

Anti-Arbitration Injunction Suits - Indian Judiciary's Recourse Between Scylla And Charybdis

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Introduction

We cannot suppose the existence of an organized society without the existence of law. With the transformation of a state of nature into a state of polity, law was henceforth applied in a loose sense to solve the problems of the individuals. The power of determination of disputes is placed in the hands of a person whom the disputant's trust, besides the court of law. The law of Arbitration stems from the concept of mediation and conciliation. The present paper is regarding Anti-Arbitration injunction suits, where civil court takes over the jurisdiction of arbitral tribunals to take up the issue by gaining jurisdiction. The series of judgements stun the readers pertaining to the legacy of the subject in the Indian jurisprudence.

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Overview of Arbitration

Historically, the word Arbiter was used as a non-technical designation of a person to whom controversy was referred for decision irrespective of any law¹. Later, it has been attached a technical perspective and designation of a person selected with reference to an established system for friendly determination of controversies which is though not a judicial process and is yet to be regulated by law by implication²

Arbitration is a term derived from the nomenclature of Roman law³. It is applied to an arrangement for taking and abiding by the judgment of a selected person in some disputed matter instead of carrying it to the established courts for justice. In Halsbury's laws of England, Arbitration has been defined in the following terms -

¹ Coursehero.com. 2022. ADR 1.pdf - CHAPTER -4 THE ALTERNATIVE DISPUTE REDRESSAL METHODS INTRODUCTION in India, ADR methods have a very ancient legacy. Indian civilization | Course Hero. [online] Available at: <<https://www.coursehero.com/file/52749367/ADR-1pdf/>> [Accessed 15 January 2022].

² 2022. [online] Available at: <<https://fdocuments.in/document/chapter-4-the-alternative-dispute-redressal-methods-in-4pdfthe-alternative-dispute.html>> [Accessed 15 January 2022].

³ Scribd. 2022. *ADR Preeti Singh | PDF | Arbitration | Mediation*. [online] Available at: <<https://www.scribd.com/document/392135031/ADR-preeti-singh-pdf>>

“An Arbitration is the reference of dispute or difference between not less than two parties, for determination, after hearing both sides in a judicial manner by a person or persons other than a court of competent jurisdiction.”⁴ The principal sources of the Indian Arbitration Law are

the Indian Arbitration Act, 1940 and the Judicial decisions supplying the vacuum or cure the lacunae in the Act, 1940. Though Arbitration Act, 1940 is a comprehensive code it didn't contain the important provisions for powers and duties of an arbitrator except a few sets out in Section-13 of the Act and nothing has been provided about the conduct of reference. It is silent on weaknesses inherent in individual private contracts. The rules providing for filing of awards differ from High Court to High Court. It doesn't contain the clause on the liability of an Arbitrator in the event of his resignation in the amidst the process.

Plugging such lacunae upon the recommendations of Law Commission and in the lines of English Arbitration Act, 1979, the Arbitration and Conciliation Bill 1995 was introduced to consolidate and amend the law

⁴2022. [online] Available at: <<https://thelegalinfo.com/2020/07/13/what-is-arbitration-arbitration-law-in-india/>> [Accessed 15 January 2022].

relating to Arbitration and it culminated into the Arbitration and Conciliation Act, 1996.

The definition of Arbitration is provided to mean any arbitration whether or not administered by permanent Arbitral institution and “Arbitration Agreement” is defined as an agreement referred to in Section-7 of the Act.

Arbitration agreement

Therefore the existing comprehensive legislation of 1996, reads out Section 7 that an Arbitration agreement means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship whether contractual or not and it also provides that an arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement, an arbitration agreement shall be in writing and it is deemed to be in writing if it is contained in a document signed by the parties, in exchange of letters, telex or other means of communication⁵ which provide a record of the agreement or in exchange of statements of

⁵ 2022. [online] Available at: <<https://www.toppr.com/ask/question/reference-in-a-contract-to-a-document-containing-an-arbitration-clause/>>

claim and defences in which the existence of the agreement is alleged by one party and not denied by the other⁶ and the reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.

Competence of Arbitral Tribunal to rule on its jurisdiction

The Act also provides for a categorical provision under section 16 provides for the competence of arbitral tribunal to rule on its jurisdiction regarding the matters with respect to the existence or validity of arbitration agreement and whether an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract and the other provisions contained in Sub-Sections 2 to 6 of Section – 16 of the Act. This is based on the principle Kompetenz-Kompetenz.

⁶ 2022. [online] Available at: <https://www.indiacode.nic.in/show-data?actid=AC_CEN_3_46_00004_199626_1517807323919&orderno=7.>

Anti- Arbitration Injunction Suits

These types of suits are not expressly recognised by the Arbitration Conciliation Act, 1996, rather the previous Acts, but the Indian courts' judicial activism has led to the recognition of this concept by constant judicial interpretations in judgements. These suits basically restrain the opposite party to go ahead or commence with the proceedings before the arbitral tribunals complying in accordance with the Arbitration Agreement they have entered. In some cases, the parties are referred to arbitration without their proper consent owing to the need of the hour, but identifying the inconvenience sorted to the parties and keeping in mind the injustice they may face, the courts can issue an anti-arbitration injunction suit.

Indian legal jurisprudence was reanalyzed to understand the scope of anti-arbitration injunction suits because of the uncertainty the judgements have created over a period of time without giving the status of a precedent to a particular case. It is in this context the concept of Anti Arbitration Injunction Suits has to be examined in the light of the decided cases.

Kvaerner Cementation India Vs. Bajranglal Agarwal⁷

The authority on the subject law is found in the case decided by the Full Bench of the Supreme Court in *Kvaerner Cementation India Vs. Bajranglal Agarwal* (2012 (5) SCC 214). In this a suit is filed before the Civil Court in the first instance seeking for stay of the proceedings proposed to be initiated by the Arbitrator. Initially the Civil Court granted the Injunction and on merits the same court vacated its earlier injunction orders. The same is challenged before the Bombay High Court which refused to interfere with the order of the lower court. Against the said order the Special Leave Appeal is filed before the Hon'ble Supreme Court of India. The Supreme Court hearing both the sides categorically held that "a bare reading of Section-16 of the Arbitration and Conciliation Act, 1996 makes it explicitly clear that the Arbitral Tribunal has the power to rule on its own jurisdiction even when any objection to the respective existence or validity of the Arbitration agreement is raised and a conjoint reading of sub Sections (2), (4) & (6) of Section-16 would make it clear that such a decision would be amenable to be assailed within the ambit of Section-34 of the Act." Observing as such the Hon'ble Supreme Court

⁷ 2012 (5) SCC 214

refused to interfere with the order of the Bombay High Court implying that it is not open for the Civil Court to decide on the arbitral nature of any dispute when the agreement between the parties provides for such arbitration clause.

Booz Allen and Hamilton Inc. Vs SBI Home Finance Ltd. & Ors

In Booz Allen and Hamilton Inc. Vs SBI Home Finance Ltd. & Ors finally decided by the Supreme Court the question regarding the Arbitration came up for resolution. Capstone Investment Co. Pvt. Ltd. (in short, Capstone) and Real Value Appliances Pvt. Ltd. (in short, RV Appliances) entered into the Leave and License Agreements with Booz Allen and Hamilton Inc. Apart from that Capstone and RV as one part, Booz Allen as Second part and SBI Home Finance Ltd., as Third part entered into a Tripartite Deposit agreement. As per the said agreement Booz Allen paid Capstone and RV a sum of Rs.6.5 Crores refundable deposit from which a sum of Rs.5.5 Crores was paid to SBI on the instructions of Capstone and RV towards repayment of the loan taken by them from SBI HFL and the balance of Rs.1.00 crore was accounted for them in the manner indicated by them. The loan availed by Capstone was cleared and however the loan availed by RV was not cleared. In that agreement Clause – 16

provides for reference of any dispute to an arbitrator who shall be retired Judge of Mumbai High Court and if no such Judge is available any Senior Counsel practicing in Mumbai high Court shall be appointed as sole arbitrator.

As the loan amount due by RV Appliances was not repaid, SBI filed a mortgage suit (Suit No.6397/1999) in the High Court of Bombay⁸ on 28.10.1999 against Capstone (first defendant), appellant (second defendant), and RV Appliances (defendant No.3) in regard to the mortgaged property (flat No.9A) for the following reliefs⁹

- (a) for a declaration that the 1st defendant as mortgagor was due in a sum of Rs.8,46,10,731/- with further interest on the principal sum at the rate of 16.5% per annum and additional interest for delayed payment at the rate of 2% per month from 1st September, 1999 till payment or realization;
- (b) for a declaration that the amount and interest mentioned in prayer (a)

⁸ TaxGuru. 2022. Mortgage suit cannot be referred for settlement through arbitration. [online] Available at: <<https://taxguru.in/corporate-law/mortgage-suit-referred-settlement-arbitration.html>>

⁹ 2022. [online] Available at: <<https://main.sci.gov.in/jonew/judis/37919.pdf>>

above is secured in favour of the plaintiffs by a valid and subsisting mortgage of flat No.9A and three garages (suit premises)¹⁰;

(c) for a direction to the first defendant to pay to the plaintiff the amount and interest in prayer (a) by such date as may be fixed by the Court for redemption of the mortgage and in the event of the first defendant failing to make payment by that date, the suit premises be sold by and under the orders and directions of the Court in enforcement and realization of the mortgage thereon and the net realization thereof be paid over to the plaintiff in or towards satisfaction of its claim herein;

(d) for a personal decree against the first defendant to the extent of any deficiency in sale realization;

(e) that the second defendant be ordered to vacate the suit premises and hand over possession thereof to the plaintiff to enable the plaintiff effectively to enforce and realize its security thereon."

Booz Allen and Hamilton Inc filed the application under Sec-8 of the Act seeking for the matter to be referred to the arbitration.¹¹ Ultimately, the

¹⁰ 2022. [online] Available at: <[https://freelegalconsultancy.blogspot.com/2012/07/whether-sbi-could- seek- eviction-of.html](https://freelegalconsultancy.blogspot.com/2012/07/whether-sbi-could-seek- eviction-of.html)>

¹¹ Indiankanoon.org. 2022. Booz-Allen & Hamilton Inc vs Sbi Home Finance Ltd. & Ors on 15 April, 2011. [online] Available at:

Hon'ble Supreme Court held that The detailed counter affidavit dated 15.12.1999 filed by the appellant, in regard to the notice of motion for temporary injunction, amounted to submission of the first statement on the substance of the dispute, before filing the application under section 8 of the Act and therefore the appellant lost the right to seek reference to arbitration and held that having regard to their finding on question it has to be held that the suit being one for enforcement of a mortgage by sale, it should be tried by the court and not by an arbitral tribunal and dismissed the appeal accordingly.

Rashtriya Ispat Nigam Ltd. Vs. Verma Transport Company¹²

Rashtriya Ispat Nigam LTD is a Public Sector Undertaking is engaged, inter alia, in the business of manufacturing and marketing of iron and steel products. The Respondent Verma Transport Company is a partnership firm engaged in the business of consignment agents at Jalandhar. A contract was entered into between them in regard to the handling and storage of iron and steel materials of RINL at Ludhiana. The RINL

<[https://indiankanoon.org/doc/188958994/?type=print.>](https://indiankanoon.org/doc/188958994/?type=print.)

¹² [2006 (7) SCC 275.]

contends that one Shri Anil Verma, Partner of the Respondent-Firm had constituted various firms and companies and obtained several consignment agency contracts from RINL pertaining to Delhi, Faridabad, Chandigarh and Ludhiana etc.,¹³ who conspired with certain officials of the Appellants and obtained payments @ Rs.140/- per M.T. in place of Rs.36/- per M.T. on a false plea that the Transport Union at Bahadurgarh did not permit transportation of goods without levy of a fee of Rs.100/- per M.T¹⁴ on transportation of such goods. An investigation was conducted by the Central Bureau of Investigation and a criminal case was initiated against Shri Anil Verma and the concerned officials of RINL. Allegedly, with the object of presenting a clean image to RINL and with a view to avoid termination of all the contracts by them, a plea was put forth that Shri Anil Verma had resigned from the partnership firm as also from his other firms/companies. According to RINL, the said Shri Anil Verma was replaced by his family members as a partner of the said firm but he continued to be in complete control over the firms/companies. The contract of the Respondent was terminated by RINL on 23.05.2002.

¹³ 2022. [online] Available at: <<https://www.casemine.com/judgement/in/5609ae39e4b014971141338d>> [Accessed 30 January 2022].

¹⁴ Scribd. 2022. Arbitration Cases CA2 | PDF | Arbitration | Lawsuit. [online] Available at: <<https://www.scribd.com/document/508718180/Arbitration-Cases-CA2>>

The Firm, however, filed a suit being Suit No.122 of 2002 for grant of permanent injunction restraining the Appellants herein from in any manner blacklisting the Respondent-Firm or terminating the consignment agency contract. On an application for injunction having been filed, the Civil Judge, Junior Division, directed the parties to maintain status quo in regard to the status of the Respondent-Plaintiff herein qua termination of the contract as also the order of blacklisting. The RINL appeared to have sought for time to file written statement. They also filed a rejoinder to the counter affidavit to the application for injunction wherein it took a specific plea that the subject-matter of the suit being covered by the arbitration agreement entered into by and between the parties, it was not maintainable.¹⁵ On 07.06.2002, they filed an application under Section 8 of the 1996 Act, which was rejected by the Civil Judge, Junior Division by an order dated 03.10.2002.

Ultimately, the matter came up before the Hon'ble Supreme Court wherein it was held that the application filed under Section-8 of the Act

¹⁵ lawyersclubindia. 2022. Section 8 of Arbitration and Conciliation ACT - Others. [online] Available at: <<https://www.lawyersclubindia.com/judiciary/Section-8-of-Arbitration-and-Conciliation-ACT-386.asp>>

was maintainable.

Hindustan Petroleum Corpn. Ltd. Vs. Pink City Midway Petroleums¹⁶

It is another case of greater importance where the preemptory nature of Sec – 8 of Arbitration and Conciliation Act for referring the matter to Arbitration where the parties through their agreement agreed to refer any dispute to arbitration is upheld by the apex court.

The HPCL and Pinkcity Midway (the dealer) entered into a Dealership agreement for supply of petroleum products by HPCL. There was a Short delivery of Motor Spirit and High Speed Diesel detected in an inspection in dispensing units of the dealer. After issuing show cause notice, the HPCL suspended sales and supply of products to the dealer for 30 days and also levied the fine. The dealer filed a Suit for declaration and injunction with interim stay application filed before the Civil Judge's Court who stayed the suspension of supplies to the dealer by the HPCL. HPCL filed the application u/s 8 r/w Section 5 of the Act for referring dispute to arbitrator as per clause 40 of Dealership Agreement entered into

¹⁶ 2003 (5) Supreme 88.

between them. The Civil Judge dismissed the said application holding that the dispute about suspected short supply was not covered by arbitration agreement. The HPCL took the matter in revision before the High court and the same is also dismissed by the High Court. The HPCL again filed the appeal before the Hon'ble Supreme Court. The Hon'ble Supreme Court held that Section 8 is preemptory in nature and it is mandatory for Civil Court to refer dispute to arbitrator if agreement contained arbitration clause. It also held that if there was any objection as to applicability of arbitration clause to facts of the case, the same will have to be raised before concerned Arbitral Tribunal.

P. Anand Gajapathi Raju & Ors. v. P.V.G. Raju (Dead) & Ors.¹⁷

Referring to the earlier judgment of the Apex court in the case of P. Anand Gajapathi Raju & Ors. v. P.V.G. Raju (Dead) & Ors. has held that the language of Section 8 is preemptory in nature.¹⁸ Therefore, in cases where there is an arbitration clause in the agreement, it is obligatory for the Court

¹⁷ 2000 (4) SCC 539.

¹⁸ Indiankanoon.org. 2022. Hindustan Petroleum Corpn. Ltd vs M/S. Pinkcity Midway Petroleums on 23 July, 2003. [online] Available at: <<https://indiankanoon.org/docfragment/1087099/?big=0&formInput=arbitration%20clause.>>

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.¹⁹ 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.²⁰

It further held that it is clear from the language of the Section, as interpreted by the Constitution Bench judgment in *Konkan Railway* (supra) that if there is any objection as to the applicability of the arbitration clause to the facts of the case, the same will have to be raised before the concerned Arbitral Tribunal and found fault with the courts below stating that in this case the courts below ought not to have proceeded to examine the applicability of the arbitration clause to the facts of the case in hand but ought to have left that issue to be determined by the Arbitral Tribunal as contemplated in Clause 40 of the Dealership

¹⁹2022. [online] Available at: <<https://www.toppr.com/ask/question/the-power-of-court-to-refer-parties-for-arbitration-would-and-must-necessarily-include->> [Accessed 3 February 2022]

²⁰ iPleaders. 2022. Scope of Section 8 of the Arbitration and Conciliation Act, 1996.[online] Available at: <<https://blog.ipleaders.in/scope-section-8-arbitration-conciliation-act1996> (2016) 0 Supreme(SC) 648>

Agreement and as required under Sections 8 and 16 of the Act.

Vimal Kishor Shah Vs. Jayesh Dinesh Shah.²¹

It is a case where the Arbitration agreement incorporated in the Trust Deed is not held to be valid by the Division Bench of the Hon'ble Supreme Court.

One Shri Dwarkadas Laxmichand Modi executed a family Trust Deed on 06.04.1983 in favour of six minors who later attained majority. To manage the affairs of the Trust and its properties, the settlor appointed two persons -Shri Dinesh Nandlal Shah and Smt. Saryu Kishor Shah as Managing Trustees.²² Clause 20 of the Trust Deed provides that every dispute or differences regarding the interpretation of any of the clauses or provisions or the contents of the Trust Deed or any dispute inter se trustees or disputes between the trustees and beneficiaries or disputes between beneficiaries inter se as and when arise,²³ the same would be resolved in

²¹ (2016) 0 Supreme(SC) 648)

²² 2022. [online] Available at:

<<https://www.casemine.com/search/in/trust%2Bdeed%2Bcenter%2Binc>>

²³ Bhalla, S., 2022. *Arbitration Clause in Trust Deed is not Enforceable*. [online]

Mystery of Law and Justice. Available at:

<<https://lawmystery.com/2016/12/02/arbitration-clause-trust-deed-enforceable->

pursuance of the provisions of the Indian Arbitration Act, 1940 and the decision of arbitrator(s) shall be final and binding on the parties to the arbitration.²⁴ Soon after its formation somewhere from 1989-90 onwards, differences cropped up inter se beneficiaries with respect to the manner in which the affairs and the business of the Trust were being carried on. This led to tendering of the resignation by one trustee from Trusteeship. A demand was also made in the notice that since parties have not been able to amicably resolve their disputes/differences, therefore, all such disputes/differences be referred to the arbitrator for his decision as per clause 20 of the Trust deed.²⁵ one set of beneficiaries filed an Arbitration application in the High Court of Bombay against the other set of beneficiaries praying for referring all disputes/differences, which had arisen between the parties, to the arbitrator in terms of clause 20 of the Trust Deed.²⁶

dispute/>

²⁴ Indiankanoon.org. 2022. *Vimal Kishor Shah & Ors vs Jayesh Dinesh Shah & Ors on 17 August, 2016*. [online] Available at:

<<https://indiankanoon.org/doc/41329464/?type=print.>>

²⁵ 2022. [online] Available at:

<<https://www.casemine.com/search/in/deed%20of%20trust%20act.>>

²⁶ Indiankanoon.org. 2022. *Vimal Kishor Shah & Ors vs Jayesh Dinesh Shah & Ors on 17 August, 2016*. [online] Available at:

<<https://indiankanoon.org/doc/41329464/?type=print.>>

The Hon'ble Supreme Court held that the disputes relating to Trust, trustees and beneficiaries arising out of the Trust Deed and the Trust Act are not capable of being decided by the arbitrator despite existence of arbitration agreement to that effect between the parties.²⁷

Bina Modi vs. Lalit Modi²⁸

The facts were that, disputes arose between Modi family, where the son Lalit Modi and the mother Bina Modi along with her other children regarding the partition of the family properties, wherein the trustees have approached different forums to settle the dispute. Lalit Modi has instituted the International Commercial Arbitration at Singapore and Bina Modi institutes a suit to render an anti-arbitration injunction as the proceedings if initiated are against Indian public policy.

The Delhi High Court in the case basing on the Apex court's ruling in

²⁷ Bhardwaj, P. and Sharma, D., 2022. Disputes relating to Trust and Trustees cannot be settled by way of arbitration even if arbitration agreement exists to that effect | SCC Blog. [online] SCC Blog. Available at: <<https://www.scconline.com/blog/post/2016/08/19/disputes-relating-to-trust-and-trustees-cannot-be-settled-by-way-of-arbitration-even-if-arbitration-agreement-exists-to-that-effect/>>

²⁸ 2020 SCC Online Del 1678.

Kvaerner Cementation India Vs. Bajranglal Agarwal ²⁹held that the Arbitrability or otherwise of any Arbitration agreement shall have to be decided by the Arbitral tribunal only and not by the Civil Court. It has deviated from the decision of the Supreme Court in Vimal Kishor Sha

Vs. Jayesh Dinesh Sha where it was held that the disputes relating to trust, trustees and beneficiaries arising out of a trust deed and the Trust Act are not capable of being decided by the arbitration tribunal despite existence of arbitration agreement to that effect between the parties. Therefore, it was held that the case has to be sorted out with the help of arbitral proceeding negating the judgement of McDonald's and also relying on the section 41(h) of the Specific Relief Act, 1963 because when a best alternative remedy is available, they have to be respected and proceeded as u/s 16 of the Arbitration and Conciliation Act, 1996.

Critical Analysis

Comparing the concept with Scylla and Charybdis is quite suitable as the dispute are now under a Hussle and tussle between the civil courts and

²⁹ 2000 (4) SCC 539.

arbitral tribunals. Alternate dispute Resolution has come into limelight because of the speedy redressal it offers with the consent of the parties and within less procedural aspects of CPC, 1908 or the other evidence related issue. But when the suits like the Anti-arbitration Injunction arise, it frames a chaotic situation in justice delivery systems. When a specific mechanism is provide for resolving disputes under special legislation ousting the general jurisdiction of the civil courts, it has to followed for the common good. So, the suits hang between the two evils i.e., Scylla and Charybdis if the mechanisms are not understood and initiated properly. The judiciary is trapped with uncertain decisions and prayers by the parties. Like, the case of Kvaerner was decided in the year 2001, but didn't assume the status of precedent because of being undermined and unreported. But the case of Bina Modi, the Delhi high court has made sincere efforts in the re-affirming the status of Kvaerner as precedent by considering the ratio of that case to this case.

Although, in exceptional cases, the civil courts can exercise jurisdiction and there's no complete need of ousting jurisdiction in all the cases. But the listed process should be followed for better and accurate results unless there is a chance of grave injustice to the parties or where the dispute needs to be settled under the robust mechanism of civil courts in the

matters of examinations and evidences.

Conclusion

The catena of decisions delivered by the Apex court tilt towards the non-prosecution of any dispute covered under the Arbitration agreement by the Civil Courts and since it is categorically provided on the provision contained in Section-16 of the Act itself the courts leaned towards upholding the provisional status of the Act and observed restraint in allowing the courts to try the matters on their own without referring the same to the arbitral forum.