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THE JUDICIAL INTERVENTION IN ARBITRATION

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Being dynamic is the nature of law and the law changes with the changing need of the society. Arbitration between parties has been the way to settle disputes in historical times as well and the same has come to the forefront in the present scenario where courts have upheld that in certain cases and disputes, amicable settlement is the better solution than the long and formal court procedures. Arbitration is thus the best method of resolving disputes in cases where a negotiation would be a better resort and solution.
However, there needs to be a body to regulate the procedures of arbitration. The procedures range from selecting the arbitration panel to executing the award of the arbitration panel. The Indian law here has included the judicial bodies in the arbitration law so that the same can regulate the arbitration proceeding. However, in the practical world, there are times when the Court intervenes in arbitration proceedings to the extent that the entire purpose of having an arbitration proceeding fails and it is therefore important to draw a line as to the role of the Court in arbitration proceedings. This notes highlights the role to be played by the Indian Courts in arbitration proceedings and concludes on the justification of the role of the Court.

INTRODUCTION

Ab When we date back to the history, we see the real purpose behind passing an act for alternate dispute resolution methods. Seeing the ever rising number of pending cases in India, there was a need for an alternate method of dispute resolution and that took form in the Arbitration and Conciliation Act, 1996. One of the main objectives of enactment on Arbitration and Conciliation in 1996 is minimising the supervisory role of the courts in arbitral process. The Statement of Objects and Reasons contained in the Arbitration and Conciliation Bill, 1995 emphasized the objective of minimisation of the interference of the courts in arbitration process. In accordance with the provisions of the Arbitration and Conciliation Act, 1996, the interference of the courts is very limited in matters relating to arbitration except in specified circumstances as compared to the old Act, of 1940. After amending the 1940 Act, the judicial intervention was limited to places where it was very much required. Moreover, the interference of the courts can be termed as court assistance instead of saying court interference. This project will show how the interference is actually assistance since there are some provisions in the Act which requires the assistance of the Court for efficient functioning. The Court will not come in the way of arbitration matters at all from the commencement of arbitration proceedings till the arbitral award is made. [1] Section 5 of the Act, 1996 provides for the extent of judicial intervention which says that "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".. Therefore, the judicial intervention has been restricted and minimised in the arbitration laws for India. Under Section 5, the words used are "Judicial Authority" which is a wider term than the word "Court" and judicial authority includes all such authorities/agencies conferred with the judicial powers of the Government.

Arbitration is a process of settling disputes in the commercial sphere and is well known to the Indian system of justice. It is an old practice through which the panchayats in villages would settle disputes between the parties. [2] The main objective of the Arbitration Act is to minimize the supervisory role of courts in the arbitral process and to provide that every final arbitral award is enforced in the same manner as if it were a decree of the Court. Litigation in India is generally time-consuming and expensive. Civil courts in India are typically bogged down with delays[3]. An estimated backlog of 30 million cases and routine delays to dispose of a single case has severely undermined public confidence in the rule of law.[4]

Justice delayed is justice denied and there have been number of cases when the petitioner or the defendant does not live to see the judgment. The entire purpose of judiciary fails if the cases take years for a judgement. For this, arbitration was suggested as a measure to dispose of cases at a speedy rate. India has an effective arbitration law in place. It is a mechanism used by the parties to resolve disputes in their commercial as well as non-commercial transactions. In Arbitrations, disputes are resolved with binding effect, by a person or persons acting in a judicial manner in private, rather than by a national court of law. The decision of the arbitral tribunal is usually called an Award. The courts shall not interfere in arbitral proceeding is one of the fundamental theme underlying the Act. Indeed the Act contemplates three situations where judicial authority may intervene in arbitral proceedings.

In this situation, arbitrations are becoming increasingly popular where the parties have the hope of avoiding the judicial system. There are other reasons to support recourse to arbitration too. For international transactions, arbitration offers the hope of reducing bias and the prospect of parallel lawsuits in different countries. There may also be the expectation (warranted or not) of confidentiality, speed and expertise. Just as the proof of the pudding lies in the eating, the efficacy of any legislation must be judged by its implementation. Unfortunately, insofar as the 1996 Act is concerned, the reality has been far removed from the ideals professed by

the legislation. The current practice is certainly a far cry from that envisaged by the objectives of the Act. The general assumption is that arbitral awards should be final and binding, and open to limited challenge before the Court.[5]

Thus, the Arbitration and Conciliation Act, 1996 came up. The primary purpose of the 1996 Act was to encourage arbitration as a cost-effective dispute resolution mechanism, reflected in the preamble to Act. Thus, the 1996 Act was constructed to provide a modern arbitration instrument respecting both the New York Convention and the UNCITRAL Modern Law on International Commercial Arbitration (the "Model Law"). Indeed, it not only acknowledges the importance of the Model Law but also recognizes the need for uniformity in arbitration legislation throughout the world.

Arbitral autonomy largely depends on the degree in which the courts involve themselves in the arbitration process. Yet, arbitration should not be entirely impervious to court assistance for its very efficacy may sometimes depend on the involvement of the courts. Be it through an order to compel arbitration, the designation of arbitrators, or even the issuance of conservatory measures, courts often help effectuate arbitral justice. However, there are certain provisions in the Act [6] which require the assistance of the Court. Thus, the difference between assistance and interference has to be understood. The Act involves the Court in the following sections and provisions which have been discussed below:

SECTION 9: INTERIM MEASURES, ETC., BY COURT

"A party may, before, or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with section 36, apply to a court-

(i) For the appointment of a guardian for a minor or person of unsound mind for the purposes of arbitral proceedings; or

(ii) For an interim measure of protection in respect of any of die 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 die 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 part or authorising any samples to be taken or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of 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 the purpose of, and in relation to, any proceedings before it."

Under section 9 of the Act, 1996 interim relief may be sought by a party before or during arbitral proceeding or any time after the making of the award but before the enforcement of the award. As in the case of actions brought by the people before courts for interim orders pending passing of the final order, the parties to the arbitration agreement may seek interim reliefs or orders pending final arbitral award by the arbitral tribunal, for the purposes as provided in the Act, 1996 by making an application. The provisions of Section 9 of the Act, 1996 are on the lines of Article 9 of the UNCITRAL Model Law and also Section 41 of old Act, 1940.[7]

The court has the power to issue interim orders as it issues orders in the ordinary civil suits. The court is not having power to issue orders for staying or suspending the arbitration proceedings during the period when the application for interim reliefs is pending. The court will not interfere if the parties commence the arbitration proceedings and the arbitrators give the arbitral award. It may be noted that the application can be made before the court even before commencement of arbitration proceedings in accordance with the provisions of Section 21 of the Act, 1996, as held in Sundaram Finance Limited Vs. NEPC India Limited[8]. However, the court has to be satisfied that there is a valid arbitration agreement is existence and applicant intends to take the dispute to arbitration. In the case Bhatia International Vs Bulk Trading S. A. & Anr[9], it was held that while examining a particular provision of a statute to find out whether the jurisdiction of a Court is ousted or not, the principle of universal application is that ordinarily the jurisdiction may not be ousted unless the very statutory provision explicitly indicates or even by inferential conclusion the Court arrives at the same when such a conclusion is the only conclusion.

SECTION 11: APPOINTMENT OF ARBITRATORS

After the Amendment 2015, [10]the Supreme Court, High Court or any person or institution designated by such court have been given the power to appoint the arbitrators in cases of parties failing to decide the arbitrators.

Parties desirous of referring their dispute are at full liberty to appoint the arbitrators of their choice. The number of arbitrators shall not be even number. If the parties do not agree on the procedure for appointment of arbitrator or arbitrators, each party shall appoint an arbitrator and the two appointed arbitrators shall appoint the third arbitrator who shall act as the presiding Arbitrator, in arbitration with three arbitrators.

In case of failure on the part of a party to appoint his arbitrator within 30 days from the receipt of the request to do so from the other party or the two appointed

arbitrators fail to agree on the third arbitrator within 30 days from the date of their appointment, the appointment shall be made upon request of a party, by the of High Court (in case of domestic arbitration) or any person or institution designated by him or Supreme Court (in case of international commercial arbitration) or any person or institution designated by him.

SECTION 27: COURT ASSSISTANCE IN TAKING EVIDENCE

The arbitral tribunal, or a party with the approval of the arbitral tribunal, may apply to the Court for assistance in taking evidence. The application shall specify the raises and addresses of the panics and the arbitrators, the general nature of the claim and the relief sought, the evidence to be obtained, in particular,- the name and addresses of any person to be heard as witness or expert witness and a statement of the subject- matter of the testimony required; the description of any document to be produced or property to be inspected. The Court may, within its competence and according to its rules on taking evidence, execute the request by ordering that the evidence be provided directly to the arbitral tribunal. The Court may, while making an order under sub- section (3), issue the same processes to witnesses as it may issue in suits tried before it. Persons failing to attend in accordance with such process, or making any other default, or refusing to give their evidence, or guilty of any contempt to the arbitral tribunal during the conduct of arbitral proceedings, shall be subject to the like disadvantages, penalties and punishments by order of the Court on the representation of the arbitral tribunal as they would for the like offences in suits tried before the Court. In this section the expression" Processes" includes summons and commissions for the examination of witnesses and summonses to produce documents.

Thus, the Court assists the tribunal in taking assistance and the Court shall also punish the ones who act in contempt of the same. [11]

SECTION 34: APPLICATION FOR SETTING ARBITRAL AWARD

The Act finds way to the court in cases where applications have to be filed for setting aside arbitral award. Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with the Act. An arbitral award may be set aside by the Court only if the party making the application furnishes proof that-

(i) a party was under some incapacity, or

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration: Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or

However, there is another provision which allows the Court to set aside arbitral awards. If the Court finds that the subject- matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or the arbitral award is in conflict with the public policy of India, it can set aside the awards. 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. An application for setting aside may not be made after three months have elapsed from the date on which die party making that application had received the arbitral award or, if a request had been made under section 33, from the date on which that request had bow disposed of by the arbitral tribunal, provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter.

On receipt of an application under sub- section (1), the Court may, where it is appropriate and it is so requested by a party, adjourn the proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of arbitral tribunal will eliminate the grounds for setting aside the arbitral award. [12]

SECTION 36: ENFORCEMENT

The Court shall consider the application for grant of stay in the case of an arbitral award for payment of money, have due regard, to the provisions for grant of stay of a money decree under the provisions of the Code of Civil Procedure, 1908. On application, the Court may grant stay of the operation of such award for reasons to be recorded in writing. [13]

These are most of the provisions where the intervention of the Court can clearly be seen. However, this has to be the perspective of an individual to consider it as interference or assistance.

Among all the sections in the Arbitration and Conciliation Act, 1996, Section 34 is the most controversial one which attracts the attention of all the jurists and legal experts. Section 34(2)(b) of the Act mentions that :

"An arbitral award may be set aside by the Court only if 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.

After the Arbitration and Conciliation Amendment Act, 2015, the explanation for the above has been substituted and it now says that for the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if, the making of the award was induced or affected by fraud or corruption or was in violation of Section 75 oor Section 81 or of if it is in contravention with the fundamental policy of Indian law or it is in conflict with the most basic notions of morality or justice. Another explanation says that for avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian Law shall not entail a review on the merits of the dispute.

The Hon'ble the Supreme Court, on a number of occasions has held that a suit can be filed in a court in India challenging a foreign award passed by an arbitrator in a matter concerning International Commercial transactions if the award is against the 'public policy' and in contravention of statutory provisions. It is always in the domain of the judiciary to interpret the public policy at a given point of time. In the historic ruling of Renusagar Power Co. v. General Electrical Corporation[14] , the Supreme Court construed the expression "public policy" in relation to foreign awards as follows:

"This would mean that "public policy" in Section 7 (1) (b) (ii) has been used in narrower sense and in order to attract to bar of public policy the enforcement of the award must invoke something more than the violation of the law of India.. Applying the said criteria it must be held that 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."[15]

In its later judgment of Oil & Natural Gas Corporation v SAW Pipes[16], the apex court addressed a challenge to an Indian arbitral award on the ground that it was "in conflict with the public policy of India". The said decision has been followed in a large number of cases. Despite precedent suggesting that "public policy" be interpreted in a restrictive manner and that a breach of "public policy" involves something more than a mere violation of Indian law, the Court interpreted public policy in the broadest terms possible. The Court held that any arbitral award which is violate of Indian statutory provisions is "patently illegal" and contrary to the canons of "public policy".

The doctrine of public policy undoubtedly is governed by precedents. Its principles have been crystallised under different heads. In Patel Engineering case[17], the Supreme Court has sanctioned further court interventions in the arbitral process. It was held that the Chief Justice, while discharging this function, is entitled to adjudicate on contentious preliminary issues such as the existence of a valid arbitration agreement and the Chief Justice's findings on these preliminary issues would be final and binding on the arbitral tribunal.

In the Venture Global case [18], the consequences are far reaching for it creates a new procedure and a new ground for challenge to a foreign award not envisaged under the Act. The new procedure is that a person seeking the enforcement of a foreign award in India has not only to file an application for enforcement under Section 48 of the Act, it has to meet an application under Section 34 of the Act seeking to set aside the award. The new ground is that not only must the award pass the New York Convention grounds incorporated in Section 48, it must pass the expanded "public policy" ground created under Section 34 of the Act.[19]

When nothing seems to work out in India, the organ which leads the forefront is judicial wing of the state. Momentous in this regard is to analyze the recent trends in judicial intervention in the arbitral awards in the era of globalization. The basic purpose of arbitration is to bring about cost-effective and expeditious resolution of disputes and further preventing multiplicity of litigation by giving finality to an arbitral award. The article ambidextrously and comprehensively analyzes India's Commitment and challenge to the International Arbitration in the era of globalization when the investment by the foreign entities is at the peak.

Designed to echo the Model Law, the 1996 Act was tailored to assist India in complying with its international obligations under the New York Convention. However, in addressing both domestic and international commercial arbitration in the same legislation, the Act has faced obstacles. In certain key provisions, the text of the 1996 Act has also veered away from the text of the Model Law. The result has been that over the years, Indian courts have rendered a myriad of decisions that are often blatantly inconsistent with each other and with the letter of the law.

Additionally, in many instances, these courts reached conclusions that were most likely never intended by the drafters of the 1996 Act or the Model Law. [20]To facilitate international commercial arbitration in India, domestic courts would need to take a more pro-arbitration approach, while following the limits and scope recommended by the Model Law. If the 1996 Act is based on the Model Law as its preamble suggests,

these courts should be more sensitive to international arbitration practice.

Indian courts should be mindful that international commercial arbitration was designed as an alternative forum for dispute resolution—a forum to which commercial parties bargaining at arm's length have chosen to resort. As has been demonstrated by this Article, the role of the courts is to assist the arbitration process to the maximum extent possible, and not to take the dispute resolution process away from the arbitral tribunal. If this fundamental notion is heeded, many of the present controversies may be mitigated by the national courts providing due assistance to arbitration.

Following the decision in Bharat Aluminum Co. a foreign award cannot be set aside under Section 34 of Arbitration Act, 1996. This judgment has settled the confusion of applicability of Part I of the Arbitration Act, 1996 to an International Arbitral Award which is seated outside India. In past, the view taken in Bhatia International and Venture Global Engineering by the Apex Court received massive criticism as it allowed the International Awards to be challenged under Section 34 of the Arbitration Act, 1996.

In guise of this settled law, not only were the International Awards challenged under Section 34 of the Act but the parties used to approach the Courts of India for an interim relief under Section 9 of the Arbitration Act and even under Order 39 of Code of Civil Procedure. This approach jeopardized the whole object of the Act as the parties seeking to delay Arbitration proceedings were entertained by the Indian Courts which caused immense prejudice to the opposite parties. Now as a result of this judgment, the foreign awards (passed outside India) cannot be challenged under Section 34 of Arbitration & Conciliation Act, 1996 and the parties seeking to resist the enforcement of the award has to take recourse to one of the grounds provided under Section 48 of the Act. Further, interim remedies under Section 9 of the Act have also been restricted where the Arbitration is seated outside India.

Thus, the intervention of Indian Courts has been minimized to provide a platform for an effective and efficient dispute resolution mechanism. This proactive approach taken by Indian judiciary will be appreciated by jurists all over the world. Thus, we see that assistance must be taken from the Courts but the Courts must not interfere in the proceedings of the Arbitration Tribunals because it would then nullify the purpose of the Arbitration and Conciliation Act, 1996.

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