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AN ANECDOTE OF ARBITRATION LAW IN INDIA[1]

ABSTRACT

The Arbitration law was introduced by the Britishers when India was their colony. With the introduction of the Code of Civil Procedure in 1859, some provisions related to arbitration law were also introduced for the first time in India by British raj. As new drafts of CPC were introduced to replace previous ones, updated provisions of Arbitration Law were also introduced in India during colonial era. However, the first comprehensive substantive law related to arbitration law enactment by the British government in India viz. Indian arbitration Act 1899 which was a replica of English Arbitration Act, 1899. The major development that took place in the evolution of Arbitration Law was only after the independence of India when India became a sovereign state and rectified major international treaties and Conventions related to arbitration law. In not more than 160 years, India saw a significant evolution in Arbitration Law. Moreover, India's 1991 liberation, privatization and globalization policy act as a catalyst in the evolution of Arbitration Law in India. Furthermore, through article the authors tried to explain some major sections of the Arbitration and Conciliation Act, 1996 along with some judgments.

Keywords- Substantive, Privatization, Independence, Treaties.

EVOLUTION OF ARBITRATION IN INDIA

The anecdote of the arbitration in India commences during the British raj in India with the enactment of first Code of Civil Procedure Act, 1859[2] which codified civil laws in the country and includes some provisions related to arbitration between the parties to the suit filed in the courts. This code consists of sections from 312 to 325 which deals with the arbitration between the parties whereas section 327 of the CPC, 1859 provides for the filing in court by the arbitrator of his award. However, this act was replaced by subsequent laws namely, Code of Civil Procedure Act of 1877, then in 1882 by Code of Civil Procedure Act of 1882, and finally

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[1] Sakshi Saxena & Rahul Kumar Kumavat, Students at Manipal University

[2]Hitesh, Evolution of Arbitration law in India, Legal Service E-Journal(18 october,6:30 PM),https://www.legalserviceindia.com/legal/article-4145-evolution-of-the-arbitration-law-in-india.html

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by Code of Civil Procedure 1908 which is still in operation till date. The aforementioned acts consist of provisions for the arbitration between the parties. However, the provision of arbitration in aforesaid acts was applicable in only three Presidency towns of Calcutta (now named as Kolkata), Bombay (now named as Mumbai), and in Madras (now named as Chennai) where Britishers used to directly ruled.

The first substantive law related to arbitration act was enacted by the British government in India in 1899 viz. Indian Arbitration Act 1899 which was an imitation of English Arbitration Act, 1899. The provisions incorporated made possible for the first in Indian history to resolve the dispute between the parties outside the court in other words, this act empowers the parties to resolve the dispute through the mode of arbitration by mutual agreement without the intervention of the courts. However, for the execution as well as for setting aside the arbitral award, the parties have to take the course of the court.

Thereafter, the major change that took place after the first world war when League of Nations promulgated the Geneva Protocol in 1923 and the Geneva conventionfor the Execution of Arbitral Awards in 1927. These both were endorsed not only by Britain but also by its colonies including India. The protocol and convention both were recognised by the British India by enacting Arbitration (Protocol and Convention) Act, 1937to implement the protocol as well as convention in India. Subsequently, in 1940 the British government in India enacted a new arbitration act namely Arbitration Act of 1940 on the similar lines of England's Arbitration Act, 1934. This act remained in force until 1996 when a new act was enacted by independent India.

A major development that took place related to recognition and enforcement of foreign awards was New York convention in 1958. The independent India for the first time was the original signatories to the New York Convention of 1958, and this convention was ratified by the Indian parliament in 1960. It's interesting to note that the provisions of the New York convention of 1958 were incorporated in the first schedule of the present act viz. Arbitration and Conciliation Act of 1996. Subsequently, Indian parliament enacted an act namely The Foreign Awards (Recognition and Enforcement) Act in 1961 with the objective to implement this convention in India.

This is how there were three different laws in India dealing with the arbitration which were as follows: The Arbitration (Protocol and Convention) Act 1937 which was enacted with the aim to implement the Geneva Protocol of 1923 and Geneva Convention of 1927 by British government; secondly, The Arbitration Act, 1940 a substantive law which deals with the domestic arbitration; and lastly, the Foreign Awards (Recognition and Enforcement) Act of

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1961 which was enacted by the parliament of the independent India with the objective to implement the New York convention on Recognition and Enforcement of Foreign Awards. However, after the major economical change in India in 1991 that is liberalisation, privatisation and globalisation of Indian economy, it was felt that there is an urgent need of major amendment in the current Arbitration Act of 1940. Eventually, working group was set which consists of law ministers of different stares, members of arbitral institutions, representatives of the industries and legal experts. The final draft of Arbitration and Conciliation Bill, 1995 was preparedby the working group in 1995 and thereafter it was introduced in the parliament which was passed in 1996 and became an act namely Arbitration and Conciliation Act, 1996. This act was subsequently amended in 2015 and then in 2019. Through section 85 of the act repealed all the prior enactments related to arbitration.

ARBITRATION AND CONCILIATION ACT, 1996

The Arbitration and Conciliation Act, 1996[3] is divided into four parts which are as follows, domestic arbitration in India, enforcement of Foreign Awards which is based on New York convention (of 1958) which is related enforcement of the Foreign Awards and Geneva Convention of 1927,Conciliation, and supplementary provisions.

The Hon'ble Supreme Court of India held in the case of Fuerst Day Lawson vs. Jindal Export (2011)[4] held in its judgement that first three parts of this act are kept separately from each other inferred from the intent of the legislature.

- Section 89 of the Code of Civil Procedure, 1908.

This section 89 was incorporated in the code of Civil Procedure, 1908 by the CPC (Amendment) Act 1999 with the recommendation of Law Commission of India and Malimath Committee[5].With the enactment of Arbitration and Conciliation Act 1996, this provision was inserted in the CPC with the objective to provide alternative method to disputed parties to resolve their dispute peacefully and mutually agreed without the intervention of the court such as Arbitration, Conciliation, Judicial settlement including the settlement through Lok Adalat and Mediation. However, this provision was challenged before the Hon'ble Supreme Court in

[3]The Arbitration and Conciliation Act,1996,No.26,Acts of Parliament,1996(India).
[4]Fuerst Day Lawson Ltd vs Jindal Exports Ltd ,2010
[5] Uzair Ahmad Khan,ADR Methods and Civil Code Procedure 1908, iPeaders Blog,(28 Oct. ,2021,4:00PM),https://blog.ipleaders.in/arbitration/

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famous case of Salem Advocate Bar Association, Tamil Nadu vs. Union of India, 2002[6]. The apex court in its judgement upheld this provision in the CPC,1908. Thereafter, again the issue related to section 89 of CPC 1908 was raised before the Hon'ble Supreme Court in Afcons infrastructure and Ors. v. Cherian Verkay Construction and Ors, 2012[7]in which the court upheld the constitutional validity of this section. However, the apex court remarked on this provision as “Trail Nightmare" and held that there exist many anomalies in this provision.

IMPORTANT SECTIONS UNDER ARBITRATION AND CONCILIATION ACT 1996

Section 2[8]of this act is a definition clause which defined various term related to arbitration also says about where the place of Arbitration can take place in India.

- General provisions (Sections from 7and 9)

Section 7 defines the “arbitration agreement” and makes it mandatory for the parties to the contract that it should be in writing which means both the parties should sign the agreement. Furthermore, it states that the arbitration agreement between the parties may be part of the original contract or it can be separate agreement between the parties. Section 9confers the right with the parties to seek the interim relief from the court, provided that it must be before the enforcement of the arbitral award under section 36. There are various situations are mentioned in this section where a party can apply before the court for interim measures prior, during or after the arbitral proceedings provided that before its enforcement under section 36.

- Composition of Arbitral tribunal (Sections from 10 to 15)

Section 10 of the Arbitration and Conciliation Act deals with the number of arbitrators, this section confers the power in the hands of parties to decide the number of arbitrators in arbitral agreement if they shouldn't be in even numbers. Section 11of the act provides for the procedure to appoint the arbitrators which may be decided by the parties entered the contract. In case parties failed to decide the procedure for appointing arbitrators then this provision provides a mechanism for appointing either a three-person arbitral tribunal or a one-person arbitral tribunal without court’s intervention. Moreover, this section provides for the appointment of arbitrator regardless of their nationality. This provision is important as in case parties failed to appoint any arbitrator, this section provides the mechanism for the same. Section 15provides for a mechanism for appointing substitute arbitrators on two conditions, if parties agreed to terminate

[6]Salem Advocate Bar Association vs. Union of India, 2005
[7]Afcons infrastructure and Ors. v. Cherian Verkay Construction and Ors., 2010 (8) SCC 24)
[8]The Arbitration and Conciliation Act,1996, No.26,Acts of Parliament,1996(India).

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the mandate of arbitrator for any reason or If the arbitrator resigns.

- Jurisdiction of Arbitral tribunal (sections 16 and 17)

Section 16is based on the principle of Kompetenz which means arbitral tribunal is competent enough to rule on its own competence. In other words, arbitral tribunal have competence to decide its own jurisdiction. Moreover, the same provision tells that arbitral agreement is separable from the main contract, which means doctrine of severability shall apply. Section 17confers the power to parties to the dispute to seek the interim order from the arbitral tribunal.

- Conduct of Arbitral Proceedings (sections from 18 to 27)

Section 18 provides equal treatment of parties, the provision binds the arbitral tribunal to treat the parties equally without partiality or any bias. Moreover, arbitral tribunal shall give the equal opportunity to parties to present their case. This provision enshrined the principles of Natural justice that no party shall condemned unheard.Section 19 empowers the parties to determine the rules and procedures of the arbitration proceedings of their own. Incase parties failed to decide the rules and procedures of the arbitration proceedings, in such situation arbitral tribunal is authorised to decide appropriate rules and procedures of the proceedings. Moreover, this provision provides for non applicability of Code of Civil Procedure, 1908 and the Indian Evidence Act, 1872 on arbitral proceedings. Section 20of the act empowers that the parties has rightto fix the place of Arbitration, it is important to note that the term “venue" and “seat" are not same and the apex court made distinction in its n various judgements. In case parties failed to agree on the place of Arbitration, it shall be determined by the arbitral tribunal considering the circumstances of the case including the convenience of the parties.

Section 21 states that the arbitral proceedings[9]commence on the date on which a request for the dispute to be referred to arbitration is received by the respondent unless the parties agreed otherwise.Section 22empowers the parties that they have right to agree upon language used in the arbitral proceedings. In case parties failed to agreed upon language, the arbitral tribunal shall determine the language to be used in the arbitral proceedings. Moreover, this provision empowered the tribunal to translate the language of the documentary evidence in which parties agreed upon.

Section 23 of this act talks about the statements of claim and defence, within the period of time either agreed upon by parties or determined by the arbitral tribunal, the claimant shall state the

[9]Veena Pranathi, The Arbitration and Conciliation Act,1996, iPeaders Blog,(28 Oct. ,2021,4:15PM,https://blog.ipleaders.in/arbitration-conciliation-act-1996-overview/.

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facts which supports his claim or the relief or remedy he sought, and respondent shall state his defence. In addition to this, the parties may submit all the documents or other evidences along with their statements. Moreover, the respondent may submit his counter claim or plea of set off.

Section 25is about the default of parties, if claimant failed to communicate his statement of claim under section 23(1), the arbitral tribunal shall terminate the proceedings. Whereas if respondent failed to communicate his statement of defence under section 23 (1), the arbitral tribunal shall continue the proceedings. Moreover, this section provides that if party fails to appear at an oral hearing or to produce documentary evidence, the tribunal may continue the proceedings, the word may here provides that it's on the discretion of the tribunal.

Section 26empowers the arbitral tribunal that it may appoint one or more experts on specific issue and to report to it and may direct parties to give experts any relevant information or produce any relevant documents, goods, or other property for his inspection.

- Arbitral Awards and Termination of proceedings (sections from 28 to 33)

Section 28of this act states that the arbitral tribunal shall decided the dispute before it in accordance with the substantive law applied in India for the proceedings other than international commercial arbitration. In other words, in domestic commercial arbitration, the arbitral tribunal shall decide the matter in accordance with the substantive law applied in India. And in international commercial arbitration, the arbitral tribunal shall decide the dispute in accordance with the rules of law designated by the parties. In case parties failed to designate law, the arbitral tribunal shall apply the rules of law it considers to be appropriate after considering all the circumstances surrounding the dispute. Section 29states that if there are more than one arbitrator in the arbitral proceedings, the decision shall be decided by the majority and question of procedure may be decided by the presiding arbitrator. For the speedy expedition of the arbitral proceedings two new sections were incorporated in the act that are section 29 A and section 29B by the Arbitration and Conciliation (Amendment) Act of 2015.

Section 29 Aprovides for the time limit for the arbitral awards, it provides that the arbitral award shall be made within a period of 12 months from the date the arbitral tribunal entered upon the reference. Whereas if the award is made with the period of six months from the date, the arbitral tribunal enters upon the reference, the arbitral tribunal entitled to receive the additional fees as parties may agree. In case proceedings mayn't concluded in 12 months then the period may further extend to not more than 6 months with the consent of parties. Section 29 Balso provides for fast-track procedure, this section was inserted with the objective of speedy expedition of the arbitral proceedings within six months.

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Section 30provides for the settlement between the parties during the arbitral proceedings, in other words during the arbitral proceedings, the arbitral tribunal may use mediation, conciliation or any other procedure to encourage settlements between the parties. And if during the arbitral proceedings, the parties settle the dispute then arbitral tribunal shall terminate the arbitral proceedings and the arbitral tribunal shall record the settlement as the arbitral award. Section 31 provides for the arbitral award shall be in writing and shall be signed by the members of the arbitral tribunal. Moreover, this section provides that the arbitral award shall state the reason upon which it is based unless parties are agreed that no reasons are to be given or the arbitral award is agreed under the terms of section 30. Thereafter a signed copy of arbitral award shall be sent to parties, it is not necessary that original copy of award should be send. Section 32provides for termination of Arbitral proceedings, once the arbitral tribunal passed the final arbitral award or order, the proceedings shall be terminated. Hence, the mandate of Arbitral tribunal shall terminate.

- Recourse against the arbitral award (section 34)

Under this sectionIf parties to the arbitral agreement are not satisfied with the arbitral awards made by the arbitral tribunal, then they can challenge the award before the court for setting aside the arbitral award on certain grounds which are mentioned in the clause 2 of the section 34. The court can set aside the arbitral award awarded by the arbitral tribunal on the grounds mentioned in clause 2 of the section 34. Moreover, arbitral award can be set aside by the court if it's in conflict with the public policy of India. The ambit of the term "public policy " is determined by the Hon'ble Supreme Court in its various judgements.

- Finality and enforcement of the arbitral award(section 35 and 36)

Section 35 says that arbitral award shall be final and binding on the parties and persons claiming under them. Section 36of the act provides for enforcement of the arbitral award. When the time limit under section 34 barred the parties for seeking course of court to set aside the arbitral award, such award shall be enforced in accordance with the provisions of Code of Civil Procedures, 1908.

CONCLUSION

Arbitration is one of the methods to solve disputes in less time and money friendly as per parties. With the rise in adopting, it for solving cases,it practice is in demand and making it more preferrable method to solve disputes in India. Its emerging scenes and today in the 21st

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centuryit shows us its importance. Its process is easier than other lawsprocedures to solve disputes. With the upcoming developments in arbitration filed will lead Indiato become one of the biggesthubs for arbitration in near future after Singapore in the world.

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