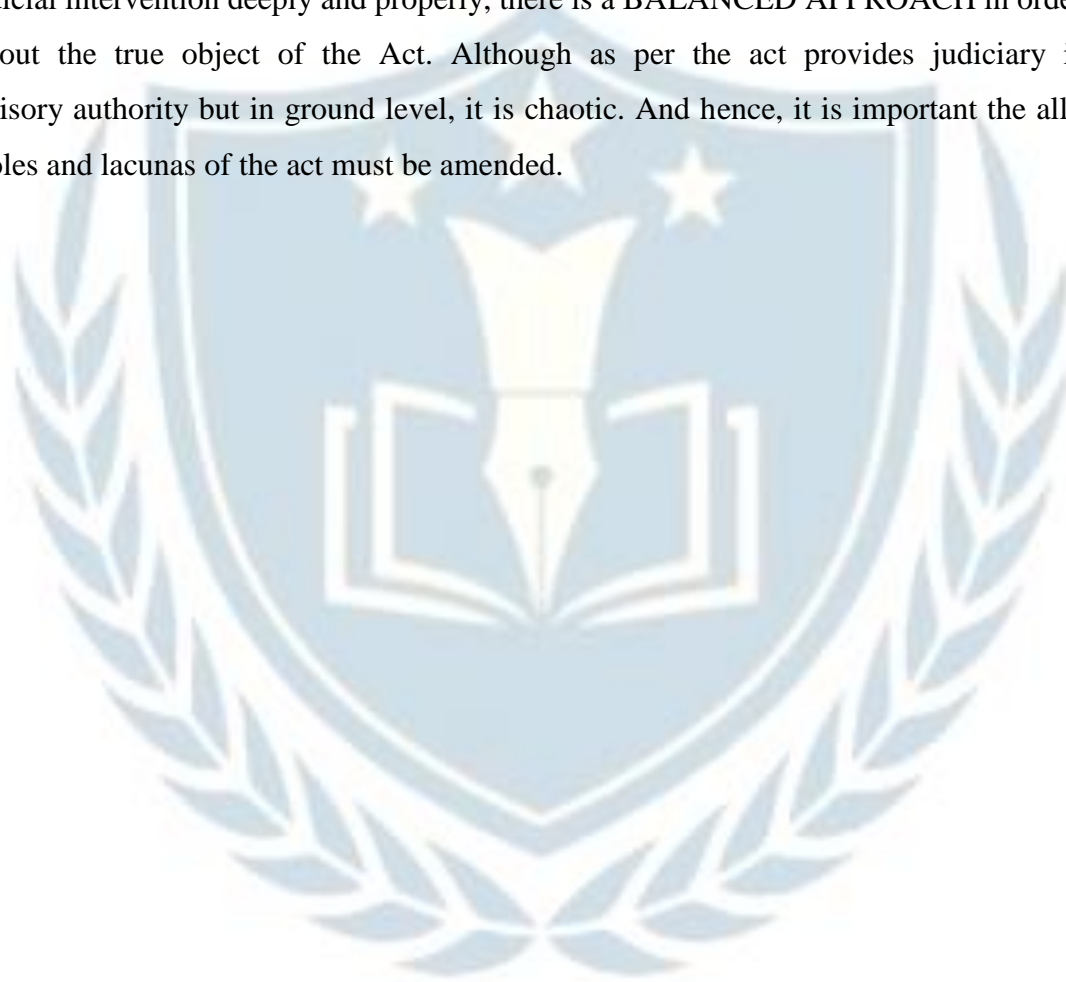
¹⁸(2014) 9 SCC 263

¹⁹(2A) An arbitral award arising out of arbitrations other than international commercial arbitrations, may also be set aside by the Court, if the Court finds that the award is vitiated by patent illegality appearing on the face of the award: Provided that an award shall not be set aside merely on the ground of an erroneous application of the law or by reappraisal of evidence.

²⁰Ssangyong Engineering and Construction v. National Highways Authority of India, F.A.O. (OS) Comm. 82/2016

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act and proper delegation of responsibilities need to be done so that the judiciary does not act as a intervening entity and rather, supervises in such a manner that the arbitral proceedings are carried on smoothly without being disrupted. Section 34 of the act has been extensively amended and interpreted by the courts in order to define the term Public policy to draw a line regarding intervention of courts. Sub section 6 of section 34 has also been added to provide a limitation period to the courts. The appointed personnel of the arbitral tribunals are proceedings are mostly retired judges who are used to go by the code strictly. But observing the judicial intervention deeply and properly, there is a **BALANCED APPROACH** in order to bring out the true object of the Act. Although as per the act provides judiciary is a supervisory authority but in ground level, it is chaotic. And hence, it is important the all the loopholes and lacunas of the act must be amended.



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