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IMPERMISSIBILITY OF BIFURCATION OF THE SUBJECTMATTER OF THE SUIT: A REFUGE TO CIRCUMVENT THE ARBITRAL PROCEEDINGS

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ABSTRACT

Law is squarely settled on the point that those disputes which are beyond the purview of an arbitration agreement cannot be submitted to arbitration, albeit the disputes that arise from the same contract which encompasses the arbitration clause. The issue of arbitrability demands the need of bifurcation of the subject-matter of the suit, however, since the law is silent in this aspect, the courts have held it to be impermissible. Thus, becoming a ground for parties to avoid arbitration by adding the cause of action which is beyond the scope of the arbitration agreement. This subjugates the other party's decision to submit a particular dispute to arbitration. This article discusses the issue of the impermissibility of splitting the subject-matter of the suit and its interpretation through numerous judicial pronouncements. The ultimate objective is to augment the arbitrability of disputes which were specifically reserved for arbitration, this would further boost the aim of making India an Arbitration friendly jurisdiction.

INTRODUCTION

Section 8 of The Arbitration and Conciliation Act 1996 requires that whenever a dispute is brought before any judicial authority, such dispute being part of an arbitration agreement, the Court shall refer the same to arbitration. However, the Act does not enumerate as to what is to be done in an event where the subject matter of the suit also includes those disputes which are not covered by the arbitration agreement. This leads to the want of splitting the subject matter of the suit, part of which is covered by the arbitration agreement be referred to arbitration whereas, the part which is beyond the purview of the arbitration agreement be contested as a regular suit before the Court. Since the law does not provide for such a course of action, the Courts have held it to be impermissible. This notion was observed by

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theHon'ble Supreme Court in Sukanya Holdings (P) Ltd. Vs. Jayesh H. Pandya &Anr. ["Sukanya Holdings"] where the division bench held, that bifurcation of the subject-matter of the suit before a court is not permitted and that, the "matter" shall be read as a whole. This narrow approach of the court has rendered several disputes which were reserved for arbitration as non-arbitrable, merely because it became part of the subject matter of a suit that included several other non-arbitrable disputes. Hence, the intention of the parties to refer their disputes to arbitration stands defeated. The precedent laid down in this judgment has been persistentlyrelied upon by various High Courts and the Supreme Court.

Although, the correctness of the law laid down was questioned inChloro Controls (I) Private Limited Vs. Severn Trent Water Purification Inc. and Ors. ["Chloro Controls"] but the Hon'ble Supreme Court refused to enter into the correctness of the same, thus the precedent still operates and is highly relied upon. The author has approached this issue by understanding the evolution of section 8 of the Arbitration and Conciliation Act, 1996 andthen by studying the law governing the arbitrability of the disputes. The author has further examinedthe stance taken by the Indian courts against the bifurcationof the subject-matter(at this point it is important to note that the author has confined this study only with respect to the bifurcation of the subject-matter, the question of bifurcation of parties is beyond the scope of this paper), and lastly the need of giving more emphasis to the doctrine of kompetenz-kompetenz. As such, the bifurcation of the subject-matter of the suit, which would eventually lead to the arbitrability of adispute, is a highly relevant issue in the Indian Arbitration Jurisprudence, which the author has attempted to settle through this paper.

EVOLUTION OF SECTION 8 OF THE ARBITRATION ACT

Section 8 of The Arbitration and Conciliation Act 1996, is a derivative of Article 8 of the UNCTIRAL Model Laws. The provisions of section 8 can also be seen in section 34 of the now-repealed Arbitration Act, 1940 which was based upon section 4 of The English Arbitration Act, 1934[2]. Since the 1940 act had several missing pieces, it faced harsh criticism from the courts, and hence it got repealed by the present act.Although, section 8 of the new act and section 34 of the old act are fairly analogous, the following differences can be easily discerned:

i. While the old section 34 provided for staying the judicial proceedings, the new section 8 empowers the court to refer the parties to the arbitration.

2. LAW COMM'N OF INDIA, REPORT NO. 246, AMENDMENTS TO ARBITRATION AND CONCILIATION ACT, 1996 (2014) [hereinafter "Law Commission Report"].

ii. The stage of filing of application has also been altered. While the old act required it to be filed before taking any steps, the new act relaxed this condition and laid down the proper stage i.e., before submitting the first statement on the substance of the dispute.

iii. Unlike the old act, the new act does not require the party to be ready and willing to perform all acts for the proper conduct of the arbitration proceedings[3].

iv. The direction for a stay of judicial proceedings was possible under section 34 of the old act because the court was to be approached for the stay and not for an order of reference[4]. Under the new section 8, the court's power is limited to an order of reference, there is no provision for stay[5].

v. The new act does not incorporate the provisions of section 20 of the old act, which required the parties to file the arbitration agreement in the court before instituting any suit[6].

vi. The principle of kompetenz-kompetenz was not envisaged in the old act.

In 2015 The Arbitration and Conciliation Act, 1996 got further amended and the Arbitration and Conciliation (Amendment) Act, 2015 was introduced, which came into force on 23rd October 2015. The amendment was fairly in consonance with the 246th Law Commission Report in August 2014. Major changes were introduced through this amendment, particularly in Section 8 of the act. However, no amendments were introduced in section 8 ofthe Arbitration and Conciliation (Amendment) Act, 2019 (33 of 2019).

ARBITRABILITY OF THE DISPUTES

Before delving into the issue, it is important to understand the law governing the arbitrability of the disputes. Not every dispute can be resolved through arbitration, mere insertion of an arbitration clause does not oust the jurisdiction of courts from all kinds of dispute. The term "arbitrability" was first explained by the division bench of the Hon'ble Supreme Court in *Booz Allen and Hamilton Inc. vs. SBI Home Finance Limited* ["Booz Allen"][7]. The term 'arbitrability' is nowhere defined in the present statute nor under any of the former enactments.The Supreme Court laid down three facets to determine the arbitrability of the dispute. First, can the dispute be resolved through arbitration? Second, whether the arbitration

3.Section 8 of The Arbitration and Conciliation Act, 1996, Act No. 26 of 1996 [16th August 1996] India.
4.Section 34 of The Arbitration Act, 1940, Act No. 10 of 1940 [11th March 1940] India.
5.AVTAR SINGH, Law of Arbitration & Conciliation (10th edition 2013) 63.
6.Section 20 of The Arbitration Act, 1940, Act No. 10 of 1940 [11th March 1940] India.
7. Booz Allen and Hamilton Inc. v. SBI Home Finance Limited and Ors., (2011) 5 SCC 532.

agreement covers the dispute? Finally, whether the disputes fall under the purview of being submitted to the arbitral tribunal. This verdict cleared the misconception that merely covering the dispute by an arbitration clause does not make it arbitrable per se and certainly does not oust the jurisdiction of courts. While laying down the test, the court also classified the disputes as arbitrable and non-arbitrable by categorising them into disputes which deal with rights *in rem* and rights *in personam*.

JUDICIAL APPROACH TOWARDS BIFURCATION OF THE SUBJECT-MATTER OF THE SUIT

The scope of section 8 has constantly been taken into account in a plethora of judgments by both, the Supreme Court and various High Courts. One of the most controversial areasbeing the bifurcation of the subject-matter of the suit. This issue only comes into consideration, when the arbitrability of one of the claims forming part of the subject-matter is challenged. The first time the Hon'ble Supreme Court laid down the ratio with regards to this issue was in 2003 in Sukanya Holdings Pvt. Ltd. Vs. Jayesh H. Pandya and another[8] ["Sukanya Holdings"] wherein the division bench held that the bifurcation of the subject-matter of the suit before a court is not permitted and that the "matter" shall be read as a whole. The reason cited by the court was that such provision is not enumerated in the Act. However, the Hon'ble Court observed that it is not improper to follow such a course, but it is not permitted in the statute. Allowing the parties to take such recourse would lead to conflicting decisions, one by the court and the other by the arbitral tribunal. Since, the Arbitration Act does not provide for the splitting of the cause of actions, in order to refer a dispute to arbitration, the entire the subject-matter of the suit shall form part of the arbitration clause.

To the relief,another judgment came to be passed by the division bench of the Hon'ble Supreme Court in *RashtriyaIspat Nigam Ltd. and Another Vs. M/s Verma Transport Company*[9]["RashtriyaIspat"]in 2006, wherein the application under section 8 to refer the dispute to arbitration was challenged on the ground, that the subject-matter of the suit was outside the purview of the arbitration agreement. However, the court rightly held that once a valid arbitration agreement is admitted, and if it is found that the dispute arose out of the same contract, what is necessary is to consider the substance of the contract. The court further refused to rely upon the judgment in*Sukanya Holdings* on the ground that since the parties to

8. Sukanya Holdings (P) Ltd. Vs. Jayesh H. Pandya &Anr., (2003) 5 SCC 531
9.RashtriyaIspat Nigam Ltd. and Another Vs. M/s Verma Transport Company, (2006) 7 SCC 275

the suit and parties to the agreement are the same, under section 16, the arbitrator is empowered to decide his own jurisdiction. Despite distinguishing *Sukanya Holdings* in *RashtriyaIspat*, the Hon'ble Supreme Court in 2007 in*India Household andHealthcare Limited Vs. LG Household and Healthcare limited*[10]relying upon *Sukanya Holdings* held that bifurcation of the subject-matter of the suit is not contemplated under the 1996 Act.

While laying down the ratio to determine the arbitrability of a dispute, the Hon'ble Supreme Court in *Booz Allen's* case,also considered the issue of bifurcation of the subject-matter of the suit. Adjudicating the three issues vis-à-vis validity of the mortgage, determination of the amount due to the respondent and whether the respondent could seek eviction even if entitled to enforce the mortgage. The Court stated that if these were the only issues it might be possible to refer them to arbitration.[11] However, the Court finally relying upon the judgment in *Sukanya Holdings* held that enforcement of mortgage suit is a right *in rem* which is not arbitrable. Therefore, even though the disputes in the mortgage suit were arbitrable, the inclusion of its enforcement rendered it non-arbitrable as the subject-matter of the suit cannot be bifurcated, hence the application of reference to arbitration was rejected.It is important to note that in spite of the ratio laid down in *Sukanya Holdings*being fairly debatable, even after two decades, the judgement still holds the ground and has not been overruled.

The correctness of the law stated in Sukanya Holdings was questioned in the Hon'ble Supreme Court in *Chloro Controls (I) Private Limited Vs. Severn Trent Water Purification Inc. and Ors.* ["Chloro Controls"][12]where it was arguedthat the judgement does not lay down the proper position of law, therefore clarification was sought in that regard. However, the Court refused to examine the accuracy of the judgment as the case in hand was pertaining to section 45 Part II of the Act, while judgement in Sukanya Holdings falls under Part I of the Act.While referring the parties to arbitration, the Hon'ble Court held that the judgment in Sukanya holdings still holds the field in Part 1 of the Act. It can be argued that it was a missed opportunity by the Hon'ble Supreme Court to set right the controversial precedent.

In another judgement by the Bombay High Court in *Sharad &Ors. v. Hemantkumar*[13], a suit was filed against a developer causing excess construction on the part which was reserved for amenities. The Plaintiffs invoked the arbitration clause enumerated in the deed of

10. India Household and Healthcare Limited Vs. LG Household and Healthcare limited, (2007) 5 SCC 510
11. Booz Allen, supra note 6
12.Chloro Controls (I) Pvt. Ltd. Vs. Severn Trent Water Purification Inc. and Ors. 2012(4) ARBLR1(SC)
13. Sharad &Ors. v. Hemantkumar 2018 (3) ALLMR 879

declaration,however, the Court refused to refer the matter to arbitration citing that one of the reliefs sought is a declaration in respect to an immovable property,which is a right *in rem* and as the subject-matter of the suit cannot be bifurcated, the dispute cannot be referred to the arbitration. At this juncture, it is pertinent to note that the court failed to take into consideration that, a right *in rem* invariably has some element of right *in personam* in it. Thus, it can be said that nevertheless, a right to property is right *in rem*, but while considering the bundle of rights concerning a property, which include rights in *re propria*, it also includes rights *in personam*[14]. Therefore, even if right *in rem* cannot be enforced through arbitration, some subordinate rights which stem from right *in rem* can be subjected to adjudication by an arbitral tribunal.[15]Moreover, the Court also opined that not referring the parties to arbitration does not deprive their right to approach theCivil Court asarbitration is not the only remedy available, such views of the court is harmful to the aim of making India an arbitration hub.

However, amongst all the mechanical application of the ratio in *Sukanya Holdings*, the Bombay High Court in one of its recent judgments in *TaruMeghani vs Shree Tirupati Greenfield*[16] ["TaruMeghani"]held that joining causes of action under Order II Rule 3 of the Code of Civil Procedure, 1908 with the sole intention to avoid arbitration cannot be permitted, particularly with respect to the cause of action which certainly falls within the purview of the arbitration agreement. This goes against the legislative intent of Section 8 and defeats the purpose of incorporating arbitration clauses in agreements. Order II Rule 6 of the Code of Civil Procedure, empowers a court to order the separation of causes of action in one suit if their joinder, although permissible under Rule (3)(1) would result in Court's opinion, in embarrassment, inconvenience or delay. Therefore, the court rightly ordered to refer the dispute to arbitration with respect to the first cause of action which fell within the ambit of the arbitration agreement and directed the plaintiff to institute a separate suit concerning the second cause of action.The Court instead of relying upon the judgment in *Sukanya Holdings* considered the legislative intent behind section 8 of the Arbitration Act. The court observed that there is a fine distinction between the splitting of the cause of action and separation of the cause of action, the latter being permissible in the Code of Civil Procedure.

The court further observed that if a routine interpretation of impermissibility of bifurcation of the cause of action is adopted,it would open a flood gate of similar cases, where either of the

14. N. V. PARANJAPE, Studies in Jurisprudence and Legal Theory (8th ed., 2016) 403.
15. LORD MUSTILL & STEWART C. BOYD, Commercial Arbitration: 2001 Companion Volume (2nd ed., 2001) 73.
16.TaruMeghani and Ors. vs Shree Tirupati Greenfield and Ors., 2020 SCC Online Bom 110.

parties would simply add causes of action beyond the purview of the arbitration agreement to circumvent arbitration proceedings. This would defeat the very purpose of including an arbitration clause in the agreement. The Court judiciously saw through the deliberate joinder of multiple causes of action and prevented a precedent which would derogate the object of the Arbitration Act.This decision is expected to go a long way in fostering sincerity among litigants to keep alive the spirit and purpose of including arbitration clauses into contractual agreements and not adopt tactics to frustrate the purpose.

THE DOCTRINE OF KOMPETENZ - KOMPETENZ

Analysing the above judicial decisions, one common observation that can be drawn amongst all the precedents is that the language of section 8 is directory in nature. Once a valid arbitration agreement is found to exist, having regard to section 5 thereof, no judicial authority shall intervene in the matter. However, the courts often tend to fail to take into consideration that the validity of an arbitration agreement can always be examined by the arbitrator himselfunder section 16 of the act. The Hon'ble Supreme Court in *National Insurance Company Ltd. Vs. BogharaPolyfab Private Ltd.*[17] held that it is not the responsibility of the court to decide the scope of the arbitration agreement when the matter is only at the stage of reference, that power has been vested with the arbitral tribunal under section 16 of the act. Likewise in *Hindustan Petroleum Corporation Ltd. Vs. Pinkcity Midway Petroleum*[18], the Supreme Court relied upon the judgment of the Constitution Bench in *Konkan Railway Vs. Rani Construction*[19], which held that the arbitrator is empoweredto rule on the existence, validity and applicability of the arbitration agreement. It further held that any objection with respect to the abovementioned grounds has to be raised before the arbitral tribunal, which derives its power from section 16 of the Arbitration Act.

The US Supreme Court in *Henry Schein Inc. Vs. Archer and White Sales Co.*[20] unanimously held that the issue of arbitrability is a threshold issue that shall be determined by the arbitral tribunal. It further held that the doctrine of Kompetenz – Kompetenz states that such issue shall solely be decided by the arbitral tribunal since it is competent to do so. The provision envisagedunder section 16 of the Indian Arbitration Act derives its roots from the doctrine of Kompetenz – Kompetenze. This doctrine denotes that the arbitral tribunal is competent to

[17] National Insurance Co. Ltd. v. BogharaPolyfabPvt. Ltd., (2009) 1 SCC 267.
[18] Hindustan Petroleum Corpn Ltd v. Pinkcity Midway Petroleums, (2003) 6 SCC 503
[19] Konkan Rly Corpn Ltd v. Rani Construction (P) Ltd, (2002) 2 SCC 338
[20] Henry Schein Inc. v. Archer and White Sales Co., 139 S. Ct. 524 (2019) (U.S.).

decide on its own jurisdiction, including decisions on those objections which challenge the very existence or validity of the arbitration agreement. It is surprising to find that albeit a well-defined provision in the act exists, judicial forums often find themselves ruling upon these aspects. The reason for taking such a course can be accredited to the mistrust the Indian courts tend to exhibit towards arbitrators.

CONCLUSION

Disputes relating to arbitrability and bifurcation of the subject-matter of the suitcontinue to rise even after the Arbitration and Conciliation Act has undergone several amendments. The interference of the courts acts as an impediment in our aim of making India an arbitration hub, every interference at any given stage leads to a considerable amount of delay. In *White Industries Australia Limited Vs. The Republic of India*[21], the Indian government had to pay a hefty price by paying the same amount of compensation as that of the award on account of judicial delay. The stage of reference is one of the possible areas where judicial intervention can be eliminated. The act itself is self-sufficient, the principle of kompetenz-kompetenz not only avoids unnecessary judicial intervention but also saves precious time which gets wasted in the courts. However, this doctrine can only be utilised to its full potential when the Indian courts overcome their trust deficit towards the arbitrators. In the opinion of the author, by merely joining a few causes of action, a party can easily defeat the arbitration agreement and circumvent the arbitral proceedings by taking the defence of impermissibility of bifurcation of the subject-matter of the suit, this issue can be resolved by distinguishing between the splitting of the cause of action with separating them,the latter being permissible under the Code of Civil Procedure. Moreover, the courts shall also look towards those subordinate rights which stem fromthe right *in rem*, this will help in expanding the arbitrability of disputes. If the courts continue to decide arbitrability by considering the rights to be prima facie right *in rem*, it may result in rendering most of the subject-matters asin arbitrable[22].

21. International Investment Agreement, Australia-India BIT (White Industries Australia Limited Vs. The Republic of India) (30/11/2011)
22.Kashish Sinha & Manisha Gupta, *Arbitrability of Consumer Disputes: Excavating The Hinterland* Volume 7 Issue 1 IJAL 120 (2018)