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ARBITRATION IN INDIA AND COURTS JURISDICTION OVER IT

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ABSTRACT

The Arbitration may be explained as a process in which two or more parties settle their disputes as to their legal rights and liabilities by referring the dispute to a particular person (the arbitrator), who decided the dispute with a binding effect and by applying the law, instead of the parties going to the Court of law. Arbitration is an alternative process of solving disputes, and hence, it coexists with the system of litigation. The main objective of having an arbitration proceeding is to solve the dispute as fast as possible, which also has a binding effect, without going to the Court of law and getting engaged in the long-drawn judicial proceedings. In India, the alternative method of solving disputes has been present for a long time, since trade and commerce started to grow outside the country.

INTRODUCTION

There is abundant material on purpose, intent and resolution of the legislature when the Arbitration and Conciliation Act, 1996 ("the Act") framed. There is also adequate information on the amendment to the Act in 2015. Over two decades, since the time the Act has come into effect read with amendments from time to time, arbitration undeniably has evolved to a great extent.

There is an internationally accepted principle in arbitration of "kompetenz-kompetenz" (The power of the arbitrator to determine his competence in arbitrating the dispute at hand) to enable the arbitrators to rule on their jurisdiction. The said principle though not applicable with same vigor across the world, the concept of the same is absolute alien in India. This article seeks to highlight how over a period a balance has been created vis-à-vis judicial intervention and arbitration.

Before 1996, India had three enactments which governed the process of arbitration. These were the Arbitration (Protocol and Convention) Act, 1937, the Arbitration Act, 1940, and the Foreign Awards (Recognition and Enforcement) Act, 1961. These legislations never restricted the disputing parties to approach the Court at any stage they felt like. There was also a lot of interpretational reciprocation between the three acts, which meant that it was difficult to achieve efficiency and speed in disposing of the disputes.

Following much inducement from various bodies, in 1996, the Government introduced the Arbitration and Conciliation Act, 1996, which was based on the United Nations Commission on International Trade Law (UNCITRAL) Model Law. This ensured that there was a certain level of uniformity in the law. After this Act had been introduced, it restricted the situations in which the disputing parties could approach the Court and the Act also provided genuine and legitimate powers to Arbitrational Tribunals.

Further, considering the underlying principle of the passing of the Act was to reduce the burden of the Courts in India and not to keep them outside the purview of the Act altogether. On the plain reading of the Act, it is perused that at several stages of arbitration proceedings the Courts are requested to perform the server-side work. Further, arbitration does not end with the passing of an award, since, the Act provides for recourse to Courts in case if any party wants to challenge the same.

In Copper-Lavalin SA/NV v Ken-Ren Chemicals and Fertilizers Limited[2], which was decided before the Arbitration Act, 1996 (United Kingdom) was enacted, a distinction was drawn between three groups of measures that involve the court in arbitration, the first being purely procedural steps which an arbitral tribunal cannot order or cannot enforce (e.g. issuing a witness summons to a third party), the second being designed to maintain the status quo (e.g. the granting of an interim injunction) and the third being designed to ensure the award has its intended practical effect by providing a means of enforcement if the award is not voluntarily complied with.

Section 2(1)(e) of the Act defines Court as under:-

"Court" means--

(i) in the case of arbitration other than international commercial arbitration, the Principal Civil Court of original jurisdiction in a district, and includes the High Court in the exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, but does not include any Civil Court of a grade inferior to such principal Civil Court, or any Court of Small Causes;

(ii) (ii) in the case of international commercial arbitration, the High Court in the exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions

> forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, and in other cases, a High Court having jurisdiction to hear appeals from decrees of courts subordinate to that High Court;

The definition of Court in Section 2(1)(e) has been altered into two sub-parts. Part (i) includes cases other than international commercial arbitration and Part (ii) includes the court for international commercial arbitration.

It was held in S.M. Suparies v Karnataka Bank Limited[3] that District Courts are deemed to be principal civil courts of original jurisdiction. The Principal Civil Judge of the District alone has jurisdiction to decide questions forming the subject-matter of arbitration and not any other judge.

In the matter of an application for setting aside an award, it has been held that the Civil Court at Calcutta is not the Principal Civil Court of Original Jurisdiction for the city of Calcutta. It is a civil court of inferior grade. It does not come within the definition of Court. Only the High Court has jurisdiction to entertain an application under the Act. [4]Thus, only a Principal Civil Court in a district having original jurisdiction and includes High Court having original jurisdiction can entertain questions involving arbitration.

The question then arises is can a Supreme Court be construed within the definition of "court"?

It was held in State of West Bengal v Associated Contractors[5], in no circumstances can the Supreme Court be "court" for Section 2(1)(e) and whether the Supreme Court does or does not retain seizing after appointing an arbitrator, the application will follow the first application made before either the High Court has original jurisdiction in the State or a Principal Civil Court having original jurisdiction in the district, as the case may be.

Thus, the Act contains a narrow definition of the Court. By virtue thereof, the hierarchy that is otherwise required to be followed in normal suits by any party which eventually gets prolonged to litigation is not applicable in arbitration.

SECTION 5 - 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.

An arbitration agreement is a contractual undertaking by which the parties agree to settle certain disputes by way of arbitration rather than by proceedings in court. When a dispute arises, however, one of the parties may nevertheless commence court proceedings either because he challenges the existence or validity of the arbitration agreement or because he means to breach it. Now the judicial authority has not been defined under the Act. However, under Black`s Law Dictionary Judicial authority means "the power and authority appertaining to the office of a judge; jurisdiction; the official right to hear and determine questions in controversy."[7]

The aforesaid provision bars the jurisdiction of courts to interfere or to intervene in arbitration proceedings except to the extent provided in Part I. Part I provides for the intervention of Courts in the following cases:

i. Section 8- Referring to a pending suit;

ii. Section 9- Passing interim orders;

iii. Section 11- Appointment of Arbitrators;

iv. Section 14(2)- Terminating mandate of an arbitrator;

v. Section 27- Court assistance in taking evidence;

vi. Section 29A-Time-limit for the arbitral award.

vii. Section 34- Setting aside an award;

viii. Section 37- Entertaining appeals against certain orders and

ix. Section 39(2)- Directing delivery of the award.

SECTION 8 - POWER TO REFER PARTIES TO ARBITRATION WHERE THERE IS AN ARBITRATION AGREEMENT

1. A judicial authority, before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party to the arbitration agreement or any person claiming through or under him, so applies not later than the date of submitting his first statement on the substance of the dispute, then, notwithstanding any judgment, decree or order of the Supreme Court or any Court, refer the parties to arbitration unless it finds that prima facie no valid arbitration agreement exists.

2. The application referred to in sub-section (1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof.

[Provided that where the original arbitration agreement or a certified copy thereof is not available with the party applying for reference to arbitration under sub-section (1), and the said agreement or certified copy is retained by the other party to that agreement, then, the party so applying shall file such application along with a copy of the arbitration agreement and a petition praying the Court to call upon the other party to produce the original arbitration agreement or its duly certified copy before that Court.]

3. Notwithstanding that an application has been made under sub-section (1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made.

There is no power under the section to pass an order restraining arbitral proceedings. There is no question of the court acting under Section 8 restraining arbitration from commencing or continuing. The aforesaid section is intended to achieve a converse result.[8]

However, the arbitration agreement does not oust the jurisdiction of the courts by itself. Where no party comes forward to object to the suit, the arbitration agreement becomes ousted. A suit would not affect the arbitration proceeding if it is pending or even commenced. Such proceedings can take place and an award made. At the same time, the initiation of arbitration proceedings during the pendency of a civil suit is not barred. The civil court cannot restrain such proceedings.

Section 8 is a facilitative provision in the Act. The aforesaid section enables the Court to refer the parties to the arbitration and encourage them to settle their disputes through the modes covered under this Act.

SECTION 9 - INTERIM MEASURES ETC. BY COURT

(1) A party may, before, or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced under section 36, apply to a court-

i. for the appointment of a guardian for a minor or person of unsound mind for arbitral proceedings; or

ii. for an interim measure of protection in respect of any of the following matters, namely:-

a. the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;

b. securing the amount in dispute in the arbitration;

c. the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party or authorizing any samples to be taken or any observation to be made, or experiment to be tried, which may be necessary or expedient for obtaining full information or evidence;

d. interim injunction or the appointment of a receiver;

e. such other interim measure of protection as may appear to the Court to be just and convenient and the Court shall have the same power for making orders as it has for, and about, any proceedings before it.

[(2) Where, before the commencement of the arbitral proceedings, a Court passes an order for any interim measure of protection under sub-section (1), the arbitral proceedings shall be commenced within ninety days from the date of such order or within such further time as the Court may determine.

(3) Once the arbitral tribunal has been constituted, the Court shall not entertain an application under sub-section (1), unless the Court finds that circumstances exist which may not render the remedy provided under section 17 efficacious.

The purpose of enacting the aforesaid provision is to protect the rights of the parties under adjudication from being frustrated. Section 9 implies existence, subsistence or manifestation of an arbitration agreement to give effect to "before or during arbitral proceedings".

WHEN SHOULD AN APPLICATION UNDER SECTION 9 BE ADMISSIBLE?

The Madras High Court in its decision in NEPC India Limited v Sundaram Finance Limited[9] held that an interim relief could not be availed of unless there was some manner of proceeding pending under the Act. However, the aforesaid decision was revered by the Apex Court on appeal stating that relief can be provided in such cases though arbitral proceedings have not been commenced provided there is proof of the fact that the party seeking relief means to commence arbitral proceedings.

WHEN SHOULD AN APPLICATION UNDER SECTION 9 BE NOT ADMISSIBLE?

Section 9 does not permit any or all applications. It only permits applications for interim measures mentioned in clauses (i) and (ii) above. For instance, the provision of section 9 was not allowed to be invoked to seek a stay of arbitral proceedings. The court said that such relief could have been obtained from the Tribunal itself and not from the court.[10] Interim relief can be obtained from the court to whose jurisdiction the arbitration agreement is subject.[11]

The Act provides for the intrusion of the Court in the circumstances referred to in Section 9, which is but inevitable. It was impertinent for the legislature to supplement this provision under the Act,

since, the Courts have been given the power to provide the remedy which is otherwise not available.

The Law Commission in its Report bearing No. 246 dated August 2014 stated that the arbitration proceedings are becoming a replica of the Court proceedings despite Chapter V of the Act which provides for adequate powers to the Arbitral Tribunal. Hence, the legislature while amending the Act made provision to give power and authority to the Arbitral Tribunals to deal with the issues and avoid delays.

Further, the new amendment makes a leeway for disclosures[12] that shall be sought by the Supreme Court or the High Court or the person or institution designated by such court, before appointing an arbitrator under Section 11(8).

An arbitration agreement existed between two foreign companies. A dispute occurred between them. A former judge of the Supreme Court was appointed as a sole arbitrator in terms of the agreement.[13]

Under Section 14 of the Act, the mandate of an arbitrator shall terminate and he shall be substituted by another arbitrator for the reasons mentioned therein. Further, if the controversy remains concerning any of the grounds referred to in Section 14(1)(a), a party may unless otherwise agreed by the parties, apply to the Court to decide on the termination of the mandate.

Section 17, the party may during the arbitral proceedings or at any time after the making of the arbitral award but before it is enforced by Section 36 apply to the arbitral tribunal for such reliefs as stated therein.

SECTION 27- ASSISTANCE OF THE COURT IN TAKING EVIDENCE

The Tribunal may by itself, or any party with the approval of the Tribunal, apply to the court for assistance in taking evidence. The application has to specify the particulars as stated in Section 27.

Under Sections 11, 14, 17 and 27, the Courts come into picture when the arbitral proceedings are found difficult to commence or continue. The Courts under the play of section 11 reassure parties to continue with the mode of settlement of disputes through arbitration.

SECTION 29-A- TIME LIMIT FOR ARBITRAL AWARD

The aforesaid section interalia provides that the award shall be made within 12 (twelve) months from the date the tribunal enters upon the reference. If the award has been made within 6 (six) months from the date the arbitral tribunal shall be entitled to receive such amount of additional fees as the parties may agree.[14] The parties may, by consent, extend the period specified in sub-section (1) for making an award for a further period not exceeding six months[15]. If the award is not made within the period specified in sub-section (1) or the extended period specified under sub-section (3), the mandate of the arbitrator (s) shall terminate unless the Court has, either before or after the expiry of the period so specified, extended the period. Provide that while extending the period under this subsection, if the Court finds that the proceedings have been delayed for the reasons attributable to the arbitral tribunal, then, it may order reduction of fees of arbitrator(s) by not exceeding 5% for each month of such delay.[16]

The insertion of Section 29-A according to an amendment in 2015, gives the parties to arbitration a leeway to seek an extension for the maximum period of 6 months after the expiry of 12 months. However, the extension of the period referred to in sub-section (4) may be on the application of any of the parties and may be granted only for sufficient cause and on such terms and conditions as may be imposed by the Court. Further, it shall be open to the Court to impose actual or exemplary costs upon any of the parties under this provision.

On the bare perusal of the newly inserted section 29-A, it is observed that the proceedings initiated to settle the disputes through arbitration are not to be taken frivolously. The power is given to the Courts to disable the parties from prolonging the arbitral proceedings and assist the party filing the arbitration petition to acquire prompt result.

SECTION 34- SETTING ASIDE AN AWARD

Even though Section 34 provides recourse to a court against the arbitral award that may be made only by an application for setting aside the same following sub-section (2) and sub-section (3) of Section 34, every award is nonetheless challenged before the Court. However, there are limitations attached to the court concerning the extent to which it can decide matters of arbitration. The Court

approached for setting aside cannot sit as a court of appeal and disturb the findings of fact recorded by the arbitrator after considering all the materials or record.[17]

On a bare perusal of Section 34, it is observed that the Court can set aside the award in the following circumstances: -

i. For the reasons mentioned in Section 34(2)(a)(i) to (v);

ii. For the reasons stated in Section 28(1)(a);

iii. For the reasons stated in Section 34(2)(b)(ii) on the ground of conflict with the public policy of India, that is to say, if it is contrary to:

a. Fundamental policy of Indian law; or

b. The interest of India; or

c. Justice or morality; or

d. If it is patently illegal.

iv. for the reasons stated in Section 13(5) and 16(6).

The Supreme Court stated that the requirement that adjudication authority must apply its mind can also be described as a fundamental policy of Indian law. The arbitrators committed error resulting in miscarriage of justice. They failed to appreciate and draw logical inference from proved facts. The award became liable to be interfered with.[18]

APPEALS (SECTIONS 37 AND 50)

The aforesaid section provides for an appeal that may lie in respect of the orders passed by the Arbitral Tribunal.

Section 50 deals with orders which are appealable. Section 50(2) bars a second appeal against the appellate order passed u/s 50. However, the right to appeal to the Supreme Court is not affected.[19]

Jurisdiction vis-à-vis enforcement of Foreign Awards-Section 42

Notwithstanding anything contained elsewhere in this Part or any other law for the time being in force, where for an arbitration agreement any application under this Part has been made in a Court, that Court alone shall have jurisdiction over the arbitral proceedings and all subsequent applications arising out of that agreement and the arbitral proceedings shall be made in that Court and no other Court.

The context of section 42 starts with a non-obstante clause which does away with anything which may be inconsistent with the section either in Part I of the Act or any other law for the time being in force.[20] The expression "concerning an arbitration agreement" widens the scope of section 42 to include all matters which directly or indirectly pertain to an arbitration agreement. Further, the context of the aforesaid Section is merely to see that one court alone shall have jurisdiction over all the applications for arbitration agreements, which context does not in any manner enable the Supreme Court to become a "court" within the meaning of Section 42. It has been aptly stated that the rule of forum convenient is expressly by Section 42.[21]

TYPES OF ARBITRATION PROCEDURES

There are two main types of arbitration procedures. These are-

Ad- Hoc Arbitration

Institutional Arbitration

Ad-Hoc Arbitration

Ad-Hoc Arbitration can be defined as a procedure of arbitration where a tribunal disputed parties will come together and conduct arbitration between the parties, following the rules which have been agreed by the party beforehand or by following the rules which have been laid down by the tribunal, in case the parties do not have any agreement between them. However, there are no hard and fast rules, as different parties may choose to follow different rules, for instance, the rules laid by the trade union t which the disputing parties belong.

One peculiarity regarding the process of ad-hoc arbitration is that the disputing parties would choose arbitrator of their own choice, and then those arbitrators would appoint another arbitrator by deciding among themselves. For the sake of convenience, these arbitrators would appoint the presiding arbitrator, who is senior to both of them. Many parties prefer to choose retired judges of the High Courts or the Supreme Courts as the presiding arbitrator, keeping various factors in mind like the quantum of the claim, the complexity of the dispute, etc.

Now, there is a drawback in this procedure. With the parties generally preferring senior judges as arbitrators and given their limited number, sometimes it takes as long as a whole year to get over with the arbitration proceeding. Therefore, it beats the whole purpose of the arbitration proceeding, which was meant to be quick and efficient in solving the dispute between the parties.

INSTITUTIONAL ARBITRATION

With the growth of the economy, trade and commerce developed. This was true for the Indian market also. With the enlargement of the economy and investment into the Indian market by the foreign investors, demand for institutional arbitration shot up suddenly. Despite the rising demand for institutional arbitration, the growth of institutional arbitration procedures has been slow.

But in recent times, prestigious institutional arbitration association like the London Court of International Arbitration, The Permanent Court of Arbitration and the International Chamber of Commerce have opened Centers in India. This could be seen as a very positive sign because these institutes are very well-known and prestigious and wouldn't have opened Centers in India if they did not see potential growth in Institutional arbitration.

In the case of Institutional Arbitration, the disputing parties submit their issue to an institution that has been designated to administer the arbitrational process. The institution then arbitrates the dispute according to the rules laid by them in front of the parties. Although, the dispute is not arbitrated by the institution. The institute selects a panel which administers the whole process.

All the institutes do not provide the same type of services. Some institute just provides the guidelines and the rules on which the procedure will be based (London Maritime Arbitration

Association). Other provide a roster of arbitrators to the parties but do not appoint the arbitrators themselves (Society of Maritime Arbitrators in New York).

Certain institutions administer the whole process of arbitration (International Court of Arbitration of the International Chamber of Commerce).

The growth of institutional arbitration mechanism is inevitable. Also, the support of the Courts to the institutional arbitration mechanism gives it a huge boost. The Arbitration and Conciliation Act, 1996 provide it with a lot of stability and uniformity, and it is at par with international standards of arbitration, which will surely be very beneficial for the institutional arbitration mechanism in the long run.

CONCLUSION

The Supreme Court in F.C.I v Joginderpal Mohinderpal at paragraph 7 observed-

"We should make the law of arbitration simple, less technical and more responsible to the actual realities of the situation, but must be responsive to the canons of justice and fair play and make the arbitrator adhere to such process and norms which will create confidence, not only by doing justice between the parties but by creating a sense that justice appears to have been done."

The Law Commission in its Report bearing No. 246 dated August 2014 highlighted that the paradox of arbitration is that it seeks the co-operation of the same public authorities from which it wants to set itself free. Hence, when the amendment to the Act was brought in the year 2015, a balance of the powers of the courts and arbitral tribunal was sought. Whether the purpose of the legislation in passing the Act (amendment of 2015) is served or defeated is a question that may be answered over some time. There have been a great many cases in making (some are made already) and some more will be required to equal an award to the decree of the Court and bring the matters in dispute to a necessary conclusion with the limited intrusion of the Court.

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