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EDITORIAL NOTE

ARBITRABILITY OF FINTECH DISPUTES VIS-À-VIS IFSCA ARBITRATION CENTER

By Sayandeep Gupta and Shreya Kapoor

INTRODUCTION

In September 2021, the International Financial Services Authority (IFSCA) notified a proposal to set up an International Arbitration centre at the Gujarat International Finance-Tech City International Financial Services Centre (IFSC) to provide arbitration services to fintech companies[1]. The development comes in the backdrop of establishing and strengthening dedicated/specialized alternative dispute resolution forums in the country. This includes the recently inaugurated Sports Arbitration Centre of India.[2] However, the setting up of arbitration centres is almost always followed by a natural question: What kind of disputes will be eligible for arbitration?

The proposal for IFSCA has resurfaced the issue of arbitrability of fintech disputes. Since limited information is available to clarify the mandate of this body; this article attempts to provide a brief context of the arbitrability of fintech disputes in India and the position abroad so as to highlight and pre-emptively resolve some inherent challenges with the setting-up of a specialized fintech arbitration centre.

1. HISTORICAL ASSESSMENT OF ARBITRABILITY OF DISPUTES IN INDIA

The question of arbitrability of any dispute in India can be traced back to Sukanya Holdings Private Ltd. *v.* Jayesh H. Pandya and Another[3] which held that claims cannot be bifurcated into arbitrable and non- arbitrable claims. In the event where there exists a non-arbitrable claim alongside an arbitrable claim then the arbitrable claim is also rendered non-arbitrable. Subsequent developments on this topic came in the form of Supreme Court decisions in Booz Allen and Hamilton Inc *v.* SBI Home Finance Ltd.[4] and Shri Vimal Kishor Shah *v.* Jayesh Dinesh Shah & Others[5]. The Booz Allen judgement held that disputes involving rights in rem were non-arbitrable while disputes involving rights in personam were arbitrable. Further, the Vimal Kishor Shah judgement held that if any legislation provided for a specific remedy under the jurisdiction of a Civil Court or specific

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1 INDBIZ: ECONOMIC DIPLOMACY DIVISION, https://indbiz.gov.in/ifsca-to-set-up-international-arbitration-centre-in-gift-ifsc/, (last visited Dec. 20, 2021) [Hereinafter IndBiz].

2 *Kiren Rijiju Inaugurates Countries First Sports Arbitration Centre, says it will have Far-Reaching Impact,* TIMES OF INDIA (SEPT. 26, 2021), https://timesofindia.indiatimes.com/sports/more-sports/others/kiren-rijiju-inaugurates-countrys-first-sports-arbitration-centre-says-it-will-have-far-reaching-impact/articleshow/86532956.cms .

3 *Sukanya Holdings Private Ltd. v. Jayesh H. Pandya and Another*, (2003) 5 SCC 531.

4 *Booz Allen and Hamilton Inc v. SBI Home Finance Ltd. & Others*, (2011) 5 SCC 532 [Hereinafter Booz Allen]. 5 *Shri Vimal Kishor Shah v. Jayesh Dinesh Shah & Others*, (2016) 8 SCC 788.

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forum or tribunal then such a dispute is non-arbitrable. The position of the Court on arbitrability of disputes in general was further clarified in Vidya Drolia *v.* Durga Trading Corporation[6] which came up with a four-part test to decide when a dispute becomes arbitrable.

2. APPLYING THE VIDRA DROLIA TEST TO FINTECH DISPUTES

As highlighted earlier, it is trite law that claims which are *in rem* as opposed to *in personam*, are not arbitrable.[7] Post the Supreme Court judgement in Vidya Drolia v Durga Trading Corporation[8], the question of arbitrability of disputes was more or less settled with the pronouncement of a four-fold test to answer this question. An application of these principles to fintech disputes is as follows. The cause of action and subject matter of fintech disputes can:

1. Relate to actions in rem, that do not pertain to subordinate rights in personam arising from such rights in rem. For eg: claims related to securities, retail banking, etc.
2. Affect third party rights; have *erga omnes* effect; require centralized adjudication, and mutual adjudication would not be appropriate and enforceable. For eg: disputes related to cryptocurrencies, hyper automation in financial services, etc.
3. Relate to inalienable sovereign and public interest functions of the State. For eg: disputes arising out of defaults in regulatory compliance, foreign investment, etc.
4. Be expressly or by necessary implication non-arbitrable as per mandatory statutes. For eg: Banking disputes under the Recovery of Debts Due to Banks and Financial Institutions Act,1993.

Therefore, even though the observations of Vidya Drolia do not seem to favour the arbitrability of fintech related disputes, much of it depends on the expansion and emergence of fintech services in the commercial paradigm both in domestic and cross border transactions. Additionally, the policymakers would be required to define these lines through a legislative mandate and the treatment of disputes arising in the fintech industry thereafter.

3. RBI ON FINTECH DISPUTES

On 6 August 2020, RBI in its Statement on Developmental and Regulatory Policies came up with Online Dispute Resolution mechanism for digital payments,applicable to the authorized Payment System Operators and members participating in the system. RBI in its notification mentions the objectives of this ODR system as "transparent, rule-based, system-driven, user-driven, unbiased mechanism for resolving customer disputes and grievances, with zero or minimal manual intervention".[9] Under the system a consumer can file a

[6] *Vidya Drolia & Others v. Durga Trading Corporation, (2019) 20 SCC 406 [Hereinafter Vidya Drolia].*
[7] Booz Allen, *supra* note 4, at 532.
[8] Vidya Drolia, *supra* note 6.
[9] RBI notification DPSS.CO.PD No.116/02.12.004/2020-21.

complaint via online, interactive voice responses, SMS, apps and branch offices. The consumer can track the status of the dispute which has to be resolved within a month, failure to which the consumer can approach the banking ombudsman. For now, disputes related to failed digital transactions are covered. RBI in its circulars have also provided for turn-around time along with the compensation for failed transactions. In the past, the Supreme Court has also noted that taking possession and selling securities for non-payment of dues requires powers which cannot be exercised through arbitral proceedings.[10]

The above exposition of the law clarifies that there is certain, if not ample support for resolving fintech disputes through alternative dispute resolution mechanisms. However, the same appears to be limited to the realm of payment systems and settlements.

4. WHERE IFSCA COMES IN

From the information available in the public domain, it appears that the proposed arbitration centre IFSCA aims to facilitate speedier resolution of financial disputes. Gift-IFSC is presently India's only dedicated international financial centre and falls within an exclusive jurisdiction of IFSCA, which itself was created by a separate Act[11]. Although the exact mandate of the centre has not yet been notified or clarified, the move appears promising: In the backdrop of developing IFSC as a "financial laboratory"[12], having a resident international arbitration centre dedicated to resolving financial disputes can help to detangle the inherent complex web of fintech products and services. Traditional methods of dispute resolution such as litigation have often been a barrier to globalized financial and technological cross-border expansion of the economy owing to jurisdictional issues on account of involvement of multiple parties and markets. Given the comparative ease, flexibility and relative inexpensiveness of arbitration, less time and resource investment associated with proceedings and enforcement of awards; arbitrating fintech disputes can undoubtedly supplement the dynamic nature of such markets.

Thus, as fintech becomes the contemporary frontier of the commercial regime, setting up of an arbitration centre modelled along the lines of SIAC and LCIA will promote the growth of international commercial arbitration in India.

5. POSITION ABROAD

Lawtech UK is a government backed initiative to transform UK legal sector through technology. Lawtech setup the UK Jurisdiction Taskforce (UKJT) to realize its objectives which on 22 April 2021 came up with the Digital Dispute Resolution Rules aimed at revolutionizing dispute resolution in Fintech applications and other novel digital technologies. These include *inter alia* distributed ledger technology, cryptoassets, cryptocurrencies and smart contracts. The parties can incorporate the rules into their agreements as an independent clause which allows for dispute resolution through:

i. **Automatic dispute resolution** by including oracles in smart contracts that enables predetermined

[10] Indiabulls Housing Finance Limited v. Deccan Chronicle Holdings Limited and Others, (2018) 14 SCC 783.

[11] The International Financial Services Centres Authority Act, 2019 (Dec. 20, 2019), https://egazette.nic.in/WriteReadData/2019/214809.pdf [Hereinafter FinServ Act].

[12] IndBiz, *supra* note 1.

outcomes based on the occurrence of certain events. The rules make such outcomes legally binding.

ii. **Arbitration**, which stipulates that parties settle their disputes within 30 days from appointment of the arbitrator(s) unless agreed otherwise. The arbitral award shall be binding on the parties.

iii. **Expert determination,** where a expert or panel of experts specializing in the subject matter of the dispute can give their opinion on the dispute which will be legally binding on the parties.

The key features of these rules that set it apart from other arbitral proceedings or dispute resolution methods is its options of anonymity, speed and flexibility. The arbitrators or tribunal shall have the sole discretion over the arbitration procedure after the initial notice of claim and response. They also have power to "operate, modify, sign or cancel any digital asset relevant to the dispute using any digital signature, cryptographic key, password or other digital access or control mechanism available to it"[13]. However, the parties shall have minimal recourse to challenge the arbitral award or decision. The Digital Dispute Resolution Rules are groundbreaking but they are designed primarily keeping in mind the increased legal acceptance of blockchain based technologies and smart contracts in UK jurisdiction. The stance of RBI regarding cryptoassets is adverse and hence these rules might not be well suited for digital disputes arising within the Indian jurisdiction. When compared with the UK rules, RBI directives fall far short as they deal with a very small subset of disputes. If India wishes to be a Fintech behemoth it needs to strengthen its dispute resolution mechanism which is both archaic and inadequate when it comes to novel digital technologies.

CONCLUSION

IFSCA was set up with the objective of developing and regulating the financial services market in International Financial Services Centres in India[14]. However, in the contemporary scheme of law, it is ambiguous whether this objective can be reconciled with the apparent non- arbitrability of fintech disputes. There is no doubt that setting up of a specialized arbitration centre for providing legal support to fintech companies is essential for the growth of the commercial regime. This becomes even more pertinent in light of the rising number of such entities across different sectors. However, India unlike countries like the UK, lacks explicit statutes to clarify the mandate of specialized arbitration institutions parallel to strengthening existing and proposed financial centres. It is also unclear how fintech disputes can be arbitrated against well-settled principles of law without an express legislative sanction to overcome this challenge. As the financial market becomes more digital than ever, it is expected that the mandate of the proposed International Arbitration centre shall be clarified as the same shall be instrumental in addressing the larger question of arbitrability of fintech disputes.

[13] Digital Dispute Resolution Rules 2021, § 11.

[14] FinServ Act, *supra* note 11.

INTERVIEW WITH PROFESSOR STEVE NGO

Professor Steve Ngo is a seasoned international arbitrator, academic and arbitration specialist from Singapore. He is the founding President of Beihai Asia International Arbitration Centre, Singapore and also an Honorary Professor at NLUO in addition to a number of professorial appointments. Prof. Ngo has a wide range of research interests in the area of international arbitration and dispute resolution which includes cultural elements in disputes settlement, arbitration reform, current trends and innovation in dispute resolution, including recently published his research on the application of Gross National Happiness (GNH) in dispute resolution. In addition to dispute resolution, he has a keen interest in Asian and regional studies where he is a Fellow of the Royal Asiatic Society.

Considering that you have been inducted as one of the honorary professors in the premier law schools in India, what change/modification in the Arbitration curriculum do you think would benefit the law students in terms of understanding the scholarship around International Arbitration in a better manner?

For a start, the global and regional arbitral scene has seen unprecedented massive growth. Arbitration was largely alien to the masses even about a decade ago but the situation today is markedly different. Now, I hardly have to explain to people what arbitration is; for many years, a friend who stumbled upon me from time to time will never fail to ask me how my "arbitrage" (relating to financial markets, which I am alien to) is doing! But a few years ago, he started asking me about the specifics of settling commercial disputes by arbitration. Not only that the understanding of arbitration has now grown tremendously, but we are also now attracting an abundance of people into this sector. This even includes students, so something must have gone very right or wrong given how 'magnetic' arbitration is. You asked my views about changing or modifying curriculums however I must be fair not to make a sweeping statement for the world is not homogeneous. Some institutions only want to teach the basics but others would like to be centers of excellence. Amidst the arbitration 'euphoria', the strong pull factor of arbitration means many institutions are teaching and offering arbitration courses with varying standards, contents and support. Nevertheless, I think some institutions need to raise the standard of their curriculum so that they meet the minimum expectations. Some other institutions appear to be already providing decent quality curriculums therefore they can consider challenging themselves further by exposing their students to the reality of the arbitral industry from international perspectives and comparative studies, provided there are suitable teachers internally or externally. Arbitration thrives in the international realm so internationalisation should be the direction for curriculum development and pedagogy. As for the latter, I also observed how schools lack adequate faculty members to teach international arbitration. Some of their junior faculty members no doubt has

developed an interest in arbitration but they lack actual experience and often rely on their limited exposure. I would also suggest curriculums deal with the real problems faced in the arbitral world; not only theoretical but also practical issues. Incidentally, I recently researched the application of Bhutanese "Gross National Happiness" as a guiding principle in arbitration which I think there is something for us to learn from it. So, there you go, I do apologize for giving a long answer. I have suggested possible modifications but I also think that there must be the right faculty members to teach. The 'harvest' is great but 'the laborers are few, so to speak.

Being a distinguished practitioner in the field of Dispute Resolution, what advice would you suggest to young law students interested in arbitration and litigation, and is there any path that you would suggest for them to gain theoretical and practical knowledge from?

If the essence of this question is asking how to "succeed" in the arbitral world, my immediate reaction is sadly I don't have a crystal ball. However, if it is just a plain question, then I would point out that numerous students are already going around seeking internships (remote and in-person), research assistantships, participating in moot competitions, writing blogs and articles, etc. I'm unsure about the outcome of these efforts though I think it's like saving money; if you save ten rupees a day, you will accumulate some funds after a passage of time. Meanwhile, to my mind, to succeed or make waves in the arbitration or litigation scene is no different from a computer programmer or civil engineer wanting to achieve their life's goals. I believe one needs to persevere and be focused. Specialisation is necessary, therefore find your niche. Think about what you would like to achieve, pick an area or areas to focus on, then if possible find a mentor or 'guru' to guide you. Be hungry for knowledge and set some realistic goals. Attitude is important so try not to feel deserving and treat people around you including those in the industry with respect. Finally, remember that success is not perpetual and failure is not permanent.

Findings of the Queen Mary and White & Case survey indicate that Singapore has levelled with London as "most preferred" arbitration seat worldwide, what do you feel India lacks and can emulate & improve in order to become an arbitration hub like its Asian contemporary?

First of all, I don't think there is anything that India is lacking. The country has a rich heritage and all the right talents. Indeed, I was often asked about Singapore's arbitral success. I once heard someone say that his country is 'older' than Singapore thus they should overtake it to become an international arbitral centre. I don't the science of it works that way. Singapore started looking into globalising its arbitration status at least 20 years ago. We worked very hard to be where we are. I would not encourage stoking rivalry or inciting sheer competition but I would much prefer a healthier version of 'coopetition' or the amalgamation of "cooperation" and "competition". We can all work with each other and there is no single gold medal to compete for. For instance, it was recently reported that the Chief Justice of India N.V. Ramana encouraged the establishment of an arbitral centre in Hyderabad and sought Singapore to provide some input. I was recently

appointed to the advisory committee of the Gujarat International Maritime Arbitration Centre which will be launched soon. Considering the good ties between India and Singapore, I think both countries can work together well. Indeed the world is a big place and opportunities are there for all. I already said above about finding one's niche and even a country can; India mostly certainly can. Singapore found its niche and worked to its advantage being a small city- state with no natural resources. International arbitration cannot succeed with reclusiveness.

What are the trends you feel have emerged in international arbitration as a consequence of the COVID-19 pandemic that carry a positive impact? Do you believe that these trends would sustain even in the post pandemic times?

I will only list one and that one single trend is virtual meetings. I think post-pandemic (if there is such a thing), we will still meet in person but only on a need-to basis. I would agree that case management or preliminary meetings can be conducted virtually whereas, for evidentiary hearings, it is understandable that the parties and tribunal would prefer to meet in person. This way, costs can be saved for all parties involved as well as promote efficiency. People will travel less and this would translate to productivity too. Let's see how things pan out, I try not to make predictions because truth can be stranger than fiction so to speak.

While observing the government which does not appear to move towards ratifying the ICSID Convention and the status of unenforceable nature of investment awards, do you think that India is pacing towards becoming a protectionist and State-centric respondent state when it comes to Investment Arbitration?

First of all, my stand is to refrain from commenting on any country's economic and trade policies as I believe they know what is best for themselves. What I will say is this; India is not the only country in the world that is not part of the ICSID Convention. Meanwhile, there are many other means of resolving investor-state disputes other than via the ICSID. Surely after 55 years (ICSID was established in 1966), countries that have decided not to be part of ICSID have their reasons for it. May I also add that when it comes to international arbitration and law, India certainly has a lot of experience and track record. In 1955 when a committee was established by the United Nations Economic and Social Council (ECOSOC) to consider the draft convention which was to become the celebrated New York Convention 1958, India hadtwo members on the committee. Also most recently, India's candidate was elected to the apex United Nations International Law Commission.

DEEP INDUSTRIES LTD. V. ONGC & ANR. (2020): INVOKING WRIT JURISDICTION UNDER ARBITRAL

Gurdeep Singh, student of Rajiv Gandhi National University of Law

The pro Arbitration regime requires a finality in the decisions by the courts, and incorporates the principle of minimum non-intervention of the courts. Clubbed with only a limited ground of first appeal under Section 34 and no grounds of a second appeal, there is a sense of finality to the legal process. This puts an arbitration proceeding at a better position than a traditional civil court by adopting a differential standard of judicial review under arbitrations. Only the arbitrator is the judge of the facts and his findings of fact cannot be interfered with. This puts the arbitral award at a higher pedestrian than a judgement of a court, implying that the judges can be wrong, but the arbitrator's findings never can be erroneous. What this means is that, although the powers of judicial review by constitutional courts are not ousted by a statute being the part and parcel of judicial review, but the judges have a self-imposed restraint and more often than not the powers of judicial review are not exercised, even in cases of erroneous awards. This approach of arbitration exceptionalism has been prevalent for quite some time now and the critics have argued it to be a way of outsourcing justice to private courts and minimizing the role of Constitutional Courts. This can be seen as a crisis for legitimacy of the courts but the courts have played their part in this pro arbitration approach. To illustrate, recently the Supreme Court imposed a 50K fine on a litigant to approach the court instead of arbitration. Nowadays, unknowingly people contract out their right to take recourse to the court with the rise in standard form contracts and arbitration exceptionalism

FACTS IN BRIEF TO THE DISPUTE

- The respondent, ONGC awarded a contract for the supply of one Mobile Air Compressor for a period of 5 years.
- On 11.10.2017, shortly after entering into the contract the same was terminated by the respondent and the next day, the appellant was blacklisted for 2 years from further bids floated by ONGC.
- On 18.10.2017, a Show Cause notice was sent to the appellant to show reasons why they shouldn't be blacklisted.
- On 02.11.2017, The appellant (Deep Industries) invoked the arbitration clause by way of a notice. That is the main issue between the parties in the present petition.
- On 21.12.2017, pursuant to the arbitration notice a sole arbitrator was appointed and a claim petition was filed on 02.02.2018.
- On 5.02.2018, an order for blacklisting was passed by ONGC for two years. Meanwhile, a Section 16 petition was moved before the arbitrator which was dismissed, one of the grounds being, the notice to arbitration did not mention the process of blacklisting.
- On 09.05.2018, the said application was dismissed, and the arbitrator stayed the operation of the order of two-year ban till the final dismissal of the arbitration proceedings.
- On 31.05.2018, an appeal under Section 17 order was filed before the City Civil Court, which upheld the arbitrators order and consequently the first appeal under Section 37 was heard and dismissed on merits.

- At this stage, a Special Civil Application was filed before the High Court[1] . The HC without answering the preliminary jurisdictional issue went on and allowed the petition under Article 227 on the grounds that:

    1. The ban order was passed under a General Contract Manual and not under Clause 18 of the Agreement, thereby a jurisdictional issue arose as to the powers of the arbitrator.
    2. Notice invoking arbitration was only confined to illegal termination and not blacklisting. Hence, no injunction could be granted by the arbitrator on the grounds that, the parties can be compensated later in damages.

Thus, the present Civil Appeal has been preferred before the SC.

ISSUES RAISED BEFORE THE APEX COURT

Whether under the given facts to the dispute, the High Court was correct in exercising powers under Article 227 of the Constitution? Under what circumstances can the courts interfere in an arbitral proceeding by way of their supervisory jurisdiction under Article 226/227?

ARGUMENTS RAISED BY THE APPELLANT

- The counsel for appellant has placed reliance on Section 5 and 37 and submitted that, given the Statutory scheme of the arbitration act and the denial of a right to second appeal, mere errors in law cannot be corrected and interfered with under Article 227. The legislative intent of the amendment to Section 115 CPC should be kept in mind by the HC while disposing petitions under Article 227.
- Despite the fact that provisions of Arbitration Act cannot override the powers of Judicial Review, that is a basic structure the Statutory Scheme ought to be followed in almost every case. The statutory mandate provides for only one appeal and interdicts a second appeal being filed.[15] Hence the decision of the HC should be set aside.

ARGUMENTS RAISED BY THE DEFENDANT

- The counsel for the respondent relied on notice invoking arbitration dated 02.11.2017 and vehemently submitted that the notice only pertained to the illegal termination and did not raise any plea as to the ban imposed by the respondent for two years.

- It was submitted by the counsel that powers under Article 227, although sparingly exercised, can be availed of in cases of patent lack of jurisdiction and thus the findings of the HC were correct in this regard and need no interference.[1]

- To reach this conclusion, the counsel relied heavily on *Punjab Agro Industries Corporation Ltd v. Kewal Singh Dhillon*[1], wherein the petition under Article 227 was held to maintainable and distinguished *SBP & Co. v. Patel Engineering Ltd. & Another*[2].

HELD

[15] Arbitration and Conciliation Act, 1996, Section 37(2), Act No. 26 of 1996.

A three-judge bench of the Apex Court vacated the order by HC, allowed the appeal and accordingly directed to dispose of the arbitration proceedings as expeditiously as possible in accordance with the Act.

RATIO

Statutory Scheme of the Arbitration Act: Only a Limited Grounds to Appeal Under the Act

At the outset, the court discussed Section 5 and Section 37 of which incorporate the principle of non-intervention by the courts. The non-obstante clause clubbed with a limited right to appeal runs contrary to the legislative intent which only provides for a single appeal under the Arbitration Act, and interdicts a second appeal being filed under Section 37(2) of Arbitration Act. Although Article [1] 226/227 are wide enough and part of the basic structure [1], they can't be resorted to as the normal course, as it would lead to frustration of the entire arbitral process, by way of several appeals at multiple instances, and that would subvert the principle of non-intervention. This was exactly the reason that led to derailing the scope of the older Arbitration Act of 1940. Only in exceptional circumstances, the courts should use their supervisory power, for instance, in the case of 'patent lack of jurisdiction'. This Clubbed with the doctrine of 'Effective Alternate remedy' the courts ought to be circumspect while exercising their supervisory powers under the judicial review.[1]

The Principle of Minimum Intervention in a Pro Arbitration Regime: Differential standard of Review

To further this aspect of Minimum Judicial non-intervention it would be pertinent to mention the findings of the Supreme Court in the case of *SBP & Co. v. Patel Engineering Ltd. & Another*[16], on which the learned counsel for appellant heavily relied. It was observed by the apex court that:

> *"45. It is seen that some High Courts have proceeded on the basis that any order passed by an arbitral tribunal during arbitration, would be capable of being challenged under Article 226 or 227 of the Constitution. We see no warrant for such an approach. Section 37 makes only certain orders of the arbitral tribunal appealable."*

Hence, according to the Apex Court, it won't be a sound public policy to challenge each and every award under the supervisory jurisdiction of the constitutional courts. This would simply run contrary to the legislative intent. The correct interpretation of law would be to give limited powers to the HC to interfere, specially when intervention is not necessary or required under the given facts. To Sum by the words of the SC:

> *"46. The object of minimizing judicial intervention while the matter is in the process, will certainly be defeated if the High Court could be approached under Article 227 or under Article 226."*

Interference under Article 227 only in Exceptional Cases: A Self-Imposed Restraint on Higher Courts

There is no appeal for an application under Section 16, and the same can only be taken up under a Section 34 petition, after the

[16] SBP & Co. vs. Patel Engineering Ltd. & Another, (2005) 8 SCC 618.

completion of the trial. In the present case the HC has disregarded the statutory scheme of the Act and decided the blacklisting for two years was not part of the notice invoking arbitration, a finding directly contrary to the findings by the arbitrator. Even if it the plea of Specific Relief Act was infracted, in that damages could have been granted, as a result of which an injunction ought not to have been issued, is a mere error of law and not an error of jurisdiction, much less an error of inherent jurisdiction going to the root of the matter. Also, it is pertinent to note that the HC went into the merits of the case which isn't permissible, only jurisdictional errors can be corrected under Article 227 of the constitution. In the case of *Navayuga Engineering Co. v. Bangalore Metro Rail Corporation Ltd.*[17], the SC while placing reliance on Deep industries observed that the HC should be extremely circumspect in interfering with the orders passed by the arbitrators and such intrusion should be only in exceptional circumstances in cases of patent lack of jurisdiction

Inordinate Delay in Legal Process: The Time Imposed Arbitral Policy

To sum, the court observed that the objective of the act was speedy disposal, and while the Act is a self-contained code, its objective cannot be vacated by giving multiple appeal for litigants. The court also referred to Section 29A which puts a mandate on the arbitrator to complete the arbitration proceedings within 12 months, speedy disposal being one of statutory objectives of the act.

Further, the powers under Section 115 of the CPC are a general revisional jurisdiction which can only be exercised for correcting jurisdictional errors only. Also, the legislative intent post 2002 amendment to law is no revision to be entertained in cases of an alternate remedy is available. As observed by the SC in the case of *Tek Singh v. Shashi Verma and Another*[18], wherein it was observed that no revision will lie in cases of an interlocutory order. It was observed:

> *"Under Section 115, it is not competent to the High Court to correct errors of fact however gross or even errors of law unless the said errors have relation to the jurisdiction of the Court to try the dispute itself."*

CONCLUSION

While it is trite law that a special enactment should always prevail the general law, it is also material to point out also that a special enactment cannot override a constitutional provision and the supervisory jurisdiction of the Higher Courts. While a judge being a guardian of the Constitution should make sure to respect the statutory scheme and the principle of non-intervention, he cannot act as a mere spectator in cases of erroneous decisions. This being the case the power of judicial review would always be available to the Higher Courts given the adequate set of facts. While the courts cannot reappreciate facts or override mere errors or law they certainly have powers to correct serious jurisdictional issues and illegalities in law. Hence, supervisory role of the court cannot be interdicted in every circumstance, and has to be exercised to meet the ends of justice.

[17] Navayuga Engineering Co. v. Bangalore Metro Rail Corporation Ltd., LL 2021 SC 203.

[18] Tek Singh vs. Shashi Verma and Another, (2019) SCC OnLine SC 168.

GERMINATED SPROUT IN STERILE WORLD: ANALYTICAL ROLE OF ARBITRATION IN RECONCILING CONTRADICTIONS BETWEEN INTERNATIONAL INVESTMENT AND ENVIRONMENT SAFEGUARDS

Akshaya Bhargava, Amity University, Gwalior

I. INTRODUCTION

Bilateral Investment Treaties (BITs), multilateral investment treaties, etc. are the realistic instances of international agreements. Such agreements have emerged as a potential solution to remove the long-awaited uncertainty and ambiguity in the application of soft law. The origin and emergence of BITs can be traced to two main topics in the political climate during the 1960's.[19] Firstly, the Second World War was over and there was a consensus to support the economic position of Western states as a measure against the expansion of Soviet communism. Secondly, there was a growth in decolonization which resulted in demands from undeveloped states.[20]

International investment has deeply wedged its roots in an embarking era of liberalization and globalization. With this developing phase of international businesses and dealings, potential confrontations and disputes are not left apart. The elements of globalization and liberalization have brought with it a spark to propagate the spirit of promoting cross-border investment as the former besides motivating, has opened up all the gateways to invest in those economies which are experiencing a chronic hike in their growth or which are still awaited in the developing phase. But such chronology is desperately encircled with several inevitable conflicting interests from the investor's point of view as well as from the host state's point of view; *Inter alia,* human rights and environmental issues are the predominating contradictories. The Intellectual aspect of resolving the same would lie in finding a middle way to keep both the sides at ease. Hence, this could be brought into practicality by entrusting an institution, so as to make a viable effort to reach an amicable conclusion. In general parlance, Bilateral Investment Treaties are the resemblance of their own set rules and standards which govern the business conduct in host state. This would rather create an environment where in the capital exporting state has its implied domination in such dealings and the capital importing state has a subordinate say in the framing of rules governing the conduct of investment business. Consequently, vicinities of capital importing states have been put at the surge of nature-exhaustion by the hands of capital exporting state jeopardizing the environmental safeguards of host state. Wide ranging is the umbrella of environmental protection

19 Isabel Sarenmalm, *Investment Treaty Arbitration and Environmental Sustainability*, SPRING TERM (July 2, 2021, 6:10 PM) https://www.diva-portal.org/smash/get/diva2:817626/FULLTEXT01.pdf.

20 *See*, INTRODUCTION BY THE EDITORS, THE PROPOSED CONVENTION TO PROTECT PRIVATE FOREIGN INVESTMENT, A ROUND TABLE'115 (J PUB L 1960).

which coincides with numerous issues pertaining to its regulation. The award in the arbitration regarding the Iron Rhine Railway noted that: "[…] 'environment' is broadly referred to as including air, water, land, flora and fauna, natural ecosystems and sites, human health and safety, and climate.[21] With the expansion of time, the burgeoning of legal instruments pertaining to environment has thoroughly been witnessed. In the running moment, proliferation, globalization and liberalization of economic activities via the medium of foreign investments have exclusively been considered as the principal operators of economic development globally. This signifies the need to analyze the reciprocity between environment protection and foreign investment. Environmental protection includes not only compensation measures for damage caused, but also, and more significantly, preventive tools and solutions.[22]Controversies between foreign investment and environmental protection are likely to arise when the interest of one state comes in confrontation with the interest of another state. To illustrate, the award in the case of *Trail Smelter Arbitration Case*[23]has significantly been the first example of this. Due to sulphur dioxide pollution from a Canadian smelter onto American territory, the tribunal sided with the United States and established the "polluter pays" principle, later confirmed by both the Stockholm Declaration of 1972 and the Rio Declaration of 1992.[24]Provided are the varying aspects of global norms which come in contact with one of the other adjudicating bodies i.e. court and tribunal which play a key role in scrutinizing and interpreting this prolonging coactions as well as approaching synergies. Consequently, it gives rise to the present challenges of pragmatic interpretation by the judicial organ i.e. arbitration in the regime of international investment. The mechanism of arbitration consists of two different aspects; one, the primary objective of the arbitrators is to follow the precedents as well as the arbitral awards; second, there exists varying views that the major objectives of the arbitrator are inclined towards opting the procedural framework as chosen by the parties. The contribution of this present research is to streamline the practical aspect of arbitral role in reconciling the heated atmosphere between international investments and the environmental safeguards of the capital importing states as well as the regulatory framework with respect to the treaty interpretation by the adjudicating authorities. In the backdrop of environmental regulation, international investment has attracted frequent disputes which in turn pave a way ahead resorting to arbitration proceedings. Bearing these contrasting contemplations, the present study will analyze the role of international arbitration for reconciling the emerging confrontations between the interests of foreign investors (international investment) and the public policies of the host country (quality of the environment

21 Laurence Boisson de Chazournes, *Environmental Protection and Investment Arbitration: Yin and Yang?*, RESEARCH GATE (July 5, 2021, 8:45 am)https://www.researchgate.net/publication/315330631_Environmental_Protection_and_Investment_Arbitration_Yin_and_Yang.

22 *Id.*

23 United States v. Canada 1941, U.N. Rep. Int'l Arb. Awards 1905 (1949).

24SHAW, N. MALCOLM, INTERNATIONAL LAW(Cambridge University Press, 7th ed. 2014).

and ecological balance).

REGULATORY CONFRONTATIONS AND TREATY INTERPRETATIONS

Since the era from 1980s to 2000s witnessed the increasing number of international investment treaties; it is worthwhile to note that traditional treaties have not been concerned about the environmental safeguard and the quality of ecological balance, North American Free Trade Agreement (NAFTA) has eminently been considered as the first topical investment treaties amalgamated into the free trade agreement which initiated an eye opener approach towards being compassionate for maintaining the quality of ecological balance.

The prominent conflicts between the investor's claims to freely carry on his business invested in, and the interest of host states to defend its rulings justifying the restrictions on such projects, are part and parcel of every investment agreement. But the issue arises as to the prevalence of which factor over the other? How such conflicted norms would appropriately be resolved? The probable way ahead could be figured out by referring the Vienna Convention on Law of Treaties in 1969. The latter has suggested numerous appropriate rules to reconcile the issue of treaty interpretation, which are also applied by the arbitration tribunals in the disputes concerning IIAs.

In this regard, there are two situations; one- where the parties have entered into a separate environmental treaty after their IIAs treaty & two- where the parties have an environmental saving clause fixed in their IIA treaty. So, the question arises here as to which of the treaties would be prevailing in preference to the other. To be very strategically, VCLT has provided the reconciliation for such disputes that where the environmental treaty has been signed after the IIA, then the rules of the environment treaty will be prevailing in the interpretation of IIA so as to make IIA applicable to the extent of their conformity with that of environmental treaty.

A. Abuse of Legal Procedures by Investors: A Menace

The stringent sword of international arbitration has been a determinate proof of strengthening the regime of IIAs for safeguarding the interests of foreign investors. Resorting to the shield of international arbitration, foreign investors are considered to be in a dominating position to influence the policy framework of capital importing states. For countries which are wandering optimistically for alluring more investment by foreign investors or those who are still being tangled in developing state, the toolkit of international arbitration may imply potential risks factors; among others, harm to reputation and the increased Cost- oriented approach of arbitration are the primary ones.

First, *Harm to Reputation* has repugnantly been highlighted as the most fearful issue for the growing economies as increasing cases of IIAs arbitration might adversely affect new opportunities for foreign investment. Second, *High Cost Factor* involved in the IIAs arbitration process signifies the escalating expenses besides

paying compensation in satisfying claim of investors which is a matter of great concern for the weak economies.

Impliedly, developing states find themselves under a pressurized push to take back the allegations made against deleterious acts of foreign investors impacting the quality of ecological balance of host country or they even come to their toes to try their best for reconciling the disputed claim even if there is no breach from their end of IIAs provisions. Consequently, these settlements would undoubtedly be termed as constraining or degrading the environmental policy space of the capital importing state. On the other hand, this would lead the succeeding returns in persuading the host state to alter their environmental policies in a way favorable to their (investors) interests.

Third, *Collusion between investor's claim and political dealings*. At general parlance, the role of international corporations has been kept under a stringent check that ensures the non-interference of them in the political regime as the claims of foreign investors intermingled with the domestic political reforms and activities attracts much attention. Inter alia, numerous environments' related cases in independent IIAs have been observed to be relatively linked with the entities indulging with the regional politics and the leaders that take the foremost lead. The said pattern could easily be witnessed by the Vattenfall case wherein the corporation entirely relied on the affirmations made by the representatives of CDU political party of Hamburg even though it's been lost the majority.

B. Extent of Arbitration' Role in Environment safeguarding: A Case Study

Does the IIA arbitration system have appropriate safeguards against abuse of power by the foreign investors? To deeply examine the real aspect of the said question, the researcher is much inclined towards discussing some relevant case laws which bear greater significance in judging the role of investor-host state-dispute settlement mechanism i.e. Arbitration and which would have the potential tendency to put worthy safeguards against the threat of abuse by foreign investors.

In a prominent decision of *Ethyl case*[25], Canada was a party to the arbitral dispute and it was ordered to take back one of its leading regulations regarding a ban on trading activities with a hazardous additive in the 'Gasoline'. Canada was also ordered to pay 13 mn' USD. The regulatory safeguard resorted to with the help of arbitration has profoundly been observed in the *Shell case*[26] wherein the company had to withdraw its own claim on the occasion of the reversal of one of the orders by the Nicaraguan court with regard to embargo regarding Shell's trademark which has been used to mandate the payment of damages to approx. 500 persons suffering from the health issues from fruit production. In *Vattenfallcase*[27] the corporation was found to settle down its claim referring to an IIA upon a settled view which provided a modified permit with respect to the water

25 Ethyl Corporation v. The Government of Canada, NAFTA (1992).

26 Shell Brands International AG and Shell Nicaragua S.A. v. Republic of Nicaragua, ICSID case no. ARB/06/14.

27 Vattenfall AB and others v. Federal Republic of Germany, ICSID ARB/12/12.

granted by the German authorities. The conditions of the original permit put various restrictions on the amount of water to be taken from Elbe River for the purpose of fulfilling the needs of new coal fired power plant. *Dow case*[28] expressly shows that the corporations are not given any privilege by the IIAs so as to make them viable to hold any monopolistic stand in confrontation with the convenience of host states; the same is being justified by the fact that Dow had net been given any compensation in spite of its ongoing claims.

So, from the above cases, it is apparently clear that rather being at privileged side, foreign companies are not in a position to take any arbitrary advantage under IIAs. This fact can be witnessed from the above cases wherein the company itself was ordered to take back its own claim. Therefore, the position is very clear that the role of Arbitration is too stringent which does not let its procedural framework to take undue advantage by foreign investors.

CONCLUSION

After a detailed analysis, the researcher has reached on a conclusion that the hypotheses of the present study have not resulted positively. The mechanism of dispute settlement i.e. arbitration has been striving profoundly to cope up with the emerging issues regarding confrontation of investor's interest with host state's public policy. Arbitration system evidently provides better safeguards for decreasing the chances of risks of abuse of power by the foreign investors. Besides this, researcher is putting forward some of the worthy recommendations which would be considered much significant for any further policy framework.

First, effective measures must be put in place so as to keep the cost of arbitration at a fixed minimum grade which would in turn settle down all the standards for prospective arbitration.

Second, there must be the compliance balance between the interest of foreign investor and the interest of host state. Host states must honor the merit of IIAs while safeguarding their own interest pertaining to its regional public policies.

Third, host states must be given wide space to effectively negotiate in designing the international investment agreement and to put the clause for safeguarding their environment without any pressure from the side of foreign investor and stay protected from the arbitrariness of regulators.

Fourth, the spirit of investors must be committed towards the enhancement of environmental governance of the host state as the investors are using the resources of host state so it must be the primary obligation only, to protect their vicinity with a view to deepen its roots for long lasting. Therefore, the framework of CSR has no longer been the dead paper.

Fifth, sustainable development must be the guiding principle for the interpretation of IIAs. The former must be considered as the overarching target to achieve the predetermined goal of the treaty.

[28]Dow AgroSciences LLC v. Government of Canada, NAFTA (1992).

CONFIDENTIALITY AND INDIAN ARBITRATION: A TRAGEDY OF IGNORANCE

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I. INTRODUCTION

For the ultimate goal of achieving the status of being a hub of International Commercial Arbitration, amendments were been introduced in the Arbitration and Conciliation Act, 1996 ("Act") in the year 2015 & 2019, in order to induct provisions for the creation of arbitral institution, accreditation of arbitrators, confidentiality clause, among other things. Before the amendment, confidentiality was only limited to conciliation proceedings.[29] As such, confidentiality provision has been introduced by the Arbitration and Conciliation (Amendment) Act, 2019 in form of Section 42-A. Confidentiality in arbitration proceedings was earlier ensured by certain indirect mechanisms, like, confidentiality clause could be included in the arbitration agreement signed by the parties or in the contract developed for furthering trade relations. Further, confidentiality was also ensured by way of Section 126 of the Indian Evidence Act, which provides for attorney-client privilege.

29 Arbitration and Conciliation Act, 1996, §75, No. 26, Acts of Parliament, 1996 (India).

Confidentiality for the purpose of arbitration in its literal sense would mean non-disclosure of details of proceedings to a third person, who is not a party to the dispute. Further, the statement of Section 42-A is very simplistic and only allows disclosure of arbitral award, which is required for the purpose of its enforcement. The general nature of the clause is non-obstante and it imposes the obligation on the arbitrator/s, parties to the dispute and the counsels representing them.

Arbitration takes into account confidentiality issues, and for this very reason, companies opt for arbitration for the resolution of disputes. Unlike traditional courts setup, arbitration is rather a private affair and therefore in course of proceedings, parties are less hesitant in revealing sensitive information & documents, trade secrets, books of account, etc. In order to provide a statutory guarantee for the same, introduction of Section 42-A can be considered as a remarkable step. However, this new provision comes with its own set of problems. These problems can be understood by a two-way approach. The first approach is that owing to the non- obstante clause, Section 42-A comes into direct conflict with the applicability of other provisions of the act. Another approach is certain practical difficulties faced in the implementation of Section 42-A.

II. ISSUES INVOLVED

A. ISSUE OF INTERIM RELIEF (SECTION 17):

Application for interim relief under Section 17 is made to the arbitral tribunal. As per provision enshrined in Section 17(2), any interim order passed by the arbitral tribunal

would be granted the status of being an order of the court and would be enforced in compliance with provisions of Code of Civil Procedure, 1908. A loophole of this provision is that every such order still cannot be enforced as an order of a court[30] because section 17 does not confer any power on the arbitrator or arbitration tribunal to enforce its own awards made under section 17, and any such attempt of enforcement would amount to *coram non judice*.[31] Further, Section 9(3) of the act mandates that once the arbitral tribunal has been constituted, courts cannot entertain any application for grant of interim relief. However, an exception to this provision is that if the court finds circumstances which may render application of Section 17 inefficacious, it may intervene. This paves the way for the interference of courts, in case circumstances render the order of arbitral tribunal ineffective. Such interference of court is also legally enforceable as per the provisions of the act.[32] Any such relief when is granted by the courts, require prior justification by the parties in order to prove the legitimacy of their stand. This may also require the courts to scrutinize the arbitration proceedings and documents presented in course of it. Sometimes parties are also required to annex to their application details of the arbitration proceedings and any document incidental to it. This provision would again require a breach of confidentiality clause as provided for in Section 42-A.

B. ISSUE OF APPOINTMENT OF EXPERTS (SECTION 26)

Section 26 of the Arbitration and Conciliation Act, 1996 facilitates the appointment of a neutral person as an expert[33] in order to assist the arbitral tribunal in course of proceeding. This is also in compliance with provisions of the Indian Evidence Act, 1876 which states that those facts which are otherwise not relevant become relevant when expressed by an expert.[34] Courts and Arbitral Tribunals have often opted for the opinion of an expert in cases where specific technical knowledge is required, which is not possessed by the courts.[35] Clause (2) of this provision enables such an expert to attend the oral hearings where the parties get an opportunity to put questions to him and to present expert witnesses in order to testify on the points at issue. A direct implication of this provision is that the parties would be required to disclose sensitive information to the expert and some information would naturally be disclosed if the expert is allowed to be present in the oral hearings of the dispute. This provision, therefore, comes into conflict with the confidentiality provision.

C. ISSUE OF ASSISTANCE OF COURTS IN TAKING EVIDENCE (SECTION 27):

Parties to the dispute in arbitration may seek the assistance of courts in order to take certain evidence.[36] This can also be with respect to a witness, whether a party to the dispute or any other person.[37] This is done

30 Sundaram Finance Ltd., M/s. v. M/s. NEPC India Ltd., AIR 1999 SC 565.

31 Kiran Singh v. ChamanPaswan, AIR 1954 SC 340.

32 Arbitration and Conciliation Act, 1996,§ 9, No. 26, Acts of Parliament, 1996 (India).

33 Ramnathan v. State of Tamil Nadu, AIR 1978 SC 1204.

34 Indian Evidence Act, 1872, § 46, No. 1, Acts of Parliament, 1872 (India).

35 Folokes v. Chadal, (1782) 3 Doug. K.B. 157.

36 Arbitration and Conciliation Act, 1996,§ 27, No. 26, Acts of Parliament, 1996 (India).

37 Delta Distilleries Limited v. United Spirits Limited, AIR 2014 SC 113; Arbitration and Conciliation Act, 1996, § 27, cl. 4, No. 26, Acts of Parliament, 1996 (India).

in order to not ignore any material evidence in course of proceedings and to ultimately not make unfair arbitral awards.[38] In order to utilize this provision, parties are required to make an application to the courts. However, a practical difficulty in application of this provision is created as a result of the confidentiality clause. The application made to the courts require the parties to annex certain documents with respect to the subject matter of arbitration, which indirectly means disclosure of information which is confidential to an arbitration proceeding.

D. ISSUE OF TIME BOUND PROCEEDINGS (SECTION 29A):

Section 29 provides for time limits for the completion of arbitration proceeding and provides vast power to the Courts regarding the extension of the time period and neither the arbitrator nor the parties, even by joint consent, can extend such period. It imposes an unnecessary directive on the parties to approach the competent court of law even if they mutually consent to do the needful. It is pertinent to mention here that the parties resort to the process of arbitration as it is a time-effective process and minimizes supervisory judicial interference which is not only cumbersome but also doesn't provide a speedy resolution. This provision provides that the Court can extend the period after examining the reasons for the delays and also makes it open for the Court to substitute one or all of the arbitrators[39] thereby leading to excessive judicial interference in the process of arbitration. Moreover, when this particular provision is invoked, it would require the parties to inadvertently disclose all the details and documents of the dispute which may contain sensitive information.

III. THE WAY FORWARD: SUGGESTIONS

A possible solution to the problem would be that an amendment should be made to section 42-A in order to introduce more exceptions for the confidentiality clause. By doing so, the section can be made more comprehensive and its applicability can also be enhanced. Apart from that, certain direct methods that can be used are:

1. With respect to Section 17, provision for interim relief during arbitration proceedings should be listed as an exception to the confidentiality clause. By doing so, it can be ensured that interim relief can be granted without undermining the confidentiality provision under section 42-A. Further, a grant of interim relief sometimes requires the interference of the courts. A proper procedural mechanism can be established so that parties are not required to disclose important information with respect to the arbitration proceedings while making an application to the court. For instance, a party must be allowed to disclose and review the confidential information only in his presence and must not be forced to submit a copy to the court for future access or probable misuse.
2. With respect to Section 26, when a situation arises wherein the appointed expert is required to attend oral hearings of arbitration, the expert can be made to sign an

[38] K.P. Poulose v. State of Kerela, AIR 1975 SC 1259.

[39] Arbitration and Conciliation Act, 1996, § 29, cl. 6, No. 26, Acts of Parliament, 1996 (India).

undertaking regarding non-disclosure of details of arbitration. Further, section 42-A can also be amended to impose its obligations upon every person involved in the arbitration, including the expert, if the case may be. Also, it will be prudent to insert a penalty clause and impose suitable sanctions in case of a breach. This way it can be ensured that an expert third party can be involved in arbitration proceedings without undermining the confidentiality provision.

3. In view of the conflict with Section 27, a model setup or form can be established wherein only minimal details are required. This way, parties can approach the court for utilization of provision under Section 27 and also not breach the privacy clause. This mechanism of allowing restricted access of arbitration details to outsiders can ensure both that the parties are able to access every relief available in arbitration proceedings and the confidentiality provision is also not bothered.
4. Section 29A can do more harm than good. Despite it being the time-clause of the Act, it can prolong the proceedings by unnecessary judicial interference by making it mandatory for the parties to approach the Court for seeking the time extension. Moreover, by placing a clock for completion of the arbitration proceeding, the Act does secure the objective of speedy resolution but gives a benefit of the doubt regarding the quality of such arbitral awards. The obligation to approach the Court for seeking the time- extension must be done away with and it must be left under the discretion of the arbitral tribunal and the mutuality of the parties.

IV. CONCLUSION

The confidentiality clause was introduced in the Act with a vision of making India the hub for International Commercial Arbitration. The legitimacy of this vision can also be substantiated by the fact that gradually India is becoming the hub of international trade. However, the watertight nature of the confidentiality provision under section 42-A has made the applicability of this provision very limited, and many important provisions have been overlooked in the process of drafting Section 42-A. As a result, this confidentiality clause fails to take into account many exceptions and result in conflicting provisions. Section 42-A can be considered to be a visionary step rather taken in haste, which is surely a double- edged sword. It would be pertinent to point out that resolution of dispute by way of arbitration is a preferable choice, however, the menace of confidentiality can also not be overlooked.

Moving towards the concluding remarks, it can safely be stated that the need of the hour is harmonious construction between confidentiality provision and other provisions that it comes into direct conflict with. This is because even though confidentiality is one of the ultimate aims of ADR mechanisms but it does not mean that other provisions of the act are of less importance.

LITMUS TEST: DETERMINING THE ARBITRABILITY OF INDUSTRIAL DISPUTES

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INTRODUCTION

Arbitration as a subset of Alternative Dispute Resolution has gained momentum in India since its enactment. It is considered to be a just, cost effective and time saving tool to get away from Court control. The structure of Arbitration enables parties in dispute to seek a middle ground for relief, which is in tandem with contemplating them to choose for the best option available.

The advent of arbitration has filled the unending hiatus of pending cases with the Courts, and proven to be resolving complexities arising thereof without letting the parties compromise. Therefore, in arbitration it becomes crucial to clearly and explicitly stipulate the points of discussion, so that there is no room for disappointment for the other party or to contend if the proceedings lacked somewhere in its due course. It is better to integrate the mechanism into autonomous communities of public administration or the labour relations council without letting other things function as a substitute of administrative conciliation. A procedure such as arbitration has the potential to improve the system's efficacy besides delays associated with action through Courts.

In view of its pervasiveness in the sphere of law, there are, however, issues which warrant affirmation and clarity with the applicability of arbitration in agreements such as relating to Industrial Disputes. Arbitration in labour disputes is not often seen as progressive as it ought to be, especially when it is believed to be in force when the unions are powerful. There may be other factors such as unsuitable arbitrators, lack of knowledge by disputant parties relating to the process of settlement, or even the social sanctions which govern them.

In spite of inclusion of arbitration clauses in contracts, Courts have the right to entertain writ petitions in contractual disputes subject to discretionary nature of writ jurisdiction, where matters of adjudication require in-depth analysis of the subject.[40] The idea of arbitration in case of labour disputes is in blend with adjudication and not separate as it should stand. Where matters of labour and management are involved, it becomes important that such dispute does not implant a blot on the goodwill of the industry.

ARBITRATION AND INDUSTRIAL DISPUTES

Industrial Disputes Act, 1947 was the first legislation in India to introduce the concept of ADR in labour disputes with the objective of speedy settlement and to expedite the proceedings within a certain

[40] Uttar Pradesh Power Transmission Corporation Ltd. v. CG Power and Industrial Solutions Ltd. & Anr., (2021) SC 383.

time frame.[41] Labour disputes are categorised into two domains- a) interest disputes, and b) rights based. Interest based, as the name suggests lays emphasis on salary, wage rate, bonuses and working conditions of the employment, whereas rights based examines, determines and interprets the already existing collective agreement. Labour disputes arising between the management and the labour union are referred for arbitration as the last resort to reach a settlement when all the measures run out under collective bargaining.

Disputes relating to rights can be adjudicated in a quasi-judicial manner, subject to condition that they are dealt without any protests, strikes or through any unwelcome representation, while disputes involving interests are non-adjudicable but they may or may not be arbitrable.[42] The Industrial Disputes Act, 1947 consists of provisions which support methods of ADR including arbitration. In clause 10A, the Act mentions voluntary reference of disputes to arbitration.

It was anticipated to adjunct voluntary arbitration with collective bargaining with a thought of diluting the impact of state regulation syndrome. But the essential condition which lies in its successful outcome would be a well- structured industrial arbitration law which helps in procuring the rewards and potentiality associated with it. It can emerge powerful and cogent when the union addresses the needs of every member. An arbitrator appointed through voluntary arbitration could be a drawback for the employees, as he could easily favour the management owing to bribery.

Another mechanism which exists is *compulsory arbitration*, in which the government directs the parties in dispute to adopt arbitration to reach a settlement. Also, the judgement announced by the arbitrator is final and binding unlike voluntary arbitration where the award is non-binding on the parties, provided that in case of lapse of application of filing a rejection in a given period makes the award final and binding. Compulsory arbitration comes into play when the voluntary method fails and state intervention becomes necessary in the aspect of industrial matters to ensure social justice and equal representation to the weaker section. It is preferred when the unions are unorganised and carry greater disparity in terms of power, in comparison to the employers.

AMBIT OF JURISDICTION OF LABOUR COURT

The concept of jurisdiction of Court was first witnessed in a labour dispute in ***Kingfisher Airlines v. Captain Prithvi Malhotra and others.***[43] The case proceedings were initiated by the pilot and other staff members of Kingfisher Airlines for recovery of their earned wages along with interest at a rate of 18% p.a. In response to which, the petitioner filed an application invoking Section 8 of Arbitration and Conciliation Act, 1996. The Labour Court held that in accordance with Section 10-A (5), Industrial Disputes Act, the Arbitration Act is inapplicable to the current case and, therefore the Court retained its jurisdiction over the proceedings.

[41] Vikrant Yadav, *Use of Alternative Dispute Resolution (ADR) in Labour Disputes in India: An Analysis*, 5(1) IJLJ, 132, 133 (2014).

[42] John V. Spielmans, *Labour Disputes on Rights and on Interests*, 29(2) JSTOR, (1939), https://www.jstor.org/stable/1803627

[43] Kingfisher Airlines v. Captain Prithvi Malhotra and others, 2013 (7) Bom CR 738.

Aggrieved by this decision, the petitioner moved to Bombay High Court to quash the decision of the Labour Court and decide the nature of arbitrability over this matter. The Court mentioned that the motto of inquiry was not whether the action therein is in personam or in rem (as decided in ***Booz Allen & Hamilton v. SBI Home Finance***[44]) but rather the reservation of such disputes under adjudication for public fora. The Court stated that certain cases are reserved for adjudication for public fora as a matter of public policy and any case which is under public fora is non-arbitrable in nature, hence will be declined to invoke arbitration to sought relief.

The Court cited examples of cases which were non-arbitrable and held that the Labour Court had rightly redressed the dispute and declared it non-arbitrable under the Arbitration and Conciliation Act, 1996, as a matter of public policy. The Court further examined the objective of the Industrial Disputes Act and clarified that the scheme existed to provide improved working conditions so that it does not hamper the productivity of the industry. It concluded that matters concerning public policy would exclusively be reserved under adjudication under the Industrial Disputes Act.

The Court addressed two issues- cases under Industrial Disputes Act are non- arbitrable under the Arbitration and Conciliation Act, 1996, to the extent if it is suitable, it would have to be done in parallel to the procedures laid down in Industrial Disputes Act, because any award announced by the arbitrator would have to looked into keeping in mind the factor of public policy. Lastly, a dispute is not solely an individual dispute but is to be approached in a bigger context of an industry as a whole. It is Section 10-A (5), which clearly talks about the inapplicability of the Arbitration Act to the arbitrations under the provision. In an unreported *Western Coalfield's case*, the Single Learned Judge mentioned that the arbitrator falls within the rainbow of statutory provisions. This implied that arbitration procedure cannot be separated from the Industrial Disputes Act.

Following the same principle, a judgement was passed by the Karnataka High Court in ***Rajesh Korat vs Management Innoviti Embedded***[45], underlining the exclusivity test emanating from the doctrine of public policy. In this case, the petitioner was working as an employee for the respondent and had started to face harassment from the management of the office after devoting extra hours and bringing exquisite ideas on the table. The petitioner was asked to quit voluntarily so that the firm could escape legal liabilities. However, the firm had meted out few prior conditions for the petitioner in order to proceed for resignation, which was submitting them a performance enhancement plan and handing over the company assets such as laptop, ID card, mobile and the confidential information. The company issued a termination letter after the petitioner had deposited the company assets, swiping out any chances of reemployment.

Aggrieved by this decision, the petitioner approached the Labour Court and the petitioner was offered only 50% sum of what he earned legally. While issuing a counter statement, the respondent filed an application invoking Section 8, Arbitration and Conciliation Act, 1996. The Labour

[44] Booz Allen and Hamilton Inc. V SBI Home Finance Ltd & Ors., (2011) 5 SCC 532.

[45] Rajesh Korat v. Management Innoviti Embedded, (2017) SCC Online 4975.

Court allowed the application and was contested in the High Court if Section 10 A (5) ousts the jurisdiction of Arbitration Act. The Court stressed that any arbitrary dismissal or removal of a workmen or an employee was also against the public policy as envisioned in the Industrial Disputes Act, and if such interpretation is not to be accepted then it'd be against the prime objectives of formulation of this Act.

The Court questioned the reference made by the Government even when the dispute was arbitrable, the right to exploit that opportunity lasted till the date of passing of the award as cited by the counsel for the respondent in ***Engineering Mazdoor Sabha and Another Vs Hind Cycles Limited***[46], in which issue arose out of maintainability of the appeal invoking Article 136 against an arbitral award passed by an arbitrator. The Court allowed the writ petition and directed the Labour Court to continue with the proceedings and placed reliance on the judgement laid down in ***Jai Bhagwan V. Management of the Ambala Central Co-operative Bank Ltd., the Industrial Tribunal***[47] , where once the reference has been made by the Government, the scope of entertaining a prayer under Section 8 is dissolved.

RIGHT TO ENTERTAIN WRIT PETITION

In a recent judgment given by the Supreme Court of India in ***Uttar Pradesh Power Transmission Corporation Ltd. v. CG Power and Industrial Solutions Ltd. & Anr.***[48], it held that matters involving contractual disputes will now be entertained by High Courts, notwithstanding the existence of another remedy available to deal with. In this case, the parties were engaged into four contracts for setting up a power station.

According to the petitioner, in one of the contracts drawn for the supply of equipment, material and designing, they concluded that the company failed to levy cess under the provisions of Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Act, 1996 and accordingly issued a letter to the respondent to remit labour cess.

Challenging this action of encashing bank guarantee, the respondent approached the High Court, wherein it was held that this method of recovering cess was completely inappropriate and the procedure of assessing by the authorities should precede the act of encashing bank guarantee.[49] The Supreme Court added to the points deduced by the High Court and noted the fact that the petitioner while filing a counter affidavit had failed to make any reference to arbitration procedure even when it was listed in the contract. The petitioner was also far in excess of its power by taking recourse to the methods it had opted for.

The Apex Court made a clear stance on the interference by the High Court by placing reliance on judgements such as **Harbanslal** Sahnia & Ors. v. Indian Oil Corporation

[46] Engineering Mazdoor Sabha and Another Vs Hind Cycles Limited, AIR 1963 SC 874.

[47] Jai Bhagwan vs. Management of the Ambala Central Cooperative Bank Ltd. and Anr., AIR 1984 SC 286.

[48] *Id.* at 1.

[49] Aditya Kamath, *Supreme Court Affirms that BOCW is not payable for supply of goods*, Bcp Associates Llp, (June 27, 2021, 3.23 PM), https://bcpassociates.com/supreme-court-judgement-bocw-cess-not-payable-for-supply-of-goods/

Ltd.[50]***, Whirlpool Corporation v. Registrar of Trade Marks, Mumbai & Ors.***[51] involving a similar question of law with respect to the exercise of jurisdiction by the High Court and recorded that any party can seek relief by filing a writ under Article 226, irrespective of inclusion of an arbitration clause or any other alternative remedy.

CONCLUSION

Undoubtedly, arbitration has its history of recited instances where controversies between employers and employees have been witnessed and resolved successfully. However, the poll of choosing arbitration is refused with the reason that employers are unwilling to disclose the facts or any confidential information with regard to the industry which probably might come up during the session, which gives them an affirmation of a judgement being passed in favour of the employees.

As it is envisaged in the Arbitration Act, they "shall follow such procedure as the arbitrator or authority concerned may think fit".[52] The procedure of performing arbitration and its respective duties for the arbitrators is formal. The approach is, nevertheless, of adjudication and not even relatively close to administration. The procedure layout should be such that people can easily recourse to an alternative which is unrestrained and with fewer complexities.

Determining the applicability of arbitration over a case not only prolongs the process but involves expenditure for the parties, because of which there is incongruency of adjudication with arbitration from every angle. If arbitration cannot be easily availed, do we need an establishment of a forum which acts as a medium to suffice the question of exclusive jurisdiction of labour courts in every industrial dispute? There are several tests of interpreting the applicability of arbitration but they are narrowed down to an extent where adjudication feels necessary to intrude and superimposes itself to play a role.

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[50] Harbanslal Sahnia vs Indian Oil Corporation Limited, (2003) 2 SCC 107.

[51] Whirlpool Corporation v. Registrar of Trade Marks, Mumbai & Ors., (1998) 8 SCC 1.

52 The Industrial Disputes Act, 1947, § 11, No. 14, Acts of Parliament 1947 (India).

ADR UPDATES

Garg Builders v. Bharat Heavy Electricals Ltd.

4 October, 2021 | Civil Appeal No.6216 Of 2021 | Supreme Court Of India

Principle: Principle: Arbitrator cannot grant *pendente lite* interest if contract contains a specific clause expressly barring payment of interest.

Facts: The respondent had issued a tender for the construction of a boundary wall at its Bawana, Delhi. The appellant filed a bid for tender, which the respondent accepted. In 2009, the parties signed a contract that included the interest prohibiting provision, among other things. The provision stated that the respondent would not have to pay interest on any money owed to the contractor. Disputes emerged between the parties about the aforementioned contract, prompting the appellant to file a petition with the High Court of Delhi under Section 11 of the Arbitration and Conciliation Act, 1996 ("Act").

The High Court appointed a sole arbitrator to resolve the disagreements. Apart from other amounts, the appellant claimed pre-reference, *pendente lite*, and future interest at a rate of 24 percent per annum on the value of the award in the claim petition. After hearing both parties, the arbitrator found that the contract does not restrict the payment of interest for the pre-reference period, *pendente lite*, or future period. As a result, the arbitrator granted the appellant *pendente lite* and future interest on the award amount from the date of filing the claim petition to the date of realization of the award amount at a rate of 10% per annum.

The respondent, dissatisfied with the arbitrator's decision, filed a complaint with the High Court under Section 34 of the Act, alleging that the arbitrator, as a creature of the arbitration agreement, went beyond the terms of the contract in awarding *pendente lite* interest on the award amount, which was expressly prohibited by the contract. As a result, the High Court decided that the arbitrator made a mistake by allowing *pendente lite* interest. Later, the Division Bench supported the Single Judge's decision in the impugned order, and the case was taken to the Supreme Court.

Judgment: The law relating to the arbitrator's award of pendente lite interest under the Act was no longer res integra, according to the Hon'ble Supreme Court. The provisions of the Act prioritized the parties' contract and expressly limited an arbitrator's ability to award pre-reference and pendente lite interest unless the parties had agreed otherwise. The Supreme Court decided that Section 31(7) of the Act makes it clear that if the contract forbids pre-reference and pendente lite interest, as in this case, the arbitrator cannot award interest for the period in question

PSA Sical Terminal Pvt. Ltd. v. The Board of Trustees of V.O. Chidambranar Port Trust Tuticorin and Ors

28 July, 2021 | Civil Appeal Nos. 36993700 OF 2018 | Supreme Court Of India

Principle: An arbitral award rendered in ignorance of vital evidence or based on no evidence is perverse and bound to be set aside on account of patent illegality. An arbitrator is bound to arbitrate within the

four walls of contract. An arbitral award rewriting the contractual terms is bound to be set aside for lack of jurisdiction of the arbitrator.

Facts: In 1997, PSA Sical Terminals Pvt. Ltd. ("Appellant") came into an agreement with the first respondent as the bidder . The parties agreed to a license for the development, operation, and maintenance of the seventh berth at Tuticorin's V.O. Chidambranar Port. In October 1999, the Appellant offered a rate that included royalty as a cost element, which was authorized by the Tariff Authority of Major Ports ("Authority"). In 2003, the Ministry of Shipping emphasized in a notification that royalty payments would not be incorporated into costs for the Authority's tariff fixation, and that the payment would be specified in subsequent bid documents. The Authority issued amended guidelines in 2005, removing the royalty as a cost factor when determining tariffs. However, in circumstances where the bidding procedure was completed prior to the notification date, the tariff computation would continue to include royalty to protect the operator from losses. This condition was subject to a maximum of the next lowest bidder's price.

Disputes emerged between the parties regarding the agreement. The Appellant claimed that significant changes in the legislation had an impact on the project's commercial feasibility. As a result, the Appellant requested that the agreement be amended under Article 14 to include a revenue sharing method and incidental charges within the tariff system. Meanwhile, the parties engaged in a series of legal battles. In 2012, the Appellant finally exploited the arbitration clause.

In the arbitral procedures, the appellant filed a statement of claim The Authority responded by filing a counter- statement. The arbitral tribunal ruled in favor of the Appellant in an award dated February 14, 2014, and ordered the relevant terms of the agreement to be converted from a royalty model to a revenue sharing one.

The First Respondent attempted to overturn the award. After several rounds of litigation, the Appellant challenged the Madras High Court's decision to allow the First Respondent's appeal against the arbitral award in the Hon'ble Supreme Court.

Judgement: The Supreme Court ruled that the arbitrator's decision was based on no evidence and that he was also unaware of crucial evidence. When the offer was being finalized, the arbitral tribunal had operated on the assumption that there was a law requiring royalties to be accounted for as a cost for tariff fixation when, in fact, there was no such policy in place. The Supreme Court stated that the arbitral tribunal had imposed a new term on the parties with its ruling, which they had never consented to in the first place. As a result, the award amounted to the parties' entering into a new contract. The Supreme Court of India ruled that an arbitrator must function within the confines of the contract provisions. An arbitrator would be working without jurisdiction if he went beyond the provisions in the contract. As a result, the Supreme Court ruled that the challenged award was clearly unconstitutional and that the Madras High Court had correctly set it aside. As a result, the appeals were denied.

Gemini Bay Transcription Pvt. Ltd. v. Integrated Sales Service Ltd. and Anr.

10 August, 2021 | Civil Appeal Nos.8343-8344 Of 2018 | Supreme Court Of India

Principle: Foreign arbitral awards can bind non-signatories to an arbitration agreement and can be enforced against them.

Facts: A Representation Agreement ("RA") was signed in 2000 between Integrated Sale Services Ltd. ("Integrated"), a Hong Kong corporation, and DMC Management Consultants Ltd. ("DMC"). According to the RA, Integrated was to assist DMC ("Appellant") in the sale of its goods and services to potential clients in exchange for a commission. Disputes emerged between the parties, prompting Integrated to send the Appellant a notice of arbitration in June 2009. The Appellant and Gemini Bay Transcription Private Ltd. ("GBT"), as respondents in the arbitration, each submitted a statement of claim with the arbitrator. The Appellant and his family were accused of controlling the activities of DMC, DMC Global, Gemini Bay Consultancy (GBC), and GBT in order to defraud Integrated of its commission. Integrated claimed that it delivered the Appellant two high-value customers for which it was intended to get a commission of 20% of the gross revenue generated. The Appellant, on the other hand, cancelled its contracts with the consumers only to have new contracts with GBC executed afterwards.

As a result, Integrated argued that the Appellant employed GBC as a DMC alter ego to shift profits illegally. As a result, Integrated filed various claims for damages.

The arbitrator's final award was issued in March 2010, and it stated that the timing and coordination of actions between the DMC and the GBC could hardly be a coincidence. As a result, the Arbitrator awarded DMC, DMC Global, the Appellant, GBC, and GBT a total of $ 6,948,100 (United States Dollars six million nine hundred forty-eight thousand and one hundred) to be paid up jointly. Integrated went to the Bombay High Court to get the arbitral ruling enforced.

The case was taken to the Supreme Court after a series of legal battles. The Appellant challenged the findings of Division Bench of the High Court that the enforcement of the impugned judgment could not be challenged under Section 48 of the Arbitration and Conciliation Act, 1996

Judgement: The Supreme Court decided that there could be no doubt that Integrated was deprived of commission rightfully due to it under the RA. As a result, there was no doubt that Integrated had suffered a genuine loss. As a result, the appeals were denied.

Delhi Airport Metro Express Pvt. Ltd. v. Delhi Metro Rail Corporation Ltd.

09 September 2021| Civil Appeal No. 5627 Of 2021| Supreme Court Of India

Principle: Courts acting under Section 34 are not empowered to re-appreciate evidence to find faults in the arbitral award

Facts: In 2008, The Delhi Metro Rail Corporation Ltd. ("DMRC") and Delhi Airport Metro Express Pvt. Ltd. ("DAMEPL") signed a Concession Agreement ("CA") for the development of the Airport Metro Express Line project ("AMEL"). The parties agreed that DMRC would handle all civil works, land acquisition, and other government permissions, while DAMEPL would handle

the supply, installation, testing, and commissioning of various systems. On February 23, 2011, the commercial operation date was decided.

During the project's construction, disagreements emerged between the stakeholders over key design and quality issues. The line was shut down by DAMEPL on June 8, 2012. DAMEPL issued a notice on June 9, 2012, requiring DMRC to fix the deficiencies in DMRC's works within the required 90-day period. A series of meetings were held between the parties after that. DAMEPL eventually terminated the CA on October 8, 2012, after DMRC failed to remedy the faults, resulting in a default under the CA.

DMRC filed a claim for arbitration when DAMEPL terminated the CA. The case went to arbitration, with the key question being the legality of the termination notice dated October 8, 2012. DMRC argued that DAMEPL's termination letter was invalid since DMRC had purportedly made steps to satisfy its Concession Agreement requirements. DMRC requested that the arbitral tribunal order DAMEPL to take over the AMEL's activities or, in the alternative, award compensation of INR 31.73 billion plus 18 percent interest per annum.

DAMEPL justified the termination of the concession agreement by claiming that DMRC had failed to correct the faults, and it demanded INR 34.7 billion as a termination payment, plus interest and other costs in its counterclaim. The arbitral tribunal determined that DAMEPL's termination notice was valid, and DAMEPL was awarded a total termination amount of INR 27.8233 billion.

DMRC filed a petition under Section 34 of the Arbitration and Conciliation Act, 1996, to have the arbitral tribunal's award of May 11, 2017 set aside. The Section 34 case was dismissed by a single judge of the Delhi High Court, who stated that DMRC had not established any grounds for interfering. DMRC then filed an appeal under Section 37 of the Arbitration Act and Section 13 of the Commercial Courts Act, both of which were enacted in 2015. The Division Bench overturned the Single Judge's decision and granted DMRC's appeal. The arbitral tribunal's decision was partially overturned. The Division Bench's decision was then contested by both parties in the current appeals before the Supreme Court.

Judgement: In a ruling on patent illegality, the Supreme Court of India declared that not every legal error committed by an arbitral panel qualifies as "patent illegality." The Supreme Court further stated that courts could not re-appreciate material in order to infer that an award was patently unconstitutional because courts did not sit in an appeal against an arbitral award. The arbitral tribunal's conclusions were confirmed to be valid by the Apex Court. As a result, DAMEPL's appeal was granted, and the division bench's decision was set aside.

Laxmi Continental Construction Co. v. State of U.P. and Anr.

20 September 2021 | Civil Appeal No. 6797 Of 2008 | Supreme Court of India

Principle: The mandate of a sole arbitrator who was appointed by designation cannot be terminated solely on ground of their retirement.

Facts: An agreement between the appellant and the respondents established a contract for some work in 1988. Various conflicts emerged between the parties during the contract process. In its arbitration clause, the agreement stated that disagreements would be settled by government employees with the rank of superintending engineer or higher who were not involved in the agreement's work. As a result, a single arbitrator was assigned, who happened to be the Chief Engineer at the time. Before the sole arbitrator, the appellant filed its claim and the respondents stated their objections to the appellant's claim.

During this time, the arbitrator left his position as Chief Engineer on November 30, 1995. On August 9, 1996, the respondents were denied a further extension of arbitration. The arbitration was about to end and could not be finished due to the respondents' lapses, defaults, and frequent requests for adjournments. The appellant eventually filed an arbitration suit under Section 28 of the Arbitration Act of 1940, requesting an extension of time to make the award, as well as to hear and conduct the arbitration.

During the arbitration processes, the respondents raised their complaints that the assigned arbitrator had retired from his position as a department official. As a result, the respondents filed a miscellaneous complaint, requesting that the referral issued to the sole arbitrator be declared ineffective and invalid. The High Court of Uttaranchal heard both cases together and prolonged the timeframe of arbitration for 30 days in a common ruling dated December 11, 1997, and directed the assigned arbitrator to decide the dispute within the extended timetable.

On January 8, 1998, the sole arbitrator issued the judgement, ordering the respondents to pay a total of INR 1,097,024 plus interest from October 1, 1990 to January 7, 1998. After a series of legal battles, the issue eventually reached the Hon'ble Supreme Court. The initial claimant filed an appeal with the Supreme Court, appealing to set aside the decision of the High Court of Uttaranchal.

Judgement: The Apex Court found that the only criteria for appointment as a sole arbitrator was that he be an officer of the rank of superintending engineer or higher, after reviewing the arbitration clause in the Agreement. Unless he was disqualified by the Arbitration Act, once such an official was designated as the sole arbitrator, he continued to be an arbitrator until the proceedings were concluded. The Supreme Court then addressed the respondents' claims that the solitary arbitrator had committed misconduct by prolonging the arbitration proceedings after his retirement. The Hon'ble Supreme Court pointed out that the sole arbitrator issued an arbitral award within the time limit set by the High Court. As a result, he could not be claimed to have acted unlawfully. In light of the foregoing, the Supreme Court issued an order quashing and setting aside the High Court's ruling. As a result, the instant appeal was granted.