THE RISING PILLAR OF LAW: ARBITRATION

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In this paper, I will be dealing with the emerging trends of arbitration backed by latest amended statutes. As this field of law is widely accepted in the international parlance, it's also getting imperative for the Indian audiences to come forth and catch up with these accepted practises. For it to work smoothly, it is important to be done away with the obsolete statutes for a start. A codified text does not only create authorisation but also mandates the recognition of the law. Within a span of almost two decades many interpretations to this Act has come, by way of precedents and also by interpretations. Some of the landmark cases established as to what can be conceived out of this statute. By way of case laws and the new amendments I'll fathom the emergence of arbitration in India.

INTRODUCTION

Arbitration in India is rising by the day as an easy, pocket friendly and amiable way of resolving the disputes. This field has gained much recognition and efforts have been made by the legal fraternity to create a market where arbitration, conciliation and mediation could be accepted. It has to be noted that, efforts only in the field cannot bear any fruit if the statute governing it does not back it up. It was high time that the statute be altered and a way could be made for the new practises.

SEC 2: AMENDMENT IN THE DEFINITION OF 'COURT'

This amendment has changed the scenario of international arbitration in India. Earlier in the act of 1996 only domestic arbitration was recognised by the Part 1 of the Act, now another clause has been inserted which recognises International Commercial Arbitration as well. Sec 2(e) (ii) reads: "In the case of international commercial arbitration, the High Court in exercise of its original jurisdiction, having jurisdiction to decide the questions forming the subject matter of the arbitration if the same had been the subject matter of the suit, and in other cases, a high court having the jurisdiction to hear appeals from decrees of Courts subordinate to that High Court." "International Commercial Arbitration" means an arbitration relating to disputes arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India and where at least one of the parties is –

- An individual who is national of, or habitually resident in any country other than India

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- A body corporate which is incorporated in a country other than India.
- An association or body of individual who's central management and control is exercised in any country other than in India.
- The government of a foreign country.

High Court specifically has been provided with the powers to deal with the matters concerning the international commercial arbitration.

In P. Anand Gajapthi Raju v. P.V.G. Raju[1] it was established that the court to which the party shall have recourse to challenge the award would be the courts as defined in Sec 2 clause (e) and not the court to which an application has been made under section 8 which gives power to the parties to refer to a court as is specified in the arbitration agreement.

In Bhatia International v. Bulk Trading[2] the arbitration proceedings were already going on in Paris, France according to the prior signed arbitration agreement. The respondent applied for interim relief under Sec 9 one of which was an order of injunction restraining these parties from alienating, transferring and/or creating third party right, disposing of, dealing with and/or selling their business assets and properties. The appellant challenged the jurisdiction of the District Court saying that the sections under part I cannot be applied in the matters of part II, which the court dismissed. Further the appellants filed a writ exercising their right in Art 226 which was dismissed again. The court held that the application of appellant is maintainable. These precedents were further taken care of and hence the amended law. Until now for these cases part I could only be applied for the cases having jurisdiction only in India.

AMENDMENT IN SEC 7(4) (B): ARBITRATION AGREEMENT

Insertion of "every communication through electronic means". Amended section would read as:

An arbitration agreement is in writing if it is contained in –

- A document signed by the parties
- An exchange of letters, telex, telegrams or other means of telecommunication including communication through electronic means which provide a record of the agreement.

As in this era the modes of telecommunication has developed to a great extent and thus it made the laws go obsolete. To come par with the modern technologies and communication processes the need was felt to include the communications through electronic modes too.

[1] P. Anand Gajapthi Raju and Ors. V. PVG Raju, (2000) 4 S.C.C. 539.
[2] Bhatia International v. Bulk Trading S. A. & Anr., (2002) 4 S.C.C. 105

Although it is not mentioned that which modes will be included in it and has been left to the interpretations of the counsel and the jury accordingly.

The only condition laid down here is that the telecommunication mode should be such which provided a record of the agreement. The record would cancel out ambiguity and would make both the parties bound.

SEC 8: INSERTION OF WORDS

Amended Sec 8(1) reads:

"A judicial authority before which an action is brought in a matter which is the subject matter of the arbitration agreement or any person claiming through or under him, so applies not later than submitting his first statement on the substance of the dispute notwithstanding any judgement, decree or order of the supreme court or any other court, refer the parties to arbitration unless it finds that prima facie no valid arbitration agreement exists." With the inclusion of these words the law is being made flexible and the exhaustive character of the same is taken away. Any other person could be the counsel or any person assigned to make an application regarding it. It is now subject to the interpretation of the court.

In Yogi Aggarwal v. Inspiration clothes[3] it was held that the subject matter of the arbitration agreement should be same as the subject matter of the suit. It was alleged that the subject matter of the arbitration agreement is similar to or identical to the subject matter of the suit. In this regard the relief that was sought under sec 8 was not granted.

AMENDMENT IN SEC 9

Section 9 renumbered as sec 9(1) and Section 9(2) being inserted subsequently which reads as:

"Where, before the commencement of arbitral proceedings a court passes an order for an interim measures of protection under sub section (1), the arbitral proceedings shall commence within a period of ninety days from the date of such order or within such further time as the court may determine."

The time period to start off with the case after the interim order has been passed is established here. It is imperative to note that an interim order can be passed even before the commencement of the arbitral proceeding. It was held by the court in Firm Ashok Traders v. Gurumukh Das Saluja. The section permits to file an application for interim protection before the commencement of arbitral proceedings but the provision does not

[3] Yogi Aggarwal v. Inspiration clothes (2009), 1 S.C.C. 372.

give any indication of how much before. The word "before" means inter alia "ahead of; in presence or sight of; under the consideration or cognizance of". Sec 9 complies with the Model Law and UNCITRAL Rules and provide for "interim measure of protection".

The interim measures could be

- the appointment of a guardian for a minor or for a person of unsound mind for the purposes of arbitral proceedings or;
- a measure for the preservation, interim custody or sale of any goods which would be the subject matter of the arbitration agreement or;
- securing the amounts in dispute in the arbitration or;
- the detention, preservation or inspection of the property which is a subject matter to the arbitration on which a question may arise therein or;
- interim injunction or appointment of receiver

The interim order could be passed to protect the perishable and exhaustible materials which are an integral subject matter of the arbitration. Without such material the arbitration's cause would disappear so the material or money or anything valuable which is in dispute has to be preserved as it is, until an award regarding the same has not been passed. The usage of the same will then depend upon the award. Most certainly an interim order could be passed even after the arbitral award is being passed but before the enforcement of the same. In Sundaraman Finance Ltd v. NEPC India Ltd[4] it was held that "in order to give full effect to the words 'before or during arbitral proceeding 'occurring in section 9, it would not be necessary that a notice invoking the arbitration clause must be issued to the opposite party before an application in the same section be filed. **The court has jurisdiction to entertain an application under section 9 either before arbitral proceedings or during arbitral proceedings or after the making of an arbitral award but before it is enforced in accordance with sec 36 of the Act."** This interpretation of law came way before the statute was amended in this regard. Therefore, serving as an example for the amendment.

SEC 11: APPOINTMENT OF ARBITARTORS

Sec 11(A) inserted which reads:

"if the Central Government is satisfied that it is necessary or expedient to do so it may, by notification in the official gazette, amend the fourth schedule and thereupon the forth schedule shall be deemed to have been amended, accordingly."

In sub sections 4, 5 and 6 the words Chief Justice or any person or institution designated by him is substituted by "Supreme Court or High Court or any other person or institution

[4] Sundaraman Finance Ltd v. NEPC India Ltd., (1999) AIR (SC) 565

designated by such court" instead of "the chief justice of India or the person or body designated by him." Earlier only the Supreme Court had a say in the matters of appointment of arbitrators but now High Court too has been involved. The Supreme Court in Ador Samia v. Peekay Holdings Ltd[5] categorically held that the powers of the Chief Justice of India under sec 11 are administrative powers and therefore the SC while performing such power cannot be treated as "court". In Konkan Railway Corporation Pvt Ltd v. Rani Construction Pvt Ltd[6] it was observed that if such an order was to be treated as administrative in nature, even the order of Chief justice of India or his nominee could be challenged first before a single bench of the High Court and then before a division bench of the High court and then under article 136 of the Constitution, rather than being treated as a final order. This would only delay the proceedings further. However, if the order of the Chief Justice of High Court or his nominee be treated as a judicial order then there would lie only one appeal in the Supreme Court under Art 136 of the Constitution. Thus backlog that is created in the Supreme Court is also curbed by involving High Court's jurisdiction in the same. The words further in the sub sections of Sec 11 "the High Court or any other person designated by such court" gave a view that the court is delegating its power. To clear that ambiguity **Sec 6 (B)** has been inserted which reads as "The designation of any person or institution by the Supreme Court or, as the case maybe by the High Court, for the purposes of this section shall not be regarded as a delegation of judicial power by the Supreme Court or the High Court." It is necessary by way of Sec 7 that an arbitration agreement be presented to hold arbitration proceedings. To ease this norm **Sec 11 (6)(A)** was inserted which reads as "The Supreme Court or as the case may be the High Court while considering any application under sub sections 4 and 5, shall notwithstanding any judgement, decree or order of any court, confine to the examination of the existence of an arbitration agreement." Thus making it a mandatory provision to have an arbitration agreement. **Section 11(7)** amended. Earlier the decisions of the Chief Justice of India only were final. Now when the High Court's being involved too the decisions of the Supreme Court along with that of the High Court's has to be considered final and no appeal including Letters Patent Appeal shall lie against such decision. The rules of Civil Procedure Code are not applied in the arbitration causes so to cater to that ambiguity Sec 11 (10) is inserted which reads "The Supreme Court or as the case maybe the High Court may make such scheme as the court may deem appropriate for dealings with matters entrusted sub section (4), (5), (6) which deals with the appointment of the arbitrators and the different possibilities arising out of it.

Section 11(11) gives power to the High Court to deal with the matters that has come directly to it and the Supreme Court wouldn't meddle into the affairs entrusted to the HC

[5] Ador Samia v. Peekay Holdings Ltd, (1999) 1 SCR 658

[6] Konkan Railway Corporation Pvt Ltd v. Rani Construction Pvt Ltd, (2000) 7 S.C.C. 201

in sub sections 4 ,5 and 6. This section reads as "where more than one request has been made under sub section 4, 5 and 6 to different high courts or their designates, the High Court or such designates to whom the request has been made under the relevant sub-section shall alone to be competent to decide on the request.

SEC 11(13) INSERTED SPECIFYING THE TIME PERIOD TO DISPOSE OFF THE ORDER OF APPOINTMENT OF ARBITARTORS

The section reads as "An application made under this section for appointment of an arbitrator or arbitrators shall be disposed by the supreme court or by the High Court as the case maybe, as expeditiously as possible and an endeavour shall be made to dispose of the matter within a period of sixty days from the date of service of notice on the opposite party." By way of ascertaining a time limit to the party an effort has been made to not let the matter hung up without reaching a conclusion on it. Due to the backlog of cases in the higher judiciary the matter doesn't see the light of the day which is why it was felt necessary to fix a time limit so that the pile on could be avoided.

Sec 11(14) INSERTED FOR DETERMINATION OF COURT FEES which reads as "For the purpose of determination of the fees of the Arbitral Tribunal and the manner of its payment to the tribunal, the High Court may frame such rules as may be necessary, after taking into consideration the rates specified in the fourth schedule."

Explanation– For the removal of doubts, it has been clarified hereby that international commercial arbitration is not included in this sub section and also the cases where parties have agreed for determination of fees as per the rules of an arbitral tribunal.

Since Civil Procedure Code doesn't have much a say in the matters of arbitration, it was necessary to assign some authority to a body who could take care of the same. By the assignment of this responsibility, ambiguity as to the determination of the same has been eradicated. Though it remains purely upon the discretion of court.

SEC 12: GROUNDS FOR CHALLENGE AMENDED

Earlier it was ambiguous as to what all, the prospective arbitrator has to submit before his appointment to prove his independence or impartiality, now though it is clearly specified. The ambiguous and exhaustive section which was there earlier was "When a person is approached in connection with his possible appointment of arbitrator, he shall disclose in writing any circumstance likely to give rise to justifiable doubts as to his independence or impartiality." Now, it is mentioned that he shall disclose any circumstances –

- such as the existence either direct or indirect, of any past or present relationship with or any interest in the parties whether financial, business, professional or other kind,

which is likely to give rise to justifiable doubts as to his independence or his immorality; and

- Which are likely to affect his ability to devote his sufficient time to the arbitration and in particularly his ability to complete his arbitration within a period of 12 months.

Now it has become very much clear as to what all grounds can disqualify an arbitrator.

Sec 12(5) inserted "Any person whose relationship with the parties or counsel or subject matters falls under the schedule 7th shall be ineligible." Provided that the parties have an express agreement against that. Schedule 7th takes into consideration the principles of Natural Justice and describes the various relationships that a person has with the party to arbitration which can render that person ineligible to become an arbitrator. Positions like an employee or consultant or advisor or a lawyer in the same law firm which is involved in the dispute.

SEC 17: INTERIM MEASURES ORDERED BY THE TRIBUNAL

Section 9 and 17 work parallel to each other the point of difference that has been noted in both the sections were by way of precedents only. In Firm Ashok Traders v. Gurumukh Das Saluja[7] it was contended that the need for section 17 while section 9 is already enacted is that section 17 would operate only during the existence of arbitral proceedings. Though Sec 9 and 17 overlap but Sec 9 deals with the interim measures which exist pre and post the arbitral proceedings.

SEC 23: STATEMENTS OF CLAIM AND DEFENCE

Sec 23(2A) inserted "the Respondent in support of his case may also submit a counter claim or plead a set off which shall be adjudicated upon by the arbitral tribunal, if such set off or counter claim falls within the scope of the arbitration agreement." Earlier only the claimant had to file and submit the documents and it depended on the express agreement if the other party had to file its report. Now according to sec 23(A) it has been made mandatory that the other party has to submit that too.

SEC 24: HEARING AND WRITTEN PROCEEDINGS

This amendment serves as an instruction to the court that as far as possible the court shall indulge in holding oral hearings for the presentation of evidence or for oral argument on day to day basis and not grant any adjournments unless sufficient cause is made out and lay impose costs, including exemplary costs on the party seeking adjournment without any sufficient cause. There was no legislation for the ones who seek unnecessary adjournments

[7] Firm Ashok Traders v. Gurumukh Das Saluja, (2004) 3 S.C.C 155

just to delay the award as much as they want, to cater to that need this legislation was passed and enacted. Provisions of imposing fine turned out to be exemplary and saved the time of arbitral tribunal.

SEC 25 AMENDMENT: DEFAULT OF A PARTY

If the defendant fails to communicate his defence statement then it won't be regarded as the admission of his allegations but it would amount to the right of defence as forfeited. The communication of guilt has to come directly from the parties and the failure to defend oneself shouldn't be regarded as guilty conscience. The amended section reads as: "The respondent fails to communicate his statement in accordance with sub section 1 of section 23, the arbitral tribunal shall continue the proceedings without treating that failure in itself as an admission of the allegations by the claimant and shall have the discretion to treat the right of respondent to file such statement of defence as having been forfeited." In Atul R Shah v. M/S V Vrijlal Lalloobhai And Co[8], It was contended that "the party did not move the Tribunal to show cause for their nonappearance on 4-6-1998 before the award was communicated. The only communication is dated 3rd July, 1998 and the said communication does not make out a case or disclose sufficient cause for nonappearance on 4-6-1998. That contention, therefore, must also be rejected."

SEC 28: INSERTION OF SUB SECTION 3; RULES APPLCABLE TO SUBSTANCE OF DISPUTE

SEC 28(3) reads "While deciding and making an award the tribunal shall in all cases, take into account the terms of contract and trade usages applicable to the transaction" According to earlier implied practises the terms of contract only were taken into consideration while passing the award. Now the courts are mandated to look into the detailed version of the trade usages and the transactions so involved in it to reach to a conclusion. The conclusion then has to be taken into consideration while making an award. Although it is made imperative to consider the trade usages but the contractual terms can never be withstood in the process.

SEC 31: FORM AND CONTENTS OF ARBITRAL AWARD INSERTION OF SEC 31(7) (b) which reads as:

"A sum directed to be paid by an arbitral award shall, unless the award otherwise directs carry interest at the rate of two percent, higher than the current rate of interest prevalent on the date of award, from the date of award to the date of payment" Prior to its

[8] In Atul R Shah v. M/S V Vrijlal Lalloobhai And Co., AIR 1999 Bom 67 (1998)

substitution the interest rate specified by this clause was a whopping 18% per annum from the date of award to the date of payment.

Explanation: The expression 'current rate of interest' shall have the same meaning as assigned to it under sec 2(b) of the Interest Act, 1978 which reads as "current rate of interest" means the highest of the maximum rates at which interest may be paid on different classes of deposits (other than those maintained in savings account or those maintained by charitable or religious institutions) by different classes of scheduled banks in accordance with the directions given or issued to banking companies generally by the Reserve Bank of India under the Banking Regulation Act, 1949 (10 of 1949).

Explanation- In this clause, "scheduled bank" means a bank, not being a co-operative bank, transacting any business authorised by the Banking Regulation Act, 1949 (10 of 1949);

In Union of India v. Bright Power Project Pvt Ltd[9] it was said that the words "unless otherwise agreed by the parties", specifies that the arbitrator is bound by the terms of the contract so far as award of interest from the date of cause of action to the date of award is concerned. Therefore, where the parties had agreed that no interest shall be payable, the arbitral tribunal cannot award interest.

INSERTION OF SEC 31(A): REGIME FOR COSTS

This section takes into view, whatever costs that an arbitration proceeding or a proceeding under this act requires. Notwithstanding anything contained in the Code of Civil Procedure, the arbitral tribunal shall determine the various costs incurred by both the parties, the fees of arbitral tribunal, mode of payment of these costs and whether these costs are payable by one party to another. These costs include:

- The fees and expense of the arbitrator, courts and witnesses;
- Legal fees and expenses;
- Any administration fees of the institution supervising the arbitration;
- Any other expenses incurred in connection with the arbitral or court proceedings and the arbitral award.

It is also mandated by this section that the unsuccessful party shall be ordered to pay the costs of the successful party or the court may order a different provision. The court has to order whether the unsuccessful party has to pay part the costs or whole of it or the costs incurred by the other part before the commencement of arbitral proceedings or the costs from certain date to a certain date, whichever the court deems fit and appropriate. Sec 31 (A) has come as a relief to the ones who want to get the dispute settled and doesn't want

[9] Union of India v. Bright Power Project Pvt Ltd., (2015) 9 SCC 695

to bear any unnecessary charges. If the dispute is proved to the satisfaction of the arbitror then the award's compensation is coupled with the costs incurred by the winning party to get the dispute resolved.

SEC 34: AMENDMENT APPLICATION FOR SETTING ASIDE ARBITRAL AWARD

Sec 34(2) (B) was amended to resolve the factor of ambiguity and further establishment of clarity as to when an arbitral award can be set aside if it is not in consonance with the public policy of India. Earlier it was only mentioned "For avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption or was in violation of Sec 75 or Sec 81." Now these definitions have been further elaborated with the first provision been retained as it is. The other provisions that are so added. The arbitral award can be set aside-

- If it is in the contravention of the public policy of India
- It is in conflict with the most basic notions of morality or justice.

It is also been further mandated in sub section 5 that if party is filing an application under this section then it has to do so after sending a prior notice to the opposite party and such application shall be accompanied by an affidavit by the applicant endorsing compliance with the said requirement. Section 2A of this act that is newly inserted enacts a new ground on which the arbitral award could be set aside. This act specifies that if a party proves that the arbitral award is vitiated by the patent illegality appearing prima facie or on the face of it then it could be set aside. Provided that an award shall not be set aside merely on the ground of an erroneous application of the law or by re appreciation of the evidence. Newly inserted sub section 6 of the act specifies the time period under which the matter under this section be disposed of. It shall be disposed of expeditiously and in any event within a period of one year from the date of which the notice referred to in sub section 5 is served upon to the other party. If the parties so aggrieved by the award wants to quash the award then it has to be done by the party before the expiration of 1 year after the award has been duly passed by the tribunal. In Union of India v. Popular Construction Co. Ltd[10] it was held that the time limit prescribed under sec 34 to challenge an award is absolute and inextensible by court under sec 5 of the Limitation Act[11]. The recourse to the court against an arbitral award cannot be made beyond the period prescribed.

[10] Union of India v. Popular Construction Co. Ltd., AIR 2001 SC 4010
[11] Limitation Act, 1963, No. 36, Acts of Parliament, 1963

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SECTION 36: ENFORCEMENT; SUBSTITUTED BY A WHOLE NEW SECTION ALTOGETHER

Earlier section 36 specified that if the time period of one year that is mentioned in section 34 of this act expires then the arbitral award has to be complied with according to the civil procedure court and should be given the same importance as the decree of a court. Now it is mandated that it should be subject to the provisions of sub section 2 of section 34 that an award shall be enforced. Further it has been added in the sub section 2 of this section that the filing of an application to set aside the award doesn't in itself render the award unenforceable unless the court grants an order of stay of the operation of the said arbitral award in accordance with sec34(3) on a separate application made for this purpose. The court shall according to sub section 3 of this section make order to stay the enforcement of the arbitral award for reasons to be recorded in writing. Provided that the court shall while considering the application for grant of stay in the case of an arbitral award for payment of money have due regard for the provisions of grant of stay of a money decree under the provisions of Civil Procedure Code, 1908.

SEC 37: APPEALABLE ORDERS; AMENDMENT

Sub section 1 clause (a) has been renumbered to clause (b) under this act while clause (a) has been formulated which gives the power to the parties to appeal to the court authorised by law to hear appeals from original decrees of the court passing the order which refused to refer the parties to arbitration under section 8 of the Act.

CONCLUSION

Apart from all the major amendments that has been made, there have been inserted four schedules along with it. The Principle Act has been added with Fourth, Fifth, Sixth and Seventh Schedules respectively. The recognition of International Commercial Arbitration has eased the norms for arbitration of international business linked with India somehow paving way to a business friendly market. The amended act caters to the disputes arising out of the modern era. Some major procedural alterations have come up with the new act which annihilate ambiguity and make way for conspicuousness. The corrections so made in the act are expeditious, amicable and non-exhaustive in nature which further allows taking into consideration any precedents set by the court in the process of handling new set of facts and issues. For any statute it is not only necessary to be up-to-date but also it is important to leave a room for some fora in order to save the same from becoming obsolete.