ARBITRATION IN INDIA: SCATHED DUE TO JUDICIAL INTERVENTION

Written by ***Ramit Singh***

2nd year BA.LLB student, Institute of Law, Nirma University

ABSTRACT

It is the role of the judicial authorities to facilitate and make smooth the process of arbitration. The judicial courts should not indulge in practices that disregard the basic principles of arbitration and the go beyond its powers as enshrined under Section 11 of The Arbitration and Conciliation Act, 1996. The impertinent interventionist practices of the court must be stopped and the internationally recognized principles of competence-competence and party autonomy must be given proper regard. In the light of the 2015 and 2019 amendment in the Act, this article will discusses the effect of Garware Ropes case decided by The Apex Court of India and some other cases to demonstrate the judicial authorities' nature of overdoing its duty in terms of Section 11 and not restrict itself to only examine the existence of the arbitration clause. All of this has to be read with an idea in mind that India is a country moving forward with a goal to be the arbitration hub of the world and it is required for the judicial courts to rise up to the occasion and play an instrumental role for the goal to be an actuality and not let it remain as something which is elusive.

INTRODUCTION

In these recent times where delay is deplored and confidentiality has assumed profound significance, such facilities are delivered through the means of arbitration to parties involved in a dispute. When this dispute resolution mechanism fails to deliver what it ought to, we should not simply discard it as an option of adjudication, instead find the reasons for the failure and improve the mechanism to make it more efficacious. Similar to this notion, the Indian Legislators felt that The Arbitration and Conciliation Act, 1996 [hereinafter for the sake of brevity referred to as 'The Arbitration Act'] required alterations to cater to the need of efficiency, expeditiousness and effectiveness so they came in with the 2015 Amendment in The Arbitration Act. Looking at the growing trend of arbitration as parties' choice of dispute resolution and the goal in mind to make India the arbitration hub of the world, such amendments were essential to bring about the change. A step forward is the 2019 Amendment in The Arbitration Act which also promotes this goal by culminating an institutionalized style of arbitrations in India, which is what other major arbitration hubs in the world have adopted.

The Indian Supreme Court way back in the year 2000 had set forth the aim of taking India forward and shaping it into an arbitration hub. The court said that it is important to attract more trade and commercial relations with the rest of the world and because of this the Indian Parliament was motivated enough to enact The Arbitration Act and limit the intervention of the judicial authorities in the arbitral proceedings.[i] The amendments as well aim to have less judicial intervention in the arbitral proceedings and one of the examples for that is the inclusion of Section 11(6-A) in The Arbitration Act. Before the inclusion of the aforesaid section which was before the 2015 Amendment, the law was settled in a way that the judicial courts had a wide scope in terms of deciding an application made under article 11 of The Arbitration Act. The courts used to decide and delve into issues of whether the arbitration clause is valid or not, whether the claim still exists or not, whether there is the existence of an issue or not with the aspect of duration.[ii] This had to stop and hence the amendments were brought. But now recently while deciding the case of *Garware Wall Ropes Ltd. v. Coastal Marine Constructions and Engineering Ltd.*[iii] [hereinafter referred to as 'Garware case'], The Apex Court has failed to regard the legislators' intent and shook the notion of expeditiousness which is one of the key tenets of arbitration.

It is in this backdrop that we have to discern the problem related to the current judicial approach which is time and again meddling with the arbitration process and causing the undesirable

delay. It is the job of the judicial courts to facilitate the arbitration process and the interventionist approach of the courts must be persistently rejected and the courts must pay due regard to the core principles of arbitration, namely party autonomy and competence-competence.[iv] The consequences of this intervention are severe and it in effect digresses from the main aim of making India an arbitration hub of the world. This article shall deal with the case of Garware Ropes and its shortcomings with respect to the 2015 and 2019 Amendments in the Arbitration Act and further this article will discuss the importance of restrictions on the judicial courts by applying the principle of Competence-Competence and Party Autonomy.

THE LEGAL QAUGMIRE WITH RESPECT TO THE GARWARE CASE

The issue of an unstamped agreement and its interplay with the arbitration clause contained in it along with the question that can a judicial court send the contract to the competent authority to be impounded? All of this was to be decided by The Supreme Court in the Garware case and the court held that the contract must be duly stamped if the arbitration clause had to be considered before the court of law. The Apex Court before the 2015 Amendment, in the case of *National Insurance Co. Ltd vs M/S. Boghara Polyfab Pvt.Ltd*,[v] decided that while dealing with an application made under Section 11 of The Arbitration Act the court must identify whether there was an arbitration agreement or not and applying this proposition of law, The Apex Court in the case of *M/s SMS Tea Estates Pvt. Ltd. v. Chandmari Tea Co. (P) Ltd.*[vi] propounded that if an agreement that is not duly stamped had to be first impounded before recognizing the arbitration clause in it. The court brought in the law prescribed in the Stamp Act which prohibits an unstamped agreement to be acted upon. It has to be understood that eventually after the 2015 Amendment in The Arbitration Act which lead to the introduction of Section 11(6-A), the judicial courts were restricted in their powers to specifically examine whether the arbitration clause existed or not while deciding a matter brought under Section 11. The amendment in 2015 had set a time limit which was not binding but it provided that an application under Section 11 should be disposed within sixty days from the time when the notice is served to the opposite party. This was done to have expeditiousness in the arbitration process and to reduce the judicial court's role.

It is now on this touchstone the court had to decide the Garware case keeping in mind the SMS Tea Estate judgment which was a pre-2015 amendment decision and would it not be rendered otiose? The matter was earlier decided by the Bombay High Court but an appeal was preferred against the decision of The High Court and then finally The Supreme Court decided the matter. It has to be appreciated while this matter was before the High Court, the learned judge considered *Hindustan Steel Ltd. v/s Messrs Dilip Construction Company* [vii]where the court had held that even after the arbitration proceedings are initiated, a party can raise an issue of the stamping of the underline contract before the Arbitrator. It would be upon the Arbitrator that if he feels that there is a need to impound the contract, then he can send it to the stamp authorities. So the court held that as per Section 11(6-A) if the arbitration clause exists then the issue of impounding the contract must be decided by the Arbitrator. The decision of the Bombay High Court also clearly states that post the 2015 Amendment, SMS Tea Estate does not hold any value.

Now specifically dealing with the decision of the Supreme Court which unlike the High Court's decision is not considered to be helping Indian Arbitration in the larger picture. The court looked upon the legislative history behind the 2015 Amendment and the inclusion of Section 11(6-A) in The Arbitration Act and expressed its view that the amendment intends to put an end to the SBP & Co. and Boghar and restrict the scope of the judicial court's role under Section 11 to only examine whether the arbitration clause exists or not. The court looked upon the 246th Law Commission Report which had not talked about the SMS Tea Estate judgment and amendment also did not. The court derived from this absence that the judicial authorities while hearing an application under Section 11 should not decide any preliminary issues between parties. So in this light, the court held that since the Stamp Act applies to the agreement, it is not possible to divorce the arbitration clause from the underline contract and because of this the court further confirmed that the SMS judgment still exists and applies after the introduction of Section 11(6-A).

The court further brought into light Section 7 of The Arbitration Act coupled with Section 2(h) of the Indian Contract Act, 1872 and decided that the arbitration clause cannot be acted upon is because it does not exist in the first place. The reason behind this was that the main agreement is not enforceable under law as it is not duly stamped and it would not become a contract unless

it gets impounded and in the same token when the agreement is unenforceable, the arbitration clause would also become enforceable.

Before moving any further, it is imperative to discuss the doctrine of separability which states that the arbitration clause is separable from the underline contract and will not be affected by the main contract if it becomes invalid. If this principle would have been applied it could have fulfilled the purpose of the introduction of Section 11(6-A) and would have also limited the judicial intervention by cutting short the delay. Here the arbitration clause would have been seen as a separate agreement from the main agreement which would not be duly stamped, then it would not have affected the judicial authorities to work upon such a clause because it would not have been a part of the main agreement and the application under Section 11 would have been disposed in a far more quicker way. The arbitrator would have had the chance to impound the document at a stage when the arbitral proceedings would have been initiated.

Moving further, there is a series of analyses demonstrated under three limbs which are the application of the SMS judgment, Section 11(6-A) in terms of its scope and differentiating Garware case with Hyundai Engineering case.[viii]

The proposition of law formed in the SMS judgment and it has to change after the 2015 Amendment. The above mention Law Commission Report and the Statement of Objectives and Reasons of the 2015 Amendment did not state SMS judgment. It has to be understood that this judgment was delivered in the year 2011 when the judicial authority working under Section 11, had more powers and could consider not just the issue of existence of an arbitration clause but also other basic issues as well, unlike the status quo. So the judge while deciding this case had enough authority to decide on the issue of whether the contract is duly stamped or not and does it requires to be duly stamped. This issue could have been decided by the court under Section 11 and it would have been justified but now after the inclusion of Section 11(6-A) the power and scope of the court is limited only to the "examination of existence of an arbitration agreement". So, any judgment which prior to the 2015 Amendment wherein the court decided an application under Section 11 and examined the matter beyond the basic issue of existence of an arbitration clause, then those judgments are understood to be otiose and this draws its strength from the wordings placed in Section 11(6-A) which says "notwithstanding any

judgment, decree or order of any Court" which means that the SMS judgment cannot be made to be applicable post the 2015 amendment.

To understand the nature of the arbitration clause's existence under Section 11(6-A) it is required to look at the Law Commission Report and the Statement of Objects and Reasons of the 2015 Amendment. While perusing the Law Commission Report it can be understood that the need to bring in amendments in The Arbitration Act was to minimize the judicial intervention in the arbitral process and which is why the Law Commission recommended Section 11(6-A).

Coming to the statement of Object and Reasons, it provides that the court while deciding an application for appointment of an arbitrator, the judicial authority shall only delve into the question of existence of prima facie arbitration agreement. By adding the words " prima facie existence" of an arbitration agreement, it demonstrates that the issue of final determination of whether the arbitration clause exists or not has to be left with the arbitral tribunal which shall decide this issue as a preliminary issue. Post the amendment, the role of the court has been specified to only prima facie check that the arbitration clause exists and nothing more than that.

This judgment in the Garware Case has to be distinguished from the Hyundai Engineering judgment wherein a bit of confusion was caused with respect to the existence of an arbitration agreement. The Apex Court, in this case, was deciding a dispute in the arbitration clause placed within an insurance policy. A bare reading of the clause, it would indicate that to invoke arbitration there is a pre-condition that the liability must be solely admitted by the insurer. The Supreme Court thus decided that the court has to delve into issues other than the basic issue of existence. The court had to first look at whether the precondition has been fulfilled for an arbitral claim to have arisen. The court also distinguished the decision of Duro Felguera[ix] case as the issue under consideration is different from Hyundai Engineering.[x]

The Supreme Court had a chance to decide and settle the matter once in for all on the issue of the role of judicial authorities performing their duties within Section 11(6-A). However, the court while deciding the matter missed out on the words of caution propounded in the case of *Hindustan Steel v. M/s Dalip Construction Co.*[xi] which said that the stamp act is not enacted

to arm a litigant with a weapon of technicality to meet the case of his opponent. Therefore it would not be wrong to say that the court also took a very technical approach while deciding this matter. The court could not have been ignorant of the 2015 amendment which intended to reduce the intervention of courts in the arbitral process. It is because of this judgment the court will first send the document to be stamped and this is suggested to be done within 45 days by the Stamp Authorities, then the court after the document is duly stamped shall hear the application and dispose of it within15 days. This time period seems very improbable to be adhered to and this leads to unnecessary delay in the pre-arbitral stage. The court through deciding the case had a big chance to reduce the intervention of courts in the arbitration proceedings.

Moreover, after the 2019 Amendment in The Arbitration Act, there are drastic changes about to come as the arbitration in India will be institutional-based. As per this latest amendment appointment of arbitrators shall now be done by an institution constituted by the Supreme Court or the High Court as the case may be and then this institution shall appoint arbitrators which have brought in exclusivity wherein the courts would not be required for rendering their services of appointment. It also provides a time period of 35 days for the arbitral tribunal to dispose of the application for appointment from the date a notice served to the opposite party. In the light of these changes brought through the 2019 Amendment, the Garware case shall have no effect as the paradigm has shifted and it is not for the judicial authorities to appoint arbitrators. But it is still unclear that what approach will the institution adopt when it comes to issues such as those involving unstamped contract containing the arbitration clause. The institution would also face the same question regarding the scope within which they will have to decide Section 11 application and how deep they can go to search for the existence of an arbitration clause.

COMPETENCE-COMPETENCE AND PARTY AUTONOMY

The principle of Competence-Competence means that the arbitral tribunal has inherent power which can be seen in Section 16 of The Arbitration Act.[xii] But through the years it has been seen that by various pronouncements of the Supreme Court, the intervention of the court in the

arbitral process for matters even related to the enforcement of the arbitration agreement has denuded the inherent power of the arbitral tribunal. As in the Garware case, the court could have left this final determination of the arbitration clause with the arbitral tribunal to decide whether the contract or instrument needs to be stamped or not. So the intervention of court by the means of Section 11 disregards the inherent powers of the tribunal where it can also hear such issues as preliminary and decide whether the instrument or contract can be acted upon. It is one of the examples where the courts have taken the interventionist approach which robs the essence and intent behind drafting Section 16 of The Arbitration Act.

Party Autonomy is the cornerstone of arbitration as parities voluntarily chose arbitration as a way of dispute resolution.[xiii] Arbitration provides incomparable benefits over litigation such as speedy remedy and confidentiality of matter which is way parties prefer arbitration. The interference of the court in the arbitral process undermines the principle of party autonomy and this is why the arbitral tribunal has been given powers to decide on matters even related to its own jurisdictions so that the parties' choice is respected and it should not happen that the parties have to fall back on the courts because the tribunal is incompetent. It is understood that arbitration cannot exist without judicial assistance as courts help to appoint arbitrator, they also help to decide matters where the contract containing an arbitration clause is hit by fraud, but this assistance cannot be given so much importance that it takes over the essence and purpose of having arbitration as a dispute resolution mechanism. This means that the judicial authorities should respect the powers of the arbitral tribunal as provided under Section 16 and not get so deeply entrenched that the court even starts to open up issues which are not quintessential for the examining the existence of arbitration clause in terms of an application made under Section 11 of The Arbitration Act.

It has been seen that the while the courts hearing matters of Section 11, have crossed boundaries while examining issues other than the existence of arbitration clause which not only undermines the principle of party autonomy but also tends to sabotage the confidentiality aspect of the arbitration which is one of the important reasons why parties choose arbitration over litigation. If the court delves into other issues and not confine itself with only the existence of an arbitration clause then it is most likely the information of the dispute which the parties intended to keep confidential would get dispelled in the public domain which is extremely

unpleasant for the parties involved in the dispute. The courts must realize the importance of the principle of competence-competence and party autonomy to respect the parties' choice and the intent of the legislature. It portrays a very sad picture for the parties who have to first fight their case in courts and when they get through it, they again fight their case through arbitration which delays the arbitration proceedings and eventually the award.

CONCLUSION

It has been seen through the course of the article that arbitration in India is not being respected in the way it should be. It is through the inclusion of Section 11(6-A) of The Arbitration Act, that the legislators by the way of amendment in 2015 wanted to reduce the intervention of the courts and judicial authorities in the arbitral process so that the arbitration process can be respected by upholding the fundamental principles which would help reap the benefits of arbitration in a more effective way. This move by the legislators was successful till some extent but still, in some matters, the judicial authorities did not really act in accordance with Section 11(6-A) of The Arbitration Act and which has now resulted in the delay in the time period of 45 days stipulated to dispose section 11 applications which is contrary to the expeditiousness aspect of arbitration. It is uncertain as to what will happen in actuality when the 2019 Amendment in The Arbitration Act will be effective. This new amendment will lead to the creation of institutions and they shall be brought in at the forefront which would actually help India to conduct a more formal style of arbitrations and institutionalized approach has been working well for the other arbitration hubs of the world. The thing to look out for now is that The Supreme Court and High Courts have the power to create these institutions which shall appoint arbitrators but this will still be an uncertain situation to assess that under the garb of such power, would the judicial authorities come with ways of intervening with the arbitral process or not? When we aim to make India an arbitration hub of the world, then our conduct must manifest the same. It should be the integrity of the judicial authorities that they should respect the principle of arbitration and follow the intent of the legislation which would require them to avoid interference with the arbitral process. People have immense faith in the court of law and the same faith has to be reposed in the institution of arbitration and that can be

successfully done by the help of the courts and the judicial authorities and not when they undermine the proper functioning of the arbitration process.

REFERENCES

[i] Konkan Railway Corporation v Mehul Construction Co., (2000) 7 S.C.C. 201.
[ii] S.B.P. & Co vs Patel Engineering Ltd. & Anr., (2005) 8 S.C.C. 618; National Insurance Co. Ltd vs M/S. Boghara Polyfab Pvt.Ltd., A.I.R. 2009 S.C. 170.
[iii] 2019 SCC OnLine SC 515.
[iv] Ajay Kr. Sharma, *Judicial Intervention in International Commercial Arbitration: Critiquing the Indian Supreme Court's Interpretation of The Arbitration and Conciliation Act, 1996,* III Indian Journal of Arbitration Law (2014).
[v] (2005) 8 S.C.C. 618.
[vi] (2011) 14 S.C.C. 66.
[vii] A.I.R. 1969 S.C. 1241.
[viii] United India Insurance Co. Ltd. and Ors. v. Hyundai Engineering and Construction Co. Ltd. and Ors., 2018 SCC OnLine SC 1045.
[ix] Duro Felguera, S.A. v. Gangavaram Port Ltd., (2017) 9 S.C.C. 729.
[x] 2018 SCC OnLine SC 1045.
[xi] (1969) 1 S.C.C. 597.
[xii] The Arbitration and Conciliation Act, No. 26 of 1996, § 16(1), INDIA (1996), reads: "The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose,- (a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and (b) a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause."
[xiii] 1 Gary B. Born, International Commercial Arbitration 84 (2014).