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Dispute Resolution: Arbitration, a Solution

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INTRODUCTION



Arbitration offers a more expedient and flexible mechanism for dispute resolution, potentially easing the burden on Indian Courts.[1]

The Indian judicial system is currently dealing with a tremendous backlog of cases, causing significant delays in the resolution of disputes. This pendency not only affects the timely delivery of justice but also strains the resources of the Courts. In the year 2019 NITI Aayog published a report namely Strategy for New India @ 75[2].

According to the said report at the then prevailing rate of disposal of cases in our Courts, it would take more than 324 years to clear the backlog and the pendency at that point of time was 29 million cases. The number sufficiently describes the overburdened state of our Courts. By diverting certain cases to arbitration, parties can achieve quicker settlements, thereby contributing to a more efficient judicial process and alleviating the chronic issue of case backlog.

In recent times, Courts have increasingly promoted arbitration over traditional litigation to resolve disputes more efficiently.

Sometimes when parties enter into agreement/s and agree for an arbitration clause, the clause may be held improper by the Court due to various reasons, but the underlying arbitration agreement has been given effect to.

[1] The article reflects the general work of the authors and the views expressed are personal. No reader

[2] https://www.niti.gov.in/sites/default/files/2019-01/Strategy_for_New_India_2.pdf

CASE STUDY 1:

Perkins Eastman Architects DPC and Another Vs. HSCC (India) Ltd. [3]

In this case the Supreme Court of India delivered a significant ruling concerning the appointment of arbitrators. The case revolved around the interpretation of Section 12(5) of the Arbitration and Conciliation Act, 1996 (“Arbitration Act”) read with the Seventh Schedule of the Arbitration and Conciliation Act, 1996 (as amended by the Arbitration and Conciliation (Amendment) Act, 2015).

Background:

Perkins Eastman Architects DPC (the Petitioner) and HSCC (India) Ltd. (the Respondent) were parties to an agreement that included an arbitration clause for resolving disputes. A dispute arose between the parties, leading to the invocation of the arbitration clause. HSCC sought to appoint an arbitrator from its panel, which included its own officers. Perkins Eastman objected to this appointment, citing concerns about impartiality and independence.

Issues Before the Court

The primary issue before the Supreme Court was whether a party to a dispute, who is itself interested in the outcome, can unilaterally appoint an arbitrator. This question was crucial in ensuring the neutrality and impartiality of the arbitration process.

Court’s Analysis

The Court conducted a detailed study with respect to the provisions of the Arbitration Act, particularly focusing on Section 12(5) of the Act and the Seventh Schedule thereto. Section 12(5) of the Act stipulates that any person whose relationship with the parties or the subject matter of the dispute falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as an arbitrator. The Seventh Schedule lists various scenarios where bias or partiality might arise.

The Court noted that the intent of the 2015 amendment was to promote impartiality and independence in the arbitration process. It emphasized that the essence of arbitration lies in the

[3]2019 INSC 1285; MANU/SC/1628/2019

neutrality of the arbitrator, which is undermined if one party has the power to unilaterally appoint an arbitrator.

In its judgment, the Supreme Court opined that ***“any clause in an agreement that allows one party to unilaterally appoint an arbitrator, especially if that party is interested in the outcome of the dispute, would be invalid. The Court held that such a practice violates the principle of impartiality and independence essential for the arbitration process”***.

CASE STUDY 2:

Bhaskar Raju And Brothers And Anr Vs. Dharmaratnakara Rai Bahadur Arcot Narainswamy Mudaliar Chattram & Other Charities And Ors.[4].

In this landmark judgement, Supreme Court took a reference to resolve the issues related to arbitration of unstamped agreements. The primary issue that arose before the Court was whether an arbitration agreement would be non-existent, unenforceable, or invalid if the underlying contract is not stamped.

The Court allowed arbitration on unstamped agreements, while concluding as below:

1. Agreements which are not stamped or are inadequately stamped are inadmissible in evidence under Section 35 of the Stamp Act, 1899. Such agreements are not rendered void or void ab initio or unenforceable;
2. Non-stamping or inadequate stamping is a curable defect;
3. An objection as to stamping does not fall for determination under Sections 8 or 11 of the Arbitration Act. The concerned Court must examine whether the arbitration agreement prima facie exists;
4. Any objections in relation to the stamping of the agreement fall within the ambit of the arbitral tribunal; and

[4]2023 INSC 1066



e. The decision in *N N Global Mercantile (P) Ltd. v. Indo Unique Flame Ltd.*[5] and *SMS Tea Estates (P) Ltd. v. Chandmari Tea Co. (P) Ltd.*[6] are overruled. Paragraphs 22 and 29 of *Garware Wall Ropes Ltd. v. Coastal Marine Constructions & Engg. Ltd.*[7] are overruled to that extent.[8]

A seven-judge bench of the Supreme Court has put an end to the year's major controversy concerning arbitration in India by overruling the cases referred at paragraph (e).

CASE STUDY 3:

Ram Kripal Singh Construction Pvt. Ltd. Vs. National Thermal Power Corporation (NTPC)[9]

Background

Ram Kripal Singh Construction Private Limited (the Petitioner) and National Thermal Power Corporation (the Respondent) were parties to an agreement for development of a township for the Respondent's Super Thermal Power Project and that agreement included an arbitration clause for resolving disputes. The disagreements are linked to the terms and conditions outlined in the Letter of Award, leading to conflicts between the involved parties. Subsequent to the issuance of the Letter of Award, the Petitioner and the Respondent formalized their relationship by signing a Contract Agreement. This contract constitutes a formal pact between the parties, detailing the obligations, rights, and terms that both parties are obliged to adhere to.

[5] (2021) 4 SCC 379

[6] (2011) 14 SCC 66

[7](2019) 9 SCC 209

[8]The Supreme Court in the following judgments upheld the supremacy of Indian Stamp Act over the Arbitration Act and observed that unstamped agreements cannot be referred for Arbitration.

[9]2022/DHC/004784

Court's Analysis :

The Bench inferred that the respondent does not contest the existence of the arbitration agreement between the parties but argues that since the procedure for appointing an arbitrator specified in the arbitration clause has now become illegal and unenforceable, the entire arbitration agreement is consequently void.

The Bench further stated that :

“The procedure for appointment of an arbitrator is clearly distinct and separable from the agreement to refer disputes to arbitration, even if these are contained in the same arbitration clause. If therefore, by reason of amendment, re-statement or reinterpretation of the law, as has happened in the present case by insertion of section 12(5) in the A&C Act and the verdicts of the Supreme Court in TRF Ltd. and Perkins Eastman (supra), the procedure for appointment of arbitrator at the hands of one of the parties becomes legally invalid, void and unenforceable, that does not mean that the core agreement between the parties to refer their inter-se disputes to arbitration itself perishes. In the opinion of this Court - this “my way or the highway” approach - is not tenable in law; and in such circumstances, that part of the arbitration agreement which has been rendered invalid, void and enforceable is to be severed or excised from the arbitration clause, while preserving the rest of the arbitration agreement”.

Consequently, the Bench concluded that a valid and subsisting arbitration agreement exists between the parties, although the procedure for appointing the arbitrator by the CMD, NTPC is no longer valid and must be severed from the remaining arbitration clause.

Regarding the allegation that the claims were time-barred, the Bench observed that this would not prevent the Court from appointing an arbitrator. It left the issue of limitation, which involves mixed questions of fact and law, to be decided by the arbitrator.

CASE STUDY 4:

S.K. Engineering and Construction Company India Vs. Bharat Heavy Electricals Limited (“BHEL”)[10]

Background

BHEL entered into three distinct agreements with SK Engineering for the execution of specific works in BHEL’s projects located in Tamil Nadu. Each of the three agreements included identical arbitration clauses. Essentially, these clauses contained two key elements: (1) the Head of TBC, BHEL, or their nominee shall serve as the sole arbitrator; and (2) if, for any reason, the Head of TBC, BHEL, or their nominee is unable to serve as arbitrator, the disputes shall not be subject to arbitration at all.

When conflicts arose between the parties regarding all three agreements, SK Engineering requested the appointment of an independent arbitrator, a move opposed by BHEL. This situation led to the filing of three separate petitions under section 11 of the Arbitration Act before the Delhi High Court.

Court’s analysis

The Delhi High Court did not agree with the contentions of BHEL and held that the intention of the parties to refer disputes to arbitration cannot be disputed. Therefore, only the portion of the arbitration clause conferring right on the Head, TBC, BHEL or his nominee to act as the sole arbitrator shall become invalid, not the whole arbitration clause. The High Court has allowed the petitions by appointing an independent sole arbitrator.

Conclusion:

In light of the case laws elaborated at a certain length in this article, it is amply clear that it is critical to have an effective arbitration clause in the agreement which is complete in all respects and duly covers the essentials which are summarised below:-

- Reference to arbitrator in case of not reaching a settlement upon mutual discussions between the parties;
- Venue and seat of arbitration should be;

[10] ARB.P. 737/2023, ARB.P 738/2023, ARB.P 740/2023



- language in which the proceedings shall be conducted and the binding nature of the award issued
- The arbitration clause shall specifically outline the procedure for appointment of the arbitrator and must expressly mention that the arbitrator shall be appointed by mutual consent of both the parties or all the parties in case where there are more than two parties.
- The procedure shall typically bear a linear flow to invoke arbitration stating that the dispute shall be settled by a sole arbitrator to be mutually appointed by the parties.
- In the event the parties are unable to agree upon a sole arbitrator, each party shall appoint one arbitrator of their choice, and the two appointed arbitrators shall appoint the third arbitrator who will act as the presiding arbitrator thus making it a panel of arbitrators.

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