ANALYSIS OF MAJOR AMENDMENT IN THE ARBITRATION AND CONCILIATION ACT, 1996

By

—**K. RAMAKANTH REDDY**, Advocate
High Court at Hyderabad

Alternate Dispute Resolution is a process to settle a dispute out of the Court by appointing a third neutral party in a less cumbersome manner without interference of Court and its formal hearing procedure.

In *Salem Bar Association v. Union of India*, AIR 2005 SC 3353, is leading precedent which enforces Alternate Dispute Resolution (ADR) by directing to frame rules for procedure of mediation and out of Court settlements. A Committee chaired by Justice *Jagannadha Rao* was constituted which has made a comprehensive code to regulate the ADR process by invoking Section 89 of the Civil Procedure Code.

According to *Halsbury's* Laws of England, Arbitration means a reference of dispute to hear the matter by a person(s) other than a Court of competent jurisdiction. Conciliation on the other hand is a more flexible and confidential process where two parties discuss their dispute and sort out their differences by proposing solutions from each side.

In India, Arbitration and Conciliation Act, 1996 is the legislation which specifically deals with the ADR process and replaced the 1940 Act. The 1940 Act of Arbitration and Conciliation had provided many opportunities to the litigant to invoke the jurisdiction of Court which ultimately made the process more inefficient and intervening. The 1996 Act adopted new rules to remove the loopholes of the 1940 Act. The 1996 Act is based on following the UNCITRAL model on International Commercial Arbitration as well as Arbitration Rules of UN Commission on International Trade Law of 1976. The Act strives to minimise the interference of Court in all the arbitral process and provide a final arbitral award which can be enforced as a final decree of the Court.

However, various issues are still faced in this Act as it was no better than the 1940 Act when it comes to cost effectiveness and delays. Even after the award, one can challenge under Section 34 of the Act which makes it in executable and it remains pending for many years. The Proceedings of arbitrations became a replica of the Court proceedings. The appointment of Arbitrators and their independence was still put under challenge.

The President on 23rd October, 2015 promulgated Arbitration and Conciliation (Amendment) Ordinance, 2015 to amend the 1996 Act and make easy settlement of national and international commercial disputes. Addressing the issues of 1996 Act, the Arbitration and Conciliation Act, 2015 was introduced.

Recently, the parliament has approved the Arbitration and Conciliation (Amendment) Bill, 2018 facilitating to improve the standards of institutional arbitration by laying down the standards and make it more cost-effective, easy disposal of disputes and neutrality of Arbitrators. The High Level Committee (HLC) constituted under the Chairmanship of Justice *B.H. Srikrishna*, proposed some major recommendations which was incorporated in the amending Act.

As per the Press Information Bureau[1], the amendment prescribes to create

1. Press Information Bureau, Government of India, Cabinet Amendments to the Arbitration and Conciliation Bill, 2015 available at http://pib.nic.in/newsite/PrintRelease.aspx?relid=126356.

Arbitration Council of India (ACI), an independent body which will lay down norms, standards, grade and accredit the arbitral institution to promote all forms of ADR processes. The ACI being a body corporate where the Chairperson would be the Judge of the Supreme Court or Chief Justice or Judge of any High Court or any eminent person. The other Members would include an eminent academician *etc.*, besides other Government nominees. The Council will maintain uniform standards and an electronic depository of all arbitral awards.

The most important in terms of amendment is of Section 2(2) of the 1996 Act where there was confusion on its applicability. The whole dilemma and confusion was created after the *Bhatia International v. Interbulk Trading SA*, (2002) 4 SCC 105, which included the foreign award under the definition of domestic award, it held that-

> "As is set out hereinabove the said Act applies to (a) arbitrations held in India between Indians (b) international commercial arbitrations. As set out hereinabove international commercial arbitrations may take place in India or outside India. Outside India an international commercial arbitration may be held in a convention country or in a non-convention country. The said Act however only classifies awards as "domestic awards" or "foreign awards". Mr. Sen admits that provisions of Part-II makes it clear that "foreign awards" are only those where the arbitration takes place in a convention country. Awards in arbitration proceedings which take place in a non-convention country are not considered to be "foreign awards" under the said Act. They would thus not be covered by Part-II. An award passed in an arbitration which takes place in India would be a "domestic award". There would thus be no need to define an award as a "domestic award" unless the intention was to cover awards which would otherwise not be covered by this definition. Strictly speaking an award passed in an arbitration which takes place in a non-convention country would not be a "domestic awards". Thus the necessity is to define a "domestic award" as including all awards made under Part-I. The definition indicates that an award made in an international commercial arbitration held in a non-convention country is also considered to be a "domestic award".

After this judgment, Part-I of the 1996 Act applied to Part II which talks about arbitration done outside India including foreign awards. This decision has made the trial and examination of foreign awards in the national Court just like domestic award.

However, Supreme Court in *Bharat Aluminium Co. v. Kaiser Aluminium Technical Service, Inc. and others etc.*, (2012) 9 SCC 552, removed this dilemma by laying down that Part-I and Part-II are mutually exclusive to each other and no application of Part-I to Part-II. It was held that-

> "...the provisions of Part-I would apply to all arbitrations and to all proceedings relating thereto. Where such arbitration is held in India the provisions of Part-I would compulsorily apply and parties are free to deviate only to the extent permitted by the derogable provisions of Part-I. In cases of international commercial arbitrations held out of India provisions of Part-I would apply unless the parties by agreement, express or implied, exclude all or any of its provisions. In that case the laws or rules chosen by the parties would prevail. Any provision, in Part-I, which is contrary to or excluded by that law or rules will not apply."

Therefore, the amendment has also adopted this principle and confined the applicability of Part-I only where the place of arbitration in India.

Section 42-A is a new provision that mandates to maintain confidentiality by the Arbitrator and arbitral institution. Section 42-B protects an Arbitrator from suit or other legal proceedings for any action or omission done in good faith in the course of arbitration proceedings[2].

Another important amendment is of Section 11 which talks about the appointment of Arbitrators. The old Act with this provision tries to decrease Court intervention but on the contrary there are hundreds of cases pending in the Supreme Court and mostly relating to the appointment of Arbitrators. Particularly under Section 11, the appointment of Arbitrators by Court intervention is the most debatable aspect as when the parties fail to appoint their Arbitrators, the Chief Justice of India and Chief Justice of High Court appoint the Arbitrators which again become disputable on the nature of order passed by the CJI and Chief Justice of High Court as judicial or quasi-judicial.

In *K.R. Raveendranathan v. State of Kerala*, (1996) 10 SCC 35, it was the first time nature of appointment by the Chief Justice was debated whether the power conferred is judicial, final or binding in nature.

The whole debate was put on rest after *S.B.P. & Co. v. Patel Engineering and another*, (2005) 8 SCC 618, which has cleared many obstacles in these words-

> "Normally, any Tribunal or authority conferred with a power to act under a statute, has the jurisdiction to satisfy itself that the conditions for the exercise of that power existed and that the case calls for the exercise of that power. Such an adjudication relating to its own jurisdiction which could be called a decision on jurisdictional facts, is not generally final, unless it is made so by the Act constituting the Tribunal. Here, sub-section (7) of Section 11 has given a finality to the decisions taken by the Chief Justice or any person or institution designated by him in respect of matters falling under sub-sections (4), (5) and (6) of Section 11. Once a statute creates an authority, confers on it power to adjudicate and makes its decision final on matters to be decided by it, normally, that decision cannot be said to be a purely administrative decision. It is really a decision on its own jurisdiction for the exercise of the power conferred by the statute or to perform the duties imposed by the statute. Unless, the authority satisfies itself that the conditions for exercise of its power exist, it could not accede to a request made to it for the exercise of the conferred power. While exercising the power or performing the duty under Section 11(6) of the Act, the Chief Justice has to consider whether the conditions laid down by the section for the exercise of that power or the performance of that duty, exist. Therefore, unaided by authorities and going by general principals, it appears to us that while functioning under Section 11(6) of the Act, a Chief Justice or the person or institution designated by him, is bound to decide whether he has jurisdiction, whether there is an arbitration agreement, whether the applicant before him, is a party, whether the conditions for exercise of the power have been fulfilled and if an Arbitrator is to be appointed, who is the fit person, in terms of the provision. Section 11(7) makes his decision on the matters entrusted to him, final."

Hence, now it is a settled principle that appointment of Arbitrators by the Chief Justice either of Supreme Court or High Court is judicial, final and binding in nature.

Another amendment is of Section 29(A) which talks about completion of all

2. Press Information Bureau, Government of India, Cabinet Amendments to the Arbitration and Conciliation Bill, 2015 available at http://pib.nic.in/newsite/PrintRelease.aspx?relid=126356

arbitration process within 1 year since the arbitral Tribunal is constituted. However, by an agreement it can be extended to another 6 months. So, if in total 18 months award is not granted then party have right to approach the Court for further extension of time on basis of sufficient cause. Though, this provision has attributed to Court intervention for granting the extension of time. A completely new section has been added of Section 29(B) which prescribes fast track procedure on the basis of agreement between the parties. The parties are given liberty to exclude the arbitral Tribunal from following the institutional rules.

Section 34 is the major and breakthrough provision which was needed amendment. Section 34 provide that any arbitral award can be set aside on the basis of contravention to the "Public Policy" Section 34 states that an arbitral award should be "set aside if it is contrary to (a) fundamental policy of Indian law; (b) the interest of India; (c) justice or morality or (d) in addition, if it is patently illegal[3].

In the case of *Municipal Corporation of Greater Mumbai v. Prestress Products*, 2003 (3) Bom. CR 117, it was observed that it was the parliament's objective to curtail judicial intervention by enacting the Arbitration Act. It referred to the observation made in *Konkan Railway Corporation Ltd. v. Mehul Construction Co.*, MANU/SC/0053/2002-

A bare comparison of different provisions of the Arbitration Act, 1940 with the provisions of the Arbitration and Conciliation Act, 1990 would unequivocally indicate that the 1996 Act limits intervention of Court with an arbitral process to the minimum and it is certainly not the legislative intent that each and every order passed by an authority under the Act would be a subject-matter of judicial scrutiny of a Court of law.

Further, in *ONGC v. Saw Pipes*, AIR 2003 SC 2629, the concept of 'public policy' was expanded by ruling that-

> *"In our view, reading Section 34* conjointly with other provisions of the Act, it appears that the legislative intent could not be that if the award is in contravention of the provisions of the Act, still however, it couldn't be set aside by the Court. If it is held that such award could not be interfered, it would be contrary to basic concept of justice. If the arbitral Tribunal has not followed the mandatory procedure prescribed under the Act, it would mean that it has acted beyond its jurisdiction and thereby the award would be patently illegal which could be set aside under *Section 34*."

Also, in *Venture Global Engg. v. Satyam Computer Service Ltd.*, (2008) 4 SCC 190, it was held that –

> "If anything is found in excess of jurisdiction and depicts a lack of due process, it will be opposed to public policy of India. When an award is induced or affected by fraud or corruption, the same will fall within the aforesaid grounds of excess of jurisdiction and a lack of due process. Therefore, if we may say so, the explanation to Section 34 of ABC is like `a stable man in the saddle' on the unruly horse of public policy. It is well known that fraud cannot be put in a strait jacket and it has a very wide connotation in legal parlance."

Thus, still there is no straight jacket formula to define the public policy. The amendment has now provided that before filing an application for setting aside the award, a notice has to be sent to the other party. It has also put a time bar of 1 year for disposal of dispute relating to set aside of award after the service of notice to the other party. In this way, the long awaited dispute regarding the pendency of suit under Section 34 of the Act will be minimised.

3. Section 34 of the Arbitration and Conciliation Act, 1996.

Here, we have dealt with the most important amendments made in the 1996 Act and there have been other amendment in the Act which should be looked after. We can say from this recent amendment that now clear demarcation has been strived to be made between Domestic and International Arbitration. However, the amendment still doesn't create clarity on whether the proposed amendment is prospective or retrospective in nature. It has though acted as catalyst in the giving a new dimension to the Indian Arbitration law. It has to some extent included the recommendations of Law Commission and we can hope by these initiatives that India is on progressive path to create an arbitration hub and a hassle free system for people.

JUDICIAL INTERPRETATION - ARTICLE 21 OF THE CONSTITUTION OF INDIA

By

—**Dr. MUDDU VIJAI**, Advocate
High Court of Hyderabad for the State of Telangana and the State of Andhra Pradesh

Introduction

Article 21 enshrines the fundamental right of all Indian citizens to the protection of life and personal liberty. Article 21 weaves a string of an endless yarn of welfare legislation. Its scope and interpretation has been time and again defined and redefined, giving it the widest possible amplitude and judiciary has played an important role in lining up the actions of a welfare State.

Article 21 is protection of life and personal liberty, number of persons shall be deprived of his life or personal liberty except according to procedure established by law. The Article prohibits the deprivation of the above rights except according to a procedure established by law Article 21 corresponds to the Magna Carta of 1215, the Fifth Amendment to the American Constitution, Article 40(4) of the Constitution of Eire 1937, and Article XXXI of the Constitution of Japan, 1946. Article 21 applies to natural persons. The right is available to every person, citizen or alien. Thus, even a foreigner can claim this right. It, however, does not entitle a foreigner the right to reside and settle in India, as mentioned in Article 19(1)(e).

This article aims to examine the full scope of this constitutionally guaranteed freedom in light of the various judgments of the Courts and its contemporary application today.

In order to fully comprehend the entire scope of the article and how it is applied by the Courts, a brief examination of the principles and core concepts of the article is necessary.

Core Principles and Concepts

Protection of Life:-"precious and inalienable right under Article 21."

Personal Liberty:-Physical as well as psychological restraints are construed to be impeding personal liberty.