ONLINE OPEN ACCESS PEER-REVIEWED LAW JOURNAL

ISSN: 2582-7952

LEX BONA FIDE

VOLUME 1: ISSUE III

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With this thought, we hereby present to you

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Expanding horizons of Arbitration in India

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ABSTRACT

The research attempts to bring a cautious understanding into arbitration to analyse the issue of 'arbitrability' in India, with increasing emphasis on the ADR mechanism. The initial segment of the paper attempts a comprehension of arbitrability by following its development and movement to its present status internationally just as in India. Towards the second part, the authors try to fathom the intricacy in the interweaved connection between arbitrability and arbitration agreement. It investigates the impact of the weakness of an arbitration agreement on the arbitrability of questions and the other way around. Subsequently, the paper investigates the boundary and edge of the judicially evolved test like in Booz Allen of restrictive jurisdiction of public forums as for the arbitrability of debates. It attempts to follow the pattern of the Indian judiciary in the utilization of the test. It seeks to guide the degree and effect of the deviation of Indian courts from the internationally acknowledged standards as for the insurance of restrictive jurisdiction of public forums. It additionally looks at a reformist change in the disposition of the Indian judiciary towards arbitration with the assistance of ongoing legal proclamations. The third part of the paper then delves deeper into the landlord-tenant disputes concerning rights in personam and rights in rem. Towards the concluding fourth & fifth parts the research furthers to the expanding needs of arbitration to distinguish between the frauds so committed and the increasing reliance on the company matters be settled to mediation and a deviation towards arbitration. In the end, the paper suggests a middle approach that must be followed to calibrate the balance between judicial intervention and judicial restraint. It recommends an interpretative role for the Indian judiciary which aligns with the spirit of helping India become a 'global arbitration hub'.

Keywords: Arbitrability, Booz Allen test, Public Forums, landlord-tenant disputes, rights in personam, rights in rem, Fraud, IBC.

INTRODUCTION

"When will mankind be convinced and agree to settle their difficulties by arbitration?"[1]
- Benjamin Franklin

The principle of arbitrability is fundamental to the progression of an arbitration system in any country. The achievement of arbitration lays on the guide and help agreed to it by the courts. In such a situation, the job of the judiciary in providing a broad and expansionist interpretation of arbitrability gets vital. Notwithstanding, such help and protection are regularly discovered missing in jurisdictions described by a moderate judiciary. Arbitration in India appears to experience the ill effects of a similar disease. A few trials of arbitrability exist yet their thin interpretations have permitted a meddling judiciary to superimpose itself on the arbitral process. One such test, which has introduced itself as a significant test, is the trial of the elite ward. The reason behind this test was to restrict the unreasonable legal mediation along these lines providing the essential stimulus and help to the arbitration process in the country. All things considered, it appears to have become an apparatus to undermine the esteemed principle of gathering self-rule. The disarray exuding from the superfluous summon and conflicting interpretation of the test has brought up issues on its utility and adequacy in the promotion of arbitration in India. This paper endeavours to look at the uncertainty encompassing extension and trial of arbitrability, especially the trial of the elite ward, in India through a catena of legal choices. It features the disappointment of legal enthusiasm for the profound effect of its nearsighted comprehension of 'arbitrability' and the confined utilization of the test. The article proposes a purposive move in the legal approach towards 'arbitrability' from profoundly attached doubt to being pro-arbitration through compromise of principles of public interest and gathering self-rule.

BOOZ ALLEN

The courts have contrived particular types of tests to find out the arbitrability of a subject matter.[2] The Indian Supreme Court in Booz Allen saw that specific classes of disputes must be settled through adjudication by public forums.[3] This denoted the coming of the test of exclusive jurisdiction of public forums. The Bombay High Court established this test in the arbitrability debates while articulating its verdict on arbitrability of disputes under the Industrial Dispute Act, 1947 [hereinafter alluded to as "Industrial Disputes Act"][4] According to the court, the test of exclusivity exudes from and is profoundly established in the doctrine of public policy. Notwithstanding, to the awe of many,[5] the court in a bid to over-secure the exclusivity of the

public forums mentioned objective facts that tried to limit the order of the apex court in Booz Allen. It announced that if the legislature, on grounds of public policy, has presented elite locale on public forums regarding particular sorts of disputes at that point such disputes can't be settled through arbitration independent of the idea of rights included therein.[6] Does that imply that the foundation of specific public forums is the litmus test for deciding the arbitrability of, in any case completely arbitrable, disputes?

Given the question in the matrix, the Hon'ble court observed the right approach to confer exclusivity would require necessary examination and analysis of broad objectives of the legislation.[7] The ID Act, 1957 poised as beneficial legislation and aimed to commit towards improving the conditions of workers and their co-existing benefits for their welfare. The Court further observed even though ID Act allows 'voluntary arbitration' it even poses a set procedure for the same.[8] This differential treatment between a private dispute between an employee and employer profounds its jurisprudence like the relationship and the impact on the whole industry.[9]

Furthermore, since ID act matters are dealt with by a tribunal, then the test of exclusive jurisdiction would be the condition to arbitration if:[10]

1. The legislation so creates specific rights which do not exist under the common law; and
2. The legislation aids a special remedy by a specialized forum involving such specific rights and obligations.

This ratio was upheld in the landmark case of *A. Ayyasamy v. A Paramasivam*[11] whereby Justice Chandrachud further observed that disputes revolving on grounds of public policy and being conferred by an exclusive jurisdiction are not arbitrable.

The courts have now moved to the two-fold test i.e. upholding the test laid in Booz Allen about attributable to Right in Rem creates non-arbitrable dispute and the disputes though involving right in-personam unless not reserved for exclusive adjudication or on grounds of public policy.[12] With the contemporary developments, however, these twin fold tests fail to acknowledge the mutual agreement and intention of parties to resolve disputes through specialized third-party arbitral tribunals. The very foundation of arbitration is party autonomy and the flexibility which is ousted by the doctrine of 'exclusive jurisdiction in this test. This, judicial intervention poses a serious threat and the threat must be immediately addressed by courts.

This issue arose before the Delhi HC in the case of *HDFC Bank v. Satpal Singh Bakshi*[13] wherein the question regarding the scope of DRT w.r.t. Recovery of Debts Due to Banks and Financial Institutions Act, 1993 which provides exclusive jurisdiction were arbitrable? The court whilst deciding the arbitrability ruled in favour of party autonomy and held it to be paramount and even held that Indian judicial interventions should be minimal as the parties are free to choose an alternative forum[14] and hence, a mere creation of a specialized tribunal for dealing specific subject matters only ousts the jurisdiction of the civil courts. The emphasis yet is to be given to alternate remedies available and chosen by parties. In the case at hand, the laid its rationale upon the jurisprudence set by the ratio of Booz Allen that a dispute is not arbitrable if it attributes to a right in rem but when the element of 'right in personal is highlighted, it becomes capable of adjudication and settlement through arbitration.

But apart from the tests of Booz Allen, the twin test as laid in Ayyaswami had to be satisfied. Hence, for the scheme of exclusive jurisdiction, it further interpreted that apart from the element of coherence with the personam the dispute should also lack the element of public interest for it to have the essence of arbitrability. And in this Satpal Singh Case, the Court hence clarified that though exclusive jurisdiction was laid by the creation of specialised tribunals to adjudicate it would per se not render dispute in arbitrating as DRT acknowledges the essence of Booz Allen and twin test.[15]

LANDLORD-TENANT DISPUTES

Settling all the disputes which have arisen from the disputing jurisprudence of landlord-tenancy, the case of the landlord as a financial creditor was already settled under IBC but to observe the position and to bring it under the arbitration act, the matter was settled by the Apex Court in the case of *Vidya Drolia v. Durga Trading Corpn*,11 ('Vidya Drolia- I'), where it had simply referred the matter to a larger bench for the authoritative positing of the above issue. Such a reference was made to the Supreme Court and the landmark judgment of Vidya Drolia-II laid the very foundation to the unsettled dispute and the Apex court overturned its previous judgment given in Himangi Enterprise and HDFC bank Ltd. And it held clearly that the landlord-tenant disputes are governed by the Transfer of Property Act are arbitrable, moreover, such disputes except when covered by any specific forum created by rent control laws are arbitrable per se as these disputes acknowledge the essence of actions in rem but these pertain to subordinate rights in personam which have arisen from rights in rem. Thus, the court held that when a right in personam arises from a right in rem, then though the action attributable to rem is not arbitrable the latter which evinces from right in rem to form right against a person is arbitrable. This jurisprudence was laid

on the rationale that such actions do not affect third-party rights or do not have *erga omnes* effect which would require adjudication by civil courts.

Furthermore, neither the disputes between a Landlord and tenant do not have any correlation with inalienable and sovereign functions of the State, nor do the TOPA expressly or implicitly bars the resolution by arbitration. It was however noted that subject matter of disputes which fall under the exclusive jurisdiction of any specific forum governed by rent control legislation would not be arbitrable.

ARBITRABILITY OF FRAUD

Though Arbitration aims at minimal judicial intervention, it has not been immune from overlapping contentious issues of adjudication. To understand the arbitrability of fraud, the dual characteristics of every element of fraud needs to be identified.[16]

The Supreme Court in its decisions of Abdul Kadir[17] and N Radha Krishnan[18] had laid that in general when a public enquiry is required, it permeates to the realm of public law and hence refuse to refer such fraud disputes to arbitration. Moreover, in the latter, The apex court had that in serious allegations of fraud, it is tried by the court.

But moving forth the orthodox interpretations, the court sought to correct its judgement in the Swiss Timing[19] and World Sports group[20] case. By applying the doctrine of severability of the arbitration agreement in the former case, the court held that the authority must refer the parties to arbitration when the clause requires so and in the latter, it found no reason to decline jurisdiction when alleged fraud is procured in performance of a contract.

The Supreme Court further moved to determine the seriousness of fraud by twin test in the Ayyaswami case[21]. It sought to distinguish between “mere allegations of fraud simplicity” and “serious allegations of fraud.” It stated that mere allegation of fraud cannot be ground to nullify the effect of arbitration. It resonated with the principle of Kompetenz Kompetenz and asserted that the twin tests should determine:

1. The plea permeated the entire contract and agreement of arbitration shall be treated in itself, rendering the whole to be void
2. Where the allegation of fraud touch upon internal affairs of the state and its instrumentalities and not imply the public domain requiring public enquiry.

This stance was used to overrule the decision of the Radhakrishnan case by the full bench of the Supreme Court in Rashid Raza.[22]

However, this issue again evinced in the Avital case[23] where HSBC had alleged fraud on the part of Avital for entering a contract. HSBC got the award in its favour and moved an interim measure application. Avital contended that the alleged fraud was serious and since criminal charges were pending too, no arbitration award or order be passed.

The court considered the tests laid in Booze Allen and read them in consonance with the twin test of Ayyaswami. It held that since the allegations were of impersonation, false representation and diversion of funds, it did not have any public favour and were inter-parties rights. Further, merely by the initiation of criminal proceedings, it should not be construed that a dispute seizes to be arbitrable without applying the twin test.

Hence, the scenario has evolved from clear refute to considerable implication or serious nature of fraud to demystify its arbitrability in India since, the Apex Court in its recent landmark judgment in *Vidya Drolia*.[24] held that when civil disputes pave allegations of fraud give attributable to right in personam and hence, are arbitrable.[25]

THE TUSSLE BETWEEN IBC AND ARBITRATION

Section 8 of Arbitration and Conciliation Act, 1996 confers power for referral of parties to arbitration and 8(1) mandates the judicial authority in case of presence of arbitration to refer the parties to arbitration if the same is given in their agreement, provided that the subject-matter of the dispute is similar to the subject-matter of the arbitration clause in the agreement[26]. On the bare reading Section, 8 seems to be peremptory by nature and the subsistence of the Arbitration clause between the contracting parties makes it mandatory for the court to allow such an application[27]. Thus, a plain reading of the section indicates the judicial body is bound to refer parties to arbitration[28] and the rights of the contracting parties along with their contractual obligations must be given due consideration[29].

The tussle evinces from the non-obstante clause present in Section 238 of IBC, 2016 which states that in the event of any inconsistency among the other existing laws, the IBC will prevail over.

It is well recognized that Oppression and Mismanagement governed by Section 241 and 242 of Companies Act, 2013 and the counterparts of 1956 Act was sought in nature of ‘reliefs in rem’

as it not only affects any 2 parties but the longer impacts affect the stakeholders at large. The Court in Rakesh Malhotra's[30] case carved the dispute as non-arbitrable and the sole exception is the petition dressed up to avoid the arbitration clause.

Further, IBC aims to maximise the value of assets of all stakeholder, promote entrepreneurship and make credit available for streamlining the economic flows. Thus, IBC has a larger impact on the public at large. But it must be duly noted that the NCLT has been given the responsibility to act judicially to decide the matters related to the application filed under Section 8 of Arbitration Act where an application under Section 7 of the IBC has also been filed,[31] and thus, the judicial authority so required is also present.

Further, if the intention of the party is of utmost importance as party autonomy is an integral pillar of arbitration and thus, if a party apply for arbitration before submission of their first statement then they are mandatorily be referred to Arbitration.[32] Furthermore, though Section 238 of IBC has an overriding effect on laws that are contrary to the provisions of IBC however, the provision cannot be construed in such a manner that, it in effect overrides the rights of the parties and thus, rights of the contracting parties along with their contractual obligations must be given due consideration[33].

Hence, the research notes the recent case of Indus Biotech Private Limited v. Kotak India Venture Fund-I,[34] where the application was filed by Corporate Debtor to ascertain financial debt and thereby settle the contractual dispute by Arbitration and the Authority considered the principle of *generalia specializes non-derogant i.e.* special law prevails over general law and since A&C is a special act it dismissed the IBC application filed by a creditor and allowed the reference to arbitration.[35]

CONCLUSION

With the largest democracy in the world, India also is the home to ever-rising cases with Judiciary. As of August 2020, the total pending cases rose to 4 crores.[36] This was not simply because of disruption caused by the Pandemic of Covid as even before in Feb 2020, this number was 3.65 crore. The best resort in these trying times are the alternate dispute resolution mechanisms and arbitration as the research elucidates is the best alternative in terms of preserving time, costs, and party autonomy. It not only helps to reach an amenable solution by voluntary intention to reach a binding outcome with help of a non-partial third person. Arbitration helps to create a win-win situation for the parties and they get what they arbitrate.

Furthermore, with developments of institutions which have expertise and efficient mechanism to deal with administrative competent to render award it helps resolve even the smallest of disputes relating to arbitration and with expanding horizons of arbitrability of disputes in India, the question is not the weather but when will be recourse to arbitration as it is the future of growth and development in India.

REFERENCES:

[1] Founders Online: From Benjamin Franklin to Joseph Banks, 27 July 1783, Founders.archives.gov, https://founders.archives.gov/documents/Franklin/01-40-02-0236 (Mar 21, 2021).

[2] Shreyas Jayasimha & Rohan Tigadi, *Arbitrability Of Oppression, Mismanagement And Prejudice Claims In India: Need For Re-Think?*, 11 NUJS Law Review (2018).

[3] Booz Allen and Hamilton Inc. v. SBI Home Finance Ltd., (2011) 5 SCC 532.

[4] Kingfisher Airlines Ltd. v. Prithvi Malhotra Instructor, (2013) (1) AIR Bom R 255.

[5] Payal Chatterjee & Simone Reis, *Private Enforcement of Competition Law Issues Competition Commission of India vis-à-vis Alternate Forums - Is it an option?*.

[6] *Supra* Note 3.

[7] Life Insurance Corporation of India v. D.J. Bahadur, (1981) 1 SCC 315; Rajesh Korat v. Innoviti Embedded Solutions Pvt. Ltd., (2017) SCC OnLine Kar 4975.

[8] The Industrial Disputes Act, Section 10A (1947).

[9] New York Convention, United Nations Convention on the Recognition and Enforcement » New York Convention Newyorkconvention.org, https://www.newyorkconvention.org/english (last visited Apr 1, 2021).

[10] Dhulabhai v. Madhya Pradesh, AIR 1969 SC 78 (India); Premier Automobiles Ltd. v. Kamlakar Shanatram, AIR 1975 SC 2238.

[11] A. Ayyasamy v. A Paramasivam, (2016) 10 SCC 386.

[12] Anand Kumar Singh, *Arbitrability of Disputes in India: The Changing Landscape of 'Exclusive Jurisdiction' Discourse*, 7.1 NLUJ Law Review (2020), http://www.nlujlawreview.in/wp-content/uploads/2020/09/71-NLUJ-Law-Review-70-2020.pdf (last visited Apr 1, 2021).

[13] HDFC Bank v. Satpal Singh Bakshi, 2012 SCC OnLine Del. 4815.

[14] The Code of Civil Procedure, Section 89 (1908).

[15] Assimakis Komninos, *Arbitration and EU Competition Law*, SSRN Electronic Journal (2009).

[16] Amit Jajoo, Anamika Singh & Bhargav Kosuru, *Demystifying the Arbitrability of Fraud*, SCCONLINE (Nov. 28, 2020), https://www.scconline.com/blog/post/2020/11/28/demystifying-the-arbitrability-of-fraud/#_ftn45.

[17] Abdul Kadir Shamsuddin Bubere v. Madhav Prabhakar Oak, AIR 1962 SC 406.

[18] *N. Radhakrishnan v. Maestro Engineers,* (2010) 1 SCC 72.

[19] *Swiss Timing Ltd. v. Commonwealth Games Organizing Committee, (2014) 6 SCC 677.*

[20] *World Sport Group (Mauritius) Ltd. v. MSM Satellite (Singapore) Pte Ltd.,* (2014) 11 SCC 639.

[21] *Supra note 11*.

[22] *Rashid Raza v. Sadaf Akhtar,* (2019) 8 SCC 710.

[23] Avital *Post Studioz Ltd. HSBC PI Holdings (Mauritius) Ltd., Civil Appeal No. 5145 of 2016, along with HSBC PI Holdings (Mauritius) Limited v. Avital Post Studioz Limited Civil Appeal No. 5158 of 2016 with Civil Appeal No. 9820 of 2016.*

[24] Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1.

[25] Sarah Ayreen Mir, *The Tests for Determining Arbitrability of Fraud in India: Clearing The Mist*, KLUWER (Oct. 6, 2020), http://arbitrationblog.kluwerarbitration.com/2020/10/06/the-tests-for-determining-arbitrability-of-fraud-in-india-clearing-the-mist/.

[26] P. Anand Gajapathi Raju v. P.V.G. Raju (Dead) (2000) 4 SCC 539.

[27] Hindustan Petroleum Corporation Ltd. v. Pinkcity Midway Petroleum (2003) 6 SCC 503.

[28] Naveen Kedia & Ors. v. Chennai Power Generation Ltd. (1999) 95 CompCas 640 (CLB).

[29] Union of India v. Parmar Construction Company, 2019 (5) SCALE 453.

[30] Rakesh Malhotra v. Rajinder Malhotra, (2015) 2 CompLJ 288 (Bom).

[31] Thota Gurunath Reddy v. Continental Hospitals Pvt. Ltd., CA (AT) No. 160 of 2017.

[32] Smt. Kalpana Kothari v. Smt. Sudha Yadav and Ors, AIR 2002 SC 404.

[33] Union of India v. Parmar Construction Company, 2019 (5) SCALE 453.

[34] Indus Biotech (P) Ltd. v. Kotak India Venture Fund, (2020) 160 SCL 554 (NCLT, Mumbai).

[35] Khushnuma Khan, *The IBC vs. Arbitration Tussle.* LAWSTREET INDIA (July 14, 2020), http://www.lawstreetindia.com/experts/column?sid=428.

[36] BQ Desk, India's Pending Court Cases On The Rise: In Charts, BLOOMBERG QUINT (Sept. 29, 2020), https://www.bloombergquint.com/law-and-policy/indias-pending-court-cases-on-the-rise-in-charts.