NOTABLE RULINGS IN ARBITRATION AND THEIR INTEPRETATIONS

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ABSTRACT:

This article deals with the interpretation in the Arbitration and Conciliation Act 1996. This includes landmark and recent judicial decisions and their interpretations. After giving a small introduction, the article directly moves into interpretation of certain parts of the act. This is selected on basis of the judicial conundrums and landmark cases of the act. This article will include interpretation as to consent in Arbitration, interpretation as to judicial control over final order, interpretation as to subject matter arbitrability, interpretation as to courts power to enquire and intervene in the primary stage. These are the recent Arbitration related Judgements which have good interpretation to look into and comprehend. Arbitration uses international law and foreign cases as the legislative intent is also to make Arbitration global standard. This article set down many judicial pronouncements in every subtopic so as to explain the interpretation involved. Additionally, online dispute resolution is also added in favour of future envisions. Suggestions also given along with conclusion and references of cases.

Keywords: non-signatory, arbitrability, arbitral award, alternate dispute resolution, online dispute resolution, interpretation, judicial intervention

INTRODUCTION:

P C Markanda in *law relating to Arbitration and conciliation*[1] have noted the history of Arbitration from the concept called 'panchayat' or 'village council'. Arbitration is the mechanism of appointing an arbitrator to resolve the dispute instead of going to court. This Arbitration mechanism will approximately take 12- 18 months. The UNCITRAL model law has also impacted greatly for the Arbitration law in India and created numerous advancements. Due to the developing commercial regime, need of private dispute resolution, simple procedures will get you into mediation, negotiation, Arbitration and conciliation. Among this Arbitration is developing among big companies, corporates, MNCs, etc,. given its benefits. The Arbitration with global standard paved way for the foreign investors, MNCs to opt for Arbitration in case of any disputes. The Arbitration suits the current commercial regime where ends can be met flexibly, unlike court system. At the moment there are 35 Arbitral institutions in India. Indian government have also taken many steps to strengthen the Arbitration process including setting up committees. In *Vidya drolia*, Justice Sanjiv Khanna noted that India is becoming *pro-Arbitration*. This article deals with the interpretation of various sections of *Arbitration and Conciliation Act* 1996 by various judicial pronouncements which are imprinting it footprints in the *pro-arbitration* notion.

INTERPRETATION AS TO CONSENT IN ARBITRATION:

It is a basic rule that both parties have to consent to Arbitration via agreement to opt for Arbitration. The view of court in case of this can be seen as before cox kings Judgement and after cox kings Judgement.

i) Before cox kings Judgement.

Before ***Chloro Controls***[2] case, both ***Sukanya Holdings***[3] case and ***sumitomo corporation v CDC financial services (Mauritius) ltd***[4] case rejected the case reasoning that party to Arbitration meant party to judicial proceedings and non signatory cannot be a party to

[1] P C Markanda, law relating to arbitration and conciliation, pg no 7 , Lexis Nexis Publications, 11th edition , 2022
[2] Chloro Controls India (Pvt) Ltd V Severn Trent Water Purification Inc, (2013) 1 SCC 641
[3] Sukanya holdings Pvt ltd v jayesh h pandra and anr, AIR 2003 SC 2252
[4] AIR 2008 SC 1594

Arbitration. In ***Chloro Controls***[5] case, court have taken view that on basis of Doctrine of Group of Companies, it allowed non signatory to be a part of Arbitration.

Section 44 of the *Arbitration and Conciliation Act* 1996 includes the term 'at the request of one of the parties or any person claiming through or under him". In ***Chloro Controls***, court have interpreted this section saying that the legislative intent behind parties in this section also includes non-signatories. the Doctrine of Group of Companies is that in case of group of companies in agreements having Arbitration clause, where some agreements between few companies don't have Arbitration clause, the Arbitration clause and commonality of the problem will include other companies as a party to Arbitration. This is interpreted as implied consent by companies involving in works of common nature. The ***Chloro Controls*** case give four exceptional cases where Non-signatories are also acknowledged as party to Arbitration. The four factors includes direct relationship between signatory and non-signatory, commonality of the issue being in composite transaction, presence of ancillary agreements, where the composite reference serves Justice to all the parties. The ***canara bank***[6] case gives interpretation of single economic unit where signatories will also include Non-signatories in agreements.

ii) Cox kings[7] Judgement

In cox kings Judgement court have used many interpretations which includes international perspectives, textbooks. Court in this case held that Doctrine of Group of Companies can be applied in Indian context. Court have given an interpretation that the conduct of the non signatory parties also matters and it should be taken consideration to know whether they acknowledged the Arbitration clause in commonality of workspace or not. In cox kings Judgement court has fixed higher threshold of evidence than in earlier Indian

Judgements. Court has ruled a test to determine "whether the non signatory party had a direct, positive and substantial involvement in the negotiation, performance, or termination of the contract". Court has also taken note of a journal regarding consent for Arbitration by stravos brekoulakis. Court has also noted down that there should be a balance between consensual nature of Arbitration and the modern commercial reality. The Judgement has taken hold of

[5] (2013) 1 SCC 641
[6] Mahanagar Telephone Nigam Ltd V Canara Bank, 2023 DHC 001430
[7] Cox Kings Ltd V Sap India Pvt Ltd, 2023 INSC 1051

many foreign judgements for interpretation, for which one interpretation by Australian High Court[8] is refereed as that the non signatory party who chose to accept the benefits out of the interconnecting contract, has also have to accept the burden as well.

INTERPRETATION AS TO JUDICIAL CONTROL OVER FINAL AWARD:

Section 34 of the *Arbitration and Conciliation Act*, 1996 says that court only has the power to set aside the order only in cases where it is against the public policy, where a party is under some incapacity, invalid agreement, in conflict with basic notions of morality or Justice.

In the case of ***M/s. Dyna Technologies Pvt Ltd v M/s Crompton Greaves Ltd*** [9], court said that intent of legislature is that arbitral award should not be modified. The courts have to take concern that it should not interfere the award in a casual manner. The court gives reasoning that section 34 is not equated with the normal appellate jurisdiction saying "if the courts were to interfere with the arbitral award in the casual manner, then commercial wisdom behind opting for alternate dispute resolution would stand frustrated." Court notably said that in case of ordinarily unintelligible award, it can interfere, but it should not be done in cavalier manner even if there are some gaps in reasoning by arbitrator.

Supreme Court in ***S V Sundaram V State Of Karnataka &Anrf***[10], while quoting the case, ***Delhi Airport Metro Express Private Limited V Delhi Metro Rail Corporation***[11], set out a rule that arbitrator's decision being made by a technical expert cannot be altered or modified like a decision made by judicial person. Court rules that the jurisdiction of an arbitrator should not be easily intervened or altered. While courts are negatively favoured for modifying or altering the award, it upholds the practice of partial setting aside of the award in specific circumstances.[12] This decision was again reiterated in many Judgements relying upon the Docrine of Severability, where claims were separate and distinct. This application is based on the merits of the facts and circumstances of the case and did not give principles set down. The doctrine of severability is explained recently in the case ***Hindustan Steelworks Construction Limited V New Okhla Industrial Development Authority***[13]. In this case court gave an

[8] Rinehart V Hancock Prospecting Pty Ltd, (2016) 337 ALR 174
[9] AIRONLINE 2019 SC 1928
[10] INSC 17
[11] AIR ONLINE 2021 SC 708
[12] J G Engineers Pvt. Ltd V Union Of India, (2011) 5 SCC 758
[13] 2023 AHC 184463 DB

interpretation that unrelated claims make independent awards and noted that as per sec 34 it should not result into inJustice or unfairness.

Recently Supreme Court in ***Batliboi Environmental Engineering Ltd V Hindustan Petroleum Corporation Ltd***[14], interpreted the term 'public policy' in section 34 , and stated that arbitrator should act according to principles of fairness, Justice and legality. An arbitrator's award overriding this is can be set aside by the court.

INTERPRETATION AS TO SUBJECT MATTER ARBITRABILITY:

In the case ***vidya drolia***[15]**,** the court tries to comprehend the meaning of the word arbitrability. As the purview and scope of the *Arbitration and Conciliation Act* 1996, revolves behind the legislative intent to introduce Arbitration act in India making it in par with law around the globe. court interprets using global context and adapts meaning in two different contexts, which includes outside the united states of America and meaning in the united states of America. The former context envisages arbitrability excluding disputes which are barred from national legislation and judicial authority. The later context emphasizes arbitrability in the purview of a complicated balance between courts and arbitrators regarding who will decide initially as to issues like validity of the agreement.

Initially in the case of ***Booz Allen Hamilton inc v SBI home finance ltd & others***[16], the Supreme Court accentuates the arbitrable and non arbitrable disputes by distinguishing them on the basis of right in rem and right in personam. Right in rem means right against the world or the final award against the world can not be arbitrable for eg offences under ipc, right in personam essentially means right against a person i.e, an individual comes under the scope of Arbitration. The court also dealt with action in rem and action in personam, where the latter determines the interest, rights of the parties and former determines the title to property and rights of the parties. Correspondingly Judgement in personam deals with Judgement against a person and Judgement in rem deals with declaring title as to the world or against world. The court also notable rules that this abovementioned distinction is not watertight compartments and is not an inflexible rule. For this the court used external aids (i.e textbook) as in book named "Russell on Arbitration" and "mustill and boyd in their law and practice of commercial

[14] 2023 INSC 850
[15] Vidya Drolia vs Durga Trading Corporation, AIR 2019 SC 3498
[16] AIR 2011 SC 2507

Arbitration in England". court also gave a reasoning that the legislature made some disputes non arbitrable by necessary legal implications due to the need of adjudication of certain disputes only in public fora as a matter of public policy. Court has also given examples that criminal offences, matrimonial disputes, insolvency, etc,. are nonarbitrable.

In the case of ***Ayyasamy***[17], the court held that serious allegation of fraud is not arbitrable so as not to deduce the scope of the public fora. The court ruled that mere allegation of fraud is not out of the scope of Arbitration. The interpretation, court has taken, is that the practicality of the civil and commercial court also involves allegations are fraud. As we have already established the fact that both global point of view and legislative intent is to refer the parties to Arbitration unless it is void, inoperative, etc,., here the court has set out that if there is an allegation of fraud also court can refer and the court is compelled to see through whether the allegation of fraud is to not refer the parties to Arbitration and concludes that when prima facie court observes the serious of allegation of fraud then it cannot refer the dispute to Arbitration. Court has also interpreted using the textbooks (external aids) such as "Redfern And Hunter On International Arbitration", "International Commercial Arbitration By Gary B Born" and "International Arbitration Law And Practice by Mauro Rubino Sammartano , which textbooks support the fraud to be adjudicated by Arbitration. The book by Gary B Born, gives a clear view that only fraud which is directed at the agreement is out of the scope of the Arbitration and fraud or inducements which does not impeach the agreement is not out of the scope of Arbitration.

The court has also mentioned legislative intent that section 24(2) of Arbitration act 1940 which has been repealed by the section 107(2), where the section 24(2) excludes fraud out of scope of Arbitration. As this provision was repealed, the court stated that the legislative intent is to refer to Arbitration unless *serious* allegations of fraud is involved and mere fraud allegations are not considered as exclusion. Supreme Court recently in,

M.Hemalatha Devi & Ors V B Udayasri[18] has held that consumer disputes are out of scope of Arbitration. The court gave the interpretation that only consumer has option to go for judicial authority or Arbitration and 'builder' does not have the option under consumer protection act, 2019.

[17] Ayyasamy v A. Paramasivam, 1 (2016) 10 SCC 386
[18] Livelaw (SC) 902

INTERPRETATION AS TO COURTS' POWER TO ENQUIRY AND INTERVENE AT PRIMARY STAGE:

i) INTERPRETATION UNDER SECTION 11

Section 11 of the *Arbitration and Conciliation Act*, 1996 deals with appointment of arbitrators where parties to agreement fails to appoint an arbitrator. Parliament amended this provision by introducing ***section 11(6-A)***. sec 11(6-A) of the *Arbitration and Conciliation Act* 1996, says that court has the power to examine the existence of an Arbitration agreement.

The Supreme Court in ***duro felguera, S.A v Gangavaram port limited*** observed that power of court under S.11 of the act is conferred only to examine the existence of an Arbitration agreement – nothing more, nothing less. The reasoning behind this interpretation as given by court in its Judgement is that "the legislative policy and purpose is essentially to minimize the court's intervention at the stage of appointing the arbitrator and this intention as incorporated in section 11(6-A) ought to be respected."[19] The law commission report says that the legislative intent was to provide effective and speedy disposal as well as to limit the scope of judicial intervention. The court also noted that India is moving towards a point of minimum judicial intervention.

The Supreme Court in ***vidya drolia v durga trading corporation***[20] has authorized courts to take a *prima facie review* of the case to examine whether there is non existence of Arbitration agreement, invalid agreement and also whether the dispute is non arbitrable. The court explained that prima facie examination is not like a complete review of the case but primary review to check non-existent and invalid Arbitration agreements and gave a reasoning for this stating that where there is dismissal of case because of the abovementioned reasons then the litigation can stop at the first known instance i.e, first stage (reference to

Arbitration). The Supreme Court recently in ***NTPC Ltd v M/S. SPML Infra Ltd,*** [21] the bench of Justice D Y Chandrachud and Justice PS Narasimha has ruled that court is not expected to act mechanically and has to utilize the limited scrutiny at the pre reference stage. SC ruled that

[19] (2017) 9 scc 729
[20] AIR 2019 SC 3498
[21] 2023 SCC OnLine SC 389

the limited scrutiny, through the eye of the needle, is necessary and compelling.[22]

ii) INTERPRETATION UNDER SECTION 7

Section 11 of the Arbitration act states about Arbitration agreement and its stipulations including its contractual nature, written agreement, signature, separate clause or agreement. Court in the case ***M/S. N. N. Global mercantile private limited v. M/S. Indo unique flame ltd & ors,***[23] when interpreting section 7 of the *Arbitration and Conciliation Act* 1996, in the case explained that the scope of the stamp act 1899 is not to harass the litigant but to secure revenue for the state. The bench said "initial defects can be cured and it is never the intention of the legislature to treat an initially unstamped instrument *non-est* in law" the objective behind the enactment of the Arbitration act, 1996 was to, inter alia, avoid the complexity in the procedures and delay in litigation before court. The bench said, impounding and stamping at the section 11 stage would frustrate the very purpose of the amended Arbitration act, 1996 as it can be resolved later. So, interpret the statute in a constructive manner without defeating the legislative intent.

iii) WHEN AGREEMENT IS VIOLATIVE OF ARTICLE 14 OF CONSTITUTION OF INDIA

Court while deciding the case, ***Lombardi engineering limited v uttarkhand jal Vidyut nigam limited,***[24] regarding the condition of pre deposit, laid down the interpretation of a foreign case, *sport maska inc v. zittrer,*[25] which states that even if judicial intervention has to be ruled out, the legislature has to ensure that the Justice would be provided like in courts and for that rules of procedures has to developed to ensure the same Justice by arbitrators also. Court also used grundnorm of kelsen theory to state that constitution is the grundnorm and should not extent to the state of being against fundamental rights. By this interpretation the court has given that while referring case under section 11 (6-A), court can check into whether the contents of the contract which is not in consonance with the article 14 of the constitution of India and held that

[22] Parina katyal, Limited Scrutiny of Court Under Section 11 Of Arbitration Act Through The "Eye Of The Needle", Is Necessary And Compelling: Supreme Court, https://www.livelaw.in/amp/topstories/supreme-court-limited-scrutiny-of-court-section-11-of-arbitration-act-interference-of-courtarbitration-matters-225944 , last updated 10 April 2023
[23] 2023 INSC 1066
[24] 2023 INSC 976
[25] (1988) 1 SCR 564

condition of pre deposit is violative of article 14 by giving power to one party.

ONLINE DISPUTE RESOLUTION - A WAY FORWARD:

Online dispute resolution is the resolution of legal disputes of small and medium values using digital technology, outside the traditional court system. Online dispute resolution (hereinafter referred as ODR) also necessarily includes the techniques of Arbitration, meditation, Conciliation, as dispute resolution avenue is in queue with dispute avoidance, containment and resolution. The need of ODR stems from the covid-19 pandemic outbreak. Online dispute resolution favours less time and adapts the current era. ODR will help the needy by providing timely Justice by shorter, simpler procedures unlike lengthier court procedures. As observed in niti aayog's report 'designing the future of dispute resolution: the ODR policy plan for India', the government of India is taking initiatives to bring ODR as affordable and effective. ODR is supported by many given its benefits to the legal system.

Which cases come under online dispute resolution?

Justice D Y Chandrachud, who heads the e-committee of the Supreme Court, while saying about the type of disputes which would come under ODR, he observed, "in the wide variety of litigation that comes before every court, there is a confluence of the very substantive and not very small, but important, disputes which don't have to come before the court."[26] He had also given examples for this, cases which includes motor accidents claims, cheque bouncing cases, personal injury claims in ODR. he praises this ODR initiative by niti aayog. ODR will be the way ahead of alternative dispute resolution.

What steps are implemented in India regarding online dispute resolution?

SEBI provides an online portal for disputes in the securities market.

SEBI has also released circular regarding the ODR portal briefing all the procedure.[27] The digital data protection act 2023 envisaged digital office, where all process done digitally. Now,

[26] Press information bureau delhi (PIB), *"NITI Aayog pushes for online dispute resolution for speedy access to Justice",* https://pib.gov.in/PressReleasePage.aspx?PRID=1776202 , last updated on 29th nov 2021

[27] Team presolv360, " India's digital Justice system: how the country is embracing the online dispute resolution", https://presolv360.com/resources/India-digital-Justice-system-embrace-online-dispute-resolution/, Last updated on 18th october, 2023.

many acts includes electronic evidence (electronic documents, electronic signature) in it. new Bharathiya Naragrik Suraksha Sanhita, 2023 also explicitly acknowledges digital evidence.

SUGGESTIONS:

- The pro Arbitration approach should be maintained. As much as court looked into this it should also look into of the consent of the parties.
- Online dispute resolution should be made affordable to all and it should be availed faster.
- The cost of Arbitration should be reduced so as to accommodate more cases and reduce the inline waiting in courts.
- Steps must be taken to ensure lesser court intervention and every arbitrator should give award on principles of natural Justice, fairness.
- Flexibility of Arbitration should be increased so as to provide a positive output
- Foreign cases should also be taken for interpretation in every case so as to maintain international Arbitration standards.

CONCLUSION:

By the end of article we can comprehend that India is favouring Arbitration with lesser court intervention. This simple, shorter procedures are not only benefit to the parties contesting but also reduce the burden of court system. We can see the developments made in arbitration both by the courts and legislature , which ensures a standard arbitration mechanism. This commercial era opt out of court procedures due to stringent, lengthier process. So Arbitration and other alternative dispute resolution mechanism are developed to an greater extent. Arbitration of global standard also favours international business transactions, etc., the judicial pronouncements fill the lacunae in the act and set out rules for the arbitrators to follow. These are instances which reflects the India's way into pro arbitration notion.

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