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The History and Development of Law of Arbitration in India

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ABSTRACT

The settlement of disputes outside the court system was in existence from the Vedic Period. The Panchayat was entrusted with the duty of dispute resolution which occurred within the jurisdiction of the village. The role of Mediator also found during Vedic period in the name of Madyamasi. The Darmasutras also had a mention about the system without the court interference. The development of modern system of justice leads to the growth of new system of dispute settlement through Court System. The history of the Arbitration has been traced back to Vedic period. The existence of today's system had a great foundation upon the system of dispute resolution as found in various periods. The prevalence of Arbitration s a binding mechanism is got recognised by way of statute. The Arbitration and Conciliation Act of 1996 also reveals the system of dispute resolution procedure. Later the Code of Civil Procedure has recognised the Arbitration system by way of Amendment. Based on the amendment the High Courts also framed the rules for conducting the Arbitration proceedings. The domestic law of India is drafted in compliance with the UNCITRAL Model law on International Commercial Arbitration to have uniformity of Arbitration procedure in the global level.

Keywords: *Vedic Period, Panchayat, Dharmasutras, Arbitration.*

I. INTRODUCTION

The system of dispute resolution is not a new origin since it trace back to the ancient period. The Panchayat system was existed from time immemorial where the head of the village was to control the dispute resolution mechanism. The decision of the head had been accepted and obeyed by the people. There was no recourse against the decision of the Panchayat.

II. THE HISTORY OF ARBITRATION IN INDIA

(A) Hindu Laws in Ancient India

The study of the ancient Hindu law on arbitration and ancient literary works of India such as Vedas, Sutras, Epics and Dharmashastras gives us very useful information about the dispute

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resolution institutions prevailed in the ancient time. The *Smritis* tells us the existence of 3 types of courts like ***Puga*** a board of persons belonging to different sects and tribes but residing in the same locality. The ***Sreni*** was an assembly of tradesmen and artisans. The ***Kula*** an assembly of same caste group, and ***King*** was acted as an appellate court.

During Early Vedic Age(1500 BC to 1000 BC) the period was known as Rigveda the oldest literary work. The Sabha was a house of elders or an assembly of village, Samiti was an assembly of whole people, Vidhata Assembly was to look after the civil, military and religious functions, The Madhyamasi was a mediator of disputes.

During later Vedic Age (1000 BC to 600 BC)This period was known as the period of Samaveda,Yajurveda,Atharvaveda.The king took more active part in the administration of justice. The civil cases were decided by the king with the help of assessors. Sometimes the king used to delegate his powers to Adhyaksha who was a chief justice. The existence of town councils and village Panchayats also found during later vedic period. Sabha was a popular courts acted as arbitrator in certain cases. Sabhapathi considered as judge to settle the boundaries of property.

During Sutras Age(600 BC to 200 BC), Sutras were the manuals of instruction in a brief but in a definite language. Dharma sutras were the customary law and practice. The Parishads was consisted of the learned men of law. The decision on the interpretation of the vedic texts were found in important places.

The Epic Age(500 to 200 BC)Ramayana and Mahabharata were the sources of the dispute resolution in India. King was respected the laws of Pugas or village communities. Sreni was the guilds of particular occupation, kula an assembly of caste members, Sabhas continued the decision of the sabhas was upheld by the king.

During the period of Dharmashastras(9th century A D) this period was popularly known as the era of Manusmriti, Yajnavalkya Smriti, Vishnusmriti, and Narada Smriti. Dr. Priyanath Sen in his book, 'the general principles of hindu jurisprudence' also given an exposition of the dispute resolution institutions prevalent during the period of Dharmashastras. The body of Panchas consisted of five members of panchayats, Parishads was an autonomous body, king acted as a appellate court.

III. IN MEDIEVAL PERIOD

The medieval period was popularly known as the muslim rule in India governed by Islamic law and non- muslims were governed by their personal law. The ***Hedaya*** was a

tahkeem(arbitration) between the parties. ***Hakam*** was an arbitrator, ***Kazee*** an official judge of the court of law. The award passed by the arbitrator was binding on the parties. The court language was Persian. ***Salis*** a Persian word for arbitrator, ***Salisnama*** was an arbitration agreement and any award passed in favour of a parent, child or wife was *void ab initio*.

During Sultans the judicial administration was highly centralised. King was the fountain head of justice and decided the most important cases personally. ***Chief Sardar*** and ***Chief Qazi*** were to assist the sultan in judicial administration. Panchayats were found at village level.

During Marathas rule in India more emphasis was on amicable settlement of disputes. ***Hazr Mazlis*** the highest court of the king, ***Nyayadish*** was a chief juctice to decide both civil and criminal cases. The Village Panchayat was to look after day to day administration of justice. Panchayat was the main instrument of civil justice. The **Mamlatdar** was a representative of Peshwas in the district to assemble a Panchayat outside the village of the disputants. ***Peshwa*** the prime minister and an appellat court to hera the appeal against the Panchayat decision.

IV. IN MODERN PERIOD

Regulations: In the 1770s and 1780s, India enacted the Bengal Regulation Act 1772 and 1781, which provided the disputing parties with an option to submit the dispute to an arbitrator. The arbitrator would be chosen after the parties mutually agreed, a procedure still used in arbitration around the world today. Further, the arbitration awards would be binding on both parties. This pre-colonial arbitration legislation illustrates that arbitration in India has been prevalent and a legal option for more than a hundred years. The Bengal Regulation of 1882 was permitted the references of disputes to civil courts only. It empowered the revenue officer to refer the rent and revenue cases to arbitration and enjoined on the collectors to use every proper means for inducing the parties to refer their disputes to arbitration.

The Madras Regulations of 1816 empowered the Panchayats to settle certain disputes. Section 312 to 327 of the Code of Civil Procedure 1859 dealt with reference to arbitration without the intervention of the court. Section- 28 of the Indian Contract Act, 1872 recognises the arbitration agreement as an exception to the agreement in restraint of legal proceedings. The Arbitration Act, 1899 was confined to arbitration by agreement without the intervention of court.

In 1940, India enacted the Arbitration Act of 1940, which only dealt with domestic arbitration. Under the 1940 Act, judicial intervention was *required* in all three stages of arbitration: before referring the dispute to the arbitral tribunal, during the proceedings, and after the award was passed. The judicial court was required to determine whether a dispute existed and whether it could be resolved through arbitration. Further, before the arbitral award could be enforced, it

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was required to be made the rule of court.

V. AFTER INDEPENDENCE

The Arrears committee known as, Justice Malimath Committee constituted by the government of India on the recommendation of the chief justice conference. The committee has submitted its report in 1990. The committee made recommendation for having alternative modes for dispute resolution such as Arbitration, Conciliation and Mediation. They made the proposal for enacting the new Act.

In 1996 India's legislature enacted the Arbitration and Conciliation Act of 1996. The 1996 Act was modelled after the UNCITRAL Model Law. As Ashok Bhan stated in his inaugural speech during the "Dispute Prevention and Dispute Resolution" conference in India in 2005, the 1996 Acts' "primary purpose was to encourage arbitration as a cost-effective and quick mechanism for the settlement of commercial disputes." The Act is broken down into two parts: Part I of the Act governs domestic and international commercial arbitration that takes place in India and Part II governs foreign arbitration that is conducted outside of India. The enforcement of foreign arbitral awards in India is highly influenced and guided by the New York Convention. The 1996 Act, Section 5 particularly, refuses judicial intervention in arbitration proceedings, diametrically opposed to the 1940 Act.

Section 89 and 104 and Schedule II inserted to Code of Civil Procedure 1908 by the amendment Act of 2002. Section 89 of the Code of Civil procedure was introduced with a purpose of amicable, peaceful and mutual settlement between parties without intervention of the court. In countries all of the world, especially the developed few, most of the cases (over 90 per cent) are settled out of court. The case/ dispute between parties shall go to trial only when there is a failure to reach a resolution. Section 89 of the Code of Civil Procedure States that:

(1) Where it appears to the court that there exist elements of a settlement which may be acceptable to the parties, the court shall formulate the terms of settlement and give them to the parties for their observations and after receiving the observation of the parties, the court may reformulate the terms of a possible settlement and refer the same for

(a) *arbitration;*

(b) *conciliation*

(c) *judicial settlement including settlement through Lok Adalat; or*

(d) *mediation.*

(2) Where a dispute had been referred-

(a) *for arbitration or conciliation, the provisions of the Arbitration and Conciliation Act, 1996 shall apply as if the proceedings for arbitration or conciliation were referred for settlement under the provisions of that Act.*

(b) *to Lok Adalat, the court shall refer the same to the Lok Adalat in accordance with the provisions of sub-section (1) of section 20 of the Legal Services Authority Act, 1987 and all other provisions of that Act shall apply in respect of the dispute so referred to the Lok Adalat;*

(c) *for judicial settlement, the court shall refer the same to a suitable institution or person and such institution or person shall be deemed to be a Lok Adalat and all the provisions of the Legal Services Authority Act, 1987 shall apply as if the dispute were referred to a Lok Adalat under the provisions of that Act;*

(d) *for mediation, the court shall effect a compromise between the parties and shall follow such procedure as may be prescribed.*

If the dispute referred to arbitration and conciliation the provisions of the Arbitration and Conciliation Act of 1996 is made applicable. If the dispute referred to Lok Adalat then section 20(1) of the Legal Services Act of 1987 shall be applicable.

VI. ALTERNATIVE DISPUTE RESOLUTION RULES, 2003

Alternative Dispute Resolution Rules, 2003 are framed to govern the process of settlement outside the court system. Rule 2 says about the procedure for directing parties to opt for alternative modes of settlement. Rule 3 says that the persons authorised to take decision for the Union of India, State Governments and others shall nominate a person who are authorised to take a final decision as to the ADR. Under rule 5 the parties within 30 days shall apply to the court their intention to settle the disputes through ADR the court fixes the procedure for reference to the different modes of settlement.

Rule 7 authorises the courts to conduct training in ADR and preparation of manual. The High Court shall take steps to have training courses and it shall nominate a committee of judges to prepare manuals. The High Court and District Court shall conduct seminars and workshops on ADR mechanisms

In Salem Advocates Bar Association, Tamil Nadu vs Union of India, AIR 2003 SC 189 the challenge made to the constitutional validity of amendments to Code of Civil Procedure. Justice

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M. Jagannadha Rao Committee was constituted to recommend for quicker dispensation of justice. The points for consideration were raised by the committee as follows;

1. The consideration of the various grievances relating to amendments to the code
2. The consideration of various points raised in connection with draft rules for ADR and mediation under Order X Rule I A,IB and IC
3. A conceptual appraisal of case management it also contains the model rules of case management.

In *Renusagar Power Co. v. General Electric Co.,* the Court held that an arbitral award is contrary to the public policy of India if it is contrary to: (1) a fundamental policy of Indian law, (2) the interest of India, or (3) justice or morality. This holding broadens the scope of the term "public policy" and does not help arbitrators and officials in interpreting the legislation, creating room for unpredictability and inconsistent precedent. The subjectivity of the term allows for *every* party to attempt to appeal on the grounds of "public policy," adding to the already backlogged court system.

In *Bhatia International v. Bulk Trading S.A.*, "the bench of three judges relied on what they described as the "spirit" of the 1996 Act when granting an interim measure of protection to the foreign party, invoking Section 9 in Part I (interim measures of protection by the court in pending arbitrations)—even though Part I did not apply, and was not intended to apply to foreign arbitrations." As discussed above, Section 5, restricting judicial intervention, has also been highly disregarded. Foreign investors should be aware of this "spirit of the law" doctrine that the courts use because it provides for unpredictability of the outcome. Further, the unpredictability of outcome may lead to inconsistent arbitration precedent. Be aware that judicial intervention is possible and other sections may be read differently according to the "spirit of the law." This is something foreign investors should highly consider before entering into an arbitration agreement.

VII. CONCLUSION

Thus**,** it can be concluded that, the law of arbitration is not a new concept. It has recognised by way of statute in modern administration of justice. It is a best mechanism available to the litigants to approach outside the court system.

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