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NEW TREND IN THE LAW OF ARBITRATION IN INDIA

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Abstract

In today's age of globalization, arbitration has gained tremendous significance and is a preferred mode of dispute resolution both domestically as well as internationally. Government of India along with Judiciary is instrumental in making arbitration synchronized and more viable. This article discusses latest trends in law regulating arbitration in India such as Seat of Arbitration, Two-Tier Arbitration System, Appointment of Arbitrator, Award of Interest, *et al.*. Deliberation has also been done on Arbitration and Conciliation (Amendment) Bill, 2018 which proposes establishment of an autonomous body for the accreditation of arbitrators, recognition/categorization and grading of arbitral institutions.

I Introduction

ADJUDICATION OF disputes by a process of arbitration has had a long recognition and acceptability in India that dates back to the Regulations promulgated by the East India Company[1] followed by successive legislative measures[2]. Despite such a long history of acceptability and recognition of the process of arbitration, the progress of such adjudicatory mechanism has remained impeded by several factors including the approach of the litigants, the Bar as well as the judiciary on whom the final responsibility lay to interpret the law and to enforce the arbitral awards.

Post liberalization of its economy, India was inspired by the initiative taken by the UN General Assembly adopting the UNCITRAL Model Law of Arbitration. Though India accepted the recommendations made by the UN General Assembly to the Member

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1 Bengal Regulation 1 of 1772, Bengal Regulation 1 of 1781, Bombay Regulation 1 of 1779, Madras Regulation 1 of 1802 etc.

2 Arbitration Act, 1899, a chapter in the Code of Civil Procedure, 1908

Nations and adopting the scheme of the UNCITRAL Model Law enacted the Arbitration and Conciliation Act (ACA), it did so with several modifications in an attempt to make the law conducive to Indian conditions. Unfortunately, the changes that were introduced by the ACA, had not been preceded by appropriate public debates and discussions by the stake holders nor even scrutinized by the law makers. Drastic changes were introduced on one fine day i.e. on 16th January 1966 by the President promulgating the Arbitration and Conciliation Ordinance 1996 (8 of 1996) effective from 25th January 1996[3] repealing the existing legal regime[4].

There had been several arbitral institutions in India that have had a long history of their presence however, it is for the first time that the ACA recognised the role of such institutions[5]. Despite several arbitral institutions that existed even prior to the independence like, the Bengal Chambers of Commerce and Industry the Indian Merchant Chambers and (later even the Indian Council for Arbitration) though left their imprint in the realm of institutional arbitration, adjudication through such like institutions could not provide any realistic opportunity to the litigants to opt for institutional arbitrations as their preferred mode for resolution of disputes.

However, a recent attempt that has been highly successful, is the Delhi High Court Arbitration Centre (DAC) launched in 2009. Though initially promoted as an institution for domestic arbitration within a short span of time requests started pouring in for international arbitrations being conducted under the aegis of the DAC. The Rules were recast to provide for international arbitrations being held at the Centre and the

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3 A complete discussion on this subject by this Author is available at Arbitration Law, Annual Survey of Indian Law, 2010, Volume XLVI: 2010. This was made effective from 25th January, 1996. The Ordinance repealed the Arbitration Act, 1940 with immediate effect and brought into force a new regime of law relating to arbitration on the lines proposed in the Arbitration and Conciliation Bill, 1995. The Ordinance could not however be replaced by an Act of Parliament. The second Ordinance, namely the Arbitration and Conciliation (Second) Ordinance, 1996 (11 of 1996) came in its place on 26th March 1996 which too could not be replaced by an Act. Thereafter, the third Ordinance, namely the Arbitration and Conciliation (Third) Ordinance, 1996 (29 of 1996) was brought into force on 26th June 1996. The Arbitration and Conciliation Bill, 1996 was finally passed by both houses of Parliament and received the President's assent on 16th August, 1996. By the time the legislation could be considered by the Parliament, several arbitrations had been commenced under the new regime and the Parliament did not have a real choice but to accept the Ordinance.

4 The Arbitration Act, 1940 (Act 10 of 1940)

5 Section 2(6) of the ACA recognizes that the parties may opt for arbitration under rules of a particular institution for arbitration and designating such institution to take decisions on their behalf. Even with regard to the appointment of arbitrators the ACA under Section 11 contemplated that the Chief Justices of the High Courts or the Chief Justice of India as the case may be, may designate an institution to perform the function of appointment of arbitrators.

institution was rechristened as Delhi International Arbitration Centre (DIAC). On similar lines a number of other arbitral institutions have been set up in other states[6]. However, it appears, that the litigants still opt for Ad-hoc arbitrations as compared to institutional arbitration. While all these efforts were on to secure the goal of India eventually becoming a hub for international arbitrations, it was realized that it would not be possible to do so without the requisite support from the government actively promoting resolution of disputes by arbitration.[7] The government recognized its responsibility and came forward with several legislative measures to reform the commercial litigations in the country including reforms in the realm of arbitration.[8]

The government, in order to give wider visibility to the changes in commercial litigation and arbitration actively envisioned itself in highlighting its efforts and organized a conference titled National Initiative Towards Strengthening Arbitration and Enforcement in India which was attended by many dignitaries from India[9] and abroad including the Chief Justice of Singapore[10] and the leading figures of various international arbitral institutions such as ICC, LCIA, SIAC, KLRCA and HKIAC etc.

Despite of these efforts, it was visualized that there was still a long gap between the expected results of such initiatives and the actual realisation on the ground, even after the government and the public sector industries had mobilized themselves to resort to arbitrations and particularly institutional arbitration. The government set up a High Level Committee under the Chairmanship of Justice B.N. Srikrishna (retd.). The Committee submitted a report making several significant suggestions for promoting institutional arbitration and to provide sufficient initiatives for the litigants to choose

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6 Punjab and Karnataka have set up dedicated Arbitration Centers under the supervision of their respective High Courts. In Maharashtra, with the support of the Industry, Bar and the Bench, a new arbitral institution Maharashtra Centre for International Arbitration (MCIA) has been launched successfully.

7 In India, Govt. is the highest litigant and along with the PSUs it contributes to a large percentage of litigations in the Country.

8 Arbitration and Conciliation (Amendment) Act, 2015.

9 The list of Indian dignitaries shows the interest taken by the executive and the judiciary on this front. The guests of honor included the President of India, Prime Minister of India and Law Minister and many judges of the Supreme Court of India including the Chief Justice of India showing.

10 Singapore offers several features which have helped develop it into a hub of arbitration, such as (i) a positive approach by the judiciary, i.e., no interference save and except in extraordinary circumstances (ii) pathological arbitration clauses being construed to give meaningful content to the agreement (iii) though the Singapore International Arbitration Centre (SIAC) is a private initiative, it has been supported greatly by the government (iv) liberalization of the legal profession and opening up of the sector to foreign law firms which have brought new businesses (v) liberalized system of visas (vi) exemption from taxation on earnings from fees.

arbitration as the preferred mode for adjudication of their disputes. The Committee also incorporated suggestions from experts on the issue of management of BIT arbitrations and also incorporated several suggestions from experts on the scope of the draft terms of the BIT.[11] The government has now sought to renegotiate the terms of the BIT with about 47 countries.

The government was quick to accept the recommendations of the High Level Committee and prepared a Bill[12] to amend the Arbitration and Conciliation Act which was introduced in the Lower House (Lok Sabha) in the Parliament in the current Monsoon Session. The Lok Sabha has passed the Bill in toto on August 10, 2018[13] and it is pending approval by the Upper House.

While several measures suggested by the High Level Committee received acceptance by the government and found a place in the impending legislation, one particular aspect needs special mention. The Bill seeks to introduce a new chapter (Part 1A) containing several new provisions unknown to the realm of arbitration – be it domestic or international. The Bill includes the first ever attempt made to introduce accreditation of arbitrators, recognition/categorization and grading of arbitral institutions through an autonomous body known as the Arbitration Council of India.

This is perceived as an anti-climax to the efforts made by the government to promote institutional arbitration. Institutions are chosen and accepted by the parties by reason of their established credibility, efficiency and proven track records in the promotion of adjudication by arbitration. Introduction of a bureaucratic control over such institutions would only be counter-productive to the very purpose of encouragement of the belief that arbitration through institutions ought to be the preferred mode. Whatever progress has been made so far in the realm of institutional arbitration, is likely to be washed out by subjugating them to a compulsory process of accreditation and gradation. It is hoped that this part of the Bill would be critically analysed by all concerned and the lawmakers would exercise their wisdom after a holistic and realistic evaluation of the proposal.

The Bill also seeks to give statutory recognition to certain concepts such as immunity of arbitrators. The merits and demerits of this proposal and other clauses sought to be amended are discussed in a separate chapter in this article.

In the quest for realization of arbitration being chosen as the preferred mode of resolution of disputes. The judiciary has also played a significant role. A quick survey

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11 The author had the opportunity to address the High Powered Committee on these issues.

12 The Arbitration and Conciliation (Amendment) Bill, 2018.

13 *Ibid.*

of the decisions rendered by the courts demonstrates a wide spectrum of areas in the realm of arbitration that significantly developed under the aegis of the courts. It is significant that the judiciary has continued to play a positive role in the promotion of arbitration as the preferred mode of adjudication by expanding new horizons in the law of arbitration. A glance at certain landmark decisions that have been rendered in the past few years would amply bear testimony to the purposive role that the courts have played in promotion of arbitration in India.

II Re: Seat of Arbitration[14]

Considerable judicial time had to be devoted by the Courts in their effort to settle the law relating to "place" and "seat" of arbitration. Section 20 of the ACA declares *inter-alia* that the "parties are free to agree on the place of arbitration". The question that arose and needed to be resolved was whether "place of arbitration" connotes the "seat" i.e., juridical seat of arbitration or a place chosen by the parties for their convenience.

It is settled that the law of arbitration is founded on party autonomy. The ACA recognizes party autonomy in all international commercial arbitrations at least in respect of (a) the law governing the substance of the dispute; (b) the law governing the arbitration agreement; and (c) the law governing the conduct of the arbitration.

Section 28 expressly recognizes party autonomy in the choice of the law applicable to the substance of the dispute. When the parties have not designated the rules of law, the default provision in Section 28(b)(iii) which provides that "failing any designation of the law… …by the parties, the arbitral tribunal shall apply the rules of law it considers to be appropriate, given all the circumstances surrounding the dispute."

With regard to the law applicable to the arbitration agreement, there is no provision which expressly recognizes the principle of party autonomy. However, section 34(2)(a)(ii), by implication, accepts that the parties can choose the law which would govern the arbitration agreement, as it provides that an arbitral award may be set aside by the court if "the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force". This provision may be contrasted with Section 34(2)(b)(i) which provides that an award may be set aside if "the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force". It is an important question as to whether this implies that the issue of arbitrability should be decided as per the law chosen by the parties. In contrast, Section 48(2)(a) of the ACA, which applies to foreign seated arbitrations, provides that enforcement of a foreign

14 A detailed discussion see, Amal K. Ganguli "Arbitration Law", XLVIII Annual Survey of Indian Law (2012).

award may be refused if the "subject matter of the difference is not capable of settlement by arbitration under the law of India".

It is in the context of international commercial arbitration that the Supreme Court had to adjudicate upon the dispute that came up for its consideration in *Bhatia International*[15]. The dispute arose out of an application under Section 9 of the ACA made by a foreign party before an Indian Court, during the pendency of the arbitration proceedings outside India. The Court upon considering the question as to whether Part I of the ACA would be applicable to international commercial arbitrations, held that the provisions of Part I of the ACA would apply even to international commercial arbitrations held outside India "unless the parties by agreement, express or implied, exclude all or any its provisions." The decision had far reaching repercussions on the law of arbitration in India.

The judgment in *Bhatia*[16] was followed in *Venture Global*[17], where, in light of a Clause in the agreement between the parties to the effect that the parties "shall at all times act in accordance with the Companies Act and other applicable Acts/Rules being in force, in India at any time" the Court held that such a clause was an indication that the parties had not intended to exclude Part I of the ACA and hence Part I of this Act was applicable to the dispute in question. The Court further held that foreign awards could be set aside by Indian courts under section 34 of the Act for violating Indian Statutory provisions and being contrary to Indian Public Policy.

These judgments were met with substantial criticism and there were calls for amending the Act to expressly state the mutual exclusivity between the two parts – Part I and Part II.

Subsequently in *Bharat Aluminium*[18] a Constitution Bench of the Court held on 06.09.2012 that the Indian courts would no longer be able to set aside awards or issue interim measure in respect of arbitrations seated abroad, setting aside the judgments in *Bhatia International* and *Venture Global*. The key implications of the judgment in *BALCO* were as follows:

> "Part I of the ACA would have no application to international commercial arbitration held outside India. Therefore, such awards would only be subject to the jurisdiction of the Indian Courts when the same are sought to be enforced in India in accordance with the provisions contained in Part II of the Arbitration Act, 1996."

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15 *Bhatia International* v. *Bulk Trading S.A.* (2002) 4SCC105.

16 *Supra* note 15.

17 *Venture Global* v. *Satyam Computer Services* (2008) 4 SCC 190.

18 *Bharat Aluminium Co* v. *Kaiser Aluminium Technical Services* (2012) 9 SCC 552; See, *Supra* note 14.

The Court further held that:

> "In a foreign-seated international commercial arbitration, no application for interim relief would be maintainable under Section 9 or any other provision, as applicability of Party I of the ACA 1996 is limited to arbitrations which take place in India. Similarly no suit for interim injunction simpliciter would be maintainable in India, on the basis of an international commercial arbitration with a seat outside India."

Awards rendered in commercial arbitrations seated outside India would only be subject to the jurisdiction of the Indians courts when they are sought to be enforced in India in accordance with the provision contained in Part II of the Act in respect of foreign awards. Parties would therefore need to rely on the relief afforded by the courts of the jurisdiction in which the arbitration is seated. As the choice of seat can have significant implications for the way an arbitration is conducted, the parties should seriously consider their choice at the drafting stage of the arbitration agreement.

Though the decision in *BALCO*[19] resolved the issue as regards the applicability of Part I of the Act to foreign seated arbitrations, yet it is evident that the controversy did not end there and continued to occupy the central stage of litigation at the highest Court even after a lapse of six years[20].

The Court had occasion to revisit these issues shortly thereafter firstly in *Reliance Industries Ltd. and Anr.* v. *Union of India*[21]. The dispute therein arose out of two Production Sharing Contracts (PSCs) both dated 22.12.1994 for exploration and production of petroleum and gas in respect of distinct oil and gas fields in the Mid and South Tapti fields and two others in Panna and Mukta fields. The contracts were to be performed wholly within India. The relevant clauses of both PSCs, which were identical in all material aspects, were as follows:

> 33.9. Arbitration proceedings shall be conducted in accordance with the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL) of 1985 except that in the event of any conflict between these rules and the provisions of this Article 33, the provisions of this Article 33 shall govern.
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> 33.12. The venue of conciliation or arbitration proceedings pursuant to this article, unless the parties otherwise agree, shall be London, England

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19 *Supra* note 18.

20 For developments in this area in 2014 and 2015, see Amal K. Ganguli "Arbitration Law", L *Annual Survey of Indian Law* (2014) and Amal K. Ganguli "Arbitration Law", LI *Annual Survey of Indian Law* (2015).

21 (2014)7 SCC 603.

> and shall be conducted in the English language. The arbitration agreement contained in this Article 33 shall be governed by the laws of England. Insofar as practicable, the parties shall continue to implement the terms of this contract notwithstanding the initiation of arbitral proceedings and any pending claim or dispute.

Later by an amendment dated 24.02.2004 the venue/seat "was changed" from London to "Paris". However, when disputes arose between some of the parties, under a notice issued by one of the parties, the venue for arbitration was agreed to be London instead of Paris. The respondent raised four preliminary objections in regard to royalties, cess, service tax, and the power of the Comptroller Auditor General to carry out performance audit claiming that the same were not arbitrable. The appellants contended that the issue of arbitrability was governed by the law of the seat.[22]

Although appellants sought to rely upon the decision of the Constitution Bench in *BALCO*[23], the court relying upon the earlier judgment of the court in *Bhatia International*, held "[w]e are also of the opinion that since the ratio of law laid down in *BALCO* has been made prospective in operation by the Constitution Bench itself, we are bound by the decision rendered in *Bhatia International*."

Rejecting the contention that "the expression "laws of India" under Article 32.2 of the PSC would also include the Arbitration Act, 1996", the court held "[i]n our opinion, the expression "laws of India" as used in the agreement has a reference only to the contractual obligations to be performed by the parties under the substantive contract i.e. PSC."[24] Referring to the decision in *Videocon Industries Ltd.*[25] the court held "[w]e are of the opinion that in the impugned judgment the High Court has erred in not applying the ratio of law laid down in *Videocon Industries Ltd*. in the present case." The court proceeded on the assumption that "[t]he parties have made .the necessary amendment in the PSCs to provide that the juridical seat of arbitration shall be London. It is also provided that the arbitration agreement will be governed by the laws of England." The court held that "[t]herefore, the ratio in *Videocon* Industries Ltd. would be relevant and binding in the present appeal." Reiterating the law laid down in *Videocon,* that the parties could not have changed the seat of arbitration without an amendment in the PSC, the court observed that the parties to the arbitration agreement in the present case had changed the seat of arbitration from Paris to London and that those

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22 For a detail discussion on the decision, see A.K. Ganguli, "Arbitration Law", L *Annual Survey of Indian Law*, 2014.

23 *Supra* note 18.

24 The Court, however did not expressly overrule the finding of the High Court.

25 *Videocon Industries Ltd.* v. *Union of India* (2011) 6 SCC161.

terms of the PSCs were amended subsequently. As per the consent award of the tribunal, though the seat of the tribunal was London, as noticed by the court, the subject matter thereof, was limited only to "arbitration initiated under claimants' notice dated 16.12.2010". It is respectfully submitted that the decision in *Videocon* squarely applied to the present case and it is evident that since only three parties (as against four contracting parties) to arbitration agreement (PSCs) were parties to consent award, resulting in the shifting of the arbitration proceedings from Paris to London, that did not result in the PSC being amended by all the parties. Hence, as held in *Videocon*, the seat/venue of arbitration remained unchanged. In spite of the fact that the parties agreed that the terms of the arbitration agreement shall be governed by laws of England, this was of no consequence, since in terms of the English Arbitration Act, 1996 the said Act would be applicable only by virtue of the seat of arbitration being in England.[26]

A recent decision to be noted in this regard is *Roger Shashoua*[27] which had to be resolved by a two judge bench presided over by Justice Dipak Misra, (as the Learned Chief Justice then was). In that case, in terms of the agreement between the parties the "venue" of the arbitration was London with a further stipulation that the arbitration proceedings shall be conducted in English in accordance with the ICC Rules and that the governing law of the agreement would be the law of India. The award rendered by the tribunal in London came to be challenged by a petition under Section 34 of the Act, first, before the District Judge, Gautam Budh Nagar, Uttar Pradesh and another petition that was filed before the High Court of Delhi. Though the Court was called upon to decide which of the two courts had territorial jurisdiction to entertain the application under Section 34 of the Act, but in view of the larger question as to whether Part I was applicable with respect to the award in question, the Court did not advert to the question of territorial jurisdiction and rightly so as that question would arise only if the Court came to the conclusion that the provisions of Part I were applicable to the award in question.

While the appellant contended that there has been an earlier determination by the Commercial Court in London between the same parties which held that the Courts in England alone would have jurisdiction with respect to the arbitration, as it was a London seated arbitration and hence the applications filed in India were not maintainable. The Respondent contended that decision of the Commercial Court in England, though

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26 Another aspect of the decision in *Videocon* case was that the Supreme Court in upholding the decision of the Gujarat High Court, did not consider Clause 33.2 of the Agreement therein which provided that nothing in the contract shall entitle the contractor to exercise its rights in a manner which will contravene the laws of India. However, such a clause had been relied upon by the court in *Venture Global Engg.*

27 *Roger Shashoua* v. *Mukesh Sharma* (2017) 14 SCC 722.

inter-party, was a decision in respect of an interlocutory proceedings that arose from an anti-suit injunction proceedings which warranted only a "mini trial" and hence, the ruling of the English Court could not be held to be binding on the parties in respect of proceedings arising after the award has been pronounced.

Dipak Misra J, speaking for the Court, resolved the issue by holding *inter alia* that since the decision rendered by Coke J., was referred to and approved in *BALCO,* "*and the discussion that has been made by the larger Bench relating to Shashoua and C* v. *D (supra) are squarely in the context of applicability of Part I or Part II of the Act. It will not be erroneous to say that the Constitution Bench has built the propositional pyramid on the basis or foundation of certain judgments and Shashoua and C* v. *D (supra) are two of them*", "*[w]e are inclined to think, as we are obliged to, that Shashoua principle has been accepted in BALCO as well as Enercon (India) Ltd. (supra) on proper ratiocination and, therefore, the submission advanced on this score by Mr. Chidambaram, learned senior counsel for the respondent, is repelled.".* In that case Cooke J., had held that since the parties had expressly designated the arbitration venue as London and the non-designation of any alternative place as a seat combined with a supranational body of rules governing the rules and no other contrary significant indicia, the inevitable conclusion was that London was the juridical seat and the English Law was the curial law that was applicable to the case.

As to the contention regarding the distinction between the "venue" and "seat" of arbitration, referring to the previous decision of the Court in *Videocon, Reliance Industries and Enercon,* Dipak Misra J., observed that *"[i]t is patent from the law enunciated in the aforesaid decision is that stipulations in the agreement are required to be studiedly analysed and appropriately appreciated for the purpose of arriving at whether there is express or implied exclusion and further meaning of the term "seat of arbitration". The Court has also ruled that it is necessary to avoid inconsistency between the provisions in the agreement and Part I of the Act.*"

Observing that *"[t]he Commercial Court in London, interpreting the same agreement adverted to earlier judgments (may be in anti-suit injunction) and held that in such a situation the Courts in London will have jurisdiction. The analysis made therein, as has been stated earlier, has been appreciated in BALCO and Enercon (India) Ltd. (supra) and this Court has approved the principle set forth in the said case. Once this Court has accepted the principle, the principle governs as it holds the field and it becomes a binding precedent. To explicate, what has been stated in Shashoua as regards the determination of seat/place on one hand and venue on the other having been accepted by this Court, the conclusion in Shashoua cannot be avoided by the parties. It will be an anathema to law to conceive a situation where this Court is obligated to accept that the decisions in BALCO and Enercon (India) Ltd. (supra) which approve Shashoua principle are binding precedents, yet with some innate sense of creativity will dwell upon and pronounce, as canvassed by the learned senior counsel for the respondent, that inter-party dispute arose in the context of an anti-suit injunction and, therefore, the same having not attained finality, would not bind the parties. This will give rise to a total incompatible situation and certainly lead to violation of judicial discipline.*" Dipak Misra J. further ruled that while "*the distinction between the venue and the seat remains. But when a Court finds there is prescription*

for venue and something else, it has to be adjudged on the facts of each case to determine the juridical seat. As in the instant case, the agreement in question has been interpreted and it has been held that London is not mentioned as the mere location but the courts in London will have the jurisdiction, another interpretative perception as projected by the learned senior counsel is unacceptable."

The Court finally concluded that "*we have already held that the agreement in question having been interpreted in a particular manner by the English courts and the said interpretation having gained acceptation by this Court, the inescapable conclusion is that the courts in India have no jurisdiction*."

III Re: Arbitrability of Fraud

For a brief overview of the judicial evolution of the law relating to arbitrability of fraud, we may consider the case of *A. Ayyasamy*[28] wherein the Court was called upon to decide whether upon an application under Section 8 of the Act, it was mandatory for the court to refer the parties to arbitration, by reason of the parties having stipulated in the partnership deed that disputes arising between partners shall be resolved by arbitration, even though the subject matter of the suit involved adjudication of allegations of fraud committed by the managing partner, was the question that came up for consideration before a two judge bench in *A. Ayyasamy*[29] case.

The parties to the *lis* were five brothers who had entered into a partnership deed dated 01.04.1994 for carrying on a hotel business which was started by their father. Disputes arose between them after the demise of their father. Four of the brothers filed a suit for a declaration that they were entitled to participate in the administration of the hotel business. They sought for a permanent injunction restraining the appellant from interfering with their right to participate in the administration of the business.

After receiving the summons in the suit, the appellant moved an application under Section 8 of the Act objecting to the maintainability of the suit in view of the arbitration agreement contained in the partnership deed and sought for reference of the disputes to the arbitrator. The application was resisted by the respondents who were plaintiffs in the suit *inter alia* on the ground that the suit was founded upon allegations of fraud attributed to the appellant which could not be adjudicated upon in arbitration proceedings and that it was the civil court which ought to adjudicate upon such disputes. Relying upon an earlier decision of the Court in *Radhakrishnan*'s[30] case, the trial court dismissed that application which order was affirmed by the High Court by dismissing the revision petition preferred against it.

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28 *A. Ayyasamy* v. *A Paramasivam* (2016) 10 SCC 386.

29 *Ibid.*

30 *N. Radhakrishnan* v. *Maestro Engineers* (2010) 1 SCC 72.

The question before the Supreme Court was whether in view of the nature of the plea of fraud taken in the suit, the courts below were justified in applying the law laid down in *Radhakrishnan*'s[31] case and declining to refer the disputes for adjudication by arbitration. Two significant pleas raised in the plaint in this regard were, that the appellant fraudulently signed a cheque for Rs.10,00,050 from the bank account of the partnership business in favour of his son without the knowledge and consent of other partners and thus siphoned off and misappropriated the amounts of common fund. It was further alleged that the day to day collections from the business were not deposited in the bank as was required by the appellant. The other allegation was, that the house of the brother of the appellant's wife was raided by the CBI which resulted in seizure of Rs. 45 lakhs in cash which he had alleged as belonging to the partnership business. The said statement was contested by the respondents as false, since the money did not belong to the partnership business.

Analysing Sections 5, 8, 16 and 34, of this Act, the Court emphasized that the scope of judicial intervention, in the cases where there is an arbitration clause, would be very limited and minimal. It was evident from Section 16 that the arbitral tribunal had the power to rule on its own jurisdiction even when the very existence or validity of the arbitration agreement is questioned. The decision of the tribunal upholding its jurisdiction to arbitrate could not be assailed during the arbitration proceedings but only upon its culmination upon the award being delivered by the tribunal. The Court however accepted that though there are no express provisions in the Act excluding any category of disputes as being non-arbitrable, Sections 34(2)(b) and 48(2) of the Act did recognize that the subject matters of certain disputes are not capable of being settled by arbitration. Referring to the earlier decisions of the Court[32] which had detailed the nature of such disputes, the Court then adverted to the question as to whether fraud is one such category that should be considered as non-arbitrable.

In that context the Court considered the law laid down in its earlier decisions. Reference was made to the decision in *Abdul Kadir*[33] wherein serious allegations of fraud being the subject matter of the suit, it was considered as providing sufficient ground for not making a reference to arbitration. In that case, the Court had relied on a decision of the Chancery Division in *Russell v. Russell.*[34] In *Russell*, one of the partners gave a notice for dissolution of a partnership. The other partner, (the partners were brothers) brought an action alleging various charges of fraud and claiming that the notice be declared void. The other partner, who was charged with fraud, moved the court for referring

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31 *Ibid.*

32 *Booz Allen & Hamilton Inc.* v. *SBI Home Finance Ltd.* (2011) 5 SCC 532.

33 *Abdul Kadir Shamsuddin Bubere* v. *Madhav Prabhakar Oak* AIR 1962 SC 406.

34 *Russell* v. *Russell* (1880) LR 14 Ch D 471.

the matter to arbitration under the arbitration clause contained in the partnership deed. That application was resisted. The Court held that "in a case where fraud is charged, the court will in general refuse to send the dispute to arbitration if the party charged with the fraud desires a public inquiry. But where the objection to arbitration is by the party charging the fraud, the court will not necessarily accede to it, and will never do so unless a prima facie case of fraud is proved."

The Court then referred to *Radhakrishnan*[35] wherein a party seeking reference of the dispute therein to arbitration by filing an application under Section 8 of the Act had made serious allegations against the respondents of having committed malpractices in the account books and manipulation of the finances of the partnership firm. The Court therein had held that such a case cannot be properly dealt with by the arbitrator and ought to be settled by the court, through detailed evidence led by both parties.

The Court, observing that "mere allegation of fraud in the pleadings by one party against the other cannot be a ground to hold that the matter is incapable of settlement by arbitration" elaborated upon the nature of the allegations of fraud which would render a dispute non-arbitrable. The Court held that "[t]he allegations of fraud should be such that not only these allegations are serious that in the normal course these may even constitute criminal offence, they are so complex in nature and the decision on these issues demands extensive evidence for which the civil court should appear to be more appropriate forum than the Arbitral Tribunal". The Court then observed that the judgment in *N. Radhakrishnan*[36] not touch upon this aspect and particularly when the allegations of fraud therein were of a serious nature.

Referring to the oft quoted decision rendered by another division bench in *Booz Allen,*[37] the Court, quoted with approval the following passage which provides the rationale for holding certain disputes as non-arbitrable.

"[*e]very civil or commercial dispute, either contractual or non-contractual, which can be decided by a court, is in principle capable of being adjudicated and resolved by arbitration unless the jurisdiction of the Arbitral Tribunals is excluded either expressly or by necessary implication. Adjudication of certain categories of proceedings are reserved by the legislature exclusively for public fora as a matter of public policy. Certain other categories of cases, though not expressly reserved for adjudication by public fora (courts and tribunals), may by necessary implication stand excluded from the purview of private fora. Consequently, where the cause/dispute is inarbitrable, the court where a suit is pending, will refuse to refer the parties to arbitration, under Section 8 of the Act, even if the parties might have agreed upon arbitration as the forum for settlement of such disputes.*"

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35 *Supra* note 30.

36 *Ibid.*

37 *Supra* note 32.

Reference was also made to the observation made by the Law Commission of India in its 246th Report[38], highlighting the divergence of views among the courts on the question of arbitrability of certain disputes. The Court noticed that in *Swiss Timing*[39] a Designated Judge while exercising his jurisdiction under Section 11 of the Act had held that the decision of the Court in *Radhakrishnan* was *per incuriam*, on the ground that the said decision did not take into consideration the decision in *Anand Gajapati Raju*[40]. Subsequently another bench in *Associated Contractors*[41] had clarified that *Swiss Timing*[42] was a decision rendered by the Designated Judge while dealing with an application under Section 11(6) of the Act and that the decision rendered in exercise of the power of appointment of arbitrator conferred under the said provision could not be deemed to have "precedential value" and as such could not be deemed to have overruled the judgment in *Radhakrishnan*. The Court in *Ayyasamy*[43] affirmed the view taken in *Associated Contractors*[44].

Upon an elaborate consideration of the subject as evolved through judicial precedent, Dr. Sikri J., in his opinion held that *"[i]t is only in those cases where the court, while dealing with Section 8 of the Act, finds that there are very serious allegations of fraud which make a virtual case of criminal offence or where allegations of fraud are so complicated that it becomes absolutely essential that such complex issues can be decided only by the civil court on the appreciation of the voluminous evidence that needs to be produced, the court can sidetrack the agreement by dismissing the application under Section 8 and proceed with the suit on merits. It can be so done also in those cases where there are serious allegations of forgery, fabrication of documents in support of the plea of fraud or where fraud is alleged against the arbitration provision itself or is of such a nature that permeates the entire contract… …the Statutory scheme of the Act… …does not specifically exclude any category of cases as non-arbitrable. Such categories of non-arbitrable subjects are carved out by the courts, keeping in mind the principle of common law that certain disputes which are of public nature, etc. are not capable of adjudication and settlement by arbitration and for resolution of such disputes, courts, i.e., public fora, are better suited than a private forum of arbitratio*n."

Applying the tests laid down to the facts that obtained in *Ayyasamy,*[45] the Court held that "the allegations of purported fraud were not so serious which cannot be taken care of by the arbitrator" and allowed the application of the Defendant under Section

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38 Law Commission of India, 246th Report on Amendments to the Arbitration and Conciliation Act, 1996 (August, 2014).

39 *Swiss Timing Ltd.* v. *Commonwealth Games 2010 Organizing Committee* (2014) 6 SCC 677.

40 *P. Anand Gajapati Raju* v. *PVG Raju* (2000) 4 SCC 539.

41 *State of West Bengal* v. *Associated Contractors* (2015) 1 SCC 32.

42 *Supra* note 32.

43 *Supra* note 28.

44 *Supra* note 41.

45 *Id.* 43.

8 thereby relegating the parties to arbitration and appointed Hon'ble Ms. Justice Prabha Shridevan, retired judge of the Madras High Court, as the arbitrator.

Dr. D. Y. Chandrachud, J. though delivered a concurring opinion, the reasoning adopted therein however goes a step further and are not mere supplementation of the views expounded by Dr. Sikri J.

Referring to the decisions rendered by the courts in England and the U.S.A., Chandrachud J., appears to concur with the philosophy that, when the contracting parties are men of commerce, they invariably intend that all their disputes be resolved by a single forum namely arbitration irrespective of the fact that the process of adjudication may involve determination of claims of fraudulent inducements, bribery, misrepresentations, or non-disclosure etc. This is evident from his assertion that "arbitration must provide a one stop forum for resolution of disputes". Emphasizing the duty of court while performing the duties of judicial decision making, Chandrachud J., held that "[*t*]*he basic principle which must guide judicial decision-making is that arbitration is essentially a voluntary assumption of an obligation by contracting parties to resolve their disputes through a private tribunal. The intent of the parties is expressed in the terms of their agreement. Where commercial entities and persons of business enter into such dealings, they do so with a knowledge of the efficacy of the arbitral process. The commercial understanding is reflected in the terms of the agreement between the parties. The duty of the court is to impart to that commercial understanding a sense of business efficacy*."

But the question still remained as to what should be the approach of the court when the subject matter of arbitration involves adjudication of allegations concerning criminal wrongdoing. Emphasizing that the judgment in *Radhakrishnan's*[46]case should not be held to have laid down a broad proposition that a mere allegation of fraud is ground enough not to compel parties to abide by their agreement to refer disputes to arbitration, Chandrachud J. cautioned that "[m]ore often than not, a bogey of fraud is set forth if only to plead that the dispute cannot be arbitrated upon." and hence "[t]he burden must lie heavily on a party which avoids compliance with the obligation assumed by it to submit disputes to arbitration to establish [that] the dispute is not arbitrable under the law for the time being in force." Even in such cases where an objection on the ground of fraud is raised, Chandrachud J. opined that it would be "for the judicial authority to carefully sift through the materials for the purpose of determining whether the defence is merely a pretext to avoid arbitration. It is only where there is a serious issue of fraud involving criminal wrongdoing that the exception to arbitrability carved out in *N. Radhakrishnan*[47] may come into existence." This is indeed a landmark decision

46 *Supra* note 30.

47 *Ibid.*

that has cleared the clouds of doubts and disputes in the matter of arbitrability of disputes that involve adjudication of allegations of fraud.

IV Re: Arbitrability of a Corporate Dispute

Another area where the issue of arbitrability arises are with regard to areas covered under special legislations. Some of the most contentious disputes involving large sums of money, pertain to Company Law.

In one such case, *Cheran Properties*[48], a three Judge Bench was called upon to adjudicate upon several issues touching upon the inter-relationship between the law of arbitration and the law regarding corporate entities i.e. those governed by the Companies Act 1956 and its new incarnation i.e. the Companies Act, 2013. In that case, disputes arose between the parties in relation to ownership of shares in a corporate entity known as Sporting Pastime India Limited (SPIL), a fully owned subsidiary of Kasturi & Sons Limited (KSL). On 19.07.2004, an agreement was entered into between K.C. Palanisamy (KCP), KSL, SPIL and M/s Hindcorp Resorts Pvt. Ltd. (Hindcorp). In terms of the said agreement, SPIL was to allot 240 lakhs equity shares of Rs. 10 each, fully paid up at par to KSL against the book debts due by SPIL to KSL. KSL offered to sell to KCP or his nominees 243 lakhs equity shares representing 90% of the total paid up share capital for a lump sum consideration of 2,31,50,000. It is stated that the object of the said transaction was to enable KCP to take over the business shares and liabilities of SPIL. KCP also agreed to discharge the liabilities of SPIL set out in Schedules 2 and 3 of the said agreement within certain stipulated time. The agreement contained an arbitration clause for resolution of disputes between the parties to the following effect "[i]n the unlikely case of dispute arising out of this agreement relating to claims and counter claims, the parties hereto agree that the same shall be referred to Arbitration under the Indian Arbitration Law. The arbitration shall be by three arbitrators. KCP shall be entitled to appoint one arbitrator. KSL shall be entitled to appoint one arbitrator. The two arbitrators so appointed shall elect the third arbitrator".

Eventually, KCP paid a sum of Rs. 2.5 crores as against the total consideration amount of Rs. 30 crores. Consequently 90% of the shares were transferred by KSL to KCP and its nominees. Since the transaction was not completed by the parties, disputes arose which were subject matter of arbitration that resulted in an award being made by the Arbitral Tribunal on 16.12.2009, *inter alia* directing the respondent to return to the claimant the documents of title and share certificates relating to 243 lakh shares of the second respondent (SPIL) which were handed over earlier to first respondent pursuant to the agreement dated 19.07.2004. In terms of the said direction, KCP and SPIL were to return the documents of title and share certificates relating to 2.43 crores

48 *Cheran Properties Ltd.* v. *Kasturi Sons Ltd.* (2018) 2 SCALE 467.

shares contemporaneously with KSL paying an amount of Rs. 3,58,11,000 together with interest @ 12% p.a. on a sum of Rs. 2.55 crores.

KCP challenged the award in a proceeding under Section 34 of the Arbitration Act, 1996 but failed. An appeal preferred from the said order was also dismissed and finally a petition by SPIL challenging the judgment of the Division Bench was also dismissed on 10.02.2017. Consequently, the award attained finality. Thereafter, KSL initiated a proceeding under Section 111 of the Companies Act, 1956 read with Sections 297, 298, 402 and 403 of the Companies Act, 1906 *inter alia* for seeking rectification of the Register of SPIL. The National Company Law Tribunal (NCLT) allowed the petition which was affirmed in appeal by the National Company Law Appellate Tribunal (NCLAT). A further appeal to the Supreme Court also met the same fate. Dr. Chandrachud, J., speaking for the Bench laid down several principles of law which would influence and have impact both in respect of the law of arbitration as well as corporate laws, despite their field of operation being completely different and independent.

Keeping in mind Section 7 of the ACA which defines the arbitration agreement *inter alia* "to be in writing", distinguishing the previous decisions of the Court rendered in *Indowind*[49] and *S.N. Prasad*[50] , Dr. Chandrachud, J., observed that "*[t]he position in Indowind was formulated by a Bench of two Judges before the evolution of law in the three Judge Bench decision in Chloro Controls*[51]. *Indowind arose out of a proceeding under Section 11(6). The decision turns upon a construction of the arbitration agreement as an agreement which binds parties to it. The decision in Prasad evidently involved a guarantee, where the guarantor who was sought to be impleaded as a party to the arbitral proceeding was not a party to the loan agreement between the lender and borrower*".

It is evident that the Court was much influenced by its earlier judgment in *Chloro Controls*[52] in the context of international arbitrations that are governed by Section 45 of the Act which finds place in Part II thereof. Since the "Group of Companies" concept was evolved under English Law, which did not contain provisions similar to Section 57 of the Indian Arbitration and Conciliation Act, Dr. Chandrachud, J., went on to explain the scope thereof by asking the question "Why does the law postulate that there should be a written agreement to arbitrate?" The question was answered by the Court as under:

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49 *Indowind Energy Ltd* v. *Wescare (I)* Ltd AIR 2010 SC 1793.

50 *S.N.Prasad, Hitek Industries (Bihar) Limited* v. *Monnet Finance Limited* (2011) 1 SCC 320.

51 *Chloro Controls India (P) Ltd.* v. *Severen Trent Water Purification Inc.* (2013) 1 SCC 641.

52 *Ibid.*

> "*The reason is simple. An agreement to arbitrate excludes the jurisdiction of national courts.*[53] *Where parties have agreed to resolve their disputes by arbitration, they seek to substitute a private forum for dispute resolution in place of the adjudicatory institutions constituted by the state. According to* Redfern and Hunter on International *Arbitration, the requirement of an agreement to arbitrate in writing is an elucidation of the principle that the existence of such an agreement should be clearly established, since its effect is to exclude the authority of national courts to adjudicate upon disputes.*"

On the question as to whether the National Company Law Tribunal had the jurisdiction to entertain the petition filed under Section 111 of the Companies Act, 1956, the Court answered the question in the affirmative holding *inter alia* that "[i]n the present case, the arbitral award required the shares to be transmitted to the claimants. The arbitral award attained finality. The award could be enforced in accordance with the provisions of the Code of Civil Procedure, in the same manner as if it were a decree of the Court. The award postulates a transmission of shares to the claimant. The directions contained in the award can be enforced only by moving the Tribunal for rectification in the manner contemplated by law". This, however, does not answer the question (which had not been raised before the Court) as regards the arbitrability of the disputes that essentially fall within the realm of Companies Act. It is evident from the decision of the Court that the arbitration award by itself was not a complete and effective adjudication of all disputes between the parties and that in order to secure a complete adjudication, the parties had to take resort to the provisions of the Companies Act and approach the specialized tribunal constituted under that Act meaning thereby that the arbitral award was incapable of being executed as a mere decree of the Court by instituting appropriate proceedings before a court of competent jurisdiction as contemplated in Section 21 read with Section 36 of the ACA. Since the question had not been canvassed by the parties, the Court did not have the occasion to pronounce upon it.

V Re: Can Supreme Court Entertain a Challenge to an Award as the Court of First Instance?

A Constitution Bench of Five Judges in *State of Jharkhand* v. *Hindustan Construction Co.*[54] was called upon to resolve conflicting opinions rendered by the Court in its earlier decisions on the vital questions as to whether the Supreme Court could be regarded as the "Court" within the meaning of Section 2(c) of the 1940 Act and Section 2(1)(e) of the 1996 Act and whether it would be competent for the Supreme Court to entertain an application for making the award a rule of the Court even if the Court retained *seisin* over the arbitral proceedings. The question came up for consideration of the

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53 Section 28 of the Indian Contract Act, 1872.

54 *State of Jharkhand* v. *Hindustan Construction Co.* (2018) 2 SCC 603.

Court in the backdrop of proceedings under the Arbitration Act, 1940, which provided for awards being filed in the Court of First Instance for being made a rule of the Court in order that the awards become enforceable. Though the 1996 Act has done away with the said procedure of making the award a rule of the Court, by declaring under Section 35 that "[t]he award shall be final and binding upon the parties" and providing under Section 36 that the Award "shall be enforced in accordance with the provisions of the Code of Civil Procedure, 1908 in the same manner as if it were a decree of the Court", for the purpose of entertaining a challenge to the arbitral award, the jurisdiction of the Supreme Court to entertain such an application as if it were a Court of first instance becomes relevant. This decision by the Constitution Bench of the Court effectively concludes that issue for the purpose of both the 1940 Act and the 1996 Act.

In an appeal rising out of the Arbitration Act, 1940, the Court, based on the statements made by the learned Counsel for the parties, referred the disputes that had arisen between them pursuant to a contract dated 25.04.1989 and in respect of which though the arbitration proceedings had commenced on 15.02.1995 but remained inconclusive, to a *de novo* arbitration by a former judge of the Supreme Court. The learned arbitrator concluded the arbitration proceedings and passed an award which was filed before the Supreme Court in terms of its earlier order of reference dated 05.02.2013 wherein the Court had requested "*the learned arbitrator to conclude the aforesaid arbitration proceedings expeditiously and further observe that the award shall be filed before this Court.*"

While the respondents filed an affidavit before the Supreme Court requesting the Court to pronounce its judgment in terms of the award as contemplated under Section 17 of the 1940 Act, the appellants challenged the said award by filing their objections on the grounds specified under Section 30 of the 1940 Act before the Civil Court (Sub Judge, Saraikella). When the matter came up before a two Judge Bench of the Supreme Court, relying upon the two earlier decisions of the Court in *Bharat Coking Coal*[55] and *Associated Contractors*[56] it was contended on behalf of the respondent that since the Supreme Court had referred the dispute for adjudication to the arbitrator appointed by it, an application for making the award rule of the court had to be filed only before the Supreme Court, which court alone had jurisdiction to pronounce judgment in terms of the award. The appellant State of Jharkhand placed reliance upon another decision of the Court in *Navbharat Construction Co.*[57] In *Bharat Coking Coal* a two Judge Bench had taken the view that a right of appeal is a valuable right and where there exists cogent reasons, a litigant should not be deprived of the same. In *Associated*

55 *Bharat Coking Coal* v. *Annapurna Construction* (2008) 6 SCC 732.

56 *Supra* note 41.

57 *State of Rajasthan* v. *Navbharat Construction Co.* (2010) 2 SCC 182.

Contractors[58] a three Judge Bench had held that the Supreme Court could not be considered to be a "Court" within the meaning of Section 2(1)(e)[59] of the Arbitration and Conciliation Act, 1996. The two Judge Bench also noticed two of its earlier decisions in *Saith and Skelton*[60] and *Guru Nanak Foundation*[61] wherein it was held that when an arbitrator is appointed by the Supreme Court and further directions are issued, the Court retains *seisin* over the arbitration proceedings and in such circumstances, the Supreme Court alone could be regarded as the appropriate court as defined in Section 2(c) of the 1940 Act.[62]

The two Judge Bench eventually held *"[w]e are of the view that there is a difference of opinion in relation to entertainability of an application by this Court for making the award as rule of the court*." The matter was referred to a larger bench for decision on the following question:

"Whether this Court can entertain an application for making the award as rule of the court, even if it retains seisin over arbitral proceedings?"

Relying upon the earlier Constitution Bench judgment in *Garikapati Veerayya*[63], it was reiterated that "*the legal pursuit of a remedy, suit, appeal and second appeal are really but steps in a series of proceedings all connected by an intrinsic unity and are to be regarded as one legal proceeding and the right of appeal is not a mere matter of procedure but is a substantive right. It has been further held that the right of appeal is a vested right and such a right to enter the superior court accrues*

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58 *Supra* note 41.

59 Section 2(1)(e) of the Arbitration and Conciliation Act, 1996 as amended by the Arbitration and Conciliation (Amendment) Act, 2015 provides: "Court" means—

(*i*) in the case of an arbitration other than international commercial arbitration, the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, but does not include any Civil Court of a grade inferior to such principal Civil Court, or any Court of Small Causes;

(*ii*) in the case of international commercial arbitration, the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, and in other cases, a High Court having jurisdiction to hear appeals from decrees of courts subordinate to that High Court;';

60 *State of Madhya Pradesh* v. *Saith and Skelton P. Ltd.* (1972) 1 SCCC 702

61 *Guru Nanak Foundation* v. *Rattan Singh and Sons* (1981) 4 SCC 634

62 *Section 2. Definitions*

(*c*) "Court" means a Civil Court having jurisdiction to decide the questions forming the subject-matter of the reference if the same had been the subject-matter of a suit, but does not except for the purpose of arbitration proceedings under Section 21 include a Small Cause Court;

63 *Garikapati Veerayya* v. *Subbiah Choudhary* 1957 SCR 488.

to the litigant and exists as on and from the date the lis commences and although it may be actually exercised when the adverse judgment is pronounced such right is to be governed by the law prevailing at the date of the institution of the suit or proceeding and not by the law that prevails at the date of its decision or at the date of the filing of the appeal and the said vested right of appeal can be taken away only by a subsequent enactment, if it so provides expressly or by necessary intendment and not otherwise."

The bench also quoted with approval, the law laid down by a subsequent Constitution Bench in *A.R. Antulay* wherein Sabyasachi Mukherji J. (as the Learned Chief Justice then was) speaking for the Court held that *"[t]he laws of procedure, both criminal and civil, confer jurisdiction on different courts. Special jurisdiction is conferred by special statute. It is thus clear that jurisdiction can be exercised only when provided for either in the Constitution or in the laws made by the legislature. Jurisdiction is thus the authority or power of the court to deal with a matter and make an order carrying binding force in the facts*." Speaking for the Court, Chief Justice Dipak Misra, referring to the observations made in *Gurunanak*[64] which had distinguished the principles laid down in *Garikapati*[65] and had observed that "*the door of this Court is not closed to the appellant. In fact, as has been stated, the door is being held wide ajar for him to raise all contentions which one can raise in a proceeding in an originating summons*" held that "[*t]he aforesaid statement of law is not correct because the superior court is not expected in law to assume jurisdiction on the foundation that it is a higher court and further opining that all contentions are open. The legislature, in its wisdom, has provided an appeal under Section 39 of the Act. Solely because a superior court appoints the arbitrator or issues directions or has retained some control over the arbitrator by requiring him to file the award in this Court, it cannot be regarded as a court of first instance as that would go contrary to the definition of the term "court" as used in the dictionary clause as well as in Section 31(4). Simply put, the principle is not acceptable because this Court cannot curtail the right of a litigant to prefer an appeal by stating that the doors are open to this Court and to consider it as if it is an original court. Original jurisdiction in this Court has to be vested in law. Unless it is so vested and the Court assumes, the court really scuttles the forum that has been provided by the legislature to a litigant. That apart, as we see, the said principle is also contrary to what has been stated in Kumbha Manji. It is worthy to note that this Court may make a reference to an arbitrator on consent but to hold it as a legal principle that it can also entertain objections as the original court will invite a fundamental fallacy pertaining to jurisdiction*."

On that analysis of the law, the Court held that "we arrive at the irresistible conclusion that the decisions rendered in *Saith and Skelton*[66] and *Guru Nanak Foundation*[67] do not lay the correct position of law and, accordingly, they are overruled. Any other judgment that states the law on the basis of the said judgments also stands overruled."

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64 *Supra* note 61.

65 *Supra* note 63.

66 *Supra* note 60.

67 *Supra* note 61.

VI Validity of a Two-Tier Arbitration System

Arbitration, being a party centric dispute resolution process, affords the parties great freedom to devise their own rules regarding the resolution of the dispute between them, going so far as to permitting the parties to choose even what substantive law would be applicable to them. However, in some cases it becomes imperative upon the Court to interfere in an unworkable mechanism, though parties may have chosen such mechanism of their own free will.

In *Centrotrade Minerals and Metals Inc.*[68] case, a three Judge Bench was called upon to rule on an important question as to whether, consistent with the principle of party autonomy which is virtually the backbone of arbitration, would it be open to the contracting parties to provide for a 2-tier arbitration system (procedure) for adjudication of came to be referred to a Bench of 3 Judges in view of conflicting decisions rendered by a 2 Judges Bench (reported in (2006) 11 SCC 245[69]).? M/s. Centrotrade Minerals and Metals Inc. (CMM) and Hindustan Copper Limited (HCL) entered into a contract for sale of 15500 DMT of copper concentrate to be delivered at Kandla Port in the State of Gujarat in two separate consignments. These goods were to be utilized at the Kethri plant of HCL in Rajasthan. After delivery of the consignments by Centrotrade Minerals and Metals Inc., disputes arose between the parties as regards the dry weight of copper concentrate. The contract contained an arbitration clause which was to the following effect:

"*All disputes or difference whatsoever arsing between the parties out of, or relating to, the construction, meaning and operation or effect of the contract or the breach thereof shall be settled by arbitration in India through the arbitration panel of the Indian Council of Arbitration in accordance with the Rules of Arbitration of the Indian Council of Arbitration.*

If either party is in disagreement with the arbitration result in India, either party will have the right to appeal to a second arbitration in London, UK in accordance with the rules of conciliation and arbitration of the International Chamber of Commerce in effect on the date hereof and the results of this second arbitration will be binding on both the parties. Judgment upon the award may be entered in any court in jurisdiction."

The arbitrator appointed by the Indian Council of Arbitration (ICA) made a NIL award. Thereupon Centrotrade invoked the second part of the arbitration clause and made a reference of disputes for being adjudicated upon in accordance with the rules of conciliation and arbitration of the International Chambers of Commerce. The International Chambers of Commerce appointed Mr. Jeremy Cooke as the sole

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68 *Centrotrade Minerals and Metal Inc.* v. *Hindustan Copper Ltd.* (2017) 2 SCC 228.

69 *Id.* at 245

arbitrator. Eventually, the arbitrator Mr. Cooke made an award on 29.09.2001, holding *inter alia* that the arbitration agreement contained in clause 14 was neither unlawful nor void and that it had the jurisdiction to decide his own jurisdiction in terms of Article 8.3 of the ICC Rules and also Section 16 of 1996 Act. It was held that the award dated 15.06.1999 passed by the arbitrator appointed by the ICA was obviously wrong. It directed HCL to pay Centrotrade a certain amount with interest.

Thereafter HCL filed an application under Section 48 of the 1996 Act in the court of the District Judge, Alipore, Calcutta, and also filed a suit before the Civil Judge, Senior Division, Alipore, praying for a declaration that the ICC award was void and a nullity.

Centrotrade filed an application for enforcement for the said award dated 19.09.2001 in the court of District Judge, Alipore, for execution which was transferred to the Calcutta High Court in exercise of the powers under clause 13 of the Letters Patent. The learned Single Judge of the High Court by its Judgment and Order dated 10.03.2004 allowed the said execution petition.

HCL preferred an appeal which was allowed by a Division Bench of the High Court. Both parties appealed to the Supreme Court from the said Judgment of the High Court. The matter was heard by a bench of 2 learned Judges of the Supreme Court who rendered a fractured verdict by their respective Judgments both dated 09.05.2006. While S.B. Sinha, Justice, took the view that the 1996 Act does not contemplate multi-layered arbitration proceedings and award as being rendered in such proceedings governed by different sets of rules, the 1996 Act puts the domestic award and the foreign award in two different and distinct compartments. While the first set of award is governed by part 1 of the Act, the second set of award governed by part 2 of the Act. The Arbitration Clause in question contemplates that the Indian Law would be applicable in relation to first part of the arbitration following ICA rules whereas the second part would be governed by the ICC Rules which are distinct and different from the ICA. The Act does not contemplate two sets of awards being rendered following the adjudicating clauses arising under the same arbitration agreement. The appellate arbitration proceeding is also alien to the act. An appeal contemplates that the procedure before both the original authority and the appellate authority would be the same since it is well settled that an appeal is a continuation of the same proceedings that does not contemplate to different procedures being followed by two adjudicating authorities considering two sets of evidences etc. The provision for an appeal does not take away the existence of the award rendered in the first instance. The Act however does not contemplate two different natures of award simply because the parties have chosen to adopt a 2-tier procedure. Sinha, J, further ruled that[70]

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70 (2006)11 SCC at page 58.

> "*if by fiction of law an award becomes a decree without the intervention of the Court, the nature of an award which can be passed by the appellate arbitrator would lose the character of an award. The doctrine of merger, therefore, would not apply. A decree, whether by reason of a statute or a legal fiction created under the statute would have different and distinct connotation vis-a-vis an award. By agreement of the parties, a private adjudicator cannot sit in appeal over an enforceable decree. A decree passed by a court of law may be set aside by that court itself in exercise of its review jurisdiction or by an appellate court created in terms of a statute. A private adjudicator, it will bear repetition to state, cannot overturn a decree created by a legal fiction. A legal fiction, it is well settled, must be given its full effect*."

Chatterjee, J, however took a different view founded primarily on the ground that both the 1899 Act and 1940 Act did not prohibit a 2-tier arbitration and in fact there are several High Court decisions which have upheld 2-tier arbitrations as valid and permissible in India. According to the learned Judge, since the position of law has remained the same in the absence of any prohibition or ban introduced under the 1996 Act, an arbitration agreement containing 2-tier arbitration proceedings would be valid.

In view of the said conflict in the decisions of the two learned Judges, the matter came to be heard by a bench of 3-Judges. Lokur, J, speaking for the Court agreed with the view expressed by Chatterjee, J, holding *inter alia* that "*On a combined reading of sub-section (1) of Section 34 of the A & C Act and Section 35 thereof, an arbitral award would be final and binding on the parties unless it is set aside by a competent court on an application made by a party to the arbitral award. This does not exclude the autonomy of the parties to an arbitral award to mutually agree to a procedure whereby the arbitral award might be reconsidered by another arbitrator or panel of arbitrators by way of an appeal and the result of that appeal is accepted by the parties to be final and binding subject to a challenge provided for by the A&C Act…*

…The fact that recourse to a court is available to a party for challenging an award does not ipso facto prohibit the parties from mutually agreeing to a second look at an award with the intention of an early settlement of disputes and differences. The intention of Section 34 of the A&C Act and of the international arbitration community is to avoid a subjecting a party to an arbitration agreement to challenges to an award in multiple forums, say by way of proceedings in a civil court as well under the arbitration statute. The intention is not to throttle the autonomy of the parties or preclude them from adopting any other acceptable method of redressal such as an appellate arbitration", The Bench gave considerable emphasis to the fact that Arbitration Act was founded on the basic principles of party autonomy which was described by Lokur, J., as "virtually the backbone of arbitrations"[71]. Though the Lokur, J., clarified that the decision of the

71 (2017) 2 SCC 249, para 38.

Court was not founded on the assumption that the Parliament despite the knowledge that views had been expressed by the members of UNCITRAL working group of which India was a State Member, a very reference was made to decisions of various domestic courts prohibiting 2-tier arbitration system. Lokur, J, further held that "*If that be so, we are entitled to proceed on the basis that even after the passage of the A&C Act, there can perhaps be no objection to the existence of a two-tier arbitration system*", it is on those premises that 3 Judges Bench ruled that the 2-tier arbitration procedure agreed to by the parties are not contrary to Public Policy of India.

There is, however, one fundamental issue which remains to be addressed as held by the Court – the first award rendered in India is an award in terms of Section 2(c) of the Act and would be final and binding on the parties in terms of mandate of Section 35. The award was also enforceable if it were a decree of Court as mandated by Section 36 of the Act. The only manner in which the legal effect of that award could be avoided was for exercise of judicial powers, power of the Court under Section 34 of Act had it been challenged before the Court. The difficulty that would arise in accepting parties substituting these statutory provisions by entering into an agreement to the contrary and subjecting that award to an appellate procedure.

There is great substance in the observations made by Sinha, J., that there could not be a dichotomy in the applicable law in respect of the original proceedings and the appellate proceedings. The two proceedings must legally be the same since an appeal is merely a continuation of the original proceeding. The other serious question that would arise is whether it will be appropriate to suggest that there could be two awards in respect of the same disputes – (1) a domestic award and the other a foreign award and that despite the fact that there is no merger of the two awards. It would only be the foreign award that would be enforceable. The Act initially contemplates such incongruous results. Such results could be sustained solely based on principles of party autonomy. If party autonomy is sole criteria than it would be open to the parties to contemplate multiple arbitrations by providing several appellate remedies by mutual agreement. Would such agreements be countenance as in confirmation with the mandate of the Act and Public Policy particularly, when the Act does not contemplate and provide for appeals from an arbitral tribunal but only under specified circumstances.[72]

The party autonomy rule would certainly not be pressed into service to substitute the statutory provisions of Section 27 of the Act which contemplates only limited and restricted appeals from the orders passed by the tribunal. However, it is well settled that the arbitration awards are the result of quasi-judicial determination though at the hands of private arbitration. The quasi-judicial determination could be a subject matter

72 See Section 17(2) of the Act.

of an appeal only if a statute provides for the same. The parties cannot by agreement confer such powers of reviewing such quasi-judicial determination by another body.

In *Sundaram Finance* (2018) 3 SCC 622, the Court was called upon to resolve conflicting views expressed by various High Courts as regards the jurisdiction of the Court to enforce an award within whose territorial jurisdiction the assets of the JDR are located. The provisions of the 1996 Act which were enacted in the backdrop of UNCITRAL Model Law *inter alia* provided in Section 36 that an award "shall be enforced in accordance with the provisions of the Code of Criminal Procedure, 1908 (5 of 1908) in the same manner as if it were a decree of the Court. Though the Court did not specifically advert to the phrase "in the same manner" appearing in Section 36, it is evident that the genesis of the conflicting views of the Court lay primarily on those words. In the absence of those words in Section 36, the mandate of the Act would have been expressed in the language that an award shall be enforced in accordance with the provisions of the Code of Civil Procedure as if it were a decree of the Court avoiding further condition i.e. the manner of such enforcement as provided in the Court. Since the decrees could not be passed only by a Court of competent jurisdiction, the Code lays down the procedure for enforcement of such decrees and rightly provides under Section 38 that a decree may be executed either by a Court which passed it or by the Court to which it sent for execution. An award though by a legal fiction in Section 36 of the Act is given the status of a decree by declaring that the award would be a decree of the Court, since that reality and in fact since an award is only a decision of the tribunal and not decision of any court, it would not be possible to identify the award as having been passed by a particular Court. However, the expression Court in Section 38 could well be understood in the contract of its definition in Section 2(1)(e) of the Act unless the context otherwise required. The Act therefore identifies a Court to which a reference in Section 36 could well be understood. It is of some significance that pursuant to the recommendations made by the Law Commission of India, Section 36 of the Act stood amended by Parliament by the Arbitration and Conciliation (Amended) Act, 2015, which came in force w.e.f. 23.10.2015 (Act 3 of 2016). In fact, Section 36 stood substituted by a new provision by such amendment containing sub-sections and a proviso. The conflicting views of the High Courts were already known when Section 36 was amended, however, for reasons not known, no attempt was made to clarify the legal position by legislative intervention. The Court was therefore, compelled to resolve the conflict by referring it to judicial interpretation. It is with that objective that the Court had to resolve the commandum by introducing a concept hitherto not known that the "Act actually transcends of territorial barriers". S.K. Kaul, J, speaking for the Bench of 2-Judges rules that "[a]n award under Section 36 of the said Act, is equated to a decree of the Court for the purposes of execution and only for that purpose. Thus, it was rightly observed that while an award passed by the Arbitral Tribunal is deemed to be a decree under Section 36 of the Act, there was no

deeming fiction anywhere to hold that the Court within whose jurisdiction the arbitral award was passed should be taken before the Court which passed the decree." ……"the enforcement of an award through its execution could be filed anywhere in the country where such decree can be executed and there is no requirement for obtaining a transfer of decree from the Court, which would have jurisdiction over the arbitral proceedings.

VII Re: Power of Appointment of Arbitrator

Another contentious area that the Courts have pronounced upon from time to time, includes appointment of arbitrators.

In *Black Pearl Hotels*[73] though an interesting question under the law of arbitration came up for consideration a Three Judge Bench chose to leave that question for determination by the High Court at a later stage and instead took up the issue as regards power and propriety of the High Court to delegate its judicial power in favour of the Registrar of the Court and directing him to determine the nature and character of document produced by a concerned party in a proceeding under Section 11 of the Act, i.e., whether a document was duly stamped, whether the document was in the nature of transaction or leased or licensed or whether it was duly stamped complying with the mandate of Section 33 (1) of the Karnataka Stamp Act, 1957.

Black Pearl Hotels – The appellant, had entered into an agreement on 01.02.2008 with the respondent i.e., which was characterized as a conducting agreement. In terms of the agreement, the appellant was required to secure an extension of its own lease in respect to the premises in question. In order to enable to the Respondent to conduct the retail shop from the premises and in return the Respondent was to pay a fixed percentage of its net sales proceeds subject to a minimum guaranteed sum of Rs. 11 Lakh per month. The Respondent was liable to deposit with the appellant an interest free refundable security in the sum of Rs. 99 Lakhs.

The agreement also contained an arbitration clause for resolution of disputes between the parties. As the disputes arose between the parties, the appellant approached the City Civil Court, Bangalore in a petition under Section 9 of the Act seeking an order of temporary injunction restraining the respondent from interfering with the peaceful possession of the appellant in respect of the premises. The appellant also issued a notice calling upon the respondent to concur to the appointment of his nominated arbitrator as the sole arbitrator to adjudicate disputes between the parties.

The respondent declined to concur with the appointment proposed by the appellant but also did not propose to nominate any other arbitrator. The appellant thereafter filed a petition under Section 11 of the Act. The Designated judge *prima facie* was of the view that the "conducting agreement" may be a lease of the immovable property.

73 *Black Pearl Hotels* v. *Planet M. Retail Ltd.* (2017) 4 SCC 498.

The learned judge directed that the matter be placed before the Registrar (Judicial) of the Court who shall determine whether the transaction is in the nature of lease or license and the stamp duty that is attracted since the agreement is apparently not duly stamped.

After an unsuccessful attempt to review the order of the Designated Judge, the appellant approached the Supreme Court by way of a petition under Article 136 of the Constitution of India.

A Three Judge Bench speaking through Justice Dipak Misra (as his Lordship then was) as the threshold clarified and made it clear with the following observations:

"[w]e are not determining whether the agreement in question is a lease or licence or an agreement simpliciter as put forth by the learned counsel for the appellant. That is required to be dwelt upon and addressed by the High Court while dealing with an application under Section 11 of the Act. It is well settled in law that while delving into the appointment of an arbitrator under Section 11, regard being had to the nature of agreement as stipulated under Section 7 of the 1996 Act, the Judge designated by the learned Chief Justice is obliged to consider the nature of agreement and whether the document requires to be stamped or not, and if so, whether requisite stamp duty has been duly paid on the same. We are so stating as in the instant case there is a written instrument and there is dispute as regards the nature and character of the document."[74]

The Court following an earlier decision in *SMS Tea Estates* held that "[t]he delegation by a Judge of the High Court will not clothe the officer with the jurisdiction of determining the nature and character of the instrument inasmuch as such fact needs to be determined by the Judge while exercising judicial function. Such judicial function is not to be delegated to an officer of the Court by the Judge of the High Court. What is delegated under the proviso (*b*) of sub-section (2) of Section 33 is only to examine the instrument for the purpose of determining as to whether the instrument is duly stamped or not and for impounding the same. We are disposed to think that Section 33(2)(*b*) does not contemplate or permit any adjudication as regards the nature and character of the instrument. The delegated power has to be restricted to cover the area, that is, whether the instrument bears the proper stamp and thus complies with the requirement of being "duly stamped", and the stamp duty payable on the same must be determined only with reference to the terms of the instrument. Proviso (*b*) to Section 33(2) does not empower the Judge of the High Court to direct the officer of the High Court to enquire and to find out the nature and character of the document."

In *SMS Tea Estates*[75] a bench of two judges it was ruled that when a lease deed or any other instrument is relied upon containing arbitration agreement the court should

74 *Id.* at para 8.

75 *SMS Tea Estates* v. *Chandmari Tea Co. Pvt. Ltd.* (2011) 14 SCC 66.

consider at the outset whether an objection as to whether the document is properly stamped is raised. If it comes to conclusion that the document is not properly stamped the court cannot act upon such a document or the Arbitration Clause therein.

Having so held, it was further observed in that case that "[i]f the document is not registered, but is compulsorily registerable, having regard to Section 16(1)(*a*) of the Act, the court can delink the arbitration agreement from the main document, as an agreement independent of the other terms of the document, even if the document itself cannot in any way affect the property or cannot be received as evidence of any transaction affecting such property." If the document is not registered but it compulsorily registrable having regard to section 16(1)A of the act. The court can delink the Arbitration agreement from the main document as an agreement independent of the other terms of the document even if the document itself cannot in anyway affect the property or cannot be received as evidence of any transaction affecting such property. The decision in *SMS Tea Estates*[76] has further clarified "[w]here the document is compulsorily registerable, but is not registered, but the arbitration agreement is valid and separable, what is required to be borne in mind is that the arbitrator appointed in such a matter cannot rely upon the unregistered instrument except for two purposes, that is (*a*) as evidence of contract in a claim for specific performance, and (*b*) as evidence of any collateral transaction which does not require registration."

Following that decision, the court should have directed the learned single judge to also consider if the Arbitration agreement is valid and if the disputes raised by the parties were covered by the Arbitration Clause, then to consider the application u/s 11 of the Act for appointment of Arbitrator on its merits in addition to determination of "the nature and the character of the document" in question.

This was imperative keeping in view the mandate of Section 16(1)A of the Act which *inter alia* directs the Arbitral Tribunal to consider that

(a) An Arbitration Clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract.

A Decision of Arbitral Tribunal that the contract is null and void shall not *ipso jure* the invalidity of the Arbitration Clause.

VIII Re: Award of Interest

The question regarding arbitrator's power to award interest, particularly, in the context of contractual provisions, have been a subject matter of elaborate considerations by the Supreme Court in several judgments including the several Constitution Benches.

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76 *Ibid.*

In *Assam State Electricity Board*[77] case, though the question which arose out of arbitration proceedings conducted under the Arbitration Act 1940, the questions determined therein are relevant to the proceedings that are governed by the 1996 Act. Therein, pursuant to a Purchase Order dated 06.09.1982, an agreement was entered into between The Assam State Electricity Board (Board) and the claimant – Buildworth (P) Ltd. in terms of which the claimant was to supply and installation of a circulating Water Piping System for the Bongaigaon Thermal Power Station (BTPS). The contract *inter alia* provided for terms of delivery escalation period for commissioning, terms of payment and dispute resolution by arbitration. Though the period of completion was 12 months, the period was subsequently extended and the actual work was completed beyond the extended period. As disputes arose between the parties, they were referred to a sole arbitrator for adjudication. The claimant made several claims on account of (i) price variation (ii) idling charges for machinery (iii) idling charges for supervisory staff and labour (iv) compensation for extended stay of civil work (v) interest from 07.02.1986 to 31.12.1997 at 18% (vi) escalation on account of gas (vii) price variation of electrodes (viii) legal expenses and (ix) future interest at 18%.

The arbitrator awarded a sum of Rs. 10,73,969 on account of idling charges towards labour and machinery and towards price escalation. A lump sum amount of Rs. 20 lakhs was awarded as pendente related interest and for future interest @ 18% p.a. payable after a period of 3 months after the date of the award. The award was challenged by the Board. The challenge failed and the award was made a rule of the court. On appeal, the High Court partially set aside the award of 20 lakhs. On further appeal by the Board before the Supreme Court, it was contended *inter alia* that though clause 2.3(a)(i) of the Purchase Order provided for price escalation. It had also fixed a sealing of Rs.9,16,825 which amount was duly paid to the claimant and hence no further amount towards price escalation was payable and subsequently the arbitrator erred in allowing the claimant for idling charges of labour and machinery even after recording a finding to the effect that claimant had also contributed to the delay in the completion of the project. There was a cross-appeal by the claimant questioning disallowing the award of interest in favour of the claimant. Rejecting the contention of the Board, the Supreme Court dismissed the appeal and allowed the cross appeal filed by the claimant but modified the award by reducing the rate of interest from 18% to 12%.

Reiterating its previous decisions in *Northern Railway* v. *Sarvesh Chopra*[78] and *A.M. Ahmed & Co.*[79] the court emphasized that escalation is a normal incident arising out of gap of time in this inflationary age in performing any contract and that the arbitrator is vested

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77 *Assam State Electricity Board and Others* v. *Buildworth Private Limited (2017) 8 SCC 146*.

78 *Northern Railway* v. *Sarvesh Chopra* (2002) 4 SCC 45.

79 *Food Corporation of India* v. *A.M.Ahmed &Co.* (2006) 13 SCC 779.

with the authority to compensate the contractor for the extra cost incurred by it as a result of the failure of the opposite party to live up to its obligation. Dealing with the second question is to the impact of contributory delay in execution of the work by the contractor on the claim for damages made by it, Dr. Chandrachud, J., speaking for the Court held that "The award does indicate that the contributory delay on the part of the claimant was present to the mind of the arbitrator and has been duly taken into consideration in computing the extent of the claim under the award. This is not a case where the arbitrator has failed to take into account a relevant consideration or has taken into account extraneous material or consideration. Once the aspect of contributory delay was present to the mind of the arbitrator, as is reflected in the reasons in the award, and this has been taken into consideration in the assessment of damages, the award does not fall for interference".

With regard to the question of award of interest in favour of the contractor, the Court justified the award by referring to the decision of the Constitution Bench in *G.C.Roy*[80] Affirming the power of the arbitrator to award interest on sums found due for the pre reference period in the absence of specific stipulation or prohibition in the contract to claim or grant such interest. Specific reference was made to para 22 of the decision of the Constitution Bench. The debate further continues to linger in light of the decisions of the Court in *Hyder Consulting*[81].

IX Re: Arbitration and Conciliation (Amendment)Bill, 2018

In light of the above judicial pronouncements, substantive amendments have become necessary to the Arbitration and Conciliation Act, 1996 as amended in 2015. Pursuant to the report of the High Level Committee headed by Justice (Retd.) B.N. Srikrishna, the Government has introduced a bill to amend the Arbitration and Conciliation Act, 1996. The said bill seeks to bring about the following laudable changes:

1) The Bill makes some crucial adjustments to the time frame imposed by Section 29A of the Arbitration and Conciliation Act, 1996. The time limit of twelve months for completion of arbitration proceedings is to commence from the time of completion of pleadings. A separate period of six months is fixed for completion of pleadings. International Commercial Arbitrations are entirely excluded from the purview of these time limits.

2) The Bill provides clarity as to the retrospective operation of the 2015 amendment and hence sets at rest the several questions of law that had arisen as a result of the said amendment.

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80 *Irrigation Dept. State of Orissa* v. *G.C. Roy* (1992) 1 SCC 508.

81 See, A.K. Ganguli, "Arbitration Law", LII *Annual Survey of Indian Law*, 2016 for detailed discussion on *Hyder Consulting* v. *Governor of Orissa*.

3) A party may challenge the arbitral award only on the basis documents already on record and is not permitted to introduce new documents.

However, there are certain other aspects where the bill might be improved upon.

The proposed Arbitration Council of India, which is to act as a certifying and grading body for Arbitration Institutions is a problematic development. The whole purpose of arbitration is to take the dispute resolution mechanism out of the purview of the control of state institutions. It would be counterproductive to the development of arbitration as the freedom that is the very soul of arbitration would be restricted.

The Bill sends a mixed message on confidentiality. While on the one hand a provision is introduced to safeguard the confidentiality of the proceedings during the course of the arbitration, the proposed Arbitration Council of India has *inter alia* been tasked with maintaining a depository of arbitral awards rendered in India and abroad. This would amount to serious risk to the confidentiality of the award.

The proposed Eighth Schedule read with proposed Section 43G would provide a list of qualifications which a person would have to meet to be appointed as an arbitrator. Some of the major omissions include QCs and foreign advocates, men of commerce, etc. This would cause problems as several arbitration agreements provide for persons of these qualifications to be the arbitrators and if the Act bars them from acting as arbitrators, it would lead to much confusion.

The Bill, though clarifies as to the retrospective applicability of the 2015 amendment, it does not clarify as to whether the 2018 amendment would be retrospectively applicable.

The Bill, for the first time introduces new provisions regarding immunity of the arbitrators providing that "no suit or other legal proceedings shall lie against the arbitrator for anything which is in good faith done or intended to be done under this Act or the rules or regulations made thereunder."

The concept of immunity of judges has a long standing history in Common Law. Initially applicable to the judges of the superior courts, this principle was extended to all judges by the Court of Appeals in *Sirros v. Moore*[82]. The scope of such immunity was extended to arbitrators through several cases.[83]

The reasons for such immunity are explained in *Sutcliffe* v. *Thackrah*[84] some of which are as follows:

a) The nature of the adjudicatory function exercised by the arbitrator is different from that of a lawyer, insofar as an arbitrator decides on the basis of the

82 [1975] QB 118.

83 *Re. Hopper* (1867) LR 2 QB 367; *Pappa* v. *Rose* (1872) LR 7 CP 525.

84 [1974] 1 All ER 859.

evidence presented to him by the parties whereas a professional man is required to undertake his own investigation.

b) Without such immunity, arbitrators would be harassed by actions which would have little chance of success and may influence the arbitrator.

c) The mere fact that the arbitrator's powers are judicial is enough to confer immunity.

The Arbitration Act, 1996 of UK provides for immunity of arbitrators under Section 29(1) which is to the effect that "[a]n arbitrator is not liable for anything done or omitted in the discharge or purported discharge of his functions as arbitrator unless the act or omission is shown to have been in bad faith.

Though conversely worded, the effect of the new provision on immunity sought to be included in the ACA is the same.

The merits for the need for such provisions have to be carefully considered before being adopted. While on the one hand such immunity is necessary to secure the independence of the arbitrator and to ensure that competent arbitrators do not hesitate in taking up arbitrations, it is also to be borne in mind that a complete immunity might dent the parties' confidence in arbitration if the arbitrators are eventually found not to have bestowed their full attention to crucial matters adversely affecting the rights of the parties. It is therefore necessary that wider consultations are held on this issue before the Bill transforms into an Act.

X Conclusion

There have been all round efforts made by all concerned to reach the desired goal of India becoming a hub for international arbitrations. The contribution and the support from all quarters – the executive government, the legislature, the judiciary (both bench and bar), industry and the litigants are extremely encouraging and cumulatively hold out a great prospect for India achieving to create an international hub in respect of all dispute resolution mechanisms and more particularly for arbitrations.

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