JUDICIAL REVIEW OF COMMERCIAL ARBITRATION IN INDIA

Submitted By

Dr. Abdul Rayees Khan

Mzumbe University, Mzumbe, Tanzania

One of the most important yet the most controversial powers of the Courts in India is the power of Judicial Review. Both the Supreme Court at the Union level and the High Courts at the State level exercise this power as part of their extraordinary jurisdictions. These Courts have been exercising the power of judicial review primarily to judge the validity of laws made by the legislatures and the action taken by the administrative or judicial branches of the State. The idea in exercising these powers is to prevent the units of State Administration from exercising the powers not belonging to them or to prevent them from exceeding the powers given to them by law so that there is protection to the rights of the individuals. The Constitution having accepted the principle of Rule of Law the Courts in India exercise the power of judicial review to maintain this fundamental principle. . However, the review power is exercised in respect of the action of public authorities but not in respect of individuals who may for the vindication of their rights approach the courts of ordinary jurisdiction.

The principles according to which the review power is exercised and the procedures which the Courts have followed in relation to this power are very important aspects of the jurisprudence of our country. The most important of all the principles which the Supreme Court of India has formulated with regard to the review power of the Courts is the principle of 'Basic Structure of the Constitution'. This doctrine has the meaning that no State or its instrumentality can do anything affecting the basic structure of the Constitution. Most of the legislative and administrative actions of the authorities of State today are reviewed by the Courts on the touchstone of 'Basic Structure of the Constitution'.

The subjects in regard to which the Supreme Court and the High Courts have exercised this power are the validity of the Acts passed by the Legislature, the orders, ordinances or notifications promulgated by the Government of the Union or the Government of the State. The power of judicial review is so vast that these Courts may review even the amendments made to the Constitution.

Further these Courts review action of the subordinate Courts if there is an error on the face of record and the Courts have not observed proper procedures in dealing with the matter. Likewise, the Courts exercise the power of judicial review in respect of the action of the Tribunals if it goes against the letter or spirit of the Constitution. Tribunals are in India are very large in number, and any decision of these institutions which is contrary to the provisions of the Constitution be reviewed by the Supreme Court and the High Courts.

The controversy about the power of judicial review pertains to the basis of the power and the extent to which it has been stretched by the Courts. The critics allege that the power of judicial review is not expressly provided in the

Constitution, nor is it based on any Statute as such. But the courts hold the view that they exercise the power of judicial review as part of their inherent powers and as a matter of judicial practice. and as an aspect of their inherent powers. The fact remains that the power of judicial review is exercised in a large number of matters and the principles evolved by the Courts by exercising this power have created a vast body of judicial legislation. Questions therefore are raised whether the Courts are justified in exercising such vast powers.

One of the controversies in India is whether the Courts may review the decisions of the Tribunals. There are Tribunals functioning in respect of a good number of subjects. There are Tribunals for service matters, tribunals for labour matters, tribunals for taxation matters and tribunals for cases pertaining to accidents in vehicular traffic. . Even in respect of commercial tribunals questions have arisen whether the Courts can exercise their review power and examine the matters already decided by the arbitration tribunals or the matters which are being dealt with by the arbitration tribunals.

While there is already criticism against the exercise of review power by the Courts in respect of the national issues the question is whether such a power can be exercised in respect of matters which have a foreign element. Like many other countries of the world India is an active partner in global economy and has in its territory several multi-national companies, and these companies enter into commercial relations with the foreign companies and for the sake of quick disposal of problems adopt the method of international commercial arbitration. The problem that arises is whether the Courts of review jurisdiction can exercise their powers in relation to the arbitration tribunals.

There is no court for dealing with international commercial disputes as 'International Court of Commercial Arbitration'. The international court of justice is concerned with disputes among the Sovereign States but has no jurisdiction to deal with disputes among the private individuals, particularly those arising from international trade and commerce. In the absence of a court with review power to examine the validity of any international instrument or the action of the State agencies the jurisdiction is exercised by the national courts despite the fact that there is a foreign element in the transaction. It has become necessary for the Courts to exercise such a jurisdiction because of the growth of international trade in which there are disputes arising between the parties to the trade, transcending national frontiers and geographical boundaries. While the parties take the initial step of seeking the resolution through international commercial arbitration and the agencies which are engaged in such a transaction, but the litigants in search of justice have to approach the national courts as they do in matters involving national elements.

The question of national courts exercising jurisdiction in matters of international commercial disputes assumes some importance because the growing trend these days at the international, regional and national levels is to keep the arbitration tribunals away from interference by the Courts. Despite such a prohibition resorted to through various legal instruments the Courts exercise their jurisdiction, particularly the review jurisdiction to do complete justice to the parties.

This paper examines the nature and scope of the review jurisdiction of the Courts in India in relation to matters pertaining to international commercial arbitration. The discussion herein pertains to the specific jurisdiction, such as,

the review jurisdiction and not jurisdiction of the general type in respect of which there is intervention in respect of any matter which is covered by the phrase 'judicial intervention'. The data for the purpose has been gathered from the international instruments on commercial arbitration and the decisions of the Courts in regard to commercial contracts of the national as well as the international character.

Before discussing these matters it is necessary to look to the approach of law in respect of the review power under the international instruments and the approach adopted by certain other countries with regard to review of arbitration matters.

Internationally, the view is in favour of finality and against judicial review, except in a very limited number of cases. This view is reflected in the following instrument which is the most important instrument formulated by the United Nations Commission on International Commercial Arbitration.

The UNCITRAL Model Law on International Commercial Arbitration in Article 5 of the Convention provides that "in matters governed by this Law, no court shall intervene except where so provided in this Law." In other words, the jurisdiction of the courts is to the extent it is provided in the Rules of the Model Law and not the same as in ordinary cases.

The Inter-American Convention on International Commercial Arbitration provides that 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. Article 4 of the same Convention provides that 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. …"

An important feature of the New Arbitration Law in United Arab Emirates is the need for commercial disputes to be final and binding without the likelihood of appeal. This element gives arbitration centres their popular commercial draw. Under the DIAC Rules, the language is very clear: "all awards shall be final and binding.

Article III of the Federal Decree No. 43 of 2006 issued by the United Arab Emirates says, "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, under the conditions laid down in the following articles…."

The rule followed in the Arab Republic of Egypt is found in Article 9 of the Law concerning Arbitration in Civil and Commercial Matters, thus:

"Article 9 : (1) Jurisdiction to review the arbitral matters referred by this Law to the Egyptian Judiciary lies with the Curt having original jurisdiction over the dispute.

(2) However, in the case of international commercial arbitration, whether conducted in Egypt or abroad, jurisdiction lies with the Cairo Court of Appeal unless the parties agree on the competence of another Court of Appeal in Egypt.

(3) The Court vested with jurisdiction in accordance with the preceding paragraph shall continue to exercise exclusive

jurisdiction until the completion of all arbitral procedures."

In China, arbitration has been the preferred method for resolving commercial disputes by international investors when they encounter problems with their Chinese counterparts. Litigation in Chinese courts which used to be regarded as the last resort, however, is increasingly attaining the attention of international investors who are operating in China because Chinese courts have gained enormous traffic over the past two decades.

After noting the provisions of international instruments on the review powers of the courts and the approach of the other legal systems let us discuss the position in India as far as review jurisdiction of the courts in relation to commercial arbitration is concerned.

The Courts in India have exercised their review power in respect of the matters of commercial arbitration not only with regard to the enforcement of arbitration awards but also in respect of various other matters, such as the validity of the law under which the arbitration has been envisaged, the validity of the appointment of arbitrators and the validity of the award made by the tribunal. The following are the important instances in which the review jurisdiction of the courts has been exercised in regard to matters of commercial arbitration:-

In Babar Ali v. Union of India and others[(1)] the Supreme Court exercised its power of reviewing the constitutional validity of the Arbitration and Conciliation Act, 1996. This Act had been passed by the Union Parliament of India to give effect to the provisions of the UNCITRAL Code on Commercial Arbitration and to adopt the new mechanism of Alternative

[(1)] (2000) 2 SCC 178

Disputes Resolution. The petitioner challenged the validity of the Act on the ground that it offends against the doctrine of Basic Structure of the Constitution. The provisions whereby jurisdiction may be exercised by the foreign agencies in regard to disputes arising in India also the, petitioner said, is contrary to the Basic Structure of the Constitution of India

The Supreme Court dismissed the petition and held that the Act is not unconstitutional, and that it does not in any way offend the basic structure of the Constitution of India. The Court observed that as per sub-section (5) of Section 16 of the Act of 1996 the question of jurisdiction of the Arbitrator cannot be considered by the courts before the passing of the award by the Arbitrator which cannot be a ground for submitting that such an award is not subject to any judicial scrutiny. The award of the Arbitrator can be challenged before the appropriate court as per the procedure laid down in the Act of 1996.

Soon after the enactment of the New Act in India on international commercial arbitration and conciliation, there was challenge to the validity of the arbitration agreements made prior to January 25, 1996 (the date of commencement of the new Act) providing for an even number of arbitrators on the ground that the provision for appointment of an even number of arbitrators is contrary to Section 10 (1) of the new Act (based on Article 10 of the UNICTRAL Model Law which reads as under:

"(10). Number of Arbitrators: (1) The parties are free to determine the numbe4 of arbitrators, provided that such number shall not be an even number."

This question was examined by the Supreme Court, and in M. M. T. C. Ltd. v. Sterlite Industries (India Ltd.[2] the Supreme Court rejected the contention of such petitioners. Instead of making a literal construction of Section 10 (1) and the arbitration agreement, the provision was construed with reference to Section 7 of the new Act, and the provision in the old Act requiring the appointment of an Umpire in the case of disagreement between the arbitrators. The provisions so read required the arbitration agreement to be construed as making provision for reference to a panel of three arbitrators and not an even number because the old Act required an Umpire to be chosen by the arbitrators. A large number of arbitration agreements made prior to January 25, 1996 were saved by judicial creativity of this nature.

1. The review jurisdiction of the court was exercised to judge the validity of the amendments that had been made to the Code of Civil Procedure, 1908. These amendments were challenged before the Supreme Court of India in Salem Advocate Bar Association v. Union of India [3] as being ultra vires the Constitution. The amendments which were made to the Code of Civil Procedure, 1908 read as follows :-

"89. Settlement of disputes outside the Court: (10 Where it appears to the Court that there exist elements which may be acceptable to the parties, the Court shall formulate the terms of settlement and give them to the parties for their observations and after receiving the observations of the parties, the Court may reformulate the terms of a possible settlement and refer the same for—

[2] AIR 1997 sc 605
[3] AIR 2003 SC 189

(a) arbitration;
(b) conciliation;
(c) judicial settlement including settlement through Lok Adalat, or
(d) mediation;

(2) Where a dispute has been referred-

(a) for arbitration or conciliation, the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) shall apply as if the proceedings for arbitration or conciliation were referred for settlement under the provisions of that Act;

(b) to Lok Adalat, the Court shall refer the same to the Lok Adalat in accordance with the provisions of sub-section (1) of Section 20 of the Legal Services Authority act, 1987 (39 of 1987) and all other provisions of that Act shall apply in respect of the dispute so referred to the Lok Adalat;

(c) for judicial settlement, the Court shall refer the same to a suitable institution or person and such institution or person shall be deemed to be a Lok Adalat and all the provisions of the Legal Services Authority Act, 1987 (39 of 1987) shall apply as if the dispute were referred to a Lok Adalat under the provisions of that Act;

(d) for mediation, the Court shall effect a compromise between the parties and shall follow such procedure as may be prescribed."

According to the respondents, the reason why the above section had been inserted was to try and see that all the cases which are filed in the court need not necessarily be decided by the court itself. Keeping in mind the laws delay and the limited number of Judges which are available, it had become imperative that resort should be had to Alternative Dispute Resolution Mechanism with a view to bring to an end litigation between the parties at an early date. The Alternative Dispute Resolution (ADR) mechanism as contemplated by Section 89 was arbitration or conciliation or judicial settlement including settlement through Lok Adalat or mediation. Sub-section 2 of Section 89 referred to different acts in relation to arbitration, conciliation or settlement through Lok Adalat but with regard to mediation Section 89 (2) (d) provided that the parties shall follow the procedure as might be prescribed. Section 89 (2) (d) therefore contemplated appropriate rules being framed with regard to mediation.

In certain countries of the world where ADR has been successful to the extent that over 90 per cent of the cases are settled out of court there is a requirement that the parties to the suit must indicate the form of ADR which they would like to resort to during the pendency of the trial of the suit. If the parties agreed to arbitration, then the provisions of Arbitration and Conciliation Act, 1996 will apply and that case will go outside the stream of the court.

The Supreme Court rejected the challenge to the constitutional validity of the amendment but observed that modalities need to be formulated for the manner in which section 89 and the other provisions which have been introduced by way of amendments may be in operation. For that purpose committee needs to be constituted consisting of a judge, sitting or retired, nominated by the Chief Justice of India and other nominated members from the Bar. The

Committee may consider management formula as well as rules and regulations which should be followed while taking recourse to the ADR referred to in Section 89.

Pursuant to the direction of the Supreme Court a Committee headed by a former Judge of the Court and Chairman, Law Commission of India (Justice M. Jagannadha Rao) was constituted so as to ensure that the amendments become effective and result in quicker dispensation of justice. It was further observed that the Committee may consider devising a model case management formula as well as rules and regulations which should be followed while taking recourse to the Alternative Disputes Resolution (ADR) referred to in Section 89.

The rules formulated by the aforesaid Committee were approved by the Supreme Court in Salem Advocate Bar Association, Tamil Nadu v. Union of India(4)

Before the coming into force of the Arbitration and Conciliation Act, 1996 India had the Arbitration Act, 1940. Courts had occasion to interpret the provisions of this Act with regard to the applicability of the law to commercial arbitrations..

In a case between the National Thermal Power Corporation (NTPC v. the Singer Company, US the Delhi High Court decided an important question of private international law. The principles of law established in this case could set at rest a number of controversies on whether contracts signed between parties on foreign lands should be governed by Indian laws and should be subject to the Indian Arbitration Act, 1940 or not.

(4) AIR 2005 sc 3353 (second case).

The case in question was regarding the Korba simulator project. Due to late receipt of design data and advance payment from NTPC, Singer was experiencing delays and increased costs on the project.

The NTPC, on its part, alleged that the Singer was to assist it in data collection and was not doing so. Singer then claimed $ 825,000 as a result of NTPC's programme delays of eight months in furnishing data. They made total claims worth $ 3,085,187.

In this case, the contract between NTPC and Singer provided for arbitration according to the rules of International Chamber of Commerce (ICC), the Court of Arbitration, Paris. The Arbitral Tribunal gave its interim award on preliminary questions involved in the disputes.

The NTPC challenged the said award and applied for setting aside the award under Sections 30 and 33 of the Arbitration Act, 1940. It was contended by the petitioner NTPC that since the contract between the parties was stipulated to be governed by the Indian laws, the award given in London was also subject to the Indian Arbitration Act,1940 and Indian Courts had jurisdiction to set aside the award. Rejecting the contention the Court held that though a contract may be governed by laws in India the Arbitration Clause contained in it need not be governed by Indian Laws.

The court further held that the main question involved in the present controversy was whether the award in question was a "foreign award" or not.(5)

The Court held that the arbitration was not to be conducted in accordance with the provisions of the Indian Arbitration Act, but as per the rules of Conciliation and Arbitration of the ICC.

(5) Financial Express, 15th June, 1990.

In this context, the award made was a 'foreign award' and would be governed by the provisions of the Foreign Award (Recognition and Enforcement) act,1961 and the provisions of the Indian Arbitration Act,1940 were not applicable.

The Court further held that since the arbitration proceedings were held in London, the procedural law involving arbitration will be the English law.

Recently, the Supreme Court has held that a suit can be filed in a court in India challenged the foreign commercial arbitration award passed by an arbitrator appointed by the London Council of International Commercial Arbitration ()LCIA) if the award is against public policy and in contravention of statutory provisions.(6)

In this case,, the Venture Global Engineering (VGE) incorporated in the United States of America and Satyam Computer Services Ltd. (SCSL) of Hyderabad in Andhra Pradesh (India) had entered into a joint venture agreement in 1999 to constitute a company named Satyam Venture Engineering Services Ltd. In February 2005, disputes arose between the parties. On a request from the SCSL, the London Council of International Arbitration (LCIA) appointed an arbitrator who had passed an award directing the VGE to transfer the shares to SCSL. Aggrieved by the order of the arbitrator the VGE filed a suit in the City Civil Court, Secunderabad, to set aside order of injunction restraining the SCSL from seeking or effecting the transfer of shares under the terms of award or otherwise.

On appeal from SCSL, the Andhra Pradesh High Court suspended the trial court's order but made it clear that the SCSL would not affect the transfer of shares until further

(6) (http)://222.hinduonnet.com/2008/01/14

orders. Therefore, the trial court rejected the suit and the High Court dismissed VGE's appeal.

An appeal was filed before the Supreme Court by the VGE against the order of the High Court. A Bench of Justices Tarun Chatterjee and Justice Sathasivam held that the provisions of the Arbitration and Conciliation Act, 1996 would apply to international commercial arbitrations held out of India.. The Bench said, "the provisions of Part 1 of the Arbitration & Conciliation Act would apply to all arbitrations including international commercial arbitrations and to all proceedings relating thereto. We further hold that where such arbitration is held in India, the provisions of Part 1 would compulsorily apply and parties…" Justice Sathasivam said, "It is also clear that even in the case of international commercial arbitrations held out of India, provisions of Part 1 would apply unless the parties by agreement express or implied exclude any of its provisions.

Prior to the passing of the International Commercial and Arbitration Act, 1996, the matter of staying the proceedings fell within the jurisdiction of the national courts. Section 3 of the Foreign Awards Act, 1961 dealt with the matter. The question whether courts could interfere in matters of commercial arbitration at the instance of the contracting parties invoking section 3 of the act was considered by the Supreme Court in Renusagar Power Co. Ltd. v. General Electric Company[7] wherein the Supreme Court held the conditions to govern the matter as under :-

"(i) There must be an agreement to which Article II of the Convention set forth in the Schedule applies;

[7] AIR 1985 sc 1156

(ii) A party to that agreement must commence legal proceedings against another party thereto;

(iii) The legal proceedings must be "in respect of any matter agreed to be referred to arbitration" in such agreement;

(iv) The application for stay must be made before filing the writing statement or taking any other step in the legal proceedings;

(v) The court has to be satisfied that there are disputes between the parties with regard to the matters agreed to be referred; this relates to effect (scope) of the arbitration agreement touching the issue of habitability of the claims"

This position was reiterated in Svenska Handelsbanken v. Indian Charge Chrome Ltd.[8]

In Union of India .v. M. V. Gupta[9] the issue decided by the Supreme Court was with regard to appointment of Arbitral Tribunal for the Railways with reference to Clause 64 of the General Conditions of Contract. It was held that where two Gazetted. Railway Officers are appointed as the Arbitral Tribunal, the High Court should not appoint a retired Judge of the High Court as a sole arbitrator and the appointment of sole arbitrator was set aside.

With regard to the question of enforcing the arbitral tribunals the Courts reviewed their decisions and laid down important principles for the interpretation of commercial contracts. In ONGC v. SAW Pipes Ltd. the Supreme Court held that if an award is erroneous on the basis of record with regard to the propositions of law or its application, the court

[8] AIR 1994 (2) SC 1155.
[9] (2004) 10 SCC 504

will have jurisdiction to interfere with the same for it is the primary duty of the arbitrators to enforce a promise which the parties have made and to uphold the sanctity of the contract where from jurisdiction of the arbitrators flows.

Their Lordships of the Supreme Court held that where an arbitral tribunal ignores the law of the land, the award would be contrary to public policy as rule of law requires every adjudicatory forum to follow and apply the law of the land. It was held that the mandate of an arbitral tribunal binds it to follow the law of the land.

It is relevant to look to the power exercised by the Courts in the case of other arbitration awards. In U.P. State Cooperative Land Development Bank Ltd. v. Chandra Bhan Dubey[10] it has been held by the Supreme Court that an arbitrator under Section 10A of the Industrial Disputes Act is subject to writ jurisdiction being a quasi statutory body. Position of a private arbitrator under the Arbitration Act is however different and it was held that against such an arbitrator writ cannot be issued.[11]

In Gujarat Steel Tubes Ltd. v. Gujarat Steel Tubes Mazdoor Sabha[12] the High Court after setting aside the award of the Arbitrator which had upheld the order of termination of service of workmen had itself ordered for reinstatement of workmen instead of remanding the matter to the Arbitrator. Objection was taken to this part of the order by contending that the High Court had no power to do so, which was negatived by Krishna Iyer, J. by saying that "this extraordinary necessary of power is unsheathed to grant final relief without necessary recourse to remand. What the Tribunal may, in its discretion do the High Court too under Article 226 can, if the

[10] AIR 1999 SC 753
[11] Balkishen v. Panna Lal AIR 1973 Del. 108.
[12] AIR 1980 SC1896

facts compel, do. Article 226, however restrictive in practice, is a power wide enough, in all conscience, to be a friend in need when the summons comes in a crisis from victim of injustice and a High Court need not feel oppressed by the technicalities which surrounded these writs in English Courts to do complete justice between the parties.

In conclusion it may be stated that the international instruments and the legislation adopted by certain countries follow the principle of maintaining the autonomy of commercial contracts; so much so that the parties may agree to submit their disputes to the arbitrators of their choice. The trend today is to give the same importance to arbitral decisions as is given to judicial settlements. The jurisdiction of the courts is restricted to a few matters only. Such a principle is well laid down in the Model Law passed by the UN Commission on International Commercial Arbitration. India has of course adopted such a principle but there is at the same time the review jurisdiction exercised by the Courts as per past practice in regard to matters of commercial arbitration also. The Courts exercise such a power de hors the Statute and as an aspect of their inherent powers. Such an interpretation is part of the Rule of Law envisaged by the Constitution. Therefore, there is justification for the Courts to exercise the power of judicial review in various matters including the matters of commercial arbitration..