Ssangyong v. NHAI: Supreme Court of India Fixing Some Troubles, and Creating Some?

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The decision of the Supreme Court of India ("SC") in **Ssangyong Engineering & Construction Co. Ltd. v. National Highways Authority of India (NHAI)** ("Ssansyong"), has led to three notable developments: (1) it clarifies the scope of the "public policy" ground for setting aside an award as amended by the Arbitration and Conciliation (Amendment) Act 2015 ("2015 Act"), (2) affirms the prospective applicability of the 2015 Act and (3) adopts a peculiar approach towards recognition of minority decisions.

Facts

The dispute arose out of a contract between the parties for construction of a four-lane bypass on a National Highway in the State of Madhya Pradesh. The appellant, Ssangyong Engineering, was to be compensated under the contract for inflation in prices of components to be used in construction of the highway. The agreed method of compensation for inflated prices was the Wholesale Price Index ("WPI") following 1993 – 1994 as the base year. However, National Highways Authority of India ("NHAI") subsequently issued a circular revising the WPI to follow 2004 – 2005 as the base year for calculating the inflated cost, which was disputed by Ssangyong. The parties referred this dispute to a three member arbitral tribunal. The majority award upheld the revision of WPI as being within the terms of the contract. The minority decision opined otherwise, and held that the revision was *de hors* the contract. Aggrieved by the majority finding, Ssangyong unsuccessfully challenged the award as being against public policy before Delhi High Court, and consequently sought remedy from the SC in appeal.

Scope of "Public Policy" under Section 34

The public policy ground under Section 34 (2)(b)(ii) (challenge to domestic awards) and Section 48(2)(b) (conditions for enforcement of foreign awards) of the 1996 Act became a cause for concern due to a broad interpretation given to the phrase "fundamental policy of Indian law" by the SC in ONGC Ltd. v. Western Geco International Ltd. ("Western Geco") – one of the three explanations given to public policy under the aforesaid provisions. This has already been discussed here. The impact of *Western Geco*, and later Associate Builders v. DDA ("Associate Builders") following *Western Geco*, was such that "fundamental policy of Indian law" was left to be exploited for refusing enforcement to foreign awards, and allowing domestic awards to be reviewed on merits. This was changed by the 2015 amendments. The SC in the *Ssangyong* case held that the broad interpretation given to "fundamental policy" in *Western Geco* does not find place under Section 34, as amended by the 2015 Act. It relied on the 246th Report of the Law Commission of India which stated that public policy

ground cannot have the same scope under Section 34 and Section 48 [para 18]. The Report further stated that even though grounds of court intervention in a domestic award ought to be wider, the same was recognized by introducing "patent illegality" in Section 34(2A) by the 2015 Act without making the same amendment to Section 48. The SC also relied on the Supplementary to the 246th Report which was released in February 2015 as a consequence of the SC's judgments in *Western Geco* and *Associate Builders* [para 20]. The Report stated that the amendments to Section 34 '*were suggested on the assumption that other terms such as "fundamental policy of Indian law" or conflict with "most basic notions of morality or justice" would not be widely construed.*'

Therefore, the SC held that the wide import given to "fundamental policy of Indian law" in *Western Geco* and *Associate Builders* is improper, and not in accordance with the intent and purpose of the amended Sections 34 and 48 of the 1996 Act [para 23]. The SC also clarified that the following interpretation be given to the respective species of public policy under Section 34(2)(b)(ii), and to "patent illegality" under Section 34(2A):

- "fundamental policy of Indian law" – contravention of a law protecting national interest; disregarding orders of superior courts in India; principles of natural justice such as *audi alteram partem* (in line with Renusagar Power Co. Ltd. v. General Electric Co.) [paras 23 – 25];
- "most basic notions of morality or justice" – the SC adopted the ratio of *Associate Builders* wherein it was observed that an award would be against justice and morality when it shocks the conscience of the court; morality, however, would be determined on the basis of "prevailing mores of the day" [para 24];
- "patent illegality" – illegality which goes to the root of the matter, but excluding erroneous application of law by an arbitral tribunal or re-appreciation of evidence by an appellate court. However, this ground may be invoked if (a) no reasons are given for an award, (b) the view taken by an arbitrator is an impossible view while construing a contract, (c) an arbitrator decides questions beyond a contract or his terms of reference, and (d) if a perverse finding is arrived at based on no evidence, or overlooking vital evidence, or based on documents taken as evidence without notice of the parties [paras 26 – 30].

The SC also affirmed its findings in BCCI v. Kochi Cricket where it held that the 2015 Act amending Section 34 is entirely prospective in nature and shall apply to applications filed on or after 23.10.2015 (date of commencement of the 2015 Act), even if arbitration proceedings were commenced prior to the said date [paras 10 – 12]. This would allow parties to such arbitrations to also benefit from the findings of the SC in *Ssangyong*, eliminating exploitative use of "public policy" and "patent illegality" to unduly interfere with domestic and foreign awards.

Minority Decisions

The SC in *Ssangyong* set aside the judgments of the Single Judge and Division Bench of the Delhi High Court. It also exercised its plenary power under Article 142 of the Constitution of India to declare the minority decision as the award between the parties. Article 142 gives the SC power to make such orders which may be necessary for doing "complete justice" in a case. This power has been deliberately left undefined and elastic enough to grant suitable reliefs in a given situation [Delhi Development Authority v. Skipper Construction Company]. However, the prevailing view is that the SC cannot by-pass statutory considerations while exercising its power under Article 142 [Supreme Court Bar Association v. Union of India].

The SC's approach in *Ssangyong* raises questions about the overall efficacy of the remedy available to the parties under Section 34 of the 1996 Act.

It is the prevailing position that the Act does not allow Indian courts to modify an award while dealing

with a Section 34 application [Delhi Metro Rail Corporation Ltd. v. Delhi Airport Metro Express].[fn]An appeal against the judgment is currently pending in the Supreme Court.[/fn] The SC appeared to have endorsed this scheme of the Act when it observed that if the majority award was set aside, the parties would have to re-agitate their claims afresh before a new arbitral tribunal [para 49]. The Court further stated that the delay in resolution of disputes between the parties caused due to the foregoing would be contrary to the objective of 1996 Act, i.e. to promote speedy resolution of disputes. However, the Court overcame the limits prescribed under Section 34 by exercising its plenary power under Article 142 and declared the minority decision as the enforceable award between the parties.

The precedential value of this judgment is limited in light of the previous SC decision of State of Punjab v. Rafiq Masih where it observed that orders under Article 142 do not constitute a binding legal precedent. Nevertheless, it raises an important issue of the power of the Indian courts to effectively deal with an application for setting aside an award. There have been instances in the past where courts have set aside majority awards and upheld the minority decision as the award between the parties. [Modi Entertainment v. Prasar Bharati; ONGC v. Interocean Shipping]. The SC's approach of invoking its plenary power under Article 142 to declare the minority decision as the award between the parties suggests that the approach adopted by the courts in the past to uphold minority decisions was not proper. It further appears to be against the principles enunciated by it in previous cases that Article 142 cannot lose sight of the provisions of a statute.

As such, the *Ssangyong* judgment appears to indicate that if a majority award is set aside by a court under Section 34 of the 1996 Act, the minority decision cannot be upheld and the parties shall have to commence arbitral proceedings afresh. On the other hand, the approach of the SC in *Ssangyong* may lead the parties to agitate the dispute up to the SC in the hope to revive minority decisions through Article 142 of the Constitution of India. It is therefore necessary to bring in suitable clarifications / amendments to the Act to address this uncertainty.

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