



**EVALUATION OF APPLICABILITY
OF JUDICIAL INTERVENTION IN
ARBITRATION PROCEEDINGS:
ARBITRATION AND CONCILIATION
ACT, 1996**

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Abstract

In the wake of explosion of litigation in courts, a new trend has emerged to resolve civil and commercial matters. Arbitration is a new instrument practiced globally. In India, with the objectives of expedition and minimum judicial interference, the legislature adopted The Arbitration and Conciliation Act 1996 to determine the procedure of arbitration proceedings. The sources emerge from early medieval era to UNCITRAL Model Law on International Commercial Arbitration. However, in order to adhere to the objectives, a conflict of competency of jurisdiction of the arbitral tribunals and the national courts often arises. The paper, in light of kompetenz-kompetenz principle, analyses how the provisions of the said act curtail or minimise the judicial interference with the arbitration proceedings, not only on a quantitative basis but also as a qualitative relief.

Introduction

“An independent and efficient judicial system is one of the basic structures of our constitution... It is our constitutional obligation to ensure that the backlog of cases is decreased, and efforts are made to increase

the disposal of cases”¹. The idea behind this judgement is the theoretical underpin of the instrument of Arbitration we use in our country. In order to maintain good governance in an age of explosion of litigation, arbitration is an urgency to manage the growing crisis of judicial delay.

The Arbitration and Conciliation Act, 1996 is based on UNCITRAL Model Law on International Commercial Arbitration, makes provision for arbitration procedures for both domestic and international matters, in a fair and efficient way. The objectives of the act, as presented by the legislature, is to provide for speedy disposal of cases relating to arbitration with least court intervention².

Party Autonomy and the independence and authority of arbitrators are the hallmarks of this Act. The prevalence of party autonomy over court intervention with the object of achieving the two-fold objective of speed and economy in resolution of disputes by ‘domestic’ and ‘international commercial arbitration’ is the core of this legislation³.

The need for these principles was felt long time back by the Supreme Court while practicing The Arbitration Act of 1940. In the judgement of Food Corporation of India V. Joginderpal Mohinderpal⁴, the Supreme Court observes

“ We should make the law of arbitration simple, less technical and more responsible to the actual realities of the situations but must be responsive to the canons of justice and fair play and make the arbitrator adhere to such process and norms which will create confidence, not only to doing justice between

¹ Brij Mohan Lal V. Union of India & Others 2002 4 Scale 433

² Arbitration and Conciliation Act, 1996, Statement of Objects and Reasons (1996).

³ Gouri R, *Judicial intervention in arbitration proceedings and speedy justice an analytical study*, Chapter I, 2014.

⁴ AIR 1989 SC 1263 (1266)



the parties, but by creating sense that justice appears to have been done.”

Section 5⁵ of the 1996 Act, unlike the 1940 Act, supports the objectives and clearly highlights the intention of the legislature to settle cases with arbitration agreement expeditiously with minimum judicial interference. Centralising the concept of “speedy justice” along with “minimum judicial intervention”, the legislature conveys that justice is not to be determined in quantitative basis by speedy disposal, but also qualitative relief provided to both the parties.

In other words, the main object to drastically curtail supervisory role of the courts, demolish various stages and proceedings through which an award was required to pass through in the mechanism of old enactments so that the object of speedy resolution of dispute is achieved⁶.

An interesting theory that the author came across while researching on the jurisdiction of the arbitral tribunal is the kompetenz-, kompetenz principle. In an uncomplicated manner, the principle relates itself to the competence and the circumstances that influence the jurisdiction of the arbitral tribunals and national courts⁷. While this

theory was first recognised in India with the passage of the Act in 1996, the concept in English law has been well known since the decision of Mr. Justice Devlin in *Brown v. Genossenschaft Osterreichischer Waldbesitzer*⁸. It was laid down that

*“[Arbitrators] are entitled to inquire into the merits of the issue whether they have jurisdiction or not, not for the purpose of reaching any conclusion which will be binding upon the parties - because they cannot do so - but for the purpose of satisfying themselves as a preliminary matter about whether they ought to go on with the arbitration or not.”*⁹

This paper aims to analyse the competence of jurisdiction of arbitral tribunals over national courts with respect to the provisions of the Arbitration and Conciliation Act, 1996 overseeing intervention of judicial proceedings before, during and after an arbitration proceeding.

Judicial Intervention Before Arbitration Proceedings

Section 5¹⁰ of the Arbitration and Conciliation Act 1996 lays the principle of judicial intervention during the proceedings. It enumerates that *no judicial authority*¹¹

⁵ **Extent of judicial intervention.**—Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part.

⁶ *Western Shipbreaking Corps. V. Clare Haven Ltd.*, 1998 (Supp) Arb LR 53.: 1998 (1) RAJ 367 (Guj)

⁷ Gary B. Born, *International Commercial Arbitration* 852 (2010).

⁸ [1954] 1 Q.B. 8 : [1953] 3 W.L.R. 689.

⁹ Pratyush Panjwani & Harshad Pathak, *ASSIMILATING THE NEGATIVE EFFECT OF KOMPETENZ-KOMPETENZ IN INDIA: NEED TO REVISIT THE QUESTION OF JUDICIAL*

INTERVENTION?, Indian Journal of Arbitration Law (2013).

¹⁰ *Supra* 5

¹¹ “Use of term “judicial authority” by legislature in all three sections, is firstly a clear recognition that judicial control of commercial disputes is no longer in the exclusive jurisdiction of courts. There are many statutory bodies and tribunals which would have adjudicatory jurisdiction in commercial matters. Hence, secondly it implies that policy of least intervention articulated in Section 5 is equally applicable to all “judicial authorities” that may have such adjudicatory jurisdiction over arbitrations. Clarified, that common use of term “judicial authority” in Sections 5, 8 and 45 does not in any way



shall intervene except where so provided by the act. The section is found to be analogues to Article 5 of the UNCITRAL Model Law. To minimize the supervision of courts, the section begins with a non-obstante clause *Notwithstanding anything contained in any other law.* Along with the intention of the legislature, the clause also defines the extent of judicial intervention allowed by the act.¹² The permissible levels of intervention can be inferred from the ending clause of the section *except where so provided in this Part.* However, since arbitration is still a developing instrument in the country, without adequate court support, the procedure might get mislead or off-track. Lord Mustill, in *Coppee-Lavalin SA NV v. Ken-Ren Chemicals and Fertilisers Ltd (In Liquidation)*¹³ said, “*Whatever view is taken regarding the correct balance of the relationship between international arbitration and national courts, it is impossible to doubt that at least in some instances the intervention of the Court may*

be not only permissible but highly beneficial.”

Therefore, the competence of jurisdiction of arbitral tribunals over national courts is yet to be decided. This is to happen over unique upcoming cases, where the judiciary will weigh the majority and dissenting opinions based on facts and find new interpretations.

Section 8¹⁴ of the Arbitration and Conciliation Act 1996 requires the judicial authority to intervene by directing the parties to arbitration where an arbitration clause exists. This has been ruled out as a mandatory requirement to be fulfilled by the judicial authority.¹⁵

This section is *similar* but not analogues to the Article 8(1) of the UNCITRAL Model Law. The legislature intentionally has not adopted the clause *unless satisfied that the agreement is null and void, inoperative or incapable of being performed.* The implied meaning of this omission is that no judicial authority has the jurisdiction to determine the validity or even existence of an arbitration

imply that Part I of 1996 Act is applicable to arbitrations which have their juridical seat outside India.”

Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc., (2012) 9 SCC 552

¹² *P. Anand Gajapathi Raju V. PVG Raju* (2000) 4 SCC 539, 541

¹³ (1994)2 All ER 449,466 (HL). This case was decided before the enactment of the Arbitration Act 1996

¹⁴ **Section 8 Power to refer parties to arbitration where there is an arbitration agreement.**—1 [(1) *A judicial authority, before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party to the arbitration agreement or any person claiming through or under him, so applies not later than the date of submitting his first statement on the substance of the dispute, then, notwithstanding any judgment, decree or order of the Supreme Court or any Court, refer the parties to arbitration unless it finds that prima facie no valid arbitration agreement exists.*] (2) *The application*

referred to in sub-section (1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof:

2 [Provided that where the original arbitration agreement or a certified copy thereof is not available with the party applying for reference to arbitration under sub-section (1), and the said agreement or certified copy is retained by the other party to that agreement, then, the party so applying shall file such application along with a copy of the arbitration agreement and a petition praying the Court to call upon the other party to produce the original arbitration agreement or its duly certified copy before that Court.]

(3) *Notwithstanding that an application has been made under sub-section (1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made.*

¹⁵ *Hindustan Petroleum Corporation Ltd., V. Pink City Midway Petroleums*, (2003) 6 SCC 503



agreement and it is the sole jurisdiction of the tribunal to rule on the above.¹⁶

On literal interpretation of the section, the reader can clearly conclude two details. One being that the non-obstante clause over-rides over every provision or clause contrary to it. Secondly, it makes a mandatory obligation on the courts instead of an optional or debatable obligation of referring the parties to arbitration.¹⁷

The latter is supported by the judgement of H.P. Corpn. Ltd. V. M/s. Pinkcity Midway Petroleums¹⁸ where the Supreme Court held “*This Court in the case of P. Anand Gajapathi Raju and others V. P.V.G. Raju (Dead) and others*¹⁹ had held that the language of Section 8 is peremptory in nature. Therefore, in cases where there is an arbitration clause in the agreement, it is obligatory for the Court to refer the parties to arbitration in terms of their arbitration agreement and nothing remains to be decided in the original action after such an

application is made except to refer the dispute to an arbitrator. Therefore, it is clear that if as contended by a party in an agreement between the parties before the Civil Court, there is a clause for arbitration, it is mandatory for the Civil Court to refer the dispute to an arbitrator.”

Judicial Intervention During Arbitration Proceedings

Section 9²⁰ of the Arbitration and Conciliation Act 1996 provides the courts with a gateway to intervene during the arbitration proceedings by empowering the courts to make interim measures on selected occasions.

The court has the jurisdiction to entertain an application under this Section before or during arbitral proceedings and after the making of the award but before it is enforced in accordance with Section 36 of the

¹⁶ Renusagar Power Co Ltd., V. General Electric Co (1984) 4 SCC 679

¹⁷ Agri. Gold Exims Ltd., V. Lakshmi Units & Wovens, 2007 (1) Arb. LR 235(SC)

¹⁸ AIR 2003 SC 2881

¹⁹ 2000 (4) SCC 539

²⁰ **Section 9 Interim measures, etc., by Court.**— [(1)] A party may, before or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with section 36, apply to a court— (i) for the appointment of a guardian for a minor or person of unsound mind for the purposes of arbitral proceedings; or (ii) for an interim measure of protection in respect of any of the following matters, namely:— (a) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement; (b) securing the amount in dispute in the arbitration; (c) the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid

purposes any person to enter upon any land or building in the possession of any party, or authorising any samples to be taken or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence; (d) interim injunction or the appointment of a receiver; (e) such other interim measure of protection as may appear to the Court to be just and convenient, and the Court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it. 4 [(2) Where, before the commencement of the arbitral proceedings, a Court passes an order for any interim measure of protection under sub-section (1), the arbitral proceedings shall be commenced within a period of ninety days from the date of such order or within such further time as the Court may determine. (3) Once the arbitral tribunal has been constituted, the Court shall not entertain an application under sub-section (1), unless the Court finds that circumstances exist which may not render the remedy provided under section 17 efficacious.]



Arbitration and Conciliation Act 1996.²¹ This section does not provide any substantial relief.²²

Section 9 is not subjected to party autonomy. The power of the court bestowed herein is mandatory. This means the parties cannot agree to avoid the provision, or otherwise. However, party autonomy and arbitral award are two foundational structures which when distorted by intervention of the judicial authorities, takes away the meaning of arbitration proceedings. Therefore, with the aim to protect rights under adjudication before the arbitral tribunal from being frustrated²³, the interim measures are to be strictly adhered to the listed scenarios in the provision.

An interesting question arises when we focus on Section 13²⁴ and Section 14²⁵ of the act, which provide the court with another opportunity to intervene in the proceedings in

the process while the parties challenge the proceedings or when the court has to terminate the mandate. When read the provisions together, one may fall in doubt on whether the remedy provided under Section 13(2) does not exclude the remedy under Section 14(2)? Or in simpler terms, whether the provisions are not mutually exclusive?

The answer has been highly debated, first appearing in the case of Guhwati HC State of Arunachal Pradesh V. Subhash Projects & Amp; Marketing Ltd²⁶ where the court basically held that the remedies pursuant to Sections 13 and 14 are concurrent and that, if a party elects to petition the Tribunal pursuant to Section 13 and has obtained an order therein, it will be deprived of recourse to Section 14. This judgement was further defined by M/s.Alcove Industries Ltd V. M/s.Oriental Structural Engineers Ltd²⁷ which was of the view that a party which fails

²¹ Globe Cogeneration Power Ltd., V. Sri Hiranyakeshi Sahakari Sakkere Karthane Niyamat Sankeshwar, 2004 (4) RAJ 263 (Kar)

²² Liverpool and London Steamship Protection and indemnity Association Ltd., V Arabian Tankers Company

²³ Firm Ashoka Traders V. Gurumukh Das Saluja 2004 (3) SCC 155

²⁴ **Section 13 Challenge procedure.**—(1) Subject to sub-section (4), the parties are free to agree on a procedure for challenging an arbitrator. (2) Failing any agreement referred to in sub-section (1), a party who intends to challenge an arbitrator shall, within fifteen days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstances referred to in sub-section (3) of section 12, send a written statement of the reasons for the challenge to the arbitral tribunal. (3) Unless the arbitrator challenged under sub-section (2) withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge. (4) If a challenge under any procedure agreed upon by the parties or under the procedure under sub-section (2) is not successful, the arbitral tribunal shall continue the arbitral proceedings and make an arbitral award. (5) Where an arbitral award is

made under sub-section (4), the party challenging the arbitrator may make an application for setting aside such an arbitral award in accordance with section 34. (6) Where an arbitral award is set aside on an application made under sub-section (5), the Court may decide as to whether the arbitrator who is challenged is entitled to any fees. d

²⁵ **Section 14 Failure or impossibility to act.**—(1) 3 [The mandate of an arbitrator shall terminate and he shall be substituted by another arbitrator, if]— (a) he becomes de jure or de facto unable to perform his functions or for other reasons fails to act without undue delay; and (b) he withdraws from his office or the parties agree to the termination of his mandate. (2) If a controversy remains concerning any of the grounds referred to in clause (a) of sub-section (1), a party may, unless otherwise agreed by the parties, apply to the Court to decide on the termination of the mandate. (3) If, under this section or sub-section (3) of section 13, an arbitrator withdraws from his office or a party agrees to the termination of the mandate of an arbitrator, it shall not imply acceptance of the validity of any ground referred to in this section or sub-section (3) of section 12.

²⁶ 2007 (1) Arb. LR 564 (Gauhati) (DB)

²⁷ 2008 (3) R.A.J. 227 (Del.)



to challenge an Arbitrator pursuant to Section 13(2) could subsequently appear before the Court pursuant to Section 14. In addition, the Delhi High Court found the remedy under Section 13 to be the first and appropriate alternative remedy to be exhausted before the party pursuant to Section 14 appeared before court.

The next decision of Delhi HC Sharma Enterprises v. National Buildings Construction Corporation Ltd²⁸ which held that the Court is entitled to terminate an arbitrator's mandate under Section 14 if it determines that the arbitration was exercised in respect of a long-dead dispute or a dispute that was not arbitrable, without the approval of the Court. The Delhi High Court held these situations to come under the purview of the de jure incapability to perform. Interestingly, in Chennai Metro Rail Limited v. M/s. Lanco Infratech Limited²⁹ it was held that all of the above contentions were not in consonance with the spirit and intention of the act. On analysing the statute, the court held that the legislature did not intend to either provide the parties with multiple remedies or mutually exclusive concurrent remedies. Both the sections happen to be a complete code within itself. It was also observed by the court that the above judgements took no note of the UNCITRAL Model Law, which provided two different tracks for the sections in question, one relating to the very appointment and another relating to the continuation. The sections are mutually exclusive and the judiciary in the case of injustice to a party may be approached pursuant to section 34(2)(a)(v)³⁰.

Judicial Intervention After Arbitration Proceedings

Section 34 of the Arbitration and Conciliation Act 1996 defines the procedure to set aside the arbitration award by the courts. The section is another instrument to keep the judicial intervention in check. It provides a list of very limited scenarios where the court has the power to set aside the arbitral award, which are as follows:-

- i. A party to the arbitration agreement was under some incapacity.
- ii. The arbitration agreement is not valid under the law.
- iii. The applicant that is the party making the application was not given proper notice of appointment of the arbitrator or of the arbitral proceedings or was otherwise unable to present his case.
- iv. The arbitral award deals with matters outside the scope of submission or reference to arbitration.
- v. The constitution of the arbitral tribunal or the procedure of arbitration was not as per agreement of the parties.
- vi. The subject matter of dispute is not capable of settlement by arbitration.
- vii. The arbitral award is in conflict with the public policy of India.
- viii. The award is founded on matters relating to conciliation proceedings between the parties, which are confidential in law or is based on admissions, suggestions or proposals made in conciliation for an attempted settlement of dispute.

A party can challenge an arbitrator on the selected grounds under Section 13 of the act in front of the tribunal itself. However, if the party is unsuccessful, they can challenge the arbitrator again but this time in the court on

²⁸ 2008 (3) Arb.LR 456 (Delhi)

²⁹ Judgement dated 10-01-2014 passed by Hon'ble Mr. Justice V.Ramasubramanian in O.P.No.845 of 2013

³⁰ Ibid



the same grounds under section 34. A feature of section 34 is that Issues will not be included in applications pursuant to Article 34 of the Act.

Hearings under section 34 of the Act are summary proceedings with the respondent's scope for objections, followed by the applicant's opportunity to show the validity of any ground under section 34(2) of the Act. Proceedings pursuant to Section 34 are different from regular civil suits. In standard civil action, it would be permissible for the court to pass judgment on the basis of the facts found in the complaint on failure to file defence. Even if there is no contest in the case pursuant to Section 34, court can not set aside award on the basis of the averments found in complaint. Even if applicant does not rely upon grounds under Clause (b), Court, on its own initiative, may examine award to find out whether it is liable to be set aside.³¹

A very interesting question arises that, whether under section 34 of the act, the court in addition to having jurisdiction in setting aside the award, also has the jurisdiction to modify the award?

It was first answered in the case of *McDermott International Inc. v. Burn Standards Co. Ltd. (sc)*³² where it was held that

*“52. The 1996 Act makes provision for the supervisory role of courts, for the review of the arbitral award only to ensure fairness. Intervention of the court is envisaged in few circumstances only, like, in case of fraud or bias by the arbitrators, violation of natural justice, etc. **The court cannot correct the errors of the arbitrators. It can only quash***

the award leaving the parties free to begin the arbitration again if it desired.

So, the scheme of the provision aims at keeping the supervisory role of the court at minimum level and this can be justified as parties to the agreement make a conscious decision to exclude the court's jurisdiction by opting for arbitration as they prefer the expediency and finality offered by it.”

The Arbitration Act of 1940 contained a provision of modification of awards by the court. However, absence of such clause in the newly adopted act of 1996 makes the intention of legislature clear to not to vest such a power in the hands of the court.³³

However, the Delhi High Court in *Union of India v. Modern Laminators Ltd*³⁴ took a view that section 34 of the Act envisages the power to modify an award and that McDermott propounded the limited scope of section 34 of the Act without discussing whether the power to modify formed part of the confines of the said scope.

The recent judgement by Gujarat High Court in *Gujarat Mineral Development Corporation Ltd. v. Simplex Infrastructure Limited*³⁵ stands by the ruling in McDermott and discourages reappraisal of awards by the courts-

“11.7.1. ...The quintessence for exercising the power under this provision is that the Arbitral Award has not been set aside. The challenge to the said award has been set up under Section 34 of the Arbitration Act about the deficiencies in the Arbitral Award which may be curable by allowing the Arbitral Tribunal to take such measures which can

³¹ Fiza Developers & Inter- Trade P. Ltd., V. AMCI (I) Pvt. Ltd. and another 2009 (5) CTC 65

³² (2006) 11 SCC 181

³³ Pushpa P. Mulchandani & Ors. v. Admiral Radhakrishan Tahiliani, 2003 (6) BomCR 24

³⁴ 2008(3)ArbLR489(Delhi)

³⁵ MANU/GJ/1067/2017



*eliminate the grounds for setting aside the Arbitral Award. **No power has been invested by the Parliament in the Court to remand the matter to the Arbitral Tribunal except to adjourn the proceedings for the limited purpose mentioned in subsection (4) of section 34.** The view which we are expressing is supported by the decision of the Hon'ble Supreme Court in the case of *McDermott International Inc. vs. Burn Standard Ltd.*.”*

“13. ...*The scope and exercise of jurisdiction by this Court in exercise of powers under Section 37 of the Arbitration Act by this Court will be coterminous with the scope of Section 34 of the Act and therefore, unless and until the case is made out for interference as per law laid down by the Hon'ble Supreme Court in the case of Associate Builders (supra), this Court would not be justified in interfering with the findings recorded by the learned Arbitrator, confirmed by the learned Commercial Court*”

Conclusion

Indian law on arbitration has evolved from indiscriminate judicial intervention, established in the Colonial Act and the successive 1961 legislation, to a more mature Act based on the Model Law. Throughout the evolution of principles, it has moved towards the objectives of expedition and minimum judicial interference. The Arbitration and Conciliation Act 1996 is holistic in nature. The next level of growth is to properly interpret these provisions by keeping party autonomy and minimum judicial interference as centric principles. Section 5 of the act defines the extent of interference by any judicial authority. These authorities are further occasionally defined by the courts.

Section 8 makes certain that the parties to arbitration are directed to the proceedings without any chance of judicial interference even before the commencement of the proceedings. The act empowers the courts to grant interim reliefs, but only for specific instances. This is done to guard the instrument of arbitration from losing purpose and has the support of the courts to come-up with interpretations to maintain the relevance of the objectives.

