



The arbitration and conciliation act, 1996: A critical examination of some problematic issues

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Abstract

The present research paper seeks to examine some knotty issues pertaining to the Arbitration and Conciliation Act 1996 in the light of Need of Permanent ADR Forums, Amalgamation of Judicial System, Role of Courts in ADR Promotion, Objective & Scheme of the Act, Preamble of the Act, Application of the Act, Date of Enforcement of the Act, Minimization of Supervisory Role of Courts, Both Domestic & International Arbitration, Use of Statement of Objects and Reasons and Interpretation of Act. The legislative and judicial trends have also been examined in the conceptual and applied aspects.

Keywords: judicial system, ADR forums

1. Introductory Reflections

In today's judicial system, ADR methods have been incorporated and the days are gone when the arbitrators were looked as an opponent by the judiciary people. Now-a-days, various ADR methods are court-annexed.

a) Need of Permanent ADR Forums and Amalgamation of Judicial System

Consumers of justice are in millions and it is becoming rather thorny for the courts to administer mounting cases with the present infrastructure and manpower. Courts are congested with cases. There is severe trouble of overfilling of dockets. Because of the mounting number of cases the Court system is under great strain. Therefore, if there was at the threshold a permanent mechanism or machinery to settle the matters at a pre-trial stage, many matters would not find their way to the Courts. In the same way, if there are permanent forums to which Courts may refer cases, the load of cases could be taken off the Courts. With the purpose of lessen the weighty claim on court time, cases must be resolved by resorting to 'Alternative Dispute Resolution' Methods before they enter the threshold of Court.

b) Role of Courts in ADR Promotion

As was observed in *Mediterranean & Eastern Export Co. Ltd. Case* ^[1] "the day has long gone by when the Courts looked with jealousy on the jurisdiction of arbitrators." In fact the fresh amendments to the Indian Civil Procedure Code and 1996 Arbitration and Conciliation Act evidently indicate an inclination to assimilate the ADR methods into the existing court structure by authorizing the Courts to have route to arbitration and conciliation in suitable cases. This merger of judicial system with arbitration and conciliation processes is in reality a historic and significant expansion.

2. Arbitration and Conciliation Act, 1996: Scrutiny of Issues

The Arbitration and Conciliation Act 1996 ^[2] marks the

opening of a significant chapter in the history of legal and judicial reforms in India. It has to be seen not as just one more law but as a piece of legislation which has the potential to bring about a qualitative revolution in the manner the role of law is perceived and the manner in which administration of justice is carried out. Due to extremely slow judicial process, there has been a big thrust on Alternate Dispute Resolution mechanisms in India. While Arbitration and Conciliation Act, 1996 is a fairly standard western method towards ADR, the Lok Adalat system constituted under National Legal Services Authority Act, 1987 is an exclusively Indian style.

a) Short Title, Extent & Commencement.

This Act may be called the Arbitration and Conciliation Act, 1996 ^[3].

b) Objective & Scheme of the Act

It may be stated that arbitration which had lost its inviolability as an alternative dispute resolution system was steadily being substituted by newer techniques such as conciliation, mediation and negotiation which have now been statutorily recognized by the Arbitration and Conciliation Act of 1996 (Act 26 of 1996). The introduction of the new-fangled law assigning a more meaningful role to arbitration and conciliation in the settlement of disputes is, in this, sense, more a rediscovery than an innovation.

i) Objective of the Act

The Arbitration and Conciliation Act, 1996 is an Act to consolidate and amend the law relating to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards as also to define the law relating to conciliation and for matters connected therewith or incidental thereto ^[4]. Therefore, it is clear that the present Act is a consolidating and an amending Act.

ii) Scheme of the Act

The present Arbitration and Conciliation Act, 1996 consists of

four parts and three schedules as follows- Part I- Arbitration, Part II- Enforcement of Certain Foreign Awards, Part III- Conciliation, Part IV- Supplementary Provisions. The First Schedule-Convention On The Recognition And Enforcement Of Foreign Arbitral Awards, The Second Schedule-Protocol On Arbitration Clauses and The Third Schedule-Convention On The Execution Of Foreign Arbitral Awards

c) Preamble of the Act

The Arbitration and Conciliation Act, 1996 was passed on the basis of the UNCITRAL Model Law on International Commercial Arbitration, 1985 and UNCITRAL Conciliation Rules, 1980^[5].

i) Preamble

WHEREAS the United Nations Commission on International Trade Law (UNCITRAL) has adopted the UNCITRAL Model Law on International Commercial Arbitration in 1985:

AND WHEREAS the General Assembly of the United Nations has recommended that all countries give due consideration to the said Model Law, in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice;

AND WHEREAS the UNCITRAL has adopted the UNCITRAL Conciliation Rules in 1980;

AND WHEREAS the General Assembly of the United Nations has recommended the use of the said Rules in cases where a dispute arises in the context of international commercial relations and the parties seek an amicable settlement of that dispute by recourse to conciliation;

AND WHEREAS the said Model Law and Rules make significant contribution to the establishment of a unified legal framework for the fair and efficient settlement of disputes arising in international commercial relations;

AND WHEREAS it is expedient to make law respecting arbitration and conciliation, taking into account the aforesaid Model Law and Rules;

BE it enacted by Parliament in the Forty-seventh Year of the Republic of India as follows:-

ii) Commentary on Preamble

The Model Law^[6] which was drafted to govern all international arbitrations by a working group of the UN and was finally adopted by the U.N. Commission on International Trade Law^[7] (UNCITRAL), to provide uniformity and certainty to both categories of cases. It had been recommended by General Assembly of the United Nations that all countries should give due consideration to the said Model Law in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of the international commercial arbitration practices. It has also recommended the use of the said Rules in cases where a dispute arises in the context of international commercial relations and the parties seek on amicable settlement of that dispute by recourse to conciliation. These rules are believed to make a significant contribution to the establishment of a unified legal framework for the fair and efficient settlement of disputes arising in international commercial relations^[8]. Certain matters which are not arbitrable are - Suits for divorce

or restitution of conjugal rights, Taxation, Non-payment of admitted liability, Constitutional issues and Criminal matters.

d) Application of the Act

It extends to the whole of India: Provided that Parts, I, III and IV shall extend to the State of Jammu and Kashmir only in so far as they relate to international commercial arbitration or, as the case may be, international commercial conciliation.

Explanation- In this sub-section, the expression “international commercial conciliation” shall have the same meaning as the expression “international commercial arbitration” in clause (f) of sub-section (1) of section 2, subject to the modification that for the word ‘arbitration’ occurring therein, the word “conciliation” shall be substituted^[9].

Thus, it is clear that in the matter of international commercial arbitration and conciliation this Act would apply to State of J & K also. The parliament is empowered to make a law by the force of Constitution of India^[10] as Part II deals with international agreements especially international awards.

e) Date of Enforcement

It shall come into force on such date^[11] as the Central Government may, by notification in the Official Gazette, appoint.^[12] In *M/s Fuerst Day Lawson Ltd. Case*^[13] the Supreme Court held that from the plain and literal interpretation of Section 1(3) of the Act and the Gazette Notification, it is clear that the Act came into force on 22.8.1996 but its purposive reading would show that the Act came into force in continuation of the first ordinance which was brought into force on 25.1.1996. Thus for all practical and legal purposes it shall be deemed to have been effective from 25.1.1996 particularly when the provisions of the Act are similar and there is nothing in the Act to the contrary so as to make the ordinance ineffective as to either its coming into force on 25.1.1996 or its continuation up to 22.8.1996.

f) Minimization of Supervisory Role of Courts

Judicial intervention under the new 1996 Act is limited to:(1) Reference of parties to arbitration where there is an arbitration agreement^[14] (2) Issuance of interim orders as 'measures of protection'^[15] (3) Appointment of arbitrators^[16] (4) Termination of the mandate of arbitrators^[17] (5) Providing evidence to arbitral tribunals^[18] (6) Setting aside or remission of the award^[19] (7) Power to hear appeals^[20] (8) Power to order delivery of awards on payment of costs to the court^[21] (9) Power to make an order on cost of arbitration where no sufficient provision is made in the award^[22] (10) Power to direct determination of any question in connection with insolvency proceedings by arbitration under certain circumstances^[23] (11) Power to extend time for reference to arbitration to time barred future disputes^[24].

The Supreme Court in *Food Corporation of India Case*^[25] observed: “We should make the law of arbitration simple, less technical and more responsive to the actual realities of the situations but must be responsive to the canons of justice and fair play and make the arbitrator adhere to such process and norms which will create confidence, not only by doing justice between the parties, but by creating sense that justice appears to have been done.” The Supreme Court in *Food Corporation of India Case*^[26] said that the legislative intent is to minimise

the supervisory role of the court in the arbitral process and quick nomination or appointment of arbitrator, leaving all contentious issues to be decided in arbitration. In *Shyama Charan Agarwal Case* ^[27] it was held that one of the aims is to settle all the disputes between the parties and to avoid further litigation. In *Paradeep Anand Case* ^[28] the Apex Court held that the provisions of the Act make it clear that arbitration proceedings are to be conducted by the arbitrator with reasonable dispatch. It follows that after passing of the award the court should also dispose of proceedings expeditiously so that the party, in whose favour the award has been passed, actually gets the benefit of the arbitration clause.

g) Both Domestic & International Arbitration

The Act of 1996 covers both international and domestic arbitration, i.e., where at least one party is not an Indian national and also arbitrations where both parties are Indian nationals respectively. The old Arbitration Act, 1940 (relating to domestic arbitration) and also the Arbitration (Protocol and Convention) Act, 1937 and the Foreign Award (Recognition and Enforcement) Act, 1961, (relating to international arbitration) were repealed, thus enabling the Act of 1996 to govern both domestic and international arbitrations ^[29].

h) Use of Statement of Objects and Reasons

The Supreme Court observed in *Narain Khamman Case* ^[30] that it is now well-settled that though the Statement of Objects and Reasons accompanying a legislative Bill cannot be used to determine the true meaning and effect of the substantive provisions of a statute, it is permissible to refer to the Statement of Objects and Reasons accompanying a Bill, for the purpose of understanding the background, the antecedent state of affairs, the surrounding circumstances in relation to the statute, and the evil which the statute sought to remedy.

Again in *Fuerst Day Lawson Ltd Case* ^[31] the Supreme Court observed that the object of the Act is to provide speedy and alternative solution to the dispute and avoid protraction of litigation. The provisions of the Act have to be interpreted accordingly.

i) Interpretation of Act

In *Sundaram Finance Ltd. Case* ^[32] the Supreme Court held that the provisions of the Act have to be interpreted and construed independently and in fact reference to Act of 1940 may actually lead to misconstruction. In order to get help construing these provisions, it is more relevant to refer to the UNCITRAL Model Law rather than the 1940 Act. It is relevant to consider *East Coast Boat Builders & Engineers Case* ^[33] that explored the effect of the Model Law and Rules. In *Konkan Railway Corp. Ltd. Case* ^[34] the Supreme Court held that the Arbitration and Conciliation Act, 1996 has been drafted according to the UNCITRAL Model Law. The Act and the Model law are however not identical and therefore the judgments and the literature thereon cannot be taken as a guide to the interpretation of the Act 1996. In *Bhatia International Case* ^[35] the Supreme Court held that general provisions such as those given under Sections 9 and 17 are applicable to all types of arbitration and are not repeated in all chapters. Such provisions are to apply to all arbitrations unless expressly barred or where other provisions have been made in

a particular chapter or part. It has also been held that Part I of the Act applies compulsorily to all arbitrations held in India and all proceedings relating thereto. The parties can only derogate from the provisions to the extent permissible.

3. Concluding Observations

Section 5 ^[36] intends to minimize the intervention of courts in arbitral proceedings. This Act has over-riding effect. Section 5 of Act clarifies that notwithstanding anything contained in any other law for the time being in force, in matters governed by the Act, the judicial authority can intervene only as provided in this Act and not under any other Act. In *Popular Construction Co. Case* ^[37] Supreme Court held that keeping in view the scheme of the Act which is "to minimize the supervisory role of courts in the "arbitral process" and the same objective being reflected in section 5 (which prescribes the extent of judicial intervention in uncertain terms) the court concluded that the time prescribed under Section 34 to challenge the award is absolute and in extendible by court under section 5 of the Limitation Act. In *Mankanner Jain Social Welfare Society Case* ^[38] Madras High Court held that the New Act has widened the powers of the arbitral tribunal to decide upon the questions relating to appointment of the arbitrator, jurisdiction by the arbitral tribunal etc. Hence for such preliminary issues a party cannot approach the Civil Court as such intervention has been prohibited vide section 5 of the Act. The Civil Court can intervene only where it has been expressly provided for by the Act. If the challenge fails and the tribunal passes the award, the party can challenge the award under section 34 as provided for in Section 16(6).

4. References

1. Mediterranean and Eastern Export Co. Ltd. v. Fortress Fabrics Ltd. (1948) 2 All ER 186.
2. Published in Gazette of India Part-II, Section 1, 19th August, 1996, (No. 55).
3. Arbitration and Conciliation Act, 1996.; Section 1(1)
4. Arbitration and Conciliation Act, 1996. Long Title
5. It has been observed that many nations like Ukraine, Bulgaria, Bahrain, Singapore, Australia, Hong Kong, Sri Lanka, Malta, Nigeria, Mexico, Egypt, Kenya, Finland, Russia and American States have also adopted and enacted appropriate law modeled on the basis of the UNCITRAL Model Law on International Commercial Arbitration, 1985 and UNCITRAL Conciliation Rules, 1980.
6. A Set of 36 Articles.
7. Adopted on June 21, 1985.
8. These objectives have been laid down in the Preamble to the Arbitration and Conciliation Act, 1996.
9. Arbitration and Conciliation Act, 1996; Section 1(2).
10. Article 253 and entries 13 and 14 in the Union List in the Seventh Schedule
11. Came into force on 22/08/1996 vide G.S.R. 375(E), dated 22nd August, 1996.
12. Arbitration and Conciliation Act, 1996; Section 1(3)
13. Fuerst Day Lawson Ltd. v. Jindal Exports Ltd. AIR2001 SC 2239; 2001 (3) SCALE 708.
14. Arbitration and Conciliation Act, 1996; Section 8
15. Arbitration and Conciliation Act, 1996; Section 9

16. Arbitration and Conciliation Act, 1996; Section 11.
17. Arbitration and Conciliation Act, 1996; Section 14(2).
18. Arbitration and Conciliation Act, 1996; Section 27.
19. Arbitration and Conciliation Act, 1996; Section 34.
20. Arbitration and Conciliation Act, 1996; Section 37.
21. Arbitration and Conciliation Act, 1996; Section 38(2).
22. Arbitration and Conciliation Act, 1996; Section 39(4).
23. Arbitration and Conciliation Act, 1996; Section 41(2).
24. Arbitration and Conciliation Act, 1996; Section 43(3).
25. Food Corporation of India v. Joginderpal Mohinderpal AIR 1989 SC 1263, 1266.
26. Food Corporation of India v. Indian Council of Arbitration, AIR, 2003. SC 3011.
27. Shyama Charan Agarwal & Sons v. Union of India (2002) 6 SCC 201: AIR 2002 SC 2659.
28. Paradeep Anand v. ITC Ltd. AIR 2002 SC 2799.
29. By virtue of Sec. 85 of the 1996 Act.
30. Narain Khamman v. Parduman Kumar (1985) 1 SCC 1 at p 8, para 12: AIR 1985 SC 4 at 8.
31. Fuerst Day Lawson Ltd v. Jindal Exports Ltd, (2001) 6 SCC 356: AIR 2001 SC 2291.
32. Sundaram Finance Ltd. v. NEPC Indian Ltd. (1999) 2 SCC 479: AIR 1999 SC 565.
33. Union of India v. East Coast Boat Builders & Engineers Ltd, 1999(4) RAJ 365 (Del). It was decided that it cannot be said that each and every provision of the said Model Law and Rules forms part of the Act even though the preamble of the Act says that it is expedient to make laws respecting Arbitration and conciliation taking into account the UNCITRAL Model law and Rules. Those Model law and Rules were taken into account while drafting and enacting the Act but whatever has been enacted is the law on arbitration enforceable in India. Had there been a lacunae in the provisions of the Indian Arbitration Act on the point at issue or if it contained such provisions which is capable of 2 or more different interpretations, then of course the internal aid to the preamble to the Act could be taken for interpreting such provision and then the relevant provisions of the said Model Law and Rules could be read so as to interpret that provision because while enacting the Indian Act, the said Model Law and Rules were taken into account.
34. Konkan Railway Corp. Ltd. v. Rani Construction (P) Ltd., (2002) 2 SCC 388: AIR, 2002 SC 778.
35. Bhatia International v. Bulk Trading S.A. (2002) 4 SCC 105: AIR 2002 SC 1432
36. Section 5 is inspired from Article 5 of the Model Law.
37. Union of India v. Popular Construction Co. (2001) 8 SCC 470
38. Mankanner Jain Social Welfare Society v. Anil Kumar Doshi, 2002 Arb. WLJ, 25(Mad.):2001 (2) Arb LR 242 (Mad).