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With this thought, we hereby present to you

LEX BONA FIDE: LAW JOURNAL

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JUDICIAL INTERVENTION IN ARBITRATION PROCEEDINGS: THE INDIAN PERSPECTIVE

By- Satyam Shresth and Abhishek Choubey

ABSTRACT

Arbitration has many advantages over litigation, a few of them being that it is less time consuming, it gives the parties the autonomy to decide the procedure for conduction of the arbitral proceeding and parties are also free to decide the manner of enforcement of the award delivered. The policy of judicial non-interference in the arbitration becomes necessary for the fulfilment of the above-mentioned advantages of the arbitration.

Many of the international instruments relating to arbitration such as the New York Convention and the UNCITRAL model law also envisage that the judiciary should have the least interference in the arbitral procedure and India being a signatory to both of them must comply with such requirements.

Section 5 of the Arbitration and Conciliation Act, 1996 gives effect to the objective of judicial non-interference and lays down that no judicial authority shall intervene with the arbitration except under the circumstances laid down in the provision itself, thus limiting the scope of the judicial intervention.

India has tried to reduce the judicial intervention in the arbitration proceedings under the Arbitration and Conciliation Act, 1996 and the judiciary can interfere in the arbitration proceeding at three stages-

1. Before the commencement of the arbitration proceeding.
2. During the conduction of the arbitration proceedings.
3. After the award has been delivered.

Before the commencement of the arbitral proceeding the court can intervene under section 8 of the Arbitration and Conciliation Act, 1996 where the court has to refer the parties to the arbitration

if there exists a valid arbitration agreement and also under section 11 where the judicial authority can appoint the arbitrator in the failure of the other party to appoint such arbitrator.

During the arbitral proceedings, the judicial authority can intervene under section 9 of the Arbitration and Conciliation Act, 1996 where it can pass an interim award and also under section 14(2) of the act where the court is empowered to terminate the mandate of the arbitrator if such arbitrator has become incapable to perform his duties.

After the passing of the arbitral award, the court can intervene under section 34 of the Arbitration and Conciliation Act, 1996 where it can set aside the arbitral award under the circumstances laid down in the section.

The article seeks to examine the scope of the permissible intervention in the arbitration by the judicial authority under the various provisions mentioned and if such intervention is complementary to the arbitral proceedings or is against such arbitral proceedings. The article also seeks to examine if the conditions of the judicial non-interference as laid down in various international instruments have been complied with or not.

JUDICIAL INTERVENTION AND THE INTERNATIONAL ARBITRATION

In the leading international arbitration conventions, the principle of least intervention of the Judiciary in the arbitral procedure has been recognized.

The reason that the parties agree to go for arbitral proceeding is that the parties are free to decide the procedure for conducting proceedings, how the award would be enforced and also because the arbitral proceedings are fast and are completed within the stipulated time limit.

Thus, the presence of a policy of judicial non interference in the arbitral proceeding is essential for the fulfilment of such the above-mentioned objective.

Some of the international conventions are-

- New York Convention- Article 11(3) of the convention states that the tribunals would have to refer the parties to arbitration after ascertaining the fact that there exists a valid agreement of arbitration. The effect of section 11(3) of the convention is that it forbids the courts from doing anything else other than referring such dispute to arbitration, thus limiting the judicial intervention.

- UNCITRAL Model Law- Article 5 of the model law states that no court shall intervene except where it is provided in the law, thus limiting the circumstances in which the courts could intervene in the arbitral process.

After looking at the international conventions it can be said that the judicial intervention has been limited to a large extent in the arbitral proceeding in the international sphere.

JUDICIAL INTERVENTION AND ARBITRATION IN INDIA

The term judicial authority includes all the courts in Indian territory and also includes district forum, state commission and the national commissions established under the consumer protection act, 1986^[1], it also includes the Company Law Board^[2] and also includes the commission which has been set up under the monopolies and restrictive trade practices act, 1969^[3].

The judicial intervention can be made at three stages during the arbitral process-

1. Before the commencement of the arbitral proceeding.
2. During the arbitral proceeding.
3. After the award has been made by the arbitral tribunal.

The extent of Judicial Intervention- Section 5 of the Arbitration and Conciliation Act, 1996 lays down the extent of permissible judicial intervention. It states that no judicial authority shall intervene in the arbitral proceeding except in the circumstances that do enumerate under the act. This acts as a limitation on the powers of the courts to intervene in the arbitral proceedings.

This section is analogous to Article 5 of the UNCITRAL model law. The use of the words “no judicial authority shall intervene” makes the intent of legislature clear that the courts would have no discretion while applying this section. The section in its later part provides exception by stating that in the circumstances enumerated under the act itself the courts can intervene.

In the Arbitration and Conciliation Bill, 1995 it was stated that one of the objectives of the act is the minimisation of the supervisory role of the courts in the arbitral proceedings, this objective has found unequivocal expression in section 5 of the Arbitration and Conciliation Act, 1996 which lays down the extent and circumstances in which the intervention would be permitted^[4].

JUDICIAL INTERVENTION BEFORE THE ARBITRAL PROCEEDINGS

Section 8- Under section 8 of the Arbitration and Conciliation Act, 1996 if a matter is brought before the court which is the subject matter of arbitration agreement and if a party before submission of the first statement on the subject matter of dispute makes an application for reference of the matter to arbitration then the court shall refer such dispute to arbitration unless it prima facie finds that no valid arbitration agreement exists.

Thus the section makes it mandatory for the judicial authorities to refer the matter to arbitration making it a legal obligation[5]. The judicial intervention contemplated under this section is in support of the arbitral proceedings and not against them.

Section 11- According to section 11(4) of the Arbitration and Conciliation Act, 1996 the court can appoint the arbitrator on the request of the party if the other party is unable to appoint the arbitrator within 30 days or if the two appointed arbitrators fail to agree on the third arbitrator. The Court is further appointed under section 11(5) to appoint the arbitrator in the case of arbitration of the sole arbitrator if the parties to the arbitration fail to agree on the arbitrator within 30 days from receipt of a request from one party.

Thus, the court under section 11 has been empowered to interfere with the arbitral proceeding and this intervention is done to support the arbitration so that arbitration agreement can be carried. This power being judicial can be delegated by the chief justice on some other justice[6].

The court while acting under section 11 of the Arbitration act should examine the existence of a valid arbitration agreement, whether the claims fall within the arbitration clause and also whether the claim is time-barred or not[7].

JUDICIAL INTERVENTION DURING THE ARBITRAL PROCEEDING

Section 14(2)- Section 14(2) of the act states that when the arbitrator becomes unable to perform his functions the parties may apply to the court to give its decision on the termination of the mandate of the arbitrator. The courts can terminate the mandate of the arbitrator if there are no disagreements as to termination and an independent arbitrator can be appointed in his place by the court under its exercise of power under section 11 of the Arbitration and Conciliation Act, 1996[8].

The decision of the arbitrator under section 13 rejecting the petition made under section 12 of the act cannot be challenged under section 14 of the Arbitration and Conciliation Act[9].

Section 9- The court under section 9 of the Arbitration and Conciliation Act, 1996 is empowered to pass interim award before, during or after the passing of arbitral award but the award has been enforced under section 36 of the Act.

Various kinds of interim reliefs can be granted by the court including the appointment of a guardian for the minor or a person of unsound mind, preservation or interim custody or sale of the goods which are the subject matter of the dispute, securing of the amount which is in dispute, detention and inspection of any property which is the subject matter of dispute, the appointment of receiver and can also pass such other interim measure as the court may consider just and convenient.

The powers conferred on the courts under section 9 are analogous to the powers conferred on an arbitral tribunal to pass interim reliefs under section 17 of the Act. The powers conferred upon the courts are not subject to any agreement between the parties[10]. The role of the court while exercising the power under the section is to protect the rights of the parties to the arbitration from being frustrated[11].

The relief under section 9 of the act is given to ensure the smooth conduction of the arbitral proceeding and cannot be resorted to for causing a delay of the arbitral proceeding[12]. The provisions of the Civil Procedure Code, 1908 which relate to the interim reliefs have to be considered while the decision is made on the application for a grant on interim relief under section 9 of the Arbitration and Conciliation Act[13].

JUDICIAL INTERVENTION AFTER THE ARBITRAL AWARD

Section 34- Section 34 of the Arbitration and Conciliation Act lays down various circumstances under which the court can set aside the decision of the arbitral award. The award can be set aside if the party to the arbitration was under some incapacity if the arbitration agreement was not valid if the party which has made the application for setting aside of arbitral award was not given proper notice for the appointment of the arbitrator if the arbitral award is related to a matter which does not form the part of the arbitration agreement and lastly if the composition of the arbitral tribunal constituted was not per the arbitration agreement.

The application for setting aside of arbitration award under section 34 must be made within 3 months from the date on which the award is received, the period can further be extended for 30 days. Thus the application for setting aside must be made within the period of limitation and must also satisfy the grounds for setting aside laid down in section 34 of the act[14].

In the case for setting aside the arbitral award when the inference made by the arbitrator is one possible inference that can be made then the award shall not be interfered with under an application made for setting aside the arbitral award under section 34 of the act[15].

The doctrine of separation states that the arbitration clause is separate from the contract containing the arbitration clause and the jurisdiction of the arbitral tribunal cannot be challenged on the ground of invalidity of the contract. Further, the courts must separate the matters referred to the arbitration from the matters not referred to arbitration[16].

The parties during the pendency of proceeding for setting aside the arbitral award acts upon that award of the tribunal then the award cannot be set aside, as the action amounts to estoppel[17]. The arbitral tribunal while exercising its jurisdiction cannot override the substantive law of the land or the provisions of the arbitration act and there is a breach of such laws then the award can be set aside[18].

SECTION 37- Section 37 empowers the appellate court to hear the appeals against the decisions of the lower concerning arbitral procedure only on the grounds mentioned in the section and further bars the appeal on any other grounds. The grounds are, refusal to refer the parties to arbitration under section 8, grant or refusal to grant of interim relief under section 9 and lastly setting aside or refusal of setting aside of arbitral award under section 34.

Further, the section in its subclause (2) empowers the court to entertain the appeals against the order of arbitral tribunal on the following grounds, acceptance of the plea made under subsection (2) and subsection (3) of section 16 and grant or refusal to grant of interim relief by an arbitral tribunal under section 17 of the act.

When an award of the arbitral tribunal is challenged under section 37 by an appeal the principles of the Code of Civil Procedure, 1908 would be applicable as there is no provision in the Arbitration and Conciliation Act to prevent the court from doing so, but the application of the principles of the CPC should align with the spirit of the Arbitration and Conciliation Act[19].

The refusal by the court to set aside the award under section 34 and appeal before the Supreme Court against the same does not bar the enforcement of the arbitral award, it has nowhere been stated that award can be enforced only after the refusal by the final appellate authority^[20].

CONCLUSION

India being a signatory of the New York Convention and UNCITRAL has taken steps for limiting the scope of judicial intervention in the arbitral awards. There are still scope for the courts to intervene but these interventions are complementary to the arbitral proceedings and are not against the proceedings. Such intervention does not create an unnecessary hurdle to the enforcement of the arbitral awards. India can reduce this intervention even further by ensuring the autonomy of the arbitration and giving due respect to the will of the parties.



REFERENCES:

- [1] Fair Air Engineers Pvt Ltd. Vs. NK Modi (1996) SCC 385
- [2] Canara Bank Vs. Nuclear Power Corporation of India Ltd. (1995) Supp 3 SCC 81
- [3] Shri Balaji Traders Vs. MMTC Ltd. (1999) CLA 261
- [4] Union of India Vs. Popular Construction Company (2001) 8 SCC 470
- [5] P Anand Gajapathy Raju Vs. P.V.G Raju (2000) 4 SCC 503.
- [6] SBP Vs. Patel Engineering (2005) 8 SCC 618
- [7] National Insurance Company Limited Vs. Boghara Polyfab Pvt Ltd. (2009) 1 SCC 267
- [8] M/S Aargee Engineers and Company Vs. Era Infra Engineering Limited 2017 (4) ALJ 700
- [9] Gangotri Enterprises Limited Vs. NTPC Tamil Nadu Energy Company Limited 2017 (2) ARBLR 116
- [10] Liverpool and London Steamship Protection and Indemnity Association Vs. Arabian Tankers Company 2004 (1) RAJ 311
- [11] Firm Ashoka Traders Vs. Gurumukh Das Saluja 2004 (3) SCC 155
- [12] M/s Sundaram Finance Ltd. Vs. M/s NEPC India Limited AIR 1999 SC 565
- [13] ITI Limited Vs. Siemens Public Communication Network Limited 2002 (5) SCC 510
- [14] State of Maharashtra Vs. M/S Ark Builders Private Limited (2011) 4 SCC 616
- [15] National Highway Authority of India Vs. Progressive MVR (2018) 14 SCC 688
- [16] Mrs Pushpa P. Mulachandani Vs. Admiral Radhakrishnan Tahiliani 2008 (7) LJ Soft 161
- [17] Brijendra Nath Vs. Mayank AIR 1994 SC 2562
- [18] ONGC Limited Vs. Saw Pipe Limited AIR 2003 SC 2629
- [19] Kanpur Jal Sangathan Vs. Bapu Construction, (2015) 5 SCC 267
- [20] Vipul Agarwal Vs. Atul Kanodia and Company, AIR 2004 All 205

