REVISED APPELLATE ARBITRATION-1

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INTRODUCTION

During the medieval time, people used to submit their dispute to the group of sagacious and prudent men of the community called *'PANCHAYAT'*—for a binding decision.[1] Earlier there was no specific authority to governing laws. Laws were just being implemented because of fear of social sanctions. "Regulations" were adopted as laws for reference of the selected dispute to arbitration. Due to the change in economic policies and ever-increasing population of India created caseloads on Indian Judiciary. The average lifespan of the dispute in Indian Litigation has increased from 10 years to 15 years.[2] With the coming up of Arbitration and Conciliation Act,1996 the old cultural Shibboleth about litigation was dispensed with. Now there were no delays in resolving the disputes. People no longer perceived Justice as a Jealous mistress that demands lifetime of preservance. The Award passed by the Arbitrators were binding between the parties and enforceable as the decree of the court. Up till now, no appeal was allowed in this regard, except the grounds set forth in Section 34 of Arbitration and Conciliation Act,1996[3] But with the decision of Supreme Court in the landmark judgment of ***"Centro trade Minerals and Metals Inc. Vs. Hindustan Copper Ltd"***[4] appellate arbitration in India was held valid.

[1] K Ravi Kumar, '***Alternative Dispute Resolution in Construction Industry***', International Council of Consultants (ICC) papers/ Retrieved from- www.iccindia.org. at p 2/ Last visited- 31st May,2018.
[2] Article on- Long Expensive, Road to Justice/ Published By- India Today/ Retrieved from- indiatoday.in/magazine/cover-story/story/20160509-judicial-system-judiciary-cji-law-cases-the-long-expensive-road-to-justice-828810-2016-04-27/ Last visited- 31st May,2018.
[3] Article on- Party Autonomy vs. Public Policy: Appellate Arbitration in India/BY- Raghav Sharma/ Last Visited- 31st May,2018.
[4] (2006) 11 SCC 245

APPELLATE ARBITRATION" DEFINED

Appellate arbitration is a process in which the parties to arbitration refer the subject matter of dispute to another arbitration to check the errors and correction rendered in the first arbitration by the arbitral tribunal. It is basically a two-tier safeguard for the parties. In general, parties opt for Arbitration as a method of dispute resolution given its expedited nature. Parties don't have to wait for 5 or 10 long years to seek justice. Hence, it is not suitable for all matters which can be referred to arbitration. This approach is followed only when both the parties in arbitration are concerned about the Arbitral award regardless of cost and time. [5]

FACTS OF THE CASE

Centrotrade is a company incorporated in the United States which entered into a contract with Hindustan Copper Limited, a Government of India Undertaking for the purchase of Copper Concentrate. The contract had an arbitration agreement stating that all the disputes and differences arising between the parties shall be subject to Indian Jurisdiction as per Indian Arbitration laws. If either party is in disagreement with the award rendered by the Indian Arbitrator, then the dispute shall be subject to Second Arbitrator in London as per the rules specified by International Chamber of Commerce. A Dispute arose between the parties to the agreement during the December 1998 and January 1999 and pursuant to clause 14 of the agreement, the subject matter of discord was referred to Indian Arbitration. Centrotrade claimed a sum of Rs 1,36,73,573.00 from Hindustan Copper limited. An Arbitrator appointed by the Indian Council of Arbitration awarded a 'Nil' award. Aggrieved by the decision of the Indian Arbitrator, the dispute was further referred to second arbitrator in London. As a result of this arbitration, the decision was made in the favour of Centrotrade and HCL was ordered to pay the requisite amount with interest. After the award was passed, Claimant(Centrotrade) filed for its enforceability under section 44 of Indian Arbitration and Conciliation Act,1996 and at the same time HCL filed for the award being void and Unenforceable.

[5] Article on- ***'SC of India upholds the validity of Appellate Arbitration Clauses'***/ Publsihed by-Shivansh Jolly/ Published on- February 16, 2017/ Retrieved From- arbitrationblog.kluwerarbitration.com/2017/02/16/supreme-court-india-upholds-validity-appellate-arbitration-clauses/ Last Visited- 31st may,2018.

ISSUES

1) Whether appellate arbitration as provided in the Clause 14 is contrary to Indian Laws?
2) Whether foreign award rendered in the appellate arbitration if enforceable under Indian Domestic arbitrations laws is counter to public policy.?

ANALYSIS

1) The court while deciding the issue, placed its abundance reliance on the principle of "Party Autonomy". According to one of the classic book on International Arbitration stated that- *"Party autonomy is the guiding principle which is to be followed in an international commercial arbitration".* [6] Legislative history is the evidence of the fact that this principle was adopted without any opposition. Thus, adoption of this principle is not only endorsed for international laws but also for the national laws. Indian arbitration laws chase UNCITRAL model of arbitration which in return gives preference to the principle of Party Autonomy. Article 19(1) of the UNCITRAL model laws provides for the will of the parties to agree on the procedure of the arbitration proceedings. In the present case of Centrotrade, the honorable court held that Indian law does not restrict from having an appellate arbitration forum. The findings of the court were based on the decision of *Heeralal Agarwalla and company Vs. Joakim Nahapiet*[7] wherein it was held "*agreement by the parties to submit to more than one arbitration on the same dispute is permissible and valid in India under both, the 1899 Act and 1940 Act of Arbitration laws".* The intention of parties will be given prima facie importance to determine the dispute between them, provided it should not be against the rules of lex arbitri and law of place of arbitration.[8] But this does not mean that the parties have full discretion to handle arbitration proceedings according to their whims and fancies. There are certain mandatory rules and provisions which the parties have to adhere too. From the moment of negotiating an arbitration agreement to making

[6] A. REDFERN and M. HUNTER, with N. Blakaby and C. Partasides, law and practice of International Commercial Arbitration,4th ed,2004 at p.265.
[7] AIR (1927) Calcutta 647
[8] Article on- "Party Autonomy vs. mandatory rules in International Arbitration"/ Published on 21st feb,2012/ Published by- SAYENKO KARENKO NEW LAW FIRM/ Retrieved From- //sk.ua/publications/party-autonomy-vs-mandatory-rules-in-international-arbitration/ Last visited- 4th june,2018.

of arbitral award, the extent of party autonomy may differ. Moreover, before amendment, Arbitration laws in India were governed by three separate acts. After the amendment all the arbitration laws have been consolidated in one act i.e. Arbitration and Conciliation Act,1996. Part 1 of the act deals with domestic arbitration laws and part 2 of the act deals with international commercial arbitration. They both should be read together in order to give complete meaning and effect to the code. Legislature had consolidated the laws with the intention of giving similarity in administration of domestic as well as foreign award. There is nothing in the act restricting an arbitration proceeding governed under part 1 of the act (Domestic award) and the appeal to the same lies under part 2 of the act. i.e. foreign award. There is nothing under section 35 of the act that limits the appeal of domestic award to international arbitration. The meaning of word "Award" under section 35 should be construed in a liberal manner, it means the final award that is obtained after the appeal. Thus, the clause 14 of the arbitration agreement was valid as per Arbitration and Conciliation Act,1996.

2) While deciding the second issue court held that the award rendered in appellate arbitration in London is not against the public policy. The arrangement entered into by the parties in this case i.e. clause 14 does not intend and purport to violate the provisions of section 34 and section 36 of the act redundant. The word "Public policy" is referred to or mentioned in 3 sections in the Indian Arbitration and Conciliation Act,1996- 1) Section 34 (grounds for setting aside of arbitral award, 2) Section 48 (conditions for enforcement of award as per New York convention), 3) Section 57 (conditions for enforcement of awards as per Geneva Conventions). The term public policy is not defined anywhere in the Arbitration Act or any other Statue. Thus, giving the court discretion as well as power to interfere on making of arbitral award. It can be termed as "defiant horse" which the courts can used to fiddle with arbitration proceedings. Law Commission of India in its 246th report held that the arbitral award which is guided by fraud or corruption or is in contravention of basic fundamental policy of India or is contrary to the basic notions of morality will be treated as against the public policy of India. The lacuna that overshadowed the interpretation of public policy of India was the definition of the fundamental policy. Thereby, keeping in view the above inadequacy, the Supreme Court of India in the case of *ONGC LTD Vs. Western Geco International*

Ltd[9] held that the fundamental policy is based on three principles. They are follows; - 1) determination of the rights of the parties in a fair and reasonable manner. 2) determining rights and obligations in accordance with the principles of natural justice 3) the decision should not be so perverse or irrational.[10] Hence, with regard to the present case where original arbitration is domestic and thus is governed by part 1 of the act and the appellate arbitration is foreign and thus governed by part 2 of the act, is not against public policy of India. It does not violate any of the provision under section 34 of act.[11] Furthermore, Doctrine of Merger also applies to the above scenario. It propounds that the decisions given by the appellate arbitral tribunal over the tribunal having original jurisdiction to decide the disputes were to be enforced and final[12]. Thereby, nullifying the argument advanced by HCL regarding the conferring of two arbitration awards.

COMMENT

Indian Judiciary adopted a pro-arbitration approach because it was thriving for its existence because of the pending caseloads. It still has an estimate of around 3.8 million cases pending in high court and approx. 27 million cases pending before subordinate judiciary. More than 26 percent of the cases are 5 years old.[13] In addition to it, India has opened its door for business outsourcing and foreign direct investment contributing to the misery. But this pro-arbitration approach is stunted due to the adoption of the appellate arbitration by the Indian Judiciary without making requisite provisions for the same. It can be very well illustrated through the situation of dichotomy and depecage created in the present case. Though the judges gave due regard to the principle of Party Autonomy but failed to consider the fact that freedom of parties in arbitration proceedings is not absolute. It is subject to the restrictions imposed by arbitration laws. Moreover, appellate arbitration is only suitable for the parties who want satisfaction from

[9] 2014(9) SCC 263
[10] Article on- *Arbitration ordinance 2015-'Public policy' defined*/Published by- Anup Koushik Karavadi/Retrieved from-cn.lakshmisri.com/News-and-Publications/Publications/articles/Corporate/arbitration-ordinance-2015-public-policy-defined/ Last visited-4th june,2018.
[11] Centrotrade Minerals and Metals Inc. Vs. Hindustan Copper Ltd (2006) 11 SCC 245
[12] Article on-*" Doctrine of Merger; Supreme Court explains*"/ Published on- 24th December,2010/Retrieved from-http://www.legalblog.in/2010/12/doctrine-of-merger-supreme-court.html/Last Visited-4th June,2018.
[13] Article on- *"Strengthening Arbitration and its Enforcement in India"*/ By-BIbek Debroy (Member, Niti Aayog), Suparna Jain (OSD, Niti Aayog)/ Last visited-4th June,2018.

the award regardless of time and money. It does not suit India's ideology of clearing the pending caseloads i.e. it demands time. Furthermore, the amended Arbitration and Conciliation Act, 1996 is still mum about the same. It is nowhere expressly mentioned that it allows appellate arbitration and if the parties opt for it, within what timeframe the appeal against the first arbitral award should be made, or whether the appellate arbitral tribunal can send the matter back to the original tribunal etc.[14] There is still a lot of Hullabaloo regarding the same. India is known for making lengthy laws but when it comes to implementation India fails miserably.

[14] Article on- *"Two Tier Arbitration Clauses"*/ Publsihed by- Khaitan and Co./ Retrived from- www.khaitanco.com/PublicationsDocs/InternationalLawOffice-KCOCoverageSM040517.pdf/ Last visited-4th June,2018.