



ROLE OF JUDICIARY IN INDIAN ARBITRATION

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I. INTRODUCTION

Arbitration is the process of dispute settlement through agreed individual or group if individual done in a private setting after considering evidences and contentions of the parties involved. It is similar to a court trial but is speedy and less formal. Individual or group of individual chosen by the parties to mediate the dispute is/are called Arbitrator/s. Arbitrator is an individual who is neutral to the dispute and has been vested with the power of making binding decision on the parties involved. Alternative dispute resolution processes are gaining immense amount of popularity due to their non-orthodox approach, which gives the advantages of efficacy and consensual decision making. Considering the ever increasing pendency of the cases with the Judiciary of India which has surged 8.6%¹ and drastic shortage of governmental institutes and officials to address them, Arbitration is seen to gain momentum over time. Main reason of why people are avoiding the hassle of litigation is because of its time consuming nature. These factors are pushing people aggrieved with civil wrongs like contractual disputes, towards alternative dispute resolution or Arbitration which comes under the Arbitration & Conciliation Act, 1996 ("**Arbitration Act**").

II. JUDICIAL INTERFERENCE

The Judiciary has played a salient part in encouraging and transforming India into an arbitration friendly nation. Though the Arbitration strives to reach upon a mutually agreed decision without the help Judiciary, still the courts can intervene in different stages of the arbitration process. These stages are:

Before Arbitration process- Section 8 of Arbitration Act mandates the judicial authority to direct the parties to the process of arbitration on the basis of the arbitration agreement between the parties. There are certain conditions mentioned in sub-sections (1) and (2) which were also reiterated in *P. Anand Gajapathi Raju & Ors. v. P. vs G. Raju (Died) & Ors*², are that there should be a an arbitration agreement in the first place and party to the contract must bring an action in front of a court of law against the other party. Also the subject matter of the action in court must be the subject matter of the arbitration agreement i.e., "the suit should be in respect of 'a matter' which the parties have agreed to refer and which comes within the ambit of arbitration agreement."³ This section is peremptory. When there is a dispute regarding the validity of the arbitration clause in the agreement, Supreme Court has explicitly said that the courts should interpret the agreement in such a manner which upholds the arbitration agreement.⁴ Section 45 empowers the judicial authorities to suggest parties for alternate dispute resolution processes and this section also empowers them to restrict the parties to seek arbitration in case when the arbitration agreement is illegal, void or impossible to perform. Section 9 of the Arbitration Act provides interim measures to the party involved in an arbitration agreement by an interim application⁵ before the commencement of the arbitral proceedings. Once the trial commences, the relief granted under this section is invalid unless there are some extraordinary circumstances. Courts can also appoint an Arbitrator under section 11 of the Arbitration Act. It is to kept in mind that the arbitrator appointed by either Supreme Court or High Court should appointed within sixty (60) days from the date on which notice is sent to the other party. Arbitrator appointed should not be related to the cause of the disagreement between the parties.

During the Arbitration process- Section 27 of the Arbitration Act talks about the assistance of court in handling the evidences during an arbitrating proceeding. This assistance can be availed by either the arbitral tribunal or a party with the approval of the tribunal. This power conferred upon the court by the virtue of section 27 is not adjudicatory in nature. Bombay High Court, in the case of *Montana Developers Pvt. Ltd vs Aditya Developers*⁶ stated that section 27 doesn't allows the court to adjudicate upon the validity of an order passed by an arbitral tribunal.

¹ <https://www.prsindia.org/policy/vital-stats/pendency-cases-judiciary#:~:text=As%20of%20April%202018%2C%20there,before%20the%2024%20High%20Courts.>

² (2000) 4 SCC 539.

³ (2003) 5 SCC 531.

⁴ *India Household and Healthcare Ltd. v. LG Household and Healthcare Ltd.*, (2007) 5 SCC 510.

⁵ Section 2(1)(e), Arbitration Act.

⁶ *Arbitration Petition (Lodging) No. 680 v 2016.*

Post Arbitral process- Section 34 grants courts to interfere and overrule arbitral awards. Sub-section 3 of the said section provides the limitation i.e. a court would not entertain an application to set aside an arbitral award if the application is presented after the passage of three (3) months from the date of obtaining of arbitral award. Sub-section 5 states that signed copy of the arbitral award should be delivered to each party, and mere pronouncement of the decision does not account to deemed receipt. When the signed copy is received by the party, it also delivers the rights which the party is entitled till the expiration period counted from the date of receiving the award. Intervention by the court could be done in case when the party was either incapacitated or the arbitration agreement was void since inception. Interference can be justified when the party who initiated the arbitral proceeding were not properly informed or relevant information was concealed from them regarding the appointment of Arbitrator. Abuse of power by the Arbitrator, invalid arbitral procedure, issue not fit for arbitration under the law, etc are certain grounds on which the Arbitral award can be set aside.

III. ANALYSIS OF THE INTERFERENCE

Till now various High Courts and the Supreme Court have not much interfered with the working and have upheld the decisions of passed by the way of Arbitration whenever the decisions were repealed in the court of law. Even when there have been some minute errors in arbitration agreement itself, still the courts have respected the will of the parties by respecting agreement itself. This reflects the intentions of judiciary in respect to arbitration as even when there have been some variations; still the courts have favoured the arbitration agreement. The Supreme Court in the case of *Enercon India Limited & Ors. vs Enercon GmbH & Anr*⁷ has stated that even if there are some errors in the arbitration agreement, still due the respect for the parties' intention regarding the arbitration, the courts can make the agreement workable for that sake despite it having being minor errors.

Whenever there has been an attempt to bypass the arbitral award by the parties, the judiciary has taken pro-arbitration stand and has refused to intervene in the arbitral procedures. The reason of Supreme Court backing the arbitral awards is because of Section 13(1) of Commercial Courts, Commercial Division and Commercial Appellate Division of High Court Act, 2015 ("**Commercial Courts Act, 2015**") as parties appeal against the award under the same section and these kinds of appeal comes under the jurisdiction of Arbitration Act.⁸ An appeal under Commercial Court Act cannot bypass provisions under Arbitration Act which implies that the appeal must be under Arbitration Act.

IV. SETTING UP BOUNDARIES

In the case of *Ravi Arya & Ors vs Palmview Overseas Limited & Ors.*⁹ Bombay High Court passed a decree that while having remedies under Arbitration Act parties cannot ask for an anti-arbitration injunction while overlooking the provisional remedies of Arbitration Act. In this particular case the appellant contended that the appointment of Arbitrator was done without following proper procedure which was agreed upon and was done after conspiring with the opposite party. Court held that the relief of restraining the proceedings of the arbitral tribunal has been guaranteed by Section 12 of the Arbitration Act which cannot be bypassed by the court. The appointment of the Arbitrator can be challenged under section 12 by the party but the court of law cannot intervene by bypassing the Arbitration Act. Supreme Court in the case of *Avitel Post Studioz Limited vs HSBC PI Holdings (Mauritius) Limited*¹⁰ stated two tests when there is an entanglement regarding the allegations of fraud which would make the matter unfit for arbitration. The two tests which need to be applied while considering the question of fraud are as follows:

When it is proved that the Arbitration Agreement is invalid because it only exists due to fraud; or

When there are contentions against the State or its mechanism that there course of action was fraudulent, mala fide or illegal which will change the issue from error or violation of contractual agreement by the parties to an issue of public law.

Thus, by further narrows the scope for parties to avoid arbitration citing fraud, the Supreme Court stated that apart from the cases which pass the abovementioned tests, all the other cases including allegations of fraud will be Arbitrated.

V. ASSUMING THE ROLE OF GUARDIAN

Judiciary has not only dealt with the unsatisfied parties from the Alternative dispute resolution processes but has also observed and acted on the legislative amendments which challenged the very essence of Arbitration Act. One of the examples of this is the recent amendment of Arbitration & Conciliation (Amendment) Act, 2019 which inculcated section 87 which implied that Amendment Act of 2015 was to be applicable prospectively. This denoted that the 2015 amendment which brought Section 36 would be not affect the petition filed against the arbitration award passed after the proceedings which commenced before the date of 2015 Amendment which is 23rd October 2015, under section 34. This brought back the pre-amendment scenario of automatic stay of execution of Arbitral Awards passed through the proceedings which started before 23rd October 2015. This 2019 Amendment which introduced section 87 was incompatible with the judgment of *BCCI vs Kochi Cricket Private Limited & Ors*¹¹. This Amendment was struck down in the case of *Hindustan Construction Company Limited & Anr. vs Union of India & Ors.*¹² by the Supreme Court. With section 87 out of the picture, the judgment passed in the case of *BCCI vs Kochi Cricket Private Limited & Ors*¹³ was rejuvenated once again. Supreme Court read Section 35 which deals with the decisiveness of an award, with Section 34 and 36 which deals with the interference of the court after an award has been delivered to the parties, and stated that it was never the intended that application filed by the party demanding that the award passed should be set aside would automatically stay enforcement of the award in question. It simply meant that application filed by a petitioner seeking setting

⁷ (2014) 5 SCC 1.

⁸ *Kandla Export Corporation & Anr. V. OCI Corporation & Anr.* (2018) 14 SCC 715.

⁹ APPEAL (L) NO. 585 OF 2018 in NOTICE OF MOTION (L) NO. 3049 OF 2018 in SUIT (L) NO. 1676 OF 2018.

¹⁰ 2020 SCC OnLine SC 656.

¹¹ (2018) 6 SCC 287.

¹² (2019) SCC OnLine SC 1520.

¹³ *Supranote 11.*

aside of a decision made by the arbitrator would not automatically facilitate an automatic stay against the enforcement of any arbitral award, not keeping in mind the fact that when the arbitration process commenced.

VI. IS JUDICIARY DOING ENOUGH?

Judiciary is acting as a guardian to make sure that Arbitral proceedings and their awards are not tempered or disturbed by external and even internal forces. Though this is only done in the most judicial way possible which is by passing judgments which favors Arbitration or by upholding the decisions passed through Alternative dispute resolution processes. This will not help India to achieve a status of 'Arbitration hub' which is crucial for not only attracting foreign enterprises but will also help in tackling the inherent problems of the judiciary system in the country. We can say that the judiciary has the right intention but there are still a lot of things to do so that the desired goal can be achieved. These steps can be the following:

Not interfering isn't enough, judiciary must put some efforts in converting ad-hoc arbitration into an institutionalized arbitration which will not only increase the status and standard of arbitration but will also encourage trust and authority in the masses regarding arbitration.

Legislature plays a vital role in the system of law and many of the cases either stems from it or causes hindrances in their goals or proper functioning. Precedents should be passed which serves as directives to the ministries, governmental authorities, public sector undertakings and other governmental departments which will abide them by the arbitral awards. These awards should also have the consensus of the higher officials of the respective governmental authority.

Petition challenging the arbitral awards should be discouraged by mandating appropriate procedures so that puny and unnecessary applications can be filtered.

Appointment of the Arbitrator should be given the utmost importance and appointment should be such that the Arbitrator/s is eligible to mediate the matter at hand.

More resources should be pumped in by the government and judges and courts holding arbitral proceedings should be increased in every district. This will help in shortening the span of arbitral proceedings which is its main advantage over judicial proceedings.

VII. CONCLUSION

India has a long way to go for becoming an arbitration hub but it is surely on the right track. We have seen the different ways through which judiciary can intervene in the arbitral proceedings and can even overrule its award which in my opinion is necessary to ensure smooth and ethical working but only judiciary's efforts are not enough. The role which judiciary has assumed in respect of arbitration which is of a guardian is good but arbitration as an institution in India needs a lot more than that. Without governmental aid judiciary cannot do enough in ensuring that arbitration receives the attention which it needs. It is evident that promoting arbitration will not only solve the judicial crisis but it can also make India a hotspot for international commercial arbitration which strengthen India in terms of legal and financial point of view. It will encourage corporate enterprises around the world to establish commercial centers in India because of easy and reliable arbitration set up. This can boost the economy of the country and can also increase the foreign reserves. While concluding all I would like to say that improving the standards of arbitration in India will benefit the country as a whole.