JUDICIAL INTERVENTION IN THE ENFORCEMENT OF ARBITRATION AWARDS IN INDIA

Submitted By

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The history of the evolution of law on arbitration in India shows that the settlement of disputes in the by-gone era in our country was mostly by the intervention of a third person who was impartial and unbiased. The parties involved in a dispute elected an arbitrator of their own choice to decide the dispute, and they honored the judgment that was given by the arbitrator. In this kind of resolution of dispute the elders of the village sat under a banyan tree and resolved the disputes. This kind of procedure of arbitration was followed by the private individuals in respect of various matters including the matters relating to business and trade. The resolution of disputes this way kept the matter outside the courts. Whatever institution functioned that way to resolve the dispute was the court and whatever was decided was of the value of a judicial decision for the disputants. The system of courts on the modern lines however started coming up under the rule of the Colonial powers, particularly the Britishers.

The colonial rule of the Britishers in India started when the merchants of England, in the name and style of the East India Company established their commercial institutions in the beginning of 17th century, and later on captured the political power by ousting the native rulers. When the East India Company in the exercise of its power of administering the

territory introduced a system of Courts on the lines of the English Courts from the 18th century it took the decision of retaining in the social life of India the popular institution of arbitration. The Bengal Regulation of 1772, for example, provided for the resolution of disputes through arbitration. Not only that the ancient system was allowed to continue, a Regulations was also introduced to the effect that there could be arbitration at the instance of the Courts as well. The Bengal Regulation of 1781 provided that "The Judge do recommend and so far as he can without compulsion prevail upon the parties to submit to the arbitration of one person, to be mutually agreed upon by the parties". No award of any arbitrator be set aside, except upon full proof, made by oath of two creditable witnesses that the arbitrators had been guilty of gross corruption or partiality, in the course of which they had made their award.

The Bombay Regulation I of 1779 and Madras Regulation I of 1802 inter alia provided for reference to and resolution of disputes through arbitrations. The courts established by the East India Company thus had the power to refer a dispute to arbitration instead of deciding the matter by their own Court procedures.

When Arbitration became a part of legislation in India, there followed many Statutes, one after the other in quick succession. The Code of Civil Procedure, 1859 contemplated two types of arbitration, viz., (1) arbitration by the intervention of the court in a pending suit and (2) arbitration without the intervention of the court. Apart from these two types f arbitration the third type which gained ground in India was statutory arbitration, and this is there even now in regard to various matters including employment, labour and civil service.

When the British Parliament enacted in respect of the British Kingdom the English Arbitration Act, 1889 and formalized the institution of arbitration a similar statute was enacted in respect of India also called the Indian Arbitration Act, 1899 which give a statutory status to the institution of arbitration.

Another Statute called the Indian Specific Relief Act provided that a person who had agreed to submit a matter to arbitration but had later on refused to do so could be compelled by a coercive order of the court to submit his dispute to the process of arbitration

The Code of Civil Procedure enacted in the year 1908 enabled the parties of a civil suit to seek reference of their disputes to arbitration, and empowered the courts to refer the dispute for arbitration. The Act also empowered the Courts to have control over arbitral proceedings and adjudicate on the validity of awards.

While the legislation of the earlier days had emphasized the procedure of Arbitration as a method of settling the disputes outside the courts problem had arisen with regard to the competence of the arbitrators and the enforcement of the awards which in certain cases were erroneous. Therefore, the legislation enacted subsequently addressed the problem of competence of the arbitrators, the method of their appointment, the exercise of powers and jurisdiction by them, and the system of setting aside the arbitral award. The legislation so enacted sought to control the powers and functions of the arbitrators, by investing the Courts with jurisdiction to set aside an arbitral award if the same was not in accordance with the basic principles of justice.

In order however to prevent the misconduct of arbitrators or an erroneous judgments by the arbitrators the Courts were given supervisory jurisdiction in regard to matters of arbitration but this was without prejudice to the sanctity of the institution of arbitration.

Thus, everything possible had been done to make the institution of arbitration serve the purpose for which it had existed in our ancient civilization. The main object of the legislative measures was to make justice available to the aggrieved persons. The most important aspect of the law on arbitration as it developed from its early stages was that it remained a separate system altogether without being a part and parcel of the judicial proceedings.

When India attained Independence in August 1947 it adopted its own Constitution which came into force with effect from 26th January 1950. The aim of the new Republic as enunciated in the Preamble of the Constitution is to attain justice, liberty, equality and fraternity. The Constitution is based on the principle of Rule of Law, and the Courts enjoy independence as far as their organization and functioning is concerned. Further, the Constitution has allowed the earlier laws to continue to be in force, and the earlier institutions to continue to function if they are not in conflict with any provision of the Constitution. The institution of arbitration which is not ousted by the provisions of the Constitution continues to function as an institution for the purpose of doing justice to the aggrieved persons. As a result of the system adopted by the framers of the Constitution there is in India the system of justice by courts, and justice by arbitral tribunals.

India's judicial system is made up of the Supreme Court of India at the apex of the hierarchy for the entire country and twenty three High Courts at the top of the hierarchy in each

State. These courts have jurisdiction over a state, a union territory or a group of states and union territories. Below the High Courts are a hierarchy of subordinate courts such as the civil courts, family courts, criminal courts and various other district courts. The courts which may intervene in regard to enforcement of commercial arbitration are the courts of civil jurisdiction, the High Courts in the first instance, and the Supreme Court of India in appeal.

The matters of commercial arbitration in regard to which these courts may intervene are quite large in number, but the intervention of the courts in regard to enforcement of the arbitral awards can serve as a good sample for studying the nature and scope of the rule of judicial intervention in commercial arbitration.

At the international level a good number of legal instruments have been adopted under the aegis of the United Nations and necessary legislation has been adopted in India to give effect to these instruments.

The developments at the international level on the subject of commercial arbitration, and the developments in the legal system of our country in regard to various matters call for an examination of how the system of arbitration continues in its earlier form and how it has undergone changes since the advent of changes at the national, regional and international levels.

The object of this paper is to underline the interaction of the two branches of law with a focus on the intervention of judicial institutions in regard to the enforcement of arbitration awards. The paper highlights the situations in which the Courts can, under the law on arbitration, interfere with arbitration proceedings, the grounds on which such an intervention is permissible and the extent to which they can intervene in

regard to various matters of arbitration, whether the arbitration is a commercial arbitration at the national level or arbitration at the regional or international level.

I. MATTERS IN REGARD TO WHICH JUDICIAL INTERVENTION IS PERMISSIBLE :

i. Under the provisions of International Conventions

The International Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 has the following provisions according to which there is scope for the courts to intervene and deal with the arbitral awards.

The Convention provides that each contracting state shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon[1]. It is also provided that to obtain the recognition and enforcement the party applying for recognition and enforcement shall supply the duly authenticated original award or a duly certified copy thereof.[2] The most important provision of the Convention according to which there is intervention permissible on the part of the Courts is Article V which provides the following :

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that :
   a. The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereof, under the law of the country where the award was made; or

b. The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or
c. The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration or,
d. The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties; or
e. The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:
   a. The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or
   b. The recognition or enforcement of the award would be contrary to the public policy of that country.

Under the aegis of the United Nations Organization the Commission on International Trade Law has framed a model law called the UNITRAL Model Law on International Commercial Arbitration. Article 5 of the UNCITRAL Model Law contains the provision about the extent of court intervention.in matters of international commercial arbitration. It says, â€œIn matters covered by this Law, no court shall intervene except where so provided in this Law.

Article 14 of the Model Law describing the grounds for setting aside an arbitral award says, â€œRecourse to a court against an arbitral award may be made only by an application

for setting aside in accordance with paragraphs (2) and (3) of this article;

(2) An arbitral award may be set aside by the court specified in article 6 only if:

a. <u>the party making the application furnishes proof that:</u>

i. a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State; or

ii. the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

iii. the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or

iv. the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this law from which the parties cannot derogate, or failing such agreement, was not in accordance with this Law; or

b. <u>the court finds that ;</u>

i. the subject matter of the dispute is not capable of settlement by arbitration under the law of this State; or

ii. the award is in conflict with the public policy of this State.

and the authority for certain functions of arbitration assistance and supervision.

ii. **Under the Provisions of Regional Conventions :**

The Convention adopted by the Gulf Cooperation Council (GCC) on the execution of judgments, delegations and judicial notifications has the following provisions as far as judicial intervention in matters of commercial arbitration is concerned.. Each of the GCC countries shall execute the final judgments issued by the courts of any member state in civil, commercial and administrative cases and the personal affairs cases in accordance with the procedures as provided under this agreement[3] The execution of a judgment may be rejected in full or in part in the following events:

A. If the judgment is in violation of the provisions of the Islamic Shariaa, the provisions of the Constitution or the public order in the state where the judgment is required to be executed;

B If the judgment is issued in absence and the judgment debtor is not notified of the suit or the judgment properly;

C. If the dispute in respect of which the judgment is issued was the subject matter of a former judgment issued on the merit of the dispute as between the same litigants, is related to the same right in terms of its subject matter and grounds.

D If the dispute in respect of which the judgment required to be executed is issued is the subject matter of a suit currently heard by one of the courts

of the states where the judgment is required to be executed between the same litigants.

E If the judgment is issued against the Government of the state where the judgment is required to be executed or against one of its officials for acts done by such officials during or only due to the performance of the duties of their job.

F. If the execution of the judgment is in conflict with the international conventions and protocols applicable in the state where such execution is required.

The Inter-American Convention on International Commercial Arbitration is yet another important instrument at the regional level on commercial arbitration. Under the following provisions judicial intervention is permissible in respect of the following matters.

In the absence of an express agreement between the parties, the arbitration shall be conducted in accordance with the Rules of Procedure of the Inter-American Commercial Arbitration Commission.[4] An arbitral decision or award that is not appealable under the applicable law or procedural rules shall have the force of a final judicial judgment. Article 5 of this Convention is the most important provision in so far as the scope for judicial intervention is concerned. It provides as follows :

1. The recognition and execution of the decisions may be refused, at the request of the party against which it is made, only if such party is able to prove to the competent authority of the State in which recognition and execution are requested.
   a. That the parties to the agreement were subject to some incapacity under the applicable law or that the agreement is not valid under the law to which the parties have submitted it; or

b. That the party against which the arbitral decision has been made was not duly notified or the appointment or the arbitrator or of the arbitration procedure to be followed, or was unable, for any other reason to present his defence; or
c. That the decision concerns a dispute not envisaged in the agreement between the parties to submit to arbitration;or
d. That the constitution of the arbitral tribunal or the arbitration procedure has not been carried out in accordance with the terms of the agreement signed by the parties, or
e. That the decision is not yet binding on the parties or has been annulled or suspended by a competent authority of the State in which, or according to the law of which, the decision has been made.

2. The recognition and execution of an arbitral decision may also be refused if the competent authority of the State in which the recognition and execution is requested finds:
   a. That the subject of the dispute cannot be settled by arbitration under the law of that State; or
   b. That the recognition or execution of the decision would be contrary to the public policy (order publicâ) of that State.

iii. **Under the Provisions of Statutes enacted By the Legislature in India :**

The following Statutes enacted by the Union Parliament show the nature and scope of judicial intervention in regard to matters of commercial arbitration. The courts deal with the matters of arbitration award when one of the parties seeks the enforcement of the award or challenges the validity of the award when it is sought to be enforced. These two aspects of arbitration awards are fairly important and have come in for examination by the courts in quite a good number of cases.

The following are the matters in which judicial intervention is permissible under the Statute :-

(1) The Arbitration and Conciliation Act, 1996

The Arbitration and Conciliation Act of 1996 is based on Article 34 of the UNCITRAL Model Law dealing with challenges to an arbitral award. This section is one of the most important provisions of the Act in as much as it involves the delicate act of balancing the party autonomy on the one hand and judicial control of the arbitral result on the other.

One of the main objectives of the Act is to minimize the supervisory role of the courts in the arbitral process. Section 5 regulates court intervention in the arbitral process. It provides that notwithstanding anything contained in any other law for the time being in force in India, in matters governed by Part I of this Act, the court will not intervene except where so provided in this Part. Accordingly, section 34 imposes certain restrictions on the right of the court to set aside an arbitral award. The grounds of challenging the arbitral award have been curtailed under the new Act and the limited grounds on which the award can be challenged have specifically been enumerated in the Act itself.

The award can now be set aside only if any of the five grounds as specified in section 34 (2) (a) or any of the two grounds as specified in section 34 (2) (b) of the Act exist. The grounds under Section 34 (2) (a) are :

a. Incapacity of parties;
b. Non-existence or invalidity of arbitration agreement;
c. Exceeding jurisdiction;
d. Non-compliance of due process;
e. Composition of arbitral tribunal or the procedure was not in accordance with the agreement of the parties.

The other two grounds are contained in Section 34 (2) (b) which provides that an award may be set aside by the court on its own initiative if the subject matter of the dispute is not arbitrable or the impugned award is in conflict with the public policy of India.

In order to succeed in invoking the jurisdiction of the Court to get the award set aside a party has to plead and prove the existence of one or more such grounds. If a party fails to establish its case within the four corners of Section 34, the award cannot be se aside. Thus, from the language of the statute, it is evident that the intention of the legislature has been to provide immunity to the award from being assailed on grounds other than those provided in Section 34.

(2) The Code of Civil Procedure, 1908

The Code of Civil Procedure was amended in the year 1999 introducing two pivotal provisions regarding arbitration. Section 89 and Rules IA to 1C to Order X of the Code have made it incumbent upon the courts where it appears that there exist chances of settlement of dispute to call upon the parties at their option to agree for one or the other alternative methods of dispute resolution, viz., arbitration, conciliation, judicial settlement including settlement through Lok Adalat or Mediation.

The above legislative measures were intended to provide for a simple, speedy and less expensive system of dispute resolution.

II. JUDICIAL INTERPRETATION OF THE LAW ON ENFORCEMENT OF ARBITRATION AWARDS :

Arbitration is a consensual adjudication process which implies that the parties have agreed to accept the award given by the arbitrator even if it is wrong. As long as proper procedures are followed by the arbitrator, the courts cannot interfere with the enforcement of the award on the ground of

error of law or error of fact. The underlying idea is if the courts are given the power to review on the ground of error of law or error of fact then it will defeat the objectives of the Act and will also make arbitration the first step in the process which will lead to the highest court of the land by way of successive appeals.

In Rajasthan State Mines and Minerals Limited v. Eastern Engineering Enterprises[5]it was held that the Court cannot interfere with the decision of an arbitrator on the ground that his decision is based on error of law or fact.

In most of the cases of arbitration awards the party raises the question about the validity of the arbitration clause on various grounds. For example, in Smita Conducors Ltd. v. Euro Alloys Ltd.[6] . In August 1990 a contract was proposed by the Respondent and the Appellant containing an arbitration clause. Subsequently, another contract was proposed by the Respondent to the Appellant for the supply of Alumunium rods. The Appellant did not sign nor return the second contract. However, the appellant opened certain irrevocable letters of credit and shipments were made on the basis of the same. The Respondent initiated arbitration proceedings before the Board of London Model Exchange. The arbitrator considered the matter and issued an Award, and ordered payment of a certain sum of deposit. The Appellant filed an appeal to the Appellate Board of the London Model Exchange seeking to set aside the Award and his inability to pay the deposit. The London Model Exchange rejected the request.

The Respondent then filed a petition before the High Court of Bombay under the provisions of the Foreign Award (Recognition and Enforcement) Act, 1961. The question of law was whether in a case like this it can be implied from the conduct of such a party that a valid arbitration clause exists

and a foreign award passed in such circumstances becomes enforceable in India

The Appellant contended that the foreign award could be enforced it was in pursuance of an agreement in writing for arbitration to which the New York Convention applies, and since it was not in pursuance of Para 2 of Article II of the New York Convention it could not be enforced. The High Court rejected the contention of the appellant. In appeal, the Supreme Court confirmed the decision of the High Court and observed, If a contract is formed by reason of the conduct of parties as indicated in the letters exchanged it must be held that there is an agreement in writing between the parties in this regard. Therefore the Court rejected the contention of the appellant in this regard and said that it reached this conclusion based on the facts applicable t the case and did not want to widen the scope of the consideration of Para 2 of Article II of the New York Convention.

In most of the cases the defeated part resists the enforcement of arbitration award on the validity of the arbitration agreement, and one of the strong grounds on which the validity of arbitration agreement is assailed is Public Policy The party asserts that the arbitration award cannot be enforced because the contractual relationship in which the arbitration was resorted to was opposed to public policy. Public Policy therefore has been an important ground for setting aside the Arbitration Award. The courts in India have examined the question how far it is permissible for the Courts to interfere with the arbitration award on grounds of public policy. The decisions rendered on the concept of public policy show the extent of the power of the Court in enforcing the arbitration award and recognizing the heads of public policy.

The term public policy has not been defined in the Arbitration and Conciliation Act, 1996. In England, public policy is interpreted to mean firstly, anything which does not go against the fundamental conceptions and morality of the English system, secondly, which does not prejudice the interests of the country or its relations with foreign countries and last, which is not against the English concept of human liberty and freedom of action.

In Gherulal Parekh v. Mahadeodas Maiya[7] the Supreme Court considered the scope of Section 23 of the Indian Contract Act, which accommodated the principle of determining the validity of a contract on the touchstone of public policy, and laid down the rule that a contract which is opposed to public policy shall be void. But the Supreme Court gave a very limited interpretation to the concept of Public Policy and held that there are certain specified heads of public policy only, beyond which it is not prudent to introduce new heads of public policy.

The limitation which the Court put on its own power may be seen from what it observed in the case. The doctrine of public policy was only a branch of the common law and just like its any other branch it was governed by precedents; its principles had been crystallized under different heads and thought it was permissible to expound and apply them to different situations, it could be applied only to clear and undeniable cases of harm to the public. Although theoretically it was permissible to evolve a new head of public policy in exceptional circumstances, such a course would be inadvisable in the interest of stability of society.

In Central Inland Water Transport Corporation Ltd. v. Brojo Nath Ganguly[8] the Supreme Court considered the applicability of the expression public policy on the touchstone of Section 23 of the Indian Contract Act and Article 14 of the

Constitution of India. In this case the Court was dealing with unequal bargaining power of the workmen and the employer and came to the conclusion that any term of the agreement which is patently arbitrary and/or otherwise arrived at because of the unequal bargaining power would not only be ultra vires Article 14 of the Constitution of India but also hit by Section 23 of the Indian Contract Act.

In Renusagar Power Company Ltd. v. General Electric Company[9] the concept of Public Policy was considered in a very narrow compass. The Court held that the foreign award would be considered as being in conflict with public policy of India if it was shown to be contrary to (i) fundamental policy of Indian law; or (ii) the interests of India; or (iii) justice or morality. A narrow meaning to the expression public policy was given therein by confining judicial review of the arbitral award only on the aforementioned three grounds.

In its judgment in Oil & Natural Gas Company v. SAW Pipes[10] the Supreme Court gave a very wide interpretation to the concept of Public Policy. In this case, the SAW Pipes addressed a challenge to an Indian arbitral award on the ground that it was â€کin conflict with the public policy of India. Despite precedents suggesting that public policy be interpreted in a restrictive manner and that a breach of public police involves something more than a mere violation of Indian law, the Court interpreted public policy in the broadest terms possible. The Court held that any arbitral award which violates Indian statutory provisions is patently illegal and contrary to public policy.

The Court pointed out that in a case where the validity of award is challenged there is no necessity of giving a narrow interpretation to the term public policy of India. On the other hand, a wider meaning is required to be given so that the

patently illegal award passed by the tribunal could be set aside. The Court observed,

"in our view, the phrase public policy of India used in Section 34 in context is required to be given a wider meaning. It can be stated that the concept of public policy connotes some matter which concerns public good and the public interest. What is for public good or in public interest or what would be injurious or harmful to the public good or public interest has varied from time to time. However, the award which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public interest. Such award/judgment/decision is likely to adversely affect the administration of justice. Hence, in our view, in addition to narrower meaning given to the term public policy in Renusagar case it is required to be held that the award could be set aside if it is patently illegal. The result would be an award could be set aside if it is contrary to :

a. fundamental policy of Indian law; or
b. the interest of India; or
c. justice or morality, or
d. in addition, if it is patently illegal. Illegality must go to the root of the matter

and if the illegality I of trivial nature it cannot be held that the award is against the public policy. Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court. Such award is opposed to public policy and is required to be adjudged void.

In SBP & Company v. Patel Engineering[11] the Supreme Court subsequently sanctioned further court intervention in the arbitral process. The case concerned the appointment of an arbitrator by the Chief Justice in circumstances where the parties chosen method for constituting the tribunal had failed. The Court held that the Chief Justice, while discharging

this function is entitled to adjudicate on contentious preliminary issues such as the existence of a valid arbitration agreement and is entitled to call for evidence to resolve jurisdictional issues.

III. CONCLUSION:

On the basis of the provisions found in the international instruments, the regional conventions and the statutes enacted in India it may be concluded that there is scope for judicial intervention in mattes of commercial arbitration, on more than one ground. The decisions rendered by the Courts in India amply demonstrate that the Courts may intervene and rule on the validity or otherwise of the arbitration agreements. The powers of reference, review, revision and appeal have made the judiciary an important actor in the matter of commercial arbitration. The justification for judicial intervention is based on the ancient principle that where there is a right there ought to be a remedy, and that a wrong should not be allowed to go unremedied.

While there can be judicial intervention in regard to quite a good number of arbitration matters there are people who are against the idea of judicial intervention. They believe that the Statute should never envisage the idea of setting aside the arbitration award. On the other hand, there should be a provision to stick to the award, and any award made by the arbitration tribunal should be treated as final, and there should be no reconsideration or reexamination of the same by the courts.

A reconciliation in the above two theories is found in the system obtaining at present which gives vent to the idea that the judicial proceedings and arbitration proceedings are complementary means of achieving justice.

References:

1- Article 3.

2- Article 4.

3- Article 1 of the Convention

4- Article 3 of the Convention.

5- (1999) 9 SCC 283

6- Civil Appeal No.12930 of 1996 decided by the Supreme Court of India on August 31, 2001.

7- AIR 1959 SC 781.

8- AIR 1986 SC 1571.

9- MANU / SC 0195/1994

10- AIR 2003 SC 2629

11- (2005) 8 SCC 618.