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Abstract

Whenever or wherever there is intervention by courts, it invariably delays the arbitration proceedings or implementation of arbitral awards. Then there is a sense of frustration and helplessness on account of what is seen as excessive intervention by courts in regard to arbitrations and arbitral awards, in spite of Sec. 5 of the *Arbitration and Conciliation Act, 1996* advocating minimum intervention by courts. Therefore, in interpreting any provision of the Act of 1996 courts must not ignore the objects and purpose of the enactment. However, this supervision must be restricted and pragmatic. The courts should have an important role in ensuring predictability, stability and certainty in statute law by settling conflicting interpretations, updating statute law to new developments and also to make statutes work at a practical level.

It is unfortunate that delays, high cost, frequent and sometimes unwarranted judicial interventions at different stages are seriously hampering the growth of arbitration as an effective dispute resolution process. In this context it is necessary to observe the provisions of the Act relating to arbitration which make provision for judicial intervention and the effect that such intervention has had on the efficacy of arbitration. A mere perusal of the amendments of arbitration law from 1996 through 2015 to 2019 reveals one intent, which is to prevent arbitration from inordinate delays, makes it more cost effective and above all protect the same from court interference.

I. Introduction

Arbitration is an effective and efficient system of dispute resolution. It is the means by which parties to a dispute get the dispute settled through the intervention of a third person, but without

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having recourse to a Court of Law. Arbitration is different from courts. The arbitrator considers arguments and evidence from both sides and hands down a final and binding decision.

Arbitration is not intended to replace or supplant the courts of the land but is in addition to the traditional court system. The *Arbitration and Conciliation Act, 1996* (herein after referred as the Act of 1996) is the law which applies to both domestic and international arbitration in India. The law of arbitration was known even before the British rule. The law on arbitration before the Act of 1996 substantially contained in three enactments, namely, the *Arbitration Act, 1940*, the *Arbitration (Protocol and Convention) Act, 1937* and the *Foreign Awards (Recognition and Enforcement) Act, 1961*. The *Arbitration Act, 1940* was found to be unsatisfactory due to too much court intervention. As such repealing all the above enactments the *Arbitration and Conciliation Act, 1996* is passed which is a holistic approach to alternative dispute resolution in India. The Act of 1996 is cast in terms of the United Nations Commission on International Trade Law (UNCITRAL) Model law. The main objectives set out in the Statement of Objects and Reasons of the 1996 Act are "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".[2] The fundamental nature of arbitration is the settlement of disputes through a tribunal of their own choice instead of to a court.

The Hon'ble Supreme Court in *P. Anand Gujapathi Raju v. P.V.G. Raju*,[3] observed that Sec. 5 brings out clearly the object of the Act, namely, that of encouraging resolution of disputes expeditiously and less expensively. When there is an arbitration agreement, the court's involvement should be minimal.

There has been a growth of judicial law making by the Courts in the last few years of the working of the Indian *Arbitration and Conciliation Act, 1996.* A perusal of some of the recent judgments of the courts seem to have played a negative role, taking the law backward thus preventing the growth of international trade and commerce. A relative minefield of interpretation was opened up within the new 1996 Act.

[2] Arbitration and Conciliation Act, 1996 (Act No. 26 of 1996), Statement of Objects and Reasons.
[3] AIR 2000 SC 1886

The Supreme Court in *McDermott International Inc. v. Burn Standard Co. Ltd.,*[4] had the occasion to remark on the scope of the jurisdiction of the Court as follow:

> "The 1996 Act makes a provision for the supervisory role of courts, for the review of the arbitral award only to ensure fairness. Intervention of the court is envisaged in few circumstances only, like, in case of fraud or bias by the arbitrators, violation of natural justice, etc. The court cannot correct errors of the arbitrators. It can only quash the award leaving the parties free to begin the arbitration again if it is desired. So, scheme of the provision aims at keeping the supervisory role of court at minimum level and this can be justified as parties to the agreement make a conscious decision to exclude the court's jurisdiction by opting for arbitration as they prefer the expediency and finality offered by it".

The need to reduce supervisory control of the court is indisputable. The widespread discontent resulting from excessive judicial intervention in arbitral awards paved the way for the 1996 Act. One of the objectives of the *Arbitration and Conciliation Act 1996* was to allow minimal judicial intervention and the finality of arbitral awards. Desai J., had once remarked that, the way in which the proceedings under the 1940 Act are conducted and without an exception challenged in the Courts, has made lawyers laugh and legal philosophers weep.[5] The 1996 Act which grew out of the desire to keep pace with global developments, sought to serve the following purposes: to narrow the basis of challenges of the award; decrease judicial supervision; ensure finality of awards; and expedite the arbitration process.

Though the legislature has truly tried to limit the supervisory power of judiciary in arbitration proceedings, judicial intervention in arbitration proceedings in India is mainly due to the interpretation of the *Arbitration and Conciliation Act, 1996.* The Act of 1996 specifically provided for limited instances in domestic arbitration when a Court can intervene prior to the making of an award by the arbitral tribunal. A great weakness of *Arbitration Act, 1940* consisted in the fact that it contained numerous provisions which provided for court's intervention at almost every stage of

[4] (2006) 2 Arb LR 498, 517
[5] Guru Nanak Foundation v. Rattan Singh & Sons (1981) 4 SCC 634.

the conduct of arbitral proceedings. The present Act of 1996 has severally cut down such provisions.

II. Need for supervision by courts

The Supreme Court being the apex court, its decisions are binding on all sub-ordinate courts in India and every high court has superintendence over all sub-ordinate courts and tribunals throughout the territory under which it exercises its jurisdiction. High courts have power to issue writ under Articles 226 and 227 of the Constitution of India for the enforcement of rights conferred by the Constitution. This supervisory power is limited only to see that the subordinate tribunal functions within the limits of its authority, the fact, however, remains that interference under Art. 227 is intended only for the purpose of promoting the cause of substantial justice. The exercise of power under Art. 227 is also discretionary, depending as it does on the facts and circumstances of each case.[6]

The court will exercise its superintending power over inferior tribunals only in extreme cases and under unusual circumstances that is in cases of emergency and in order to prevent great impending injury. The exercise of the power is so limited, the court possessing it will be overwhelmed with applications for its exercise and the regular functions of the court will be impaired. The power of superintending control will not, therefore, be exercised upon light occasions, or when other and ordinary remedies are sufficient, or when nothing practical may be accomplished thereby.

The object of minimizing judicial intervention while the matter is in the process of being arbitrated upon, will certainly be defeated if the High court could be approached under Article 227 or under Article 226 of the Constitution of India against every order made by the arbitral tribunal. Therefore, it is necessary to indicate that once the arbitration has commenced in the arbitral tribunal, parties have to wait until the award is pronounced unless, of course, a right of appeal is available to then under Section 37 of the Act of 1996 even at an earlier stage.[7] However the higher judiciary has

[6] Chander Bhan v. Chattar Singh, AIR 1968 Del. 229
[7] JUSTICE RAJIVE BHALLA, ARBITRATION: PROCEDURE AND PRACTICE 541 (2009).

been looking upon the arbitral tribunal as a subordinate court and therefore it is necessary for it to exercise supervision over the functioning of the arbitral tribunal.

Generally, the power will not be exercised to review or control the discretion of a subordinate tribunal. Where, however, an inferior court has been guilty of an abuse or a capricious or arbitrary exercise of such discretion, the superior court will not interfere by the exercise of its superintending power. The legislature has no power to enlarge or encroach upon the supervisory powers of courts granted by the Constitution. Where the Constitution confers upon the supreme judicial tribunal the power of superintending control over inferior jurisdictions, either in express terms or by grant of the power to award the various writs by means of which that control is generally exercised, the legislature has no power to encroach upon and impair or limit the jurisdiction.[8]

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The need to reduce supervisory control of the court is indisputable. The widespread discontent resulting from excessive judicial intervention in arbitral awards paved the way for the 1996 Act. The 1996 Act which grew out of the desire to keep pace with global developments, sought to serve the following purposes: to narrow the basis of challenges of the award; decrease judicial supervision; ensure finality of awards; and expedite the arbitration process.

The object of the Act would be defeated if the disputes remain pending in courts for months and years before even commencement of arbitration. For expeditious disposal of cases, it is imperative

[8] WILLIS A. ESTRICH, AMERICAN JURISPRUDENCE 462-468 (1958).
[9] (2006) 2 Arb LR 498, 517

that arbitration cases should be decided on the basis of affidavits and other relevant documents and without oral evidence. There may, however be a few exceptional cases where it may become necessary to grant opportunity to the parties to lead oral evidence. In both the situations, the judicial authority is required to decide the issue expeditiously within a time frame and not to treat such matters like regular civil suits.[10]

III. Role of Courts in arbitral process

The main objective of the new enactment was to make courts' intervention minimal whereas under old Act for anything and everything the parties were rushing to courts for interim and such other reliefs freezing the arbitration proceedings for years. Our Courts are entrusted with the duty of taking care of the created laws since its initiation and its application. The Act contemplates courts exercising a role in arbitration proceedings. Whenever or wherever there is intervention by courts, it invariably delays the arbitration proceedings or implementation of arbitral awards. The scheme of the 1996 Act is clear enough i.e., during the arbitration proceedings court's intervention is done away with.

The Court can intervene only in the following ways: to stay legal proceedings and refer parties to arbitration (Sec. 8), to grant interim measures (Sec. 9), to appoint arbitrators in cases of conflict (Sec. 11), to terminate the mandate of arbitrators in a limited set of circumstances (Sec. 14(2)), and assist in taking evidence (Sec. 27), setting aside the award (Sec. 34), enforcing awards (Sec. 36), hearing appeals against the orders (Sec. 37). The Court has dealt with plethora of cases under these sections and in 23 years of passing of the 1996 Act the Court is flooded with cases under the aforesaid provisions.

The courts in India especially the Supreme Court weakened the new statue. There were problems over the appointment of arbitrators over the effect of section 9 of the Act of 1996 concerning the powers of the court in relation to interim measures and in the use of term public policy under section 34 of the Act of 1996.

[10] Shin Etsu Chemical Co. Ld. v. Aksh Optifibre Ltd., (2005) 7 SCC 234

Where the existence of arbitration clause in the agreement is proved between the parties, the question as to whether arbitration agreement is attracted to the facts of a given case is not to be decided by the civil court and only the arbitrator has jurisdiction to decide the same.

The power of the court to interfere with the decision given by the arbitral tribunal regarding its jurisdiction is limited by the same principles and to the same extent as the power of the court to interfere with the interpretation of the arbitral tribunal of any other contractual provision. Even if another view is possible, it would not be permissible for the court to set aside the award on that ground.[11] The Act has given very wide powers and deep area of operation to the arbitrators and the court's powers have been statutorily curtailed. The tribunal's authority is not confined to the width of its jurisdiction but goes to the very root of its jurisdiction.

IV. The two amendments to *Arbitration and Conciliation Act, 1996*

The *Arbitration and Conciliation Act, 1996* was amended by the *Arbitration and Conciliation (Amendment) Act, 2015* to make arbitration process cost effective and speedy with less court intervention. The *Arbitration and Conciliation (Amendment) Act, 2015* has introduced certain changes in Sec. 11 in relation to the process of appointment of a tribunal by the courts. Prior to the amendment, a party could request the "Chief Justice" to take necessary measures to constitute the tribunal. The Amendment Act has now replaced the words "Chief Justice" with either "Supreme Court" or "High Court" for cases involving international arbitrations and domestic arbitrations respectively. The section came before the Supreme Court in several important cases for interpretation.

The Act introduced a limitation in sub-sec. (6A) providing that the Supreme Court or the High Court shall limit its examination only with the existence of an arbitration agreement, and not with other issues such as, e.g., live claim, qualification, conditions for exercise of power, etc. The *Patel Engineering* case provided that the Chief Justice can delegate his/her power under Sec. 11 of the Act of 1996 only to another judge of that court but not to any other person or institution considered to have judicial powers as judicial power can only be delegated to judicial authority. However, the 2015 Amendment Act took this aspect into account and specified in a new sub-sec (6B) that "The designation of any person or institution by the Supreme Court or, as the case may be, the High

[11] P. C. MARKANDA, LAW RELATING TO ARBITRATION AND CONCILIATION 522 (8th ed., 2013).

Court, for the purposes of this section shall not be regarded as a delegation of judicial power by the Supreme Court or the High Court."

The Amendment Act has solved the issue regarding the nature of the function of the Chief Justice, by replacing the word "Chief Justice" with the "Supreme Court or the High Court". The provision incorporated in sub-sec. (8) of this Sec.11 required a prospective arbitrator to submit a declaration following Sec. 12 of the Act.[12] This provision ensures that a prospective arbitrator, who due to his/her schedule may not be able to carry out an expedite arbitral proceedings will not be appointed. Another important addition was included in sub-sec (14) of Sec. 11 of the1996 Act stipulating that the High Court can formulate rules for the purpose of determining the fees of the arbitrators.[13]

Further new Fifth Schedule and Seventh Schedule were added to the Act by the 2015 Amendment. The Fifth schedule touches upon the issue of independence and impartiality of the arbitrators and lists the grounds justifying doubts in their independence and impartiality. Another list of grounds is stipulated by the Seventh Schedule and entails relationships between arbitrators and the parties or the counsel making an arbitrator ineligible for appointment. The 2015 Amendment Act also prohibits parties to agree in advance and appoint an arbitrator who had previously been an employee of either of the parties. These provisions ensure independence and impartiality of arbitrators to be appointed and the equal opportunities for parties to have a say in the appointment process regarding their arbitrators.[14] But the Amendment Act 2015 has failed to address certain issues; one among them is of institutional arbitrations, which necessitated the *Arbitration and Conciliation (Amendment) Act, 2019.* This amendment is considered as an important effort of the Government to encourage institutional arbitration and to make India a center of robust ADR mechanism. The amendments are based on a High Level Committee report constituted by the Central Government under the Chairmanship of B. N. Srikrishna J., former Judge of the Supreme

[12] Arbitration and Conciliation Act, 1996, sec 11(8): "The Supreme Court or, as the case may be, the High Court or the person or institution designated by such Court, before appointing an arbitrator, shall seek a disclosure in writing from the prospective arbitrator in terms of sub-section (1) of section 12, and have due regard to-

(a) Any qualifications required for the arbitrator by the agreement of the parties.
(b) The contents of the disclosure and other considerations as are likely to secure the appointment of an independent and impartial arbitrator."

[13] *Ibid,* sec 11(6); "For the purpose of determination of the fees of the arbitral tribunal and the manner of its payment to the arbitral tribunal, the High Court may frame such rules as may be necessary, after taking into consideration the rates specified in the Fourth Schedule."

[14] Rohit Moonka and Silky Mukherji, *Impact of the recent reforms on Indian Arbitration Law*, 6 BRICS LAW JOURNAL 1, 65 (2017).

Court of India to examine the effectiveness of existing arbitration mechanism by studying the functioning and performance of arbitral institutions in India, to devise a roadmap to promote institutional arbitration mechanisms and to evolve an effective and efficient arbitration eco system for commercial dispute resolution and suggest reforms in the *Arbitration and Conciliation Act, 1996.*[15]

Sec. 34 of the *Arbitration and Conciliation Act, 1996* occupies important position in practice as it is the only section in the entire Act which allows the court to go into the validity of the arbitral award. While deciding the objections under Sec. 34, the court must keep in mind that the intention of the legislature in repealing the Act of 1940 and substituting it by the Act of 1996 was primarily to attach finality to arbitration proceedings and interference by the courts was intended to be curtailed drastically. Thus the scope of interference with the award is very limited and is restricted to the grounds mentioned in Sec. 34 of the Act.[16]

The Act of 1996 makes provision for supervisory role of courts for review of the arbitral award only to ensure fairness. The court cannot correct the errors of the arbitrators. Intervention of the court is envisaged in few circumstances only, like, in case of fraud or bias by the arbitrators. It can only quash the award leaving the parties free to recommence arbitration. Intervention of courts with arbitral awards of the arbitral tribunal is to be minimalistic and confined to statutory spelt out reasons enumerated under Sec. 34 after coming into force the Act of 1996. Thus the scheme is to keep supervisory role of courts to minimum.[17]

Prior to July 2019 Sec. 34(2) (a), had followed the wording of the Model Law and stipulated that "an arbitral award may be set aside by the court only if: "(a) The party making the application "furnishes proof that…" However, in July 2019, by the further amendment of the Act of 1996, (Amending Act No. 33 of 2019) for the words "furnishes the proof that" the words "establishes on the basis of the record of the arbitral tribunal that" were substituted. This substitution had its origin (and justification) in two decisions of the Supreme Court of India:

[15] Arbitration and Conciliation (Amendment) Bill, 2018, Statement of Objects and Reasons.
[16] Dr. P. C. Markanda, *supra* note 10 at 806
[17] *Ibid* at 829

(i) in the case of *Fiza Developers and Inter-Trade Private Limited v. AMCI (India) Private Limited and Another*[18], the court had deprecated the practice of framing issues under Section 34 of the 1996 Act, which appeared to be necessitated by the words "furnishes proof"; and

(ii) the case of *Emkey Global Financial Services Limited v. Girdhar Sondhi*[19] reported in 2019(9) SCC 49 it was stated that the nature of proceedings under Section 34 were summary.

The decision also stressed the need for expeditious disposal. In the latter decision, the recommendation of the high-level committee (Justice Sri Krishna Committee) (that the words "establishes on the basis of the record of the arbitral tribunal that" should be substituted in the place of the words "furnishes proof that") received judicial benediction.[20] The way Sec.34 was interpreted by the apex court, contrary to the intentions of the law enhanced the judicial supervision which necessitated two major amendments to the provision in 2015 and 2019. It is only hoped that the courts will interpret the provision so as to attain the object by confining the scope for challenging the awards to narrow limits.

V. Conclusion

Thus, from the above discussions it can be concluded that the party autonomy and maximum judicial support with minimum judicial intervention are the salient features of the Act of 1996. It provides for maximum judicial support of arbitration and minimum intervention. Inspite of minimum interference of court in arbitrations, delay still occurs whenever the parties approach the court for assistance in the above circumstances. At the same time it is to be appreciated that, when dispute resolution is provided for through institutions other than courts, it becomes necessary to have some supervision on them to strengthen them in the interest of justice. As the higher courts have supervisory power over the lower courts, in the initial period, the then existing legal framework provided for judicial supervision of arbitral proceedings and there was a provision to challenge the arbitral awards. However, this resulted in excessive judicial intervention which

[18] 2009(17) SCC 796
[19] 2019(9) SCC 49
[20] FALI S. NARIMAN, HARMONY AMIDST DISHARMONY: THE INDIAN FRAMEWORK 140-141 (2020).

became a cause of worry. In addition contemporary developments at the global level and national level paved way for the adoption of the *Arbitration and Conciliation Act, 1996*, one of the important objectives of which is to reduce the supervisory role of the courts on arbitration.

It remains to wait and watch how amendments to the Act of 1996 are desirable that the judiciary will adopt such interpretation which will promote the expeditious resolution of disputes by arbitration by confining the judicial supervision in narrow limits. The commotion created by judicial interpretation is addressed by the amendments carried in 2015 and 2019 to further strengthen expeditious resolution of disputes. It is hoped that with these new amended provisions and appropriate interpretation of them by the judiciary, India will become a favored destination for arbitration.

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