



ROLE OF JUDICIARY IN ARBITRATION

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Abstract: This study has been undertaken to investigate the role of judiciary in arbitration with respect to Arbitration & Conciliation Act, 1996. The paper looks into the intervention of judiciary in pre-arbitral stage, during arbitral process, post arbitral process. The paper discusses on the analytical part and the way forward for the intervention of judiciary in arbitration.

Index Terms - Arbitration & Conciliation Act, 1996, arbitration, intervention, judiciary

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I. INTRODUCTION

Arbitration is a form of Alternate Dispute Resolution, where parties resolve their disputes outside the vicinity of the courts i.e. the dispute is then decided by a third party who is known as an arbitrator. Parties have the discretion on choosing an arbitrator mutually, and if the parties are not able to appoint an arbitrator, then the courts have the power to appoint an arbitrator in such cases. Parties go for arbitration rather than going to court is because court proceedings takes a lot of time and involves huge cost, whereas in arbitration process starts quickly and it is less expensive as compared to court proceedings. Moreover, confidentiality is something which is a key advantage in arbitration over adjudication by courts. Main objective of arbitration is to ensure quick and consensual decision with minimum courts intervention, but to achieve this objective courts need to intervene in arbitration process, from appointing of arbitrators to appeal after getting an award from arbitration. In this response paper we will try to look whether the role of judiciary in arbitration is too much or is it on the right path to make India an arbitration friendly state.

II. Intervention of Judiciary

In India arbitration is governed by the Arbitration & Conciliation Act, 1996. If we look into this act the intervention of the courts can be categorized in three stages-

1. Pre arbitral stage-

Now, section 8¹ of the act deals with the Power to refer parties to arbitration where there is an arbitration agreement, it states that if a party to arbitration agreement applies first statement on the substance of dispute, the court can refer the parties to arbitration unless it finds that prima facie no valid arbitration agreement exists.

¹ The Arbitration and Conciliation Act, 1996

Section 9² of the act deals with interim measures by court, it states that the courts have the power to grant interim measure in accordance with section 36 of the act, and also has the powers of making orders as it deems fit for the purpose of any proceeding before it.

Section 11³ of the act deals with the appointment of arbitrators,

- ◆ The Supreme Court and the high court shall have the power to designate, arbitral institutions, from time to time.
- ◆ This sections gives powers to chief justice or any person designated by him shall appoint an arbitrator in the following circumstances:
 - If a party fails to appoint an arbitrator within 30 days from receipt of a request by one party from the other party to so agree
 - If two arbitrators, appointed by both the parties fail to appoint the third arbitrator in accordance with section 11(3)
 - If in a case where there is a sole arbitrator, and when the parties fail to agree on the appointment of an arbitrator within 30 days from the request by one of the party to the other party
 - When the procedure which was agreed by the parties are not acted upon on time.
- ◆ When more than one request has been made to the chief justice of different high courts or there designates, the chief justice or the designate to which the request has been made shall be the one to decide on the requests.
- ◆ The decision made by the chief justice or any person or any institution designated by him for the appointment of an arbitrator is final. The chief justice may make such schemes as he may deem fir to act upon with the matters entrusted to him.

2. During arbitral process-

Now, section 27⁴ deals with courts assistance in taking evidences, it states that arbitral tribunals or party with the approval of the arbitral tribunal can seek courts assistance in taking evidences. Moreover, in the case of Alka Chandewar v. Shamsul Ishar Khan⁵, it was held that the courts also have the power for contempt of orders made by the arbitral tribunals.

3. Post Arbitral-

Now, section 34⁶ gives the court the judicial power to intercede and put to the side the arbitral award. It can be set aside only if

- ◆ Party was under some incapacity

² The Arbitration and Conciliation Act,1996

³ The Arbitration and Conciliation Act,1996

⁴ The Arbitration and Conciliation Act,1996

⁵ S.L.P.(Civil) No.3576 of 2016)

⁶ The Arbitration and Conciliation Act,1996

- ◆ The arbitration agreement is void
- ◆ The party making the application was not given proper information or for appointment of arbitrator
- ◆ The award deals with something which is not falling within the terms of the submission to arbitration
- ◆ The composition or arbitral procedure was not according to the agreement of the parties.

Courts may also set aside the award if it finds that-

- ◆ The subject matter of the dispute is not capable of being resolved through arbitration.
- ◆ The award by the tribunal is in conflict with the public policy of India.

III. ANALYSIS AND WAY FORWARD

The courts in India have reliably adopted arbitration friendly approach in recent past. In the case of **Uttarakhand Purv Sainik Kalyan Nigam Ltd. Vs. Northern Coal Field Ltd**⁷. The court relied on the section 16 of Arbitration and Conciliation Act and in order to restrict judicial intervention supreme court held that the issue the very purpose of Arbitration & Conciliation Act, is party autonomy and minimalistic judicial intervention in arbitration process, and it observed that once an arbitrator has been appointed now all objections and issues are to be decided by the arbitrator related to jurisdictional matters. Courts will not intervene in these matters. This gives autonomy to the arbitrators as there is no judicial intervention in this matter.

As we can see Supreme Court in the case of Enercon India Limited & Ors. V. Enercon GmbH & Anr⁸ also used a very arbitration friendly approach and upheld an arbitration agreement despite of having errors in the agreement and also held that when the intention of the parties in arbitration is clear, the court can make the arbitration agreement workable despite of errors in the said agreement.

The court in the case of Kandla Export Corporation & Anr. V. OCI Corporation & Anr⁹ the court refrained it from intervening with the award passed under the arbitration act wherein the parties in the process tried to bypass the provisions of the act itself. The supreme court in this case did not interfere with an order on the ground that the party had appealed against an order passed under the Arbitration Act under Section 13 (1) of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Court Act, 2015 ("**Commercial Courts Act, 2015**") and observed that the appeals with respect of arbitration are only governed by the Arbitration Act.

The courts are also observant of the fact that anti arbitration injunction is not sought by the parties. As in the case of Ravi Arya & Ors V. Palmview Overseas Limited & Ors¹⁰. The issue in this case was that one of the

⁷ Special Leave Petition (C) No. 11476 of 2018

⁸ 5 SCC 1

⁹ 14 SCC 715

¹⁰ SCC OnLine Bom 19886

party alleged that the arbitrator which was appointed was in collusion and that the procedure was not followed and then the party filed for an order to restrain the arbitral tribunal for further proceedings, for which the court held that parties seeking for such allegations have remedies available in section 12 of the Arbitration & Conciliation Act. The Bombay high court held that if parties in arbitration have remedies available to them under the act then they cannot seek for anti arbitration injunction from court by ignoring the remedies provided under the act.

Also in the case of *Ayyasamy Vs A. Paramsivam and Avitel Post Studioz Vs HSBC*¹¹ Holding the Supreme Court held that when the court finds that there is some serious or complicated issue of fraud or forgery that affects the validation of the arbitration clause itself or the entire contract have been raised, and if the court deems it fit, then the matter will be heard in the court rather than arbitration.

Recently in the case of *Rapid MetroRail Gurgaon Limited V. Haryana Mass Rapid Transport Corporation Coram*¹², Supreme Court in this case held that High Court under article 226 should not entertain a dispute which is arbitrable unless there is an issue of public interest.

The judiciary proactively looks into the amendments which are introduced by the legislature which are against the main objective of the act itself. The arbitration and conciliation act 2019, introduced section 87 which stated that the 2015 amendment act will be applicable prospectively i.e., section 36 which was amended in 2015 will not apply to petitions which were filed under section 34 against the arbitral award which were passed in the arbitration proceedings commenced before the commencement of the 2015 Amendment Act, now this provision brings back the regime of automatic stay execution of arbitral award passed before 23rd October. Now, section 87 is directly in conflict with the judgement in the case of *BCCI V. Kochi Cricket Private Limited & Ors*¹³. The supreme court then in the case of *Hindustan Construction Company Limited & Anr. V. Union of India & Ors*¹⁴. Struck down section 87, and upheld the position which was laid in the case of *BCCI V. Kochi Cricket Private Limited & Ors*. Supreme court further stated that filing a petition seeking aside of an arbitral award therefore would not provide an automatic stay against the enforcement of any arbitral award, irrespective of when arbitration was commenced.

As from the above mentioned cases we can see that the court's intervention in arbitration is very minimalistic and they try to grant more autonomy to the arbitral tribunal so that the very objective of arbitration is fulfilled. As we can see that when issue related to jurisdiction the court has given full autonomy to the arbitrator to decide, and when it comes to granting anti-arbitration injunction the courts take the matter into full consideration and does not allow until and unless the case is very unique in itself where no remedies are to be found in the Arbitration & Conciliation Act and most of the time the court gives the tribunals the powers to deal in such cases and upheld the tribunals award. But in giving out autonomy to arbitral tribunals the courts also keep in mind that if some cases are very critical or are related

¹¹ 8245-8246 OF 2016

¹² LL 2021 SC 194

¹³ . (2018) 6 SCC 287

¹⁴ (2019) SCC OnLine SC 1520

to public policy or constitutional matters then the matter will be heard in the court rather than going into arbitration.

As we can see the courts are trying to remove all the obstacles during and after the arbitration process by not intervening with the arbitral award, by passing arbitration friendly judgement. Even after doing this much, there are many things which is yet to be done to improve the arbitration process in India and making India a hub for arbitration. There is an utmost need for restructuring arbitral institutions.

The restructuring of arbitral institutions can be done in the following ways-

- ◆ Setting up of institutions- there is a dire need of setting up of arbitral institutions with international standards also one problem needs to be addressed which our country is facing the most i.e. arbitration across the nation should be governed by a single authority or multiple centres across the country. India needs to have one central authority which will govern the arbitration with its regional office across the country.
- ◆ Investment on human capital- even if we setup arbitral institutions with international standard, we will require professional arbitrators to run those institutions who are able, conflict free and are competent, specialized in the field and are technically sound. For this thing we need to train arbitrators and pay more attention to the ones who don't have any judicial background, then a system for maintaining the records of arbitrators so that one can know what field he/she expertise on and in what matters they are not upto the mark.
- ◆ Institutionalization of arbitration- in India, arbitrations is not conducted in a structured manner. India needs to promote institutionalization of arbitration where a specialized institution is setup with permanent members and will administer the arbitral process. Also there is a need to decide whether one institute is required or two, because if we look at the size of our country domestic arbitration will in itself will be very huge, it will be better to have two institutions i.e. one for domestic and the other one for international.
- ◆ As we know that government is the biggest litigator, necessary directives shall be issued to all the ministers, bodies and public sector undertakings to accept and follow by the arbitration award.
- ◆ Awareness generation- in order to strengthen arbitration in India, we will have to promote arbitration as a model for dispute resolution. This can be done through creating awareness for better understanding of commercial matters, and how simple is the process of arbitration is, because in our country people don't want to go to courts because of the formalities involved in it and when people will get to know about how easy the process of arbitration is they will go for arbitration.

IV.CONCLUSION

India has a very diversified and useful human resource in law as well as other fields, which will sustain the arbitration eco-system in the nation. Though the reforms are in the right direction to strengthen and make India hub for arbitration, however, there is need for further support. As we have seen the involvement of judiciary in arbitration is on the right path, as we can see the judgements given by the courts are also arbitral friendly, there is no doubt that judiciary is on the right path, but the main problem is that arbitral institutions in itself needs to change and setup infrastructure and have a uniform code across the nation, this will help us in making India an arbitration hub. We can conclude that intervention of judiciary in arbitration is neither too less nor too much and also many a times judiciary acts as a guardian to arbitration and tries its best to safeguard arbitrations interest and pass judgements which provides full autonomy to the arbitral institutions, it's just that at this stage we need to focus more on developing infrastructure, create awareness and make a centralized body for arbitration.

