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LEX BONA FIDE - LAW JOURNAL is an open access, peer- reviewed and refereed journal provide dedicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

LEX BONA FIDE: LAW JOURNAL

THE JUDICIAL POWER IN ARBITRATION

ABSTRACT

The "Arbitration And Conciliation Act 1996" was enacted in the spirit of giving parties autonomy in resolving any dispute that may arise in the presence of an arbitration agreement. The arbitration agreement's powers are governed by the Arbitration And Conciliation Act 1996, which empowers the parties to decide the agreement clauses, the place of arbitration, and even the authority to choose the arbitration tribunal (panels of arbitrators) under section 10 of the act. The power granted by the act is referred to as "Party Autonomy." There are several open-ended sections in the said Act that allow for judicial intervention, which is contrary to the spirit of the said legislation. Furthermore, the precedents established by the courts in this area do not clarify the confusion but rather exacerbate the situation, making the scope of such intervention hazy and confusing. The article primarily focuses on resolving such misunderstandings by interpreting the sections and precedents established by the court. Moreover, the article focuses on the act's amendments over the years, which focused on limiting the scope of judicial intervention by establishing arbitral councils. The article's concluding remark clarifies how the establishment of an arbitral council by the 2019 amendment has reduced the scope of judicial intervention and further restored lost spirituality.

INTRODUCTION: PARTY AUTONOMY

The notion of 'party autonomy,' which is a paramount consideration of any arbitration, that empowers the individual to an arbitration. The principle of party autonomy allows individuals in choosing the number of arbitrators that are to be nominated as Tribunal unless the total amount of arbitrators does not amount to an even number.[1]In a situation where the applicants to an arbitration cannot agree on the number of arbitrators, the arbitral tribunal would only comprise of total one arbitrator.[2]
As a result, the applicants are free to decide upon the procedure required for appointing the principal arbitrator and the other arbitrator who comprise the arbitration panel (TRIBUNAL). The parties to such arbitration can approach the High Court in matters related to domestic arbitration and the Supreme Court in matters related to International Commercial Arbitration under section 11(6) and 11(9) of the act. Further, the act provides the parties with assistance in the matter of either appointing a third arbitrator when the two decided arbitrators can't decide upon the third arbitrator or even appointing the entire tribunal where the parties can't decide upon the tribunal as a whole.

Apart from the intervention of courts in matters related to the appointment of arbitrators and deciding the arbitration process the act gives the court intervention power regarding many matters which may belong to any of the procedural stages which may be a pre arbitral stage or during the arbitration process and even after the arbitral award is passed.

At the pre-trial stage, the courts are given various power to intervene in matters related to arbitration. Section 8 of the said act mandates the legislative authority to refer parties to arbitration in connection with any case taken before it, which is the subject of the arbitration clause.
Per Section 36 of the act, Section 9 provides the court with the authority to grant interim measures. The court retains its authority to issue orders for and in connection to any proceedings before it. Further, the power of judicial authority to refer parties to arbitration is discussed in section 45 of the act. The section further allows courts to refuse to refer parties to arbitration if the arbitration agreement is found to be null and void or ineffective.

When the arbitration process begins Section 27 of the act provides the court power to handle the evidence. The arbitral tribunal may request the help of the court in collecting evidence under Section 27 of the arbitration and conciliation act. Such assistance can be sought voluntarily or with the court's approval via participation in the competition.
Once the arbitral award is passed section 34 provides the court with the power to intervene and change the arbitral award where:

- The gathering was hampered by some incapacity
- When the arbitration agreement isn't legally binding
- When the party applying was not provided with adequate assistance or notice of the arbitrator's selection
- It includes options on matters that are outside the scope of discretion
- The tribunal's or arbitral procedure's composition did not match the parties' agreement
- The award will also be overturned if the court discovers that
- The contest's subject isn't legal enough to be settled by assertion
- The open setup is at odds with the arbitral award

The Arbitration and conciliation act is formed to provide "party autonomy" to all the people seeking protection under the act. But looking at the mentioned section of the act, the question that arises is whether the interventions made by the judiciary in the arbitration is to be considered as a judicial decision or should it be limited to the only administrative decision?

When the situation ends up, to decide the nature of the decision made by the courts under the disputes arising out of the above-mentioned sections, especially where the matter is regarding the appointment of arbitrators under section 11 of the act, the authorities still find themselves deeply confused and in a state of dilemma.[3]There is various judgement delivered by the court which has delivered the views of the court on the issue about the nature of such intervention made by the court.

KONKAN RAILWAY CORPORATION LTD V/S RANI CONSTRUCTION PVT LTD. The three-judge panel observed that the Act relied on the UNCITRAL Model, which itself is developed by the United Nations Commission on International Trade Law. It stated that a review of the terminology of Section 11 of the Act and Article 11 of the Model Law lays down that the Legislation had appointed the Chief Justice of a High Court in instances of domestic arbitration and the Chief Justice of India in instances of international commercial arbitration as the authority to perform the function of appointment of an arbitrator, while the Model Law had appointed the Chief Justice of India as that of the authority to perform the function of appointment of an arbitrator.[4]

It was not necessary for the Chief Justice or his nominee to indulge any controversial matters between the participants and decide them when the matter was brought before him under Section 11. The Chief Justice or his designate's only function under section 11 is to nominate an arbitrator to fill the gap left by a member to the arbitration agreement or by the two arbitrators chosen by the parties. This would allow the Arbitral Tribunal to be formed quickly and arbitration hearings to begin. If the Chief Justice or his nominee declined to nominate the arbitrator, the parties who intended the appointment could use the 'mandamus' writ. A court could intervene in the same manner that it could intervene against a government administrative order.

Further, the nature of the function performed by either the Chief Justice or his nominee could not be treated as a judicial function instead should be treated as an administrative function. As a result, it was determined that an injunction under Section 11 declining to assign an arbitrator was not subject to this Legal jurisdiction within the ambit of Article 136 of the Constitution.

To put it another way, an injunction that is rightfully the matter of a petition for special leave under Article 136 should be an adjudicatory order, one that decides on the competing claims of parties, and it must be issued by an authority established by law by the State to fulfil the State's responsibility to provide justice to its citizens.

The appeal was **dismissed** by the bench keeping in mind the above contentions.

1. **SBP & CO. V. PATEL V/S PATEL ENGINEERING LTD**

SBP & Co. v. Patel Engineering Limited, (2005) was a landmark case in which a seven-judge Supreme Court bench ruled on Section 11 (6) of the Arbitration and Conciliation Act. The said Section discusses the appointing of arbitrators and states that where a situation arises where the parties not able to agree on an arbitrator, or if in a situation where the third arbitrator is to be appointed by the two selected arbitrator or if an arbitral institution is unable to complete the procedure of appointing an arbitrator, the Chief Justice or any other person or institution may appoint an arbitrator.

Since the Arbitration and Conciliation Act has been enacted, the judiciary has been debating whether the authority granted by the said section is to be considered as an administrative decision or judicial decision. In the case of Konkan Railway Corp. Ltd. v. Rani Construction Ltd. that perhaps the Chief Justice's authority to appoint an arbitrator was administrative. As a result, the chief justice's responsibility was limited to appointing an arbitrator between both the entities so that the arbitration process could proceed.
The court also in the case overturned the judgement passed by them in the Konkan railway case stating that any decision made by the court under section 11 of the act is to be said as a judicial decision and not an administrative decision[5].

The court's decision has been widely panned and portrayed as an illustration of judicial overreach. The judicial nature of the nomination of power gave the judiciary the discretion to not only nominate an arbitrator but also to review the arbitration process, the legality of such agreement and any need for an arbitration clause in the case, and other related issues. As a result, this decision paved the way for the judicial system to interfere in arbitration proceedings. Not just that, but the SC also affirmed that judicial authority cannot be entrusted, so the phrase "any person or institution appointed by him" can only refer to a Supreme Court or High Court judge who is not the chief justice.

The case has nowhere has solved the unresolved dispute, but it has further broadened the scope for judicial intervention in the arbitral proceeding which is itself contrary to the main spirit behind the Alternate dispute mechanism.

1. **GARWARE WALL ROPES V/S COASTAL MARINE CONSTRUCTION & ENGINEERING LTD**

It was laid down in the case that the SC or, as the case may be, the HC that in examining any request under Section 11(4) to 11(6), is to constrain itself to the investigation of the existence of an arbitration agreement and allow all other preliminary questions to be determined by the arbitrator. While encouraging arbitral institutions, the 2019 Amendment Act attempted to create the Arbitration Council of India, which would be tasked with, among other things, grading arbitral institutions.[6]

Garware wall ropes v/s coastal marine construction & engineering ltd, 2019 9(SCC) 2019.
Seeing at the complexity caused by the precedents set by the court, the arbitration act went through many amendments in the year 2015 as well as 2019 about the issue related to the appointment of arbitrators under section 11 of the said act.

The 2015 arbitration and conciliation amendment brought a change regarding the appointment of arbitrator under section 11. The post amendment appointment of an arbitrator was shifted from the Chief justice of the Supreme court and the High court to the Supreme court and the High court. The amendment also stressed out a speedy disposal of an application under section 11, where any appointment of the arbitrator by the court needs to be done with a maximum period of sixty days. Further, the amendment increased the power of the courts by giving them the authority to decide the fees of arbitral tribunal and means of such payment. This amendment increased the intervention capacity of the court in matters of arbitration and conciliation, killing

the essence behind the original act.

In the year 2019, a new amendment was brought to section 11 of the act. Section 11 (3A) Act gives the SC the authority to appoint arbitral institutions for this Part that have been rated by that of the Arbitration Council of India in Section 43-I, in a situation where no arbitral institution is accessible within the jurisdiction of the HC will maintain a council of arbitrators to discharge the function. Sections 11(4), 11(5), 11(6) after the amendment lays down that the appointment of the arbitrators may not be done by anyone other than arbitral institutions deemed by the SC or the HC. The amendment further has repealed Section 11(6A) of the act which strictly confined the decision as per the arbitration agreement. The amendment made is completely contradictory to the *M/s Mayavati Trading Pvt ltd v/s Pradyuat Deb Burman and Gareware* wall ropes case.

CONCLUSION

The Arbitration & the conciliation act has travelled a long journey to date and the time to time amendments in the act has evolved the act decreasing the scope of judicial intervention and living up to the spirits of the act. The non -amended act, provided a free room for intervention to the Supreme Courts and the HC depending on the jurisdiction, to intervene in the matters related to the appointment of the arbitrators. The intervention room provided to the judiciary killed the main spirit of the act because not a limitation to such judicial intervention as provided back then. The precedents set by the court on the same were also conflicting, which did not just clear the doubt but further gave more room for the courts to intervene. The amendments made by the 2019 amendment act somehow has narrowed down the scope of judicial intervention, as it only allows the arbitral council to deal with matters related to the appointment of arbitrators. The amendment has limited the scope of judicial intervention directly helping the act gain its spirituality back. The question now stands in a new manner, because the nomination of arbitral council under section 11 is to be made by the SC & HC, hence providing an indirect opportunity for the courts to intervene.

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[6]Garware wall ropes v/s costal marine construction & engineering ltd, 2019 9(SCC) 2019.