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SCOPE OF SECTION 8 & 17 OF THE ARBITRATION AND CONCILIATION ACT, 1996

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ABSTRACT

When will mankind be convinced and agree to settle their difficulties by arbitration?

Benjamin Franklin

Over the past few decades, there has been a dramatic increase in both the number of commercial conflicts and the economic development of nations. As a result, arbitration and other forms of alternative dispute resolution are now more important than ever for organisations doing business with and in India. The purpose of this study is to critically assess the arbitration and conciliation act in India while keeping in mind the larger investigation between the effectiveness of legal performance and economic progress. In addition to focusing on section 8 and section 17 of the act, the article also tries to generate a discussion about the history of arbitration in India by noting any potential procedural faults. The 1940 and 1996 Acts that govern arbitration in India are examined and evaluated in this essay, ADR procedures are commonly used in international commercial arbitration contracts, and arbitration in particular is considered as a way out due to its perceived advantages in terms of time and cost as well as its private, independent, and neutral nature. Arbitration is growing more and more popular among the parties as a means of resolving their international and domestic commercial disputes.

KEYWORDS- ARBITRATION, SECTION 8, SECTION 17, JUDICIAL INTERPRETATION

A brief introduction to Arbitration and conciliation act

The delays and inconsistencies in the Indian legal system are well-known. It is also a well-known fact that our courts are overloaded with loads of cases, making it nearly hard to give the parties who have been wronged prompt and effective relief.

The scenario now is that the alternative dispute resolution (ADR) method, which is more efficient, quicker, and less expensive, is used globally. One such example of the global acceptance of arbitration is when two of the prominent countries India and Pakistan referred to arbitration for the Indus water dispute.

There are generally four options under the ADR mechanism:

- Negotiation
- Mediation
- Conciliation
- Arbitration

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Although the first two methods are not recognised by law, conciliation and arbitration are quasi-judicial processes that can be used to settle a disagreement with the least amount of outside assistance. The 1996 Arbitration and Conciliation Act now recognises the same (ACT 26 of 1996). The proper conduct of arbitration procedures and the execution of arbitral rulings have always been supported by the courts.

I. A brief history of the act

The history of Arbitration and conciliation act [441](herein after referred as "act") dates back to the concept of panchayats that existed wherein the citizens entrusted the power of the decisions related to the management of religion and social function to these panchayats and agreed to be bound with the decision. However when the East India Company took over the country regulations related to arbitration were framed by the company, the objective behind the same was to make these laws ready to govern domestic as well as international commercial arbitration.

Further, post-independence, the act came into force from 22nd August 1996 as the arbitration act of 1940 was facing a lot of criticism and had some reasonable shortcomings. The act of 1996 consolidated and amended laws which related to Arbitration, International Commercial Arbitration and also the enforcement of the foreign arbitral awards.

The latest amendment in the act was in the year 2015, despite the efforts of legislature to make India a pivot in the proceedings of arbitration there were still shortcomings in the act, to address the concerns the Ministry of Law and Justice invited suggestion from some eminent lawyers, jurists and legal experts of the country regarding the functioning of the 1996 act and accordingly amendments were made in the act.

Arbitration gained its relevance when two of the prominent countries (India and Pakistan) preferred arbitration for the Indus[442] water dispute that arose between them.

Though the legislation has tried its level best to address all the shortcoming that existed in the act but there are still some considerable shortcomings which the legislature should consider and make the required changes in order to give more teeth to the act.

II. A brief overview of the Arbitration and Conciliation Act.

The act was made part of the constitution on January 25, 1996. It provides for international commercial arbitration, domestic arbitration and the enforcement of foreign arbitral awards. It gains its basis from the UN model of law and is equal to the law adopted by the United Nations Commission on International Trade Law. The act is further divided in to four parts

A. Part I – (sections 2-43) – Applicable to the arbitrations taking place in India. The award granted is treated as domestic award.

B. Part II-(sections 44-60) – Talks about the enforcement of foreign awards.

C. Part III- (sections 61-81) – Process of Conciliation

D. Part IV- (sections 82-86) - Supplementary provisions.

The act contains three schedules

- Schedule I – Convention on the recognition of foreign awards of arbitration
- Schedule II – Protocol to be followed on arbitration clauses
- Schedule III- Convention on the execution of foreign arbitral awards [443]

The act further defines arbitration, arbitration agreement, arbitral awards, arbitral panel, courts and also international commercial arbitration. The act also illustrates the list of all such matters that are excluded from arbitration proceedings. Lastly the act also defines about

[441] The Arbitration and Conciliation act , 1996.

[442]THE HINDU , https://www.thehindu.com/news/national/indus-waters-treaty-world-bank-appoints-neutral-expert-(last visited June , 5 2023)

[443] Monesh Mehndiratta , Arbitration and Conciliation Act , 1996 Ipleaders Blog (Jun. 5 ,2023) https://blog.ipleaders.in/arbitration-and-conciliation-act-1996/

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the conduct of the arbitrators, arbitral panel their removal and also their remuneration.

Even though the legislation has tries level best to address all the shortcomings of the act still there exists some lacunas, some of which are highlighted below.

Section 8 of the arbitration and conciliation act states the -

Power to refer parties to arbitration where there is an arbitration agreement.—

1. A judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration.

2. The application referred to in sub-section (1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof.

3. Notwithstanding that an application has been made under sub-section (1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made.

In the landmark case, *P. Ganjapathi Anand Raju & Anr. Vs. P.V.G Raju & Ors*[444], the court laid down the need and importance of Section 8 under the Arbitration Act.

The following aspects need to be covered before making application under section 8 of the act:-

A. It is necessary to analyse whether it can be made applicable under civil dispute, based on the applicability Sec 8 can be imposed. Further in the case of *H. Shirninvas Pai vs. H.V Pai the court*[445] said that the act applies to domestic arbitration, international arbitration, and commercial conciliation. The Applicability of the act will not depend on the dispute being a commercial arbitration but rather it depends upon the existence of arbitration agreement between the parties and not on the question that it a commercial or civil dispute.

B. The presence of an arbitration agreement between the disputant parties is another significant aspect of seeking reference under Section 8 of the Arbitration Act, the same is defined under section 7 of the act.

Section 8 of Arbitration and Conciliation plays a significant aspect to limit judicial intervention in the process of arbitration. However, the judiciary has drawn exceptions on intervention on the basis of the arbitrability.

The courts every now and then have widened the scope of the term Judicial Authority the Supreme Court in *Fair Air Engineers Pvt Ltd., v. NK Modi*, held that the State Commission and the National Commission under the Consumer Protection Act, 1986 are to be treated as "Judicial Authority".

It was also said that a commission under the Monopolies and Restrictive Trade practices act, 1969 is also judicial authority. In the case of *Canara Bank v. Nuclear Power Corporation of India Ltd*, the Apex Court held that the Company Law Board can be considered a judicial authority.

The interpretation of the term judicial authority has not been specifically stated and the apex court through various judgements has widened its interpretation thereby creating an ambiguity. With an intention to restrict the scope of judiciary at pre- arbitral stage the prima facie test was introduced in the 2015 amendment which stated that a court at the section 8 stage itself should determine not only the existence but also the validity of arbitration agreement, disregarding the principle of Kompetenz-Kompetenz.

Further through an ordinance the president promulgated the Arbitration and conciliation (amendment) thereby amending section 8 of the act by stating that non-signatories to an arbitration agreement may not join in the

[444] , P. Ganjapathi Anand Raju & Anr. Vs. P.V.G Raju & Ors (2000)4SCC539

[445] H. Shirninvas Pai vs. H.V Pai (2010) 12 SCC 521

arbitration. A further change to Section 8 mandates that if the judicial authority determines that a legitimate arbitration clause prima-facie exists, it must compulsorily refer the parties to arbitration regardless of any ruling by the Supreme Court or any other court. The amendment has further nullified the judgment of the apex court in *Booz Allen Hamilton v. SBI Home finance*[446], where it had ruled that serious allegations of fraud are not arbitrable.

Although the exclusions made by the judiciary are invalidated by the Amendment to Section 8 of the Arbitration and Conciliation (Amendment) Ordinance, 2015, the effects of the amendments are still to be determined. Limiting judicial participation in the arbitration process is achieved in large part through Section 8 of the Arbitration and Conciliation Act. On the grounds of arbitrability, the judiciary has made exceptions for intervention, though. Section 8 of the Arbitration Act is still seen as acting as a guiding light for arbitration.[447]

Another important section that the paper seeks to highlight is section 17 of the act.

Section 17 of the arbitration and conciliation act states that

Interim measures ordered by the arbitral tribunal.—

(1) Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order a party to take any interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject-matter of the dispute.

(2) The arbitral tribunal may require a party to provide appropriate security in connection with a measure ordered under sub-section.

Some of the interim measures are stated below:-

A. Appointment of guardian for a party suffering from any legal disability.

B. The subject matter is to be when preserved, kept in interim custody, or had to be sold.

C. Depositing of the amount in court with respect to which dispute has arisen.

D. Detention, preservation, and inspection of any immovable property.

E. Allow any person to enter upon any land or building in possession of any party for collection of samples, conducting experiments, or making observations.

F. Interim injunctions.

G. Appointment of receiver.

The above mentioned list of interim measures is not exhaustive in nature as u/s 17(1) (e) of the act mentions the residuary clause wherein the tribunal can order any other interim measures related to the proceedings.

In order to further understand the issue it is of primary importance to get acquainted with the reasoning behind the introduction of the above stated amendment in section 17 of the act.

In the year 2001, the Government made a reference to this Commission to undertake a comprehensive review of the Arbitration and Conciliation Act, 1996 in view of the various shortcomings observed in its working and also various representations received by the Government in this regard. Further in the year 2010 the Ministry of Law and Justice requested the law commission to undertake a study of the amendment proposed.

One such recommendation of the law commission was certain amendments in the section 17 to provide the arbitral tribunal the same powers as a civil court in relation to grant of interim measures. Such provision, as per the Commission, will force the defaulting parties to approach the Arbitral Tribunal for interim relief once the tribunal has been constituted. The arbitral tribunal should continue to have powers to grant interim relief post-award.

[446] Booz Allen Hamilton v. SBI Home finance CIVIL APPEAL NO.5440 OF 2002
[447] , P. Ganjapathi Anand Raju & Anr. Vs. P.V.G Raju & Ors (2000)4SCC539

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The Madras court in the judgment of *Sundaram Finance Ltd Vs. P Sakthivel*[448] *[CRP (MD) No. 2013 of 2018]* held that the power vested with the tribunal of granting interim measures is not less than that of a regular court (under section 9 of the act) moreover the court also emphasized that section 17(1) should be read in consonance with section 94 (supplemental proceedings) of CPC, 1908. The relevant provisions are stated hereby:-

(d) Appoint a receiver of any property and enforce the performance of his duties by attaching and selling his property;

(e) Make such other interlocutory orders as may appear to the Court to be just and convenient.

Further the court observed that whenever the arbitral panel passes an interim order u/s 17 of the act it has to follow the procedure laid down under section 136 of the CPC, 1908 which illustrates the procedure that is to be followed when a person is to be arrested or the property to be attached is outside the district. Section 136 specifically states that the court in which the application is filed for the attachment of the property or issue of the warrant and the particular property or the person is not residing within the jurisdiction of the honourable court then the court is empowered to make an order to that extent and send the particular details to the district court within the local limits of whose jurisdiction such property is situated or person resides Due to the fact that the Arbitral Tribunal cannot carry out the interim Order on its own and that its order must be given equal weight with the Court, even for orders passed under Section 17, the procedure outlined in Section 136 must be followed, and no judicial order from the District Court is necessary to carry out the Interim Order. In order to be clearer, it was also determined that when dealing with section 136, the district court is only performing a ministerial duty and is ineligible to sit in appeal over the decision made by the Arbitral Tribunal because an interim order is subject to appeal under section 37(2)(b) of the Act.

After the above judgement there were several issues raised which were further addressed by the Bombay high court in *Godrej Properties Ltd vs. Goldbricks Infrastructure Pvt. Ltd* [449]

It was observed that the fairness of procedure would not permit the arbitral tribunal to pass an ex-parte order on a section 17 application without showing any extreme urgency without issuance of a notice and hearing being granted. Relief part of such petition was also considered wherein the court observed that the relief sought in the application were not of such nature that in case such relief is not granted, the applicant would be placed in a prejudicial position that no restitution of such position was possible. The high court has further categorically stated that the arbitral tribunal cannot exercise such power in view of the provisions of section 24(2) read with section 18 of the Act, as it prescribes that a party shall be given sufficient advance notice of any hearing and further qualified with an obligation of the tribunal to treat all parties equally and that each party should be given full opportunity to present its case, which is required to be recognised to be applicable at all stages of the proceedings before the arbitral tribunal.

Further there is also a possibility of the possible misuse of the interim arbitral award

Arbitration is used as a method of resolving disputes in contracts involving small-scale business loans as well as those involving large-scale commercial transactions. It is crucial to protect the rights of small borrowers who are forced to sign conventional financial institution agreements with mandatory arbitration clauses, which throw party sovereignty out the window.

Although the scope of actions that may be conducted under interim orders while the arbitration proceedings are ongoing has been

[448] Home Secretary St. George Fort v. G. Sugumaran, 2019 SCC OnLine Mad 33544

[449] Godrej Properties Ltd. v. Goldbricks Infrastructure (P) Ltd., 2021 SCC OnLine Bom 3448

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expanded by the revision to section 17. The execution court may sit in appeal over the orders passed by the tribunal, which would further delay the process and defeat the immediate nature of an arbitration proceeding. However, when an order is passed, the court also applies its judicial mind, which necessarily means a review of the order passed by the tribunal. According to arbitration jurisprudence, if a party disobeys the tribunal's orders, the tribunal has the authority to draw a negative inference and take that into account when it makes a final decision based on the merits of the case. However, to infer that the arbitral tribunal lacks any authority would be incorrect. Introduce a quasi-self-enforcing framework, similar to the English Arbitration Act, 1996, where the tribunal has the authority to impose some restricted forms of sanctions for disobeying its orders.

With regard to section 17(2), the same thing can happen. When an application is made for the enforcement of an order at the request of the tribunal or a party to the dispute, the courts must resist the urge to review the tribunal's orders because they are not permitted to issue interim orders after the tribunal has been established (unless the tribunal is not authorised to do so).

III. Conclusion

At last the author concludes that the evolution of Section 17 of the Act clearly shows that arbitral tribunals are now given the authority to handle interim measures on their own, without the need for court participation. This enables the parties to publicly support arbitration rather of bringing their problems before the courts and asking for temporary redress. Additionally, the interplay of CPC laws demonstrates that, while the arbitral tribunal has sufficient authority to act freely, it may also abide by guiding principles that would aid it in making a judgement. Given the foregoing, a sub-provision may be added to Section 17 of the Act to permit the Tribunal to decide on contempt, improving the arbitrators' flexibility and lessening the load on the courts.

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