

INORDINATE DELAY IN PASSING OF AN AWARD

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Introduction

Arbitration is an Alternative Dispute Resolution process which is preferred by parties since its fundamental principle is that it offers faster resolution of disputes as a result of time-bound proceedings. However, the resolution process is often stretched on account of delays in delivering the arbitral award by the Arbitral Tribunal. Such delay may be unintentional and bonafide.

Once the Parties have presented their final arguments upon the merits of the suit in the arbitration proceedings, it is a common practice that the Tribunal delivers the award after a certain gap of time caused by reserving the award in order to assess the legal and factual submissions of the disputing parties. Nevertheless, an inordinate delay may arise if the Tribunal fails to provide sufficient explanation if it takes an extremely long time to pass the award.

It is settled law that the scope of challenge under Section 34 of the Arbitration and Conciliation Act, 1996 [“**1996 Act**”], is extremely narrow.¹ Thus, a question arises as to whether such inordinate delay in passing the award is against the public policy of India which would make the arbitral award passed to be liable as to be set aside by the Court in the exercise of its jurisdiction under Section 34 of the 1996 Act.

Mandate of the Arbitral Tribunal

As per Section 14(1)(a) of the 1996 Act, the mandate of a Tribunal will be terminated if the Tribunal fails to act without undue delay. Thus, in the event where the Tribunal reserves the award for any period which may be considered unreasonable, the application of Section 14(1)(a) of the Act may be triggered, but will such undue delay vitiate the award passed?

It is entirely possible that a Tribunal may not remember the contentions or arguments of the Parties if there is a long gap between the date on which the final arguments had been made and

¹ *Ssangyong Engg. and Construction Co. Ltd. v National Highways Authority of India* (2019) 15 SCC 131.

the date on which the Tribunal may set out to write the award. In such a situation, if the Tribunal does not provide a satisfactory explanation for the delay, the expectations of the Parties are marred to the effect that they may conclude that the Tribunal was not entirely conscious or seized of the arguments made by the Parties while rejecting their claims as the case may be. The Tribunal must act within a reasonable dispatch and promptness because, in the event where the Tribunal delays the passing of the award, such delay would defeat the delivery of justice.

The Delhi High Court in *Harji Engg. Works. Pvt. Ltd. v. Bharat Heavy Electricals Ltd. & Anr.*² [“**Harji Engg.**”], has observed that the 1996 Act under Section 14 imposes an obligation on the Arbitral Tribunal to publish the award within a reasonable time. The Court also observed that undue delay in passing the award may lead to termination of the mandate of the Arbitral Tribunal and any award passed by the Tribunal after such inordinate delay will be liable to be set aside.

The Court noted that under the Arbitration Act, 1940 [“**1940 Act**”], the arbitration proceedings had to be concluded by the Tribunal in a time-bound manner as per the mandate of Section 23. Further, under Section 28 of the 1940 Act, the Court had the power to extend the period for making the award by the Tribunal. However, the Courts have previously refused to extend the time to publish the award upon occurrence of undue delay³ on the part of the Tribunal, and also in cases wherein the Tribunal had failed to act with reasonable dispatch.⁴

Further, the Court also placed reliance on the UNCITRAL Model Law [“**Model Law**”], wherein the principal tenet⁵ is that arbitration is to remain a time-bound proceeding which does not get prolonged due to undue delay. Based on this the Court held that it is a “*policy of law that arbitration proceedings should not be unduly prolonged*”.⁶ The Court reasons that an award passed after an inordinate delay without any explanation will be contrary to justice and would defeat the very purpose of alternative dispute resolution. Further, such an award is “*contrary to principles of fair play and justice, as justice should not only be done but also be seen to be done*”. Therefore, in this judgement, the Court held that such an ‘abnormally’ delayed award is liable to be set aside under Section 34 of the Act.

Public Policy of India

The Supreme Court, in *Oil & Natural Gas Corporation Ltd. v Saw Pipes Ltd.*⁷ [“**Saw Pipes**”] has interpreted the scope of challenge to any award on the ground of violation of public policy of India by observing that the concept of public policy connotes some matter which concerns public

² *Harji Engg. Works Pvt. Ltd. v Bharat Heavy Electricals Ltd. & Anr.* 2008 SCC OnLine Del 1080.

³ *State of Punjab v Hardyal* 1985 (2) SCC 629; *Flommore Pvt. Ltd. v National Thermal Power Corpn. Ltd.* ILR (1996) 2 Del 476; 1995 (35) DRJ 504.

⁴ *Kali Charan Sharma v State of UP* AIR 1985 Delhi 389; *WS Construction Company v Hindustan Steel Works Construction Company* AIR 1990 Delhi 134.

⁵ The UNCITRAL Model Law on International Commercial Arbitration 1985, arts 4, 12, 14, 16, 34.

⁶ *Department of Transport v Star Bus Services (P) Ltd.* 2023 SCC OnLine Del 2890.

⁷ *Oil & Natural Gas Corporation Ltd. v Saw Pipes Ltd* (2003) 5 SCC 705.

good and the public interest. Furthermore, whether any act or omission is for public good, or is in public interest, or what would be injurious or harmful to the public good or public interest has varied from time to time.

More recently, in *Ssangyong Engg. and Construction Co. Ltd.*,⁸ the Supreme Court has further restricted the scope of public policy under the 1996 Act, i.e., violation of public policy as a ground for challenge against an award would be permitted in very exceptional circumstances when the conscience of the Court is shocked by the infraction of fundamental notions or principles of justice.

Considering the narrow scope set by the Supreme Court, could a delay in passing the award be held to be against the public policy of India? The Supreme Court has time and again reiterated that it is the policy and purpose of the law to have speedy justice for which efforts are required to meet the expectations of society in ensuring speedy justice.⁹ It is extremely important that the parties must have confidence in the result of the *lis*. However, excessive delay between hearing of arguments and delivery of judgements, orders, or awards may shake the confidence of the parties.¹⁰ Such delay has been viewed as an act which shocks the conscience of the Court¹¹ and is therefore, against the public policy of India, and in certain circumstances has been held to be violative of the fundamental rights.¹²

Whether the inordinate delay in passing the award itself vitiates the award?

(i) A Single Bench of the Delhi High Court: Opposing the view in *Harji Engg.*

Interestingly, a particular Bench of the Delhi High Court in a string of judgements of *Peak Chemical Corporation*,¹³ *Niko Resources Ltd.*,¹⁴ and *Oil India Ltd*¹⁵ has taken a different view than in *Harji Engg.*, wherein the Court has held that:

- **Time and Cost of Arbitration:**

Delay in pronouncing the award is not specified under “conflict with the public policy of India” in Section 34(2)(b)(ii) of the 1996 Act. An award may not be set aside only on the ground of delay in passing of the same since it may not be expedient to remand it for fresh consideration before another Tribunal when significant amount of time and money has been spent in the original proceedings.¹⁶

⁸ *Ssangyong Engg. and Construction Co. Ltd. v National Highways Authority of India* (2019) 15 SCC 131.

⁹ *Anil Rai v State of Bihar*, (2001) 7 SCC 318.

¹⁰ *R.C. Sharma v Union of India*, (1976) 3 SCC 574.

¹¹ *Jones Investment Co. Inc v Intellectual Property Appellate Board (IPAB)*, 2015 SCC OnLine Mad 10344.

¹² *Sudipta Chakrobarty v Ranaghat SD Hospital*, (2021) 12 SCC 538.

¹³ *Peak Chemical Corporation v National Aluminium Co Ltd* 2012 SCC OnLine Del 759.

¹⁴ *Niko Resources Ltd. v UOI* 2012 SCC OnLine Del 3328.

¹⁵ *Oil India Ltd. v Essar Oil Ltd.* 2012 SCC OnLine Del 4279.

¹⁶ *Peak Chemical Corporation v National Aluminium Co. Ltd.* 2012 SCC OnLine Del 759.

- **Buffer of Section 14(2) before a Challenge under Section 34:**

The 1940 Act had an express provision under Section 23 wherein a specific time limit had been fixed to reach the resolution of the dispute. However, such a provision has not been incorporated in the 1996 Act, hence, it is for the parties to decide the future course of action in the event where there exists an inordinate delay in resolving the dispute.¹⁷ A party may approach the Tribunal to expedite the passing of the award, and if such an attempt is unsuccessful, then the aggrieved party can invoke Section 14(2) of the 1996 Act to approach the Court to expedite the award. If such remedy is not taken by a party, then it cannot challenge the award under Section 34 solely on the grounds of delay in passing the arbitral award.¹⁸

While the judgements of the particular Single Bench of Delhi High Court are opposed to that of the view taken in *Harji Engg.*, it may be noted that the Court vide its judgements mandated a preliminary buffer of remedy Section 14(2) of the 1996 Act, before any challenge can be made to an award under Section 34.

However, the Court has not brought under its consideration that the Model Law does not mandate any such preliminary buffer. The Explanatory Notes to the Model Law identify the instances wherein the involvement of the Court is invited, *i.e.*, ‘first group of instances’¹⁹ which include both (1) challenge and termination of the mandate of the Tribunal and (2) challenge to the arbitral award. It is reiterated that while doing so, the Model Law does not incorporate a buffer between the abovementioned provisions.

(ii) Division Bench of Delhi High Court upheld Harji Engg.

A Division Bench of the Delhi High Court in *BWL Ltd. v. Union of India & Anr.*²⁰ [“**BWL Ltd.**”] took note of the opposing views in *Harji Engg.* and *Peak Chemicals*. The Division Bench was hearing a challenge against the decision of a Single Judge,²¹ wherein the Single Judge had relied upon *Peak Chemicals* and held that the delay in passing the award does not vitiate the award.

The Division Bench set aside the judgement of the Single Bench while agreeing with *Harji Engg.*, held that an award pronounced after an inordinate delay from the last date of hearing in the arbitration proceedings is against the public policy of India, *i.e.*, an inordinate delay in passing of an award itself vitiates the award. Further, a challenge to the Division Bench judgement was dismissed by the Supreme Court.

¹⁷ *Oil & Natural Gas Corporation Ltd. v. Saw Pipes Ltd* (2003) 5 SCC 705.

¹⁸ *Niko Resources Ltd. v UOI* 2012 SCC OnLine Del 3328; *Oil India Ltd. v Essar Oil Ltd.* 2012 SCC OnLine Del 4279.

¹⁹ The UNCITRAL Model Law on International Commercial Arbitration 1985, Part II.

²⁰ *BSNL v BWL Limited & Anr.* MANU/SCOR/7191/2013.

²¹ OMP 771/2010, Order dated 04.07.2012.

Follow-up of the Division Bench Judgement

Another Single Bench of the Delhi High Court in *Gian Gupta v. MMTC Ltd.*²² following the observations of the Division Bench in *BWL Ltd.* has held that the decision and reasoning in *Peak Chemicals* had been rejected by the Division Bench in *BWL Ltd.* The Court also observed that there is no requirement of a mandatory recourse under Section 14(2) before approaching the Court under Section 34 on the ground of inordinate delay in pronouncing the award.

In the recent cases of *Fibroplast Marine Pvt. Ltd.*,²³ and the *Department of Transport, GNCTD*,²⁴ the Court considered the difference between the judgements rendered in *Harji Engg.* and *Peak Chemicals* while analysing the effect of the inordinate delay in passing an award. While explicitly stating that there exists a contradiction between the two judgements, the Court did not distinguish between the two. Although, from a bare reading of these recent judgements, it can be ascertained that the Court did not notice nor refer to the Division Bench judgement in *BWL Ltd.*

These three succeeding judgements relied upon the principle propounded in *Harji Engg.* However, certain interesting observations can be culled out from *Gian Gupta* and *Fibroplast* such that (1) clarificatory hearings held by the Tribunal may be a sufficient reason for the delay in passing of the award, but such clarification should appear in the award, and (2) Tribunal may be seized of the contentions of the parties even after a considerable time gap if written submissions had been filed by the parties.²⁵

Effect of ‘Clarificatory Hearings’ and ‘Written Submissions’

A Tribunal, under Section 19 of the 1996 Act, has the authority and discretion to decide the procedure it wants to follow in conducting the arbitral proceedings. The Tribunal must use This discretion sparingly while holding Clarificatory Hearings post the Final Arguments. The award must reflect the clarifications that had been sought by the Tribunal.²⁶

In the event where written submissions had been filed then it may be possible for the Tribunal to remember and consider the arguments or contentions made by the parties during the oral hearing. A question arises as to whether the filing of written submissions enables the Tribunal to delay the passing of the award. As already discussed, the Court in both *Harji Engg.* and *BWL Limited* has held that the Tribunal on account of delay may forget the contentions of the Parties. But this is coupled with the fact that delay by itself defeats justice even if the Tribunal remembers the contentions.

²² *Gian Gupta v MMTC Ltd* 2020 SCC OnLine Del 107.

²³ *Director General, Central Reserve Police Force v Fibroplast Marine Pvt. Ltd* 2022 SCC OnLine Del 3274.

²⁴ *Department of Transport, GNCTD v Star Bus Services Pvt. Ltd.*, 2023 SCC OnLine Del 2890.

²⁵ *Fibroplast* (n 12) (38/9).

²⁶ *MMTC* (n 11) (17/8).

Therefore, in *Fibroplast Marine*, though it was noticed by the Court that no written submissions were filed post-oral hearing for the reference by the Tribunal, it may not have much bearing on the outcome of a challenge to the award. Such reasoning is based on the well-settled point of law that delay defeats justice.²⁷ This principle has been affirmed by the Court in *Star Bus Services* wherein the Court reached the same conclusion as in *Harji Engg.* Though written submissions were filed.²⁸

Conclusion

The scope of challenge to an award under Section 34 of the 1996 Act, is narrow. However, the judgements of the Court, as discussed above, are clear regarding the effect of undue delay in the publishing of the award. Undue delay without any satisfaction vitiates the arbitral award under the public policy of India.

Although, the Division Bench judgement in *BWL Limited* was passed before the 2015 amendment to the 1996 Act, the principles of law laid down concerning the delay in passing of an award by a Tribunal have been followed by the Court in judgements following the 2015 amendment to the 1996 Act. Interestingly, the Supreme Court has not yet discussed in detail this facet of a challenge to an award under Section 34. Further, the period post which an award is said to have been passed after an undue delay has not been defined or set in any of the above-stated judgements.

Although the Division Bench in *BWL Limited* did not agree with the reasoning in *Peak Chemicals*, the Division Bench did not deal with the legitimate concern raised in the latter regarding the time and cost of arbitration, which are crucial factors when considering whether an award should be set aside under Section 34 on the ground of undue delay in passing it. Albeit it must be noted that the Courts in the above-stated judgements have consistently held that the delay has to be considered in the light of the facts and circumstances surrounding each case.

Based on the above discussion, the authors are of the view that the delay in passing of an award, which has not been satisfactorily explained by the Tribunal, vitiates the award.

²⁷ *Kunwar Singh v Sri Thakurji Maharaj* 1995 Supp (4) SCC 125; *Bhagwandas Fatechand Daswani v HPA International* (2000) 2 SCC 13; *Anil Rai v State of Bihar* (2001) 7 SCC 318; *Kanbaiyalal v Anupkumar* (2003) 1 SCC 430.

²⁸ *Star Bus Services* (n 13) (16/4).