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Acquiescing Paternal Encroachment Judicial Inroad in the Arbitral Code

GAYATRI VISHAL SHIRDHONKAR[1]

ABSTRACT

The author has attempted to portray the realities of the ADR mechanism in India. The alternative dispute resolution machinery is plagued by various troubles which have been highlighted in the article. Emphasis is placed on the legislative intent on enforcement of arbitral law and the reasons as to why it is frustrated. The flaws and drawbacks of the Act and its adverse effects are underlined. The intertwining and similarities between the ADR and judiciary are striking; this has caused severe problems and has shaken the very foundation of ADR. The author calls for cohesive action plan to overcome these obstacles.

Keywords: *Arbitration, arbitral tribunal, Arbitration and Conciliation Act, Judicial interference, legislative intent.*

I. INTRODUCTION

The inception of the regulation and administration of "amicable settlements" in India begin with the enforcement of the Indian Arbitration Act, 1899,[2] which was based on the English Arbitration Act, 1899.[3] The principal reasons for enactment of the said Act was to expedite the dispute resolution process while rendering justice to both parties (all parties) amicably, to circumvent incommodious litigation process and to reduce the judicial caseload.[4] This Act was appurtenant to merely the presidency towns in India (Madras, Bombay and Calcutta). In due course, the Code of Civil Procedure, 1908[5] was enacted, which also encompassed provisions to facilitate the arbitration process. The schedule II of the CPC enveloped aspects of arbitration which were outside the scope of the Indian Arbitration Act, 1899[6] and had wider ambit as its enforcement was not restricted to presidency towns. This was the result of the immutable legislative intent to stimulate and encourage the Alternative Dispute

[1] Author is a student at ILS Law College, Pune, India.
[2] Indian Arbitration Act, 1899.
[3] English Arbitration Act, 1899.
[4] Aditya Sondhi, 'Arbitration in India: Some Myths Dispelled', [2007], 19, Student Bar Review, 48, 49.
[5] Code of Civil Procedure, 1908. Hereinafter referred to as 'CPC'.
[6] Indian Arbitration Act, 1899.

 [ISSN 2581-5369]

Resolution (ADR) mechanism. Subsequently, the Arbitration (Protocol and Convention) Act, 1937[7] took effect; It further stitched the gaps in the earlier Act by annexing provisions relating to 'foreign arbitral awards.' The abovementioned legislation, however, failed to comprehensively translate the legislative intent into discernible actions of law. In 1940, the legislature endeavoured to achieve its antecedent objectives by brining into picture the Arbitration Act, 1940.[8] While the said Act was sound and based on well found reasoning, it was deemed inutile and ineffective. The provisions of this piece of legislation were centred around 'domestic arbitration'. It was overtly reticent in context of foreign arbitration process and enforcement of arbitral awards as a result of the same. The Indian Supreme Court reflected on the impotency of the said Act in the case of *Guru Nanak Foundation v. Rattan Singh & Sons*[9] by stating that the arbitral proceedings were futile as majority of the decisions were challenged in courts, which made the "lawyers laugh and legal philosophers weep". The court also shed light on the desideratum on having an unadorned and straightforward law which would fill up the cavities left by its predecessors and simplify the arbitral process. This proffered the much-required nudge to the legislation to formulate an all-inclusive piece of legislation which would promote its intentions and make the arbitral process more lucid. Thus, to do away with the blind spots of its predecessors, the Arbitration and Conciliation Act, 1996[10] was enacted. The Act has sanctioned the establishment of a comprehensive ADR machinery in our country. It also cures the deficiencies caused by the pervious legislation as it contains provisions for domestic arbitration, international commercial arbitration as well as enforcement of awards of such arbitrations. The Act however, only purports to further the legislative objectives. It has numerous provisions which resembles the cumbersome litigation process and warrants for judicial interference under various circumstances. Therefore, not only does it frustrate the legislative intent, it also contradicts the very substratum of the ADR mechanism.

II. POSITION OF LAW

While an argument can be made for the need for cogent judiciary to supervise on any authority or body which discharges adjudicatory functions, the cavernous judicial interference exists right form the stage of formulation of arbitral tribunal to enforcement of the arbitral award by the said tribunal. This obtrusion is facilitated by the Act itself. There are multiple layers in the Act, which authorise judicial scrutiny and various spots which call for

[7] Arbitration (Protocol and Convention) Act, 1937.
[8] Arbitration Act, 1940.
[9] (1981) 4 SCC 634.
[10] Arbitration and Conciliation Act, 1996. Hereinafter referred to as "the Act".

 [ISSN 2581-5369]

judicial intervention. The autonomy and the self – sufficiency of the ADR process has been lost due to said interference. The idea of judicial supervision is to provide guidance and a helping hand, when and if needed. It has however, turned into an instrument for causing delays and in certain cases, has been resorted to as an alternative to the ADR process itself.

Firstly, by the virtue of section 11 of the Act[11] the Chief Justice (or the nominee) of the jurisdictional High Courts, has the authority to appoint and formulate an arbitral tribunal. This power is exercised when no prior arbitral agreement is in existence. The party who wants to opt for arbitration must approach the court and a conclusion will be arrived at after listening to both the parties. The judicial power is further succoured by the fact that the order passed by the Chief Justice (or the nominee) can be challenged by the medium of an appeal or even a Special Leave Petition (SLP)[12] in the Supreme Court.[13] The judiciary has exacerbated the legislative imbroglio further by the way of its pronouncements. In the case of *SBP & Co. v. Patel Engineer*[14] an observation was made by the Apex Court that, in proceedings for appointment of a tribunal, evidence can also be held if the court deems it to be necessary. All of the above, augments the time taken in formulation of an arbitral tribunal and setting up the apparatus for arbitral proceedings. The false sanctimony of the judiciary becomes intelligible when certain judgments are brought under the scanner which criticize the arbitral process for its longevity.

Secondly, the appendage of the judicial interjection can be seen in the Act by scrutinising the provisions for providing interim relief to the parties involved in the arbitration process. The interim relief is in the form of detention, preservation, or inspection of the property or the amount which forms the subject matter of the dispute, issuance of interim injunction, appointment of a receiver or any other relief which is deemed fit. Section 9 of the Act[15] vests these powers into the judiciary and section 17 of the Act[16] grants these powers to the arbitral tribunal. Thus, *prima facie*, there are two contemporaneous authorities who are granted synonymous powers. Howbeit, there is no mechanism charted out in the Act which distinguishes one from the other. This has set in motion huge chaos as there is no demarcation of powers as to which authority should be approached to and under which circumstances.[17] Originally, the courts had the authority to exercise the said power and

[11] Arbitration and Conciliation Act, 1996, s 11.
[12] The Constitution of India 1950, art. 136.
[13] T.I. Ltd. v. Siemens Public Communications Networks Ltd, (2002) 5 SCC 510.
[14] (2005) 8 SCC 618.
[15] Arbitration and Conciliation Act 1996, s 9.
[16] Arbitration and Conciliation Act 1996, s 17.
[17] A.K Ganguli, 'THE PROPOSED AMENDMENTS TO THE ARBITRATION AND CONCILIATION ACT,

entertain applications which demand the said 'interim relief' even while the arbitral proceedings were ongoing. Notwithstanding the same, an attempt was made to curb this power and limit the scope of judicial reach by the Arbitration and Conciliation (Amendment) Act, 2015.[18] This downsized the court's power by restricting it only up to the point wherein the arbitral tribunal has been appointed. Once the tribunal is composed, the power is endowed on the tribunal. However, a proviso which was added to the provision via this amendment, tipped the scales back in the favour of the judiciary. It stated that judiciary can very well entertain an application for interim relief even after the constitution of arbitral tribunal if the courts are of the opinion that the relief under section 17 would not adequately fend to the needs of the parties.[19] Forthwith, the Arbitration and Conciliation (Amendment) Act, 2019[20] was enacted to explicate and amplify the powers of the arbitral tribunals. Prior to the amendment, the tribunal could grant interim relief only after it had laid down the award but before its enforcement. In an attempt to articulately enhance the powers of the arbitral tribunal, this precondition was amputated by the amendment. Concomitantly, both the amendments can be looked at, as endeavours by the legislature to procure balance in power between the two authorities. While this is laid down to be the position of law, the judicial pronouncements paint a different picture. It has overstepped its bounds, which are outlined in the Act, in many cases. A division bench of the Calcutta High Court ruled that an order under section 9 of the Act would be valid, even if the seat of arbitration is outside India.[21] On another recent occasion, in the case of *Bhubaneshwar Expressways Pvt. Ltd. v. NHAI*, despite the formation of the arbitral tribunal, the Delhi High Court went ahead with the grant of interim relief.[22] The Delhi High Court has opined that the scope of powers under section 9 of the Act is not restricted and that it is a comprehensive provision which does not limit the authority of courts.[23]

Additionally, the Act has kept this ball rolling by the means of section 34.[24] A reasonable man would expect the dispute to be resolved when the award has been passed by the arbitral tribunal. However, under the scheme of the provision, an arbitral award can be subjected to judicial scrutiny and can even be set aside under certain circumstances. To promote the same,

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1996 – A CRITICAL ANALYSIS', [2003], 45, Journal of Indian Law Institute, 3, 16.
[18] Arbitration and Conciliation (Amendment) Act 2015.
[19] A.K Ganguli, 'THE PROPOSED AMENDMENTS TO THE ARBITRATION AND CONCILIATION ACT, 1996 – A CRITICAL ANALYSIS', [2003], 45, Journal of Indian Law Institute, 3, 15.
[20] Arbitration and Conciliation (Amendment) Act 2019.
[21] Kaventer Agro Ltd. v. Seagram Co. 1. (APO 498 of 1997 and APO 449 of 1997).
[22] OMP(I) (COMM.) 218/2019 decided on 03rd June 2020.
[23] OMP. (I) COMM 109/2020, decided *on 13th May 2020.*
[24] Arbitration and Conciliation Act, 1996, s 34.

unascertained terms such as "opposed to public policy" have been employed in the section. Thus, the *lis* rather commences, if such a challenge is made. An arbitral tribunal, in most cases, consists of retired Supreme Court or High Court judges. When the award passed by such a tribunal is challenged, it implies that the decision of retired High Court or Supreme Court judge(s) is to be examined by trial court's judge(s).[25] The capacity of the courts, thus, is intumesced or enlarged and is been made analogous to an appellate court. This was reiterated in the case of *ONGC v. Saw Pipes*[26] by the Supreme Court. It was held that an arbitral award can be challenged on grounds of it being 'patently illegal' or when it is opposed to the 'substantive position of law'. To such a degree, the trial court proceedings, challenging an arbitral award, are tantamount to a fresh civil suit. The merits of the award are re-examined and, in most probability, even evidence is taken afresh.[27] Subsequent rounds of litigation are also endorsed by the Act under section 37.[28] It allows the aggrieved parties to appeal the trial court's decision in the High Court. Further, it can be taken to the Supreme Court by way of an appeal or even in the form of an SLP.[29] Solely on the grounds that an application challenging the award is pending, the enforcement of such an award can be thwarted. The judiciary has verbalised, in the case of *NALCO v. Presteel Fabrications Ltd*,[30] that the state of affairs can only change through legislative amendments in the Act. The Act has smoothened the way for excessive judicial meddling and thus only the Act can reform the same. To remedy this and in pursuance of the 176th Law Commission Report (which made suggestions synonymous to above), the Arbitration and Conciliation (Amendment) Bill, 2003,[31] was introduced. It was, however, withdrawn later on and was never passed by the Indian parliament. This stumbling block hits at the very foundation of the ADR mechanism as it lengthens the time taken to deliver an award. The plight of the successful parties in arbitration, who cannot enjoy their award, cannot be fathomed. At the same time, several parties are vanquished yet delighted as they savour the indeterminant delay of facing consequences.

Apart from the above, it is an ordinary practice, to file a suit in the court, notwithstanding a pre-existing arbitral agreement between the concerned parties. The credibility of the agreement loses value by its complete disregard by the parties. When such a predicament is arrived at, the defendant is required to file an application to the court under section 8 of the

[25] Aditya Sondhi, 'Arbitration in India: Some Myths Dispelled',[2007], 19, Student Bar Review, 48, 50.
[26] (2003) 5 SCC 705.
[27] Aditya Sondhi, 'Arbitration in India: Some Myths Dispelled',[2007], 19, Student Bar Review, 48, 50
[28] Arbitration and Conciliation Act, 1996, s 34.
[29] T.I. Ltd. v. Siemens Public Communications Networks Ltd, (2002) 5 SCC 510.
[30] (2004) 1 SCC 540.
[31] the Arbitration and Conciliation (Amendment) Bill, 2003.

Act[32] and bring the existence of the arbitral agreement to the court's attention. Section 8 authorises the courts to refer the parties to the matter, for arbitration. The provision mandates production of arbitral agreement for scrutiny and only when its genuineness is proved, the court will do the needful.[33] In case of foreign awards, similar provisions exist.[34] This process results in the courts examining the agreement carefully, thus, undermining the agreement and putting the ADR mechanism on a lower footing.

The all-embracing provisions discussed above, raises questions on the credibility of the arbitral tribunal and indicates judicial mistrust on it. Irrefutably and indubitably, the judiciary must have some authority over bodies executing adjudicatory functions. However, the extent of judicial power in this context can be termed as 'extravagant'. The intrusive judicial approach has resulted in antagonizing the ADR mechanism. It has lost its independence and has provided loopholes to the parties who intend on escaping their liabilities.

III. WAY FORWARD

Extrapolating a conclusion from the above, it would be erroneous to state that the judicial case load has been reduced by the ADR machinery. As a matter of fact, it has added items to the list of judicial chores. The superfluous judicial encroachment has crippled the ADR machinery and has prevented it from standing on its own, while increasing its own workload. The mechanism of resolving a dispute amicably was built on the premise that so can be done by deliberations and discussions between parties, outside the taut judicial ambit. This very premise has shattered by the legislature (despite having the best intentions in mind) and judicial pronouncements. On the whole, analysing the paternalistic legislative attempts and the pattern of judicial pronouncements, two conclusions can be drawn. Either, that the judiciary does not have faith in the efficacy of arbitral proceedings and hence feels obligated to interfere or that the parties (citizens at large) are sceptical of the proceedings and thus fall back on the wisdom of the judiciary to adjudicate. The scepticism to the ADR mechanism is not new. It has been combating balking reservations from its outset. Instillation of confidence and annihilation of this disbelief is crucial as the future of ADR hangs on this thread. To extricate the ADR mechanism from the above, colossal reorientation of the system has become the need of the hour. It is manifestly established that both the legislature as well as the judiciary have toiled to conceive a system which will promote and strengthen ADR. To illustrate the same, closer examination of the Supreme Court judgment in the case of

[32] Arbitration and Conciliation Act, 1996, s 8.
[33] Aditya Sondhi, 'Arbitration in India: Some Myths Dispelled',[2007], 19, Student Bar Review, 48, 53.
[34] Arbitration and Conciliation Act, 1996, s 45 & s 46.

 [ISSN 2581-5369]

Mahanagar Telephone Nigam Ltd. vs. Canara Bank[35] must be done. While deciding this matter, Supreme Court applied the "Group of Companies" doctrine and laid down that the other parties, who have not entered into the arbitration agreement, can also be made a part of the arbitration proceedings, if while signing the agreement, circumstances exhibited the intention of signatory as well as non-signatory parties. This evinces the court's open mindedness towards the process. On another occasion, the Supreme Court *rashid raza vs. sadaf akhtar*[36] held that vitiation of arbitral proceedings cannot happen on mere allegations of fraud; in the case of *Hindustan Construction Company Limited versus Union of India*[37] it was ruled that an challenge to the arbitral award in the courts does not automatically stay the execution of the same. These decisions, along with many others, depict the pro ADR approach of the judiciary. The 2015 and 2019 Amendments stand testament to similar legislative attempts. The question remains, however, that in the backdrop of the abovementioned pitfalls, are these efforts 'adequate'.

Establishing a united front is of paramount importance. Both the legislature as well as the judiciary must work in cohesion. If this is not done, no alterations can be made and any attempt by one will be shot down by other, as is the current scenario. Primarily, the legislature must protract its endeavours, which aid in ameliorating the Act. Amendments homogenous to the 2015 and 2019 Amendments must be brought in to remedy the situation. The ramification of earlier legislative actions is the ongoing subservience of the ADR machinery to the judiciary. Thus, the onus is on the legislature itself to correct the same. While judicial supervision is a prerequisite, it has to be circumscribed. This rationale must be imbibed by the legislature, in its law making. Furthermore, the perplexing judicial stance must be clarified. There are certain instances when the judiciary has emphasised on the practicality and profitability of ADR. On the other hand, there are instances where it has obstructed the process. It is of exigent importance that emphasis is made on judgments which aggrandize the ADR mechanism. Time and again, judicial must shed light on the utility and efficacy of ADR in order to stimulate its acceptance. This judicial spotlight will also dispel all the questions raised regarding its mistrust on the mechanism. It will give a boost of confidence to other stakeholders in the matter, to view the mechanism through the lens of optimism and approach it with more certainty. The pre-eminence of the judiciary has to be maintained throughout, however, this dominance must not hamper the natural course of ADR machinery or in any way complicate it (as is the current situation).

[35] AIR 2019 SC 4449.
[36] (2019) 8 SCC 710.
[37] 2019 (6) ARBLR 171 (SC).

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Lastly, the society at large, must relinquish its qualms and imprint some faith in the ADR mechanism. Since its outset, the public at large have been habituated to knock on the doorstep of judiciary for settlement of disputes. Thus, the hesitance to move to another institution can be understood. However, one must take into account the perverse effect is has on the judicial machinery. Not only does it exhaust judiciary with excessive workload, it also distracts the judiciary with matters which can be resolved easily with amicable settlements. Understanding the juxtaposition of a legal battle in the courts and amicable settlement in ADR process can further clarify the dire need for a pro ADR system.

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