

SUPREME COURT OF INDIA ON ARBITRAL TRIBUNAL

Sudhir S. Kotwal (Advocate)

Research Scholar

Supervisor\ Guide

Dr. Mrs. Asmita A. Vaidya

Chamber No.2,

Maruti Chambers, District Court,

Nashik- 422002

Abstract

This article discusses some aspects of dispute resolution mechanism by way of Arbitral Tribunal. The Arbitration & Conciliation Act 1996 makes the provisions for the Arbitral Tribunal in Chapter III of the Act. It specifies how the arbitral tribunal is appointed & its procedure. Any party to the arbitration agreement if, aggrieved may challenge the procedure & the appointment of Arbitrator or Arbitral Tribunal. Arbitral tribunal can be terminated & new arbitrator can be appointed in certain circumstances. There are several types of Arbitration Tribunal. The Supreme Court of India has played a major role in shaping the above provisions in the Act. Various cases of Supreme Court of India have been discussed in the following Article.

Keywords- Arbitration & Conciliation Act 1996, Arbitral Tribunal, Supreme Court of India, International Commercial Arbitration, Domestic Arbitration, Institutional Arbitration.

1) Introduction

Dispute is a part of human life. Disputes are several types namely Civil (Commercial - Non Commercial), Criminal, family, revenue, Co-operative, Industrial & Labour etc. To resolve the dispute, people have to approach to court. The courts in India are flooded with pending cases due to the lack of infrastructure, less strength of judges & their in-competency to resolve dispute which requires expert knowledge. The procedure in courts for resolution of dispute is very expensive & time consuming. It will take years together to attain the finality to the result. This created a need for a mechanism with new laws for resolution of dispute where the cases can be solved speedily & with less expense. To meet this requirement & comprehensively cover 'International commercial' and Domestic disputes, this Act was passed. The parties go for arbitration because of speed, efficiency & procedural flexibility and less cost involved in this Mechanism.

Arbitration is the process in which the parties voluntarily agree to refer a present or future dispute to the Individual or Individuals, who after hearing submission of parties will issue a legally binding decision determining the issues between them. He will decide the liability & quantum of damages to be paid by the party or give other specific remedies. Arbitral Tribunal is

An International Multidisciplinary Research e-Journal

the person or a panel chosen by the parties or appointed by the court after following the procedure prescribed under the Act. Arbitration Tribunal may be the sole Arbitrator or can be an Arbitral Institution. They resolve the dispute independently & impartially. Neutrality is the main feature of Arbitral Tribunal. In case of termination or incapacity of the Arbitral Tribunal, new arbitration tribunal can be appointed according to the provision in the Act.

2) Development of Arbitration Law in India

India enacted The Arbitration (Protocol and Convention) Act 1937. Thereafter in the year 1960, India became party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958. For giving effect to this convention, India enacted the Foreign Awards (Recognition and Enforcement) Act, 1961. The law of Arbitration was thus contained in these three enactments namely, The Arbitration Act of 1940, The Arbitration (Protocol and Convention) Act of 1937 and the Foreign Awards (Recognition and Enforcement) Act of 1961. There were provisions of section 4, 8, 9, 10 r/w Para 2 of First Schedule in the Arbitration Act 1940 for resolution of dispute but these couldn't match the requirements & therefore was replaced by a new Act. The Act of 1940 was replaced by Arbitration and Conciliation Act, 1996. The 1996 Act was designed primarily to implement the UNCITRAL Model of Law on International Commercial Arbitration and to create a pro-arbitration legal regime in India. In this Act detailed provisions are made for the resolution of International Commercial & Domestic disputes. Chapter III of Arbitration & Conciliation Act deals with Composition of Arbitral Tribunal. This chapter specifies Composition of Arbitral Tribunal, grounds for its Challenge, its procedure, Termination of mandate of arbitrator & substitution of arbitrator etc.

In case of any dispute between two or more parties they make an agreement for their dispute resolution. The agreement is called as Arbitration Agreement. Parties are bound to approach to the Arbitral Tribunal if any dispute arises. In case of Arbitration Agreement between the parties, any party to the agreement may refer their dispute to Arbitral Tribunal. But when other party does not co-operate, then the party seeking Arbitration is required to approach the Chief Justice of the High Court if it is domestic Arbitration or the Chief Justice of the Supreme Court of India if it is an International Arbitration for appointment of the Arbitrator or Arbitral Tribunal under section 11 of the Arbitration & Conciliation Act 1996.

In India, there are small arbitration institutions all over the country, but none of them have stature or the ability to attract or manage large arbitrations in India. At present, commercial disputes involving huge amounts of money are not arbitrated in India. They go out of India because of which we are losing huge amount of time, money, human resources and expertise. There is need for Arbitration institution in India which would match International standards.

3) Various definition in the Act

The Act gives certain definition for better understanding of the terms used in the Chapter it is necessary to reproduce them which reads as under.

- a) **“arbitration”** means any arbitration whether or not administered by permanent arbitral institution;¹

1. Sec. 2 (1) (a) of the A & C Act

- b) “**arbitration agreement**” means an agreement referred to in Section 7;²
- c) “**arbitral award**” includes an interim award;³
- d) “**arbitral tribunal**” means a sole arbitrator or a Panel of arbitrators;⁴
- e) “**Court**” means the principal Civil court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had the subject matter of a suit, but does not include any Civil Court of a grade inferior to such principal Civil Court, or any Court of Small Causes;⁵
- f) “**Arbitration agreement**”⁶ – (1) In this Part, “arbitration agreement” means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.
(2) An arbitration agreement may be in the form of an arbitration Clause in a contract or in the form of a separate agreement.
(3) An arbitration agreement shall be in writing.
(4) An arbitration agreement is in writing if it is contained in,-
 - (a) a document signed by the parties;
 - (b) an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement; or
 - (c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.
(5) The reference in a contract to a document containing an arbitration Clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration Clause part of the contract.

4) Arbitrability of Dispute by Arbitral Tribunal-

All the disputes are not tried by the Arbitral Tribunal. Certain disputes are not suitable to be tried before Arbitration & these disputes are to be tried by the courts only. At the same time when the dispute goes to arbitration then there should not be any intervention or disturbance by the court. The dispute referred to arbitration must result in settlement agreement or at least they can narrow down the controversy such that it attains the finality. The parties to the arbitration are expected to honour the decision of arbitration. During hearing, before arbitral tribunal the intervention of the court is minimal & only in the exceptional circumstances.

2. Sec. 2(1) (b) of the A & C Act.

3. Sec. 2(1) (c) of the Act.

4. Sec. 2(1) (d) of the A & C Act.

5. Sec. 2 (1) (e) of the A & C Act.

6. Section 7 of the A & C Act

The Supreme Court of India in case of **P. Anand Gajapathi Raju Vs PVG Raju**⁷, held that Section 5 of the Arbitration and Conciliation Act, 1996 brings out clearly the object of the Act, namely that of encouraging resolution of disputes expeditiously and less expensively and when there is an arbitration agreement, the Court's intervention should be minimal. The Supreme Court of India in case of **Booz Allen & Hamilton Inc. v. SBI Homes Finance Ltd**⁸ discussed the concept of arbitrability. It states that,

- (a) Disputes capable of being adjudicated through arbitration,
- (b) Disputes covered by the arbitration agreement, and
- (c) Disputes that party have referred to arbitration. In principle, any dispute that can be decided by a civil court can also be resolved through arbitration. However, certain disputes may, by necessary implication, stand excluded from resolution by a private forum like Arbitration. Such non-arbitrable disputes include:
 - (i) Disputes relating to rights and liabilities which give rise to or arise out of criminal offences;
 - (ii) Matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights, child custody;
 - (iii) Guardianship matters;
 - (iv) Insolvency and winding up matters;
 - (v) Testamentary matters (grant of probate, letters of administration and succession certificate); and
 - (vi) eviction or tenancy matters governed by special statutes where the tenant enjoys statutory protection against eviction and only the specified Courts are conferred jurisdiction to grant eviction or decide the disputes.

In Case of **N. Radhakrishnan v. M/s Maestro Engineers**,⁹ the Supreme Court held that where allegations of fraud and serious malpractices are alleged, the matter can only be settled by the Court and such a situation cannot be referred to an arbitrator. Supreme Court has observed that fraud, financial malpractice and collusion are allegations with criminal repercussions and as an arbitrator is a creature of the contract, he has limited jurisdiction. The Courts are more equipped to adjudicate serious and complex allegations and are competent to offer a wider range of reliefs to the parties in dispute.

5) Types of Arbitration-

A) The Act defines only International Commercial Arbitration. In practice we see several types of arbitration which are not defined under the Act. The arbitral Tribunal has no any defined procedure. The Arbitral Tribunal in consultation with parties decides the procedure. Every arbitration has its own merits & demerits. There are various forms of Arbitration. The broad categories are as under.

- i) Domestic Arbitration
- ii) International Arbitration

7. AIR 2000 SC 1886.,

8. (2011 (5) SCC 532).

9. 2010(1) SCC 72.

- iii) Foreign Arbitration
- iv) Ad hoc Arbitration
- v) Institutional Arbitration
- vi) Contractual Arbitration
- vii) Statutory Arbitration

B) Need of Institutional Arbitration.

One of the objectives of arbitration & Conciliation Act is to make provision for an arbitral procedure which is fair, efficient & capable of meeting the needs of the specific arbitration. This can be achieved through the Arbitration Institution. An institutional arbitration is one in which a specialized institution with a permanent character, intervenes & assumes the functions of aiding & administering the arbitral process, as provided by the rules of that institution. Institute can frame their own rules of arbitration & also the panel of number of arbitrators specialized in every field of trade & commerce. The Supreme Court of India in case of **Union of India vs. M/s. Singh Builders Syndicate**¹⁰ favored institutional arbitration in order to save the parties from bearing excessive costs and expenses in ad hoc arbitration. The parties, of course, have the option to go for ad hoc arbitration or Institutional arbitration depending on their convenience. Ad hoc arbitration is arbitration agreed to and arranged by the parties themselves, without recourse to an arbitration institution.

6) Role of Supreme court of India in shaping the provisions of Arbitral Tribunal

Under the provisions of Act mechanism is created for resolution of dispute between the parties, still due lack of certain provisions, confusion or controversy between the parties the supreme court of India have to intervene & give the guideline or directions to simplify it. The SC has dealt with number of Issues however some of it are discussed below.

A) **Arbitration Agreement-** In the case of **Smita Conductors Ltd. v. Euro Alloys Ltd.**¹¹ The Supreme Court construed an arbitration agreement in writing between the parties. Arbitration Agreement must fulfill any of the condition (1) in a contract containing an arbitration clause signed by the parties, (2) an arbitration agreement signed by the parties, (3) an arbitral clause in a contract contained in exchange of letters or telegrams, and (4) an arbitral agreement contained in exchange of letters or telegrams. If an arbitration clause falls in any one of these four categories, it must be treated as an agreement in writing. In the case of **Rickmers Verwaltung GMBH v. Indian Oil Corpn. Ltd.**¹² the Court took the view that 'it is the duty of the court to construe correspondence with a view to arrive at a conclusion whether there was any meeting of minds between the parties, which could create a binding contract between them. In **Deep Trading Company Vs. Indian Oil Corporation & others**,¹³ Once arbitrator is not appointed as per agreed procedure within stipulated time, right of party concerned to appoint arbitrator is forfeited. Once respondent forfeited its right to appoint arbitrator, and respondent did not agree to appointment of arbitrator proposed by appellant, the matter remitted to Chief

10. 2009 (4) SCALE 491

11. (2001) 7 SCC 728

12. (1999) 1 SCC 1

13. (2013) 4 SCC 35.

Justice of High Court for appropriate order. In **Sukanya Holdings (P) Ltd. Vs. Jayesh H. Pandya**,¹⁴ the Chief Justice or his designate while appointing the Arbitrator has to see there is live & surviving dispute between the parties. In the case of **Unissi (India) Pvt. Ltd. v. Post-Graduate Institute of Medical Education and Research**¹⁵, took the view that though no formal agreement was executed but in view of the tender documents containing the arbitration clause, the reference to arbitration was proper. In the case of **Shakti Bhog Foods Ltd. v. Kola Shipping Ltd.**¹⁶ the Court held that from the provisions made under Section 7 of the Act, the existence of an arbitration agreement can be inferred from a document signed by the parties or exchange of e-mails, letters, telex, telegram or other means of telecommunication, which provide a record of the agreement. In **Jagdish Chander v. Ramesh Chander**,¹⁷ the Court held that "The existence of an arbitration agreement as defined under section 7 of the Act is a condition precedent for exercise of power to appoint an arbitrator/Arbitral Tribunal, under section 11 of the Act

(B) **Number of Arbitrators-** In case of **MMRC Ltd. Vs. Sterlite Industries Ltd.**,¹⁸ It has been held by the Supreme Court where agreement does not specify neither the number of arbitrators or their mode of appointment, the validity of an arbitration agreement cannot be challenged on that ground. The Supreme Court in case of **Groupe Chimique Tunisten S.A. Vs. Southern Petro Chemicals Industries Corporation Ltd.**¹⁹ despite agreement providing for two arbitrators appointed three arbitrators having regard to section 10 of the Act. In **Narayan Prasad Lohia Vs Nikunj Kumar Lohia**,²⁰ the Supreme Court held that parties would be entitled to derogate from the provisions of section 10 of the 1996 Act and an award by two arbitrators would not be void.

(C) **Appointment of Arbitrator-** The Supreme Court of India in **Malaysia Airlines system BHD (II)Vs Stic Travels (P)Ltd**²¹ held that Sec 11(9) that the proposed arbitrator is necessarily disqualified because he belongs to the nationality of one of the parties. The provision is not mandatory. In cases, the party who belongs to a nationality other than that of the proposed arbitrator, has no objection, the Chief justice of India can appoint an arbitrator belonging to a nationality of one of the parties. The Supreme Court of India in **Ador Samia (P) Ltd Vs Peekay Holding Ltd** case categorically held that the powers of the Chief Justice under Sec11 are **administrative powers** and therefore, the Chief Justice while exercising powers under Section 11 does not act as a "Court". There had been majority of decisions culminating in the decision of the Constitution Bench (Five Judge Bench decision), *M/s Konkan*

14. (2003) 5 SCC 531.

15. (2009) 1 SCC 107

16. (2009) 2 SCC 134

17. 2007 (5) SCC 519

18. 1996(6) SCC 716.

19. 2006(5) SCC 275,

20. 2002 (3) SCC 572

21. 2001 (1) SCC. 509

*Railway Corporation Limited v M/s Rani Construction Pvt. Ltd.*²², hold unanimously that such order is an **administrative order**. It is also held in the case of **Bhatia International Bulk Trading S.A.**, that in cases of **International commercial arbitration** held out of India, provisions of Part I of Arbitration and Conciliation Act, 1996 would apply unless the parties by agreement express or implied, excluded all or any of its provisions. The Supreme Court Disagreeing with the view of above constitutional bench, A Seven Judge Bench in the case of **S.B.P. & Company v Patel Engineering Ltd**²³. A bench consisting of seven judges held that the power conferred by section 11 of the 1996 Act was a **'judicial power'** and the Chief Justice had to act in his **judicial capacity** and **not in an 'administrative capacity'**. It is described in **National Insurance Co. Ltd. v Boghara Polyfab Pvt. Ltd.**,²⁴ that clarity regarding the **scope of inquiry** which the Chief Justice or his designate should undertake upon an application under s. 11 of the Act made to him. Dealing specifically with the issue of limitation, it was observed in the case of **Indian Oil Corporation Ltd. v. S.P.S. Engg. Ltd.**,²⁵ that where a claim is patently a long **time barred claim**, the Chief Justice or his designate may choose to decide whether the claim is a dead (long barred) claim. **Indian Oil Corporation Ltd. v Raja Transport (P) Ltd.**²⁶ case Supreme Court further clarify that where there is material to create reasonable apprehension that named person is not likely to act independently or impartially or is not available then on recording reasons and in exceptional circumstances by recording valid reasons thereby, ignoring the name arbitrator, independent arbitrator can be appointed. In case of **P. Anand Gajpati Raju vs. P.V.G., Raju**,²⁷ the Supreme Court has held that dealing with the reference of parties to arbitration must be construed bearing in mind object of the Act which is encouragement of expeditious and less expensive resolution of disputes with minimum interference of Court. The Supreme Court has further held that the language of section 8 is peremptory and therefore it is obligatory for the Court to refer the parties to arbitration in terms of their arbitration agreement. Section 8 deals with the power of the Court to refer parties to arbitration where there is an arbitration agreement. In Case of **Haryana Telecom Vs. Starlite Industries (India)**²⁸ the Supreme Court held that an arbitrator have no jurisdiction to order winding up of a company since such power is conferred only on the company court by the Companies Act. In **NBCC Ltd. v. J.G. Engineering Pvt. Ltd.**²⁹ the Supreme Court in its decision has laid down that the mandate of the arbitrator expires in case an award is not delivered within the time limit stipulated by the parties in the arbitration agreement.

22. 2002(2) SCC 388

23. 2005 (8) SCC 618

24. (2009) 1 SCC 267

25. (2011) 3 SCC 507

26. (2009) 8 SCC 520

27. (2000) 4 SCC page 539.

28. (1999) 5 SCC page 688.

29. (2010) 2 SCC 385

(D) **Challenge to appointment of Arbitrator-** In **National Agricultural Co-op. Marketing Federation India Ltd. Vs. Gains Trading Ltd.**³⁰ case, it was held that, the arbitration clause forming part of the contract is to be treated as an agreement independent of the other terms of the contract. In case of **Vinayak Shivajirao Pol Vs. State of Maharashtra**,³¹ the Supreme Court held that the mere suspicion that the arbitrator is bias is not enough. The authority of an arbitrator can be revoked on the apprehension of bias but the apprehension must be reasonable and not whimsical. In case of **Secretary to the Government Transport Department Vs. Munu Swami Mudhliyar**,³² the Supreme Court held that the mere fact that arbitrator named in the Government contract with a private contractor was a Government Officer subordinate to the officer who was interested in cancelling the contract, reasonable apprehension of bias could not be assumed. In the case of **Shivnath Rai Harnarain (India) Ltd. Vs. Abdul Ghaffar Abdul Rehman (Dead) by L.Rs**³³ the Supreme Court of India held that, having mutually agreed to have the dispute referred to an arbitrator at Singapore, the applicant is not permitted to turn around and say that this Court be appointed an arbitrator. In the case of **Aurohill Global Commodities Ltd. Vs. M.S.T.C. Ltd.**,³⁴ the Supreme Court of India held that, the Court has the power to appoint an arbitrator in case of International transaction in accordance with terms of contract.

(E) **Termination of Arbitration Agreement.-** In case of **San-A Tradubg Co.Ltd Vs I.C.Textiles Ltd.**³⁵ it is held that, a new arbitrator can be appointed if the named arbitrator, refuses to act. In case of **Shree Subhlaxmi Fabrics Pvt. Ltd. Vs. Chand Mal Baradia.**³⁶ it was

30. (2007) 5 SCC 629

31. A.I.R. 1998 SC 1096

32. A.I.R. 1988 S.C.2232

33. (2008)5SCC135

34. (2007)7SCC120

35. (2006) 3 MLJ 154 SC

36. (2005) 10 SCC 704

37. 2001 Law Suit(SC) 1408

38. 1996 (3)SCC 346,387

held that an arbitration clause that forms part of a contract will be treated as an agreement independent of the other terms of the contract; The Supreme Court of India in **S.N Palanitkar Vs State of Bihar**³⁷ case held that, merely because there is an arbitration clause in a commercial agreement, that cannot prevent criminal prosecution against the accused if an act constitutes a criminal offence is made out even prima facie.

(F) **Equal treatment to parties-** In **State Bank of Patiala Vs. S.K. Sharma**³⁸ the Supreme Court stated that it would not be correct to say that for any and every violation of a facet of Natural Justice or a rule incorporating such facet, the order passed is altogether void and ought to be set aside without further enquiry. In case of **APS Kushwaha (SSI Unit) Vs. Municipal Corporation, Gwalio & other**³⁹ Contract between parties contained arbitration clause. Hence the Chief Justice rightly appointed arbitrator under section 11(6) of Arbitration & Conciliation Act, 1996. Since appointment of sole arbitrator by designate of Chief Justice had attained finality, despite there being arbitration clause providing for reference of disputes to three members Arbitration Board, the arbitrator cannot go behind said decision. In **Himalayan Construction Co. Vs. Executive Engineer, Irrigation Division, J&K & another**⁴⁰ An Arbitrator initially appointed by designation, on abolition of his post, appointed by name and also extension of time given without objection. Hence award made by him even after his retirement could not be said to be invalid.

7) **Conclusion.**

After study of legal provisions under chapter III of the Arbitration & Conciliation Act 1996. & rulings of Supreme Court of India it is clear that, the parties are free to determine the number of arbitrators. The tribunal can consist of either a sole arbitrator or an odd. If the Arbitral Tribunal is of more than one arbitrator, either party can appoint their nominee arbitrator or the appointed nominee would further appoint a third arbitrator who would be the presiding arbitrator as per the agreement. A person of any nationality can be arbitrator unless otherwise agreed by the parties. The parties are free to agree on the procedure for appointment as well as the procedure of arbitration. There is no qualification required for a person to be appointed as an arbitrator. In case of non appointment of arbitrator by the parties within a period or there is disagreement in that case, any party may apply to the Chief Justice of High court for the appointment of arbitrator. The arbitrator can be terminated when he is unable to perform his

39. (2011) 13 SCC 25

40. (2001) 9 SCC 359,

functions or other reasons such as failed to act without undue delay or withdraw from office or the parties agree to the termination of his mandate. The arbitral proceeding will commence on the date on which request for the dispute to be referred to arbitration is received by respondent and the parties will decide the language to be used in the arbitral proceeding if not specified in the agreement. The arbitral tribunal can decide about the procedure of hearing as per the convenience of the parties. In case of Ad hoc & Institutional Arbitration it reveals that the Institutional Arbitration has superiority over the Ad hoc Arbitration. Apart from the disadvantages of the Ad hoc Arbitration, the advantages of Ad hoc arbitration alleged to be over the Institutional Arbitration are neither maintainable nor justified. The role of Institutional Arbitration over ad hoc arbitration clearly shows that it is consistent with the UNCITRAL Rules, The benefits of arbitration, such as speed, efficiency, a higher degree of procedural flexibility and less cost etc. can only be achieved by Institutional Arbitration. Thus we can conclude that, through the judgments of Supreme Court of India the provisions of chapter III of Arbitration & conciliation Act 1996 have become easy to understand. & due to the constructive encouragement of the Supreme Court for Institutional Arbitration, it will pose a challenge before the Legislators & arbitration Institutions of its application.