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APPLICABILITY OF CODE OF CIVIL PROCEDURE, 1908 AND INDIAN EVIDENCE ACT, 1872 IN ARBITRAL PROCEEDINGS

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ABSTRACT

One of the main advantages of having recourse to the arbitration instead of the regular court of law is said to be its being speedier in nature. However, the above purpose seems to get frustrated due to the delay caused by the applicability of the technicalities of the procedural laws such as the Code of Civil Procedure, 1908 and the Indian Evidence Act, 1872 by the arbitral tribunal or by the counsel for the parties during the arbitral proceedings. Though, it is so provided in various Acts like Indian Evidence Act, 1872, Code of Civil Procedure, 1908, the Arbitration & Conciliation Act, 1996 that the provisions of above-stated procedural laws shall not be applicable on the arbitral proceedings and has also been clearly held by the Constitutional Courts in India repeatedly that the above-stated procedural Code and the Act shall not be applicable in whole but basic principles of them have been allowed to be invoked to deliver the justice to the litigants by the arbitrators. However, none of the judgments clearly lays down which is the *Laxman Rekha* for the Arbitrators or as to which of the procedural provisions are applicable and which are prohibited. This paper has been written to examine the above-stated aspects in detail.

Keywords: #adr #cpc #evidence #arbitration #procedure

I. Introduction:

For adjudication of civil disputes, particularly commercial/ contractual in nature, Indian laws provide for several kinds of disputes resolution mechanism such as Courts of law, Arbitration, Conciliation, Mediation, *judicial settlement including settlement through* Lok Adalat[1665], etc. There are three tiers of courts of law in India i.e. Trial Courts, High Courts and Supreme Court. If a person needs to file a civil suit, then he has to approach the appropriate court of law as per its territorial and pecuniary jurisdiction. The disputes among the parties are adjudicated upon by the courts of law as per the substantive laws of the land. However, for conduct of the proceedings, certain procedural laws have been provided including the Code of Civil Procedure, 1908 and Indian Evidence Act, 1872, the provisions of which must be applied by the Judges for arriving at their final decisions. It is a perceivable and an acknowledged fact that courts in India take a very long time, sometimes more than a decade, to adjudicate upon the civil disputes between the litigants. The Code of Civil Procedure, 1908 and Indian Evidence Act, 1872 are mostly considered by all concerned as the main perpetrator for the above-stated delay. However, it is also a well-established fact that a fair and proper adjudication of disputes is not possible without application of the above procedural laws in the adjudication process of the courts of law. For speedy adjudication of the commercial disputes, a special Act was enacted by the Parliament of India i.e. the Commercial Courts Act, 2015 (4 of 2016) whereby special commercial courts have been established. However, that Act seems to have not achieved its purpose - credit allegedly goes to the applicability of the Code of Civil Procedure, 1908 and Indian Evidence Act, 1872

[1665] Section 89 of the Code of Civil Procedure, 1908

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with full vigor in the proceedings of the commercial courts also.

II. Need of arbitration:

Another dispute resolution mechanisms in India is arbitration which has been carefully conceived to solve the issue of mounting arrears of cases pending in the courts of law. Arbitration is said to have been existing in our ancient justice delivery system in the form of Panchayats. M.A. Sujan observes: "In popular parlance, arbitration may be defined as a private process set up by the parties as a substitute for court litigation to obtain a decision on their disputes."[1666] Arbitration is widely considered to be an effective alternative for the regular courts of law empowered to dispense speedy justice for a limited class of the disputes such as commercial ones. Other projected benefits include arbitration being confidential (an eyewash as almost all arbitral awards get challenged in the courts of law u/s 34 of the Arbitration & Conciliation Act, 1996 which makes the parties names as well as their agreements and other documents public) and economical (which may not be true in case of small scale disputes for which much higher fee than to a court of law is payable to the arbitrator as per Schedule 4 of the Arbitration & Conciliation Act, 1996).

III. Arbitration & Conciliation Act, 1996 - A self-contained code:

The Arbitration and Conciliation Act, 1908 (hereinafter "*the Act*" for short) is said to be a self-contained code allegedly providing within it all the procedural and substantial aspects of arbitral proceedings. One of the reasons for above understanding is that section 19(1) of the Act preciously provides that the arbitral tribunal shall not be bound by the Code of Civil Procedure, 1908 or the Indian Evidence Act, 1872. The above section gave a row of hope to the litigants that their disputes would be resolved speedily with the effectiveness of a court. However, what actually happened was that the Act became a tool of harassment in the hands of those parties who had superior contracting power against those who were at the receiving end. Big builders, vehicle dealers, various suppliers of goods and services, mighty retailers, seasoned shopkeepers, etc. used to provide an arbitration clause in their standard form contracts/ invoices/ bills, etc. which used to provide authority to them to appoint the arbitrator in case any disputes used to be raised by the end consumers which are generally on the weaker side in the contracts without having any real power to bargain/ object to the unfair contractual terms. Such arbitrators used to keep the arbitration matters pending for years and years. It was also commonly known that some of the retired judges used to be the arbitrators in so many arbitration cases that they used to provide next date of hearings after a gap of six or more months, which completely defeated the purpose of enactment of the Arbitration & Conciliation Act, 1996. Considering all these aspects, a major amendment in the Act was carried out *vide* Arbitration & Conciliation (Amendment) Act, 2015 (3 of 2016) in which a period of one year was fixed for conclusion of arbitral proceedings which was later on enlarged to one and half year (six months for completion of pleadings and one year for remaining proceedings like cross examination of witness and oral arguments etc.) *vide* Arbitration & Conciliation (Amendment) Act, 2019 (33 of 2019). Though, the above amendments have forced the arbitral tribunals to publish their awards within a fixed time frame; however, most of the arbitrators are unable to publish their awards within the given time frame and the parties have to extend the time by mutual consent for up to six months as per section 29A(3) of the Act. Some arbitrations get delayed even beyond this period and the parties have to approach the Courts to get the mandate of the Arbitrators extended under section 29A(4) of the Act. The delay is almost always attributed to the habits of the arbitrators and counsel of the parties of applying various

[1666] M.A. Sujan: *Law of Arbitration*, 1994 Ed., page 4.

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provisions of CPC and Evidence Act during the arbitral proceedings. In this paper, I would be analyzing those reasons and factors which force the arbitrators and lawyers alike to take recourse to the provisions of CPC and Evidence Act. Further, I would be examining which of the provisions of the CPC and Evidence Act have been held to be applicable in arbitral proceedings being principles of natural justice and being necessary for effective and proper adjudication of the disputes by the arbitrators and which of the provisions of CPC and Evidence Act have been held to be not applicable in arbitral proceedings.

A. Statutory provisions:

Section 19 of the Act provides as under:

19. Determination of rules of procedure. —

(1) ***The arbitral tribunal shall not be bound by the Code of Civil Procedure, 1908 (5 of 1908) or the Indian Evidence Act, 1872 (1 of 1872).***

(2) Subject to this Part, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting its proceedings.

(3) Failing any agreement referred to in sub-section (2), the arbitral tribunal may, subject to this Part, conduct the proceedings in the manner it considers appropriate.

(4) The power of the arbitral tribunal under sub-section (3) includes the power to determine the admissibility, relevance, materiality and weight of any evidence.

(Emphasis added)

Further, Section 1 of the Indian Evidence Act, 1872 provides as under:

1. Short title. –– This Act may be called the Indian Evidence Act, 1872.

Extent. –– It extends to the whole of India and applies to all judicial proceedings in or before any Court, including Courts-martial, [other than Courts-martial convened under the Army Act (44 & 45 Vict., c. 58)] [the Naval Discipline [29 & 30 Vict., c. 109] Act or the Indian Navy (Discipline) Act, 1934 (34 of 1934),] [or the Air Force Act (7 Geo. 5, c. 51)] but not to affidavits presented to any Court or officer, ***nor to proceedings before an arbitrator***,

Commencement of Act. - And it shall come into force on the first day of September, 1872.

(Emphasis added)

Further, the "Long Title" of the Code of Civil Procedure, 1908 is as under:

> An Act to consolidate and amend the laws relating to the ***procedure of the Courts of Civil Judicature.***

(Emphasis added)

In this regard, section 3 of the Indian Evidence Act, 1872 provides the definition of the term "court" as used in the "Long Title" of the Code of Civil Procedure, 1908 as under:

> **3. Interpretation-clause.––** In this Act the following words and expressions are used in the following senses, unless a contrary intention appears from the context: ––
>
> > **"Court".––**"Court" includes all Judges and Magistrates and all persons, ***except arbitrators***, legally authorized to take evidence.

(Emphasis added)

Thus, the Code of Civil Procedure has been enacted to consolidate and amend the laws relating to the procedure of the Courts of Civil Judicature only and not for the arbitral proceedings. Thus, as per the above-stated statutes, provisions of the Code of Civil Procedure, 1908 and the Indian Evidence Act, 1872 are not applicable to the arbitral proceedings.

B. Applicability of the basic principles of CPC & Evidence Act theory:

Though one of the parties or both of them sometimes during the arbitral proceedings argue that CPC and Evidence Act are not applicable by virtue of Section 19 of the

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Arbitration & Conciliation Act and Section 1 of the Indian Evidence Act; however, it is not *res-integra* that CPC and Evidence Act in whole are not applicable, but their basic principles that are required for doing natural justice and fair play are applicable to the arbitral proceedings as well as to any other judicial and quasi-judicial proceedings.

It is submitted that although Section 1 of Evidence Act states that Evidence Act does not extend and apply to the proceedings before the arbitrator; the courts have consistently held 'Technical rules of evidence do not apply in domestic enquiry, but rules of evidence embodied in natural justice cannot however be ignored[1667]. This provision states that the Evidence Act will be applicable to the proceedings before the court, which impliedly makes it inapplicable to other Tribunals, administrative offices, quasi-judicial bodies, etc. This does not mean that these non-judicial bodies adjudicate without any principles or laws of evidence because for delivering fair and equitable justice, it is mandatory to apply the basic principles of the Evidence Act as well as CPC. This has been the consistent position of law without any transgression or judgment to the contrary. The Apex Court in the case of ***Municipal Corporation of Delhi* v. *International Security and Intelligence Agency***[1668] has held that "The applicability of provisions of the CPC to the Arbitral proceedings under the Arbitration and Conciliation Act shall be subject to affect any rights of a party under a special law or local law in force concerning the arbitration proceedings. And that the provisions of the Code of Civil Procedure can be applied if they are not inconsistent with the provisions of Arbitration and Conciliation Act."

Reference may also be made to the judgments in the cases of ***Rashmi Housing Private Limited* v. *Pan India Infraprojects Private Limited***[1669] (paras 16, 52, 53, 54, 55, 56, 57, 58); ***Bareilly Electricity Supply Co. Ltd. vs. The Workmen and Ors.***[1670](paras 20, 21, 27); ***Sukumar Chand Jain and Ors. vs. Delhi Development Authority***[1671] (para 8), etc.

It is submitted that the purpose of arbitration is not to do away with justice by hasty trial; in fact, it is to provide for *'fair and efficient settlement of disputes'* as mentioned in the preamble of the Act. Arbitral proceedings cannot be conducted in a way to pass the award based on hunches, perceptions, conjectures, assumptions, prejudices and half backed experience which are bereft of any evidence available on the record. Hence, the principles of the CPC and the Evidence Act, which are required for the delivery of justice and fair play are applicable even to the arbitral proceedings.

C. Provisions of CPC and Evidence Act which have been held to be applicable in arbitral proceedings:

Most of the times, the arbitral tribunal conducts its proceedings as is carried on in the courts of law for example:

1. **Order XI Rule 4 CPC - Submission of statement of admission/ denial of documents:**

   Both the parties are generally directed by the arbitral tribunals to submit their statements/ affidavits containing admission or denial of the documents filed by the opposite party. Order 11 Rule 4 of the CPC mandates the parties to set out explicitly whether such party is admitting or denying the documents. The Act does not provide for filing of such affidavits or statements. This provision has been clearly adopted from the CPC and is followed during arbitral proceedings.

2. **Order XIV Rule 1 CPC - Framing of issues:**

   It is a basic principle of adjudicatory process to frame the issues without which the arbitral proceedings cannot be streamlined as well as the cause of

[1667] *Central Bank of India Ltd.* v. *Prakash Chand Jain*, AIR 1969 SC 983
[1668] AIR 2004 SC 1815
[1669] MANU/MH/2271/2014
[1670] AIR 1972 SC 330
[1671] MANU/DE/3054/2009

disputes and reasons for the award may not be properly addressed by the arbitral tribunal. Though section 23(1) of the Act directs the claimant to state in its statement of claims, the facts supporting its claims along with the points at issue; however, there is no clear mandate to the arbitrator to frame the issues. Thus, this provision is also borrowed from the CPC and Evidence Act by the arbitral tribunal and has been recognised to be a valid and necessary process.

3. **Order XVIII Rule 4(1) CPC - Evidence By Way Of Affidavit:**

Once pleadings are complete and if the parties have disputed facts stated and documents filed by each of them, it becomes incumbent upon the arbitral tribunal to provide them opportunity of proving the facts stated in their pleadings and also to prove the existence/ correctness/ delivery/ execution of the documents relied upon by them. For that, the tribunal allows parties to produce their witnesses and to file their evidence by way of affidavit for which there is no provision in the Act. Hence, this provision of CPC and Evidence Act is also borrowed for effective and valid adjudication by the arbitral tribunals.

4. **Order XVIII Rule 4(2) - Cross examination of the witness:**

Once the tribunal allows the parties to file evidence by way of affidavit of their witnesses then the tribunal necessarily has to allow the other party to cross examine those witnesses. For that, the concerned party has to produce the witness before the Tribunal, administer oath, do examination-in-chief. Thereafter, the Tribunal has to allow the other party to cross examine the witness. All these provisions have not been encapsulated in the Act and are completely borrowed from the CPC and Evidence Act which have been held to be a valid and required process of adjudication by the arbitrators.

5. **Order II Rule 2 CPC - Principle of *res judicata*:**

Order II Rule 2 of CPC provides as under:

2. Suit to include the whole claim.—

(1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish and portion of his claim in order to bring the suit within the jurisdiction of any Court.

(2) Relinquishment of part of claim.—Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.

(3) Omission to sue for one of several reliefs.—A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs; but if he omits, except with the leave of the Court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted.

Explanation.—For the purposes of this rule an obligation and a collateral security for its performance and successive claims arising under the same obligation shall be deemed respectively to constitute but one cause of action.

It is submitted that the above principle of *res judicata* has been held to be applicable to the arbitral proceedings. This proposition also includes that the claims that were raised by the claimant in the previous arbitral proceedings cannot be entertained or allowed in any other subsequent arbitral proceedings. Also, that the cause of action for which the claims could have

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been raised in the previous arbitral proceedings cannot be raised in any other subsequent arbitral proceedings even if they were not raised or pressed in the previous arbitral proceedings; all claims arising out of the cause of action which was the subject matter of the previous arbitral proceedings ought to be held as being barred/ waived irrespective of them being raised or not-raised by the claimant in the previous arbitral proceedings. It is the established position of law that the cause of action which gives occasion to, and forms the foundation of the suit, if that cause enables a man to seek for larger and wider relief than that to which he limits his claim, he cannot afterwards seek to recover the balance by another independent proceeding.

Hon'ble High Court of Delhi in ***Gammon India Ltd. & Ors.* v. *National Highways Authority of India***[1672], has held that the broad principles which are encapsulated in Order II Rule 2 CPC, as also Section 10 and Section 11 of the CPC are applicable to Arbitral proceedings as they would by themselves be inherent to the public policy of adjudication processes in India. Reference may also be made to the judgments passed in the cases of ***K.V. George* v. *Secretary to Government, Water and Power Department, Trivandrum & Ors.***[1673], ***Hooghly River Bridge Commissioners* v. *Bhagirathi Bridge Construction Co. Ltd.***[1674].

6. Section 101 to 103 of the Indian Evidence Act - Burden of proof:

It is submitted that the Act does not provide the procedure for discharging the liability of the parties to prove their claims and for appreciation of evidence by the arbitrator for adjudication of disputes between the parties. Section 19(2) and 19(3) of the Act leave it to the parties or the arbitrator, as the case may be, to follow the procedure whichever they deem fit and proper for the conduct of arbitral proceedings. However, in all the arbitral proceedings, the procedure for proving the disputed facts and documents is adopted from the following provisions of the Indian Evidence Act, 1872:

Section 101 of the Indian Evidence Act, 1872 provides as under:

> **101. Burden of proof. ––** Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist. When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.
>
> **Illustrations**
>
> (a) A desires a Court to give judgment that B shall be punished for a crime which A says B has committed. A must prove that B has committed the crime.
>
> (b) A desires a Court to give judgment that he is entitled to certain land in the possession of B, by reason of facts which he asserts, and which B denies, to be true. A must prove the existence of those facts.

Then Section 102 of the Evidence Act provides as under:

> **102. On whom burden of proof lies. ––** The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.
>
> **Illustrations:**
>
> (a) A sues B for land of which B is in possession, and which, as A asserts, was left to A by the will of C, B's father. If no evidence were given on either side, B would be entitled to retain his possession. Therefore the burden of proof is on A.
>
> (b) A sues B for money due on a bond. The execution of the bond is admitted, but B says that it was

[1672] AIR 2020 Delhi 132 (paras 25, 26, 32, 33, 34)
[1673] AIR 1990 SC 53 (paras 16, 17, 18, 19)
[1674] AIR 1995 Cal 274

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obtained by fraud, which A denies. If no evidence were given on either side, A would succeed, as the bond is not disputed and the fraud is not proved. Therefore the burden of proof is on B.

103. Burden of proof as to particular fact. –– The burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

Illustrations:

(a) A prosecutes B for theft, and wishes the Court to believe that B admitted the theft to C. A must prove the admission.

(b) B wishes the Court to believe that, at the time in question, he was elsewhere. He must prove it.

It is a well settled principle of law that burden lies upon the plaintiff/ claimant to prove its own case. Sections 101 and 102 of the Indian Evidence Act clearly lay down that the burden of proving a fact always lies upon the person who asserts it. Until such burden is discharged, the other party is not required to be called upon to prove its case. The adjudicating authority has to examine as to whether the person upon whom the burden lies has been able to discharge his burden. Until he arrives at such conclusion, the adjudicating authority cannot proceed to allow the claims/ reliefs on the basis of weakness of the other party. The law provides that there is no room for any presumption when the facts can be proved by evidence. It is submitted that no claims can be allowed without proving them with sufficient and reliable evidence. This is the basic principle of law which has to be followed for fair and equitable adjudication. In fact, the UNICITRAL Rules on which the Arbitration and Conciliation Act, 1996 is based (as mentioned in the preamble of the Act) also provides for the application of this basic principle. Article 24(1) of the UNICITRAL Rules provides "*Each party shall have the burden of proving the facts relied on to support his claim or defence.*"

The above procedure as provided in the section 101 to 103 of the Indian Evidence Act has been held to be applicable to the arbitral proceedings also. Reference may be made to the judgments passed in the cases of ***Rashmi Housing Private Limited v. Pan India Infroprojects Private Limited***[1675], ***Pradyuman Kumar Sharma and Ors. v. Jaysagar M. Sancheti and Ors***[1676], ***Bareilly Electricity Supply Co. Ltd. v. The Workmen and Ors.***[1677], ***Rangammal v. Kuppuswami & Ors.***[1678]. It has been held in the above cases that the burden of proof, even in the arbitration cases, is on the party making the claims and if the claiming party fails to discharge this burden by not producing reliable and sufficient evidence then the claim fails and no compensation can be allowed. If an arbitrator does not follow the above procedure and passes the arbitral award in ignorance or violation of above principles of Evidence Act then it is liable to be set aside by the courts of law under section 34(2)(b) of the Act being in contravention of fundamental policy of Indian law as well as being in conflict with the most basic notions of morality or justice.

In ***Hooghly River Bridge Commissioners v. Bhagirathi Bridge Construction Co. Ltd.***[1679], Hon'ble High Court of Calcutta held as under:

> 104. ...***It is true that the rules of Evidence Act have no application in an arbitration proceeding***. While the Court considering an application under Section 30 of the Arbitration Act, the Court is not concerned with the quality and quantity of the evidence, but it would be beyond anybody's comprehension that the arbitrators would be able to adjudicate upon the complicated issues both of facts

[1675] MANU/MH/2271/2014 (paras 16, 52, 53, 54, 55, 56, 57, 58)
[1676] MANU/MH/0244/2013 (para 32)
[1677] AIR 1972 SC 330 (paras 12, 15, 20, 21, 23, 26, 27)
[1678] AIR 2011 SC 2344 (paras 14, 15, 17, 18, 20, 21, 22, 24, 25)
[1679] AIR 1995 Cal 274

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as well as laws although basic documents have not been filed before it. From the records it appears that only some copies of the correspondences passed between the parties had been filed which at best merely state the claim put forward by one party and denial thereof by the other. Such correspondences by themselves in a case of this nature where extra works, escalations and damages have been claimed may not be considered to be the evidence for the purpose of proof of claims. As noticed hereinbefore, specific case of the petitioner was that some of the claims put forth by the respondent No. 1 had already been claimed and adjudicated upon in the previous arbitration proceedings. If copies of such claims and/or awards have not been filed so as to enable the arbitrator to apply their mind as to whether the contention of the petitioner in that regard is correct or not the award could be sustained. ***This Court is certainly not concerned with the merit of the claim but, in my opinion, the principles of natural justice and fair play in action require some basic evidence either oral or documentary before the arbitrators which would enable them to arrive at a just and fair conclusion.*** The petitioners, however, had examined one witness as is evident from the award itself. The petitioner filed an affidavit which was considered to be the evidence on its part. The learned Counsel for the respondent No. 1 cross-examined the said witness merely on legal question. Thus, even no factual basis had been laid down for the purpose of adjudication.

105. **In Aboobaker Latif v. Receiption** Committee it was held that ***an arbitrator is not bound by the technical rules of evidence, but he must not disregard the rules of evidence which were found on fundamental principles of justice and public policy***.

(Emphasis Supplied)

It is further submitted that the necessity of adopting the above principle of burden of proof from the Indian Evidence Act in the arbitral proceedings is that if a breach of a term of contract permits a party to the contract not to perform the contract, the burden is squarely on that party which complains of breach to prove that the breach has been committed by the other party to the contract. The test in such a situation would be who would fail if no evidence is led[1680].

It is an established principle of law that the documents which have been denied, cannot be relied upon by Hon'ble Tribunal until and unless they are proved as per the provisions of the law. Every assertion, every claim, even every entry in the books of accounts maintained in the regular course of operation like deployment of machinery on the site, employment of labour on site, extra use of material and resources, loss of profit & business opportunity, etc. have to be duly proved by production of relevant documents and by leading the witnesses[1681].

7. Order 1 CPC - Necessary and proper parties:

There is a concept of necessary party and proper party in civil suits. The distinction between the two is that a necessary party is one without whom no order can be made effectively; a proper party is one in whose absence an effective order can be made but whose presence is necessary for a complete and final decision on the question involved in the proceeding.[1682]. Rule 10(2) of Order 1 of the CPC also indicates as to who is to be termed as a necessary or a proper party. This provision empowers the court to add the name of any person, namely, (*i*) who ought to have been joined and (*ii*) whose presence before the court may be necessary in order to enable the court

[1680] *Narchinva V Kamat* v. *Alfredo Antonio Deo Martins;* (1985) 2 SCC 574, 578, 579

[1681] *Pradyuman Kumar Sharma and Ors. v. Jaysagar M. Sancheti and Ors.;* MANU/MH/0244/2013 (para 32); *Oil and Natural Gas Corporation Limited v. Enterpose GTM Four Les Travaux;* MANU/MH/1268/2014 (paras 44, 59, 60, 81) and *Bombay Slum Redevelopment Corporation Limited v. Samir Narain Bhojwani;* MANU/MH/2566/2019 (paras 171-172).

[1682] See *Udit Narain Singh Malpaharia* v. *Additional Member, Board of Revenue, Bihar*, AIR 1963 SC 786.

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to effectually and completely adjudicate upon and settle all the issues involved in the suit.

Before an arbitral tribunal presided over by a sole arbitrator, the following situation emerged: A company registered in India initiated arbitral proceedings against the Union of India for non-payment of its dues arising out of the contract for providing some technical support to the Government of India. However, the Union of India also filed its Statement of Counter-Claims against that company for not providing the technical services as per the contract. Along with its Statement of Counter-Claims, the UOI also filed an application under Order 1 Rule 10 CPC for impleading a foreign company registered in Germany alleging therein that though the contract was entered into by and between the UOI and the Indian Company but the Indian Company could not have bid for the tender floated by the UOI, had it not formed a joint venture with the foreign company. It was submitted by the UOI that being partner of the Indian Company, the foreign company was jointly and severally liable towards the UOI. The above application was contested by the Indian Company on the basis that CPC did not apply in arbitral proceedings. However, the Sole Arbitrator allowed the application of the UOI and issued summons to the foreign company to join the ongoing arbitral proceedings. The Constitution Bench of Hon'ble Supreme Court in ***Cox and Kinds Ltd. v. SAP India (P) Ltd.***[1683] concluded that non-signatory parties, by virtue of their relationship with the signatory and engagement in commercial activities, cannot be deemed strangers to the dispute under arbitration. Thus, this provision of joining non-signatory to the arbitral agreement though not provided in the Act; still is followed by the arbitral tribunals in practice and has been upheld a valid procedure in a number of cases[1684].

8. Principles of natural justice:

The Arbitral Tribunal is bound to see that there is no violation of principles of natural justice and no evidence is taken behind the back of any party or that no evidence is taken without allowing the other party to scrutinize the same or that equal opportunity of being heard is provided to both parties or that reasons are given for arriving at the decision or that the tribunal cannot reply upon the disputed documents unless proved by the party relying upon them, etc. Similarly, if there is no evidence before an arbitrator or award is based on no evidence, the Court can set aside such an award[1685].

D. Provisions of CPC and Evidence Act which have been held to be not applicable in arbitral proceedings:

1. Order VI Rule 15 CPC - Verification of pleadings:

Order VI Rule 15 of CPC provides as under:

15. Verification of pleadings.—

(1) Save as otherwise provided by any law for the time being in force, ***every pleading shall be verified at the foot by the party or by one of the parties pleading or by some other person proved to the satisfaction of the Court to be acquainted with the facts of the case***.

(2) The person verifying shall specify, by reference to the numbered paragraphs of the pleading, what he verifies of his own knowledge and what he verifies upon information received and believed to be true.

(3) The verification shall be signed by the person making it and shall state the date on which and the place at which it was signed.

xxx xxx

xxx

(***Emphasis added***)

Sometimes, the parties to the arbitral proceedings do take preliminary objections that

[1683] 2023 SCC OnLine SC 1634
[1684] *Chloro Controls(I) P. Ltd* v. *Severn Trent Water Purification Inc*; (2013) 1 SCC 641
[1685] *Bengal Jute Mills Co. Ltd. vs Lal Chand Dugar;* AIR 1963 Cal 405

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the other party has not verified its pleadings; hence, the statement of claims or defence is liable to be rejected.

It is re-submitted that Section 19(1) of the Act provides that the arbitral tribunal shall not be bound by Civil Procedure Code, 1809 and Indian Evidence Act, 1872. Further, Section 1 of the Indian Evidence Act, provides that the Act will not apply to proceedings before arbitrator. Section 23 of the Arbitration & Conciliation Act, 1996 sets out what the contents of statement of claim should be and it only requires that Claimant shall state the facts supporting his claim, the points at issue and the relief or remedy sought. There is no requirement to support the statement of claims with a verification clause or with an affidavit. Although there is no quarrel with the proposition to the extent that basic rules for recording evidence etc. are be made applicable to arbitrations, however there can be no pedantic insistence on formal requirements of verification of pleadings and of filing supporting affidavits which are required in filings cases before courts of law[1686].

2. Order VI Rule 15 CPC - Filing of affidavit in support of the pleadings:

In this regard, Order VI Rule 15 of CPC provides as under:

> **15. Verification of pleadings.—**
>
> xxx xxx
>
> xxx
>
> (4) The ***person verifying the pleading shall also furnish an affidavit*** in support of his pleadings.
>
> (***Emphasis added***)

Similar to the requirement of verification of pleadings, the courts[1687] have held that insistence upon affidavit in support of the pleadings is not required for the arbitral proceedings. The above-stated cases for verification of pleadings also deal with the requirement of the affidavit.

3. Section 47 CPC - Objections to the execution of decree:

Hon'ble Telangana High Court in ***M.S.R. Enterprises*** **v.** ***M/s. Pooja Enterprises***[1688] has held that Section 47 of CPC is not attracted in proceedings for execution of an Arbitral Award.

SECTION 65-B OF INDIAN EVIDENCE ACT: ELECTRONIC EVIDENCE

In ***Millennium School vs. Pawan Dawar***[1689], Hon'ble High Court of Delhi has held that in terms of Section 19 of the Act read with Section 1 of the Indian Evidence Act, Section 65-B of Indian Evidence Act does not apply to arbitral proceedings. It was observed:

> "43. It is also relevant to note that by virtue of Section 1 of the Evidence Act, it does not apply to arbitration. Although, the principles of the Evidence Act are usually applied in arbitral proceedings, *sensu stricto*, the said Act is not applicable. ***Section 65-B of the Evidence Act is not applicable to arbitral proceedings***..."
>
> (***Emphasis added***)

IV: Conclusion:

Procedures for conduct of court proceedings and appreciation of evidence, etc. as provided in CPC and Evidence Act are time-proven laws which enable the courts to make right decision and dispense justice to the litigants. The issue of delay in justice delivery due to the technicalities involved in the above-stated procedural laws has been resolved to a great extent by applying only their basic principles in the arbitral proceedings. Further, the malaise is not the applicability of CPC and Evidence Act but the attitude of parties of seeking avoidable adjournments, lenient stance of the arbitrators, lack of accountability of arbitrators and counsel towards the parties if delay occurs due to them,

[1686] *NPCC Ltd.* v. *Jyoti Sarup Mittal Engineers, Contractors & Builders;* 2006 SCC On Line Del 1496 and *Prakashnarayan Shaktia* v. *Hotel Corporation of India Ltd. & Anr;* 1996 SCC OnLine Bom 452
[1687] supra 23
[1688] Civil Revision Petition No.1571 of 2021 decided on: 28.04.2022
[1689] O.M.P. (COMM) 590/2020; decided on 10.05.2022

heavy workload of the arbitrator due to the bias of the courts in giving preference to the retired judges at the time of appointment of arbitrators u/s 11 of the Act, lengthy and rudderless cross examination, filing of unnecessary document coupled with no scrutiny by the arbitrators at the initial stage, lack of organized continuous training of arbitrators and advocates, long standing viewpoint of taking arbitrations as an evening/ extra work after the court hours, etc. It is submitted that all principles of CPC and Evidence Act should be held to be applicable when the parties have agreed to the same by express terms in their contract or through their conduct during the arbitral proceedings. Further, when a party relies upon certain principles of CPC and Evidence Act which are not opposed by the other party then it cannot be said that the other provisions of CPC and Evidence Act are not applicable to the arbitral proceedings. A party to the arbitral proceedings cannot pick and choose those certain provisions which may be beneficial/ conducive to its case and assert that only those selected provisions shall be applicable to the arbitral proceedings while the other provisions will not be applicable if they go against its interest. However, to the limited knowledge of the author, as on date, no judicial precedents is there in support of the above submission.