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Arbitration as a Method of Dispute Resolution in India

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ABSTRACT

As an alternative dispute resolution mechanism, the arbitration provides speedier settlement of commercial disputes, whether domestic or international in character. In the wake of globalization of trade and commerce and also for effective implementation of economic reforms in 1990s, a new Arbitration Law based upon the Model Arbitration Law formulated by the United Nations Commission on International Trade Law (UNCITRAL) was passed by the Indian Parliament repealing the earlier laws on the subject of arbitration. The Arbitration and Conciliation Act, 1996, besides giving statutory recognition to the conciliation, provides for the constitution of the arbitral tribunal to conduct the arbitral proceedings and making of the award in case of both the domestic and international commercial arbitrations. The award made by the arbitral tribunal is final and binding upon the parties and is enforceable as a decree of a Civil Court. An important question pertinent in this regard is whether the doctrine of res judicata as enshrined under the Code of Civil Procedure of 1908 is applicable to the final award of the arbitral tribunal, which is not under a strict compulsion to follow the strict procedure stipulated in the Code of Civil Procedure. This article is an endeavour to analyse the applicability of the rule of res judicata to the arbitration awards in India.

KEYWORDS: Arbitration, Arbitral Tribunal, Award, Res Judicata

I. INTRODUCTION:

Arbitration is in no way a modern concept, nevertheless it has been well thought-out on the more systematic and scientific patterns, expressed in new clear and elaborative terms and providing wide-ranging resolution in recent years than before. Though its genus can be traced back to the elemental method of village panchayats widespread in primordial India, the complexities of trade and commerce in the country and the cross-border trading with nationals of other countries demanded more systematic approach acceptable to the parties to dispute in such commercial transactions. Besides, the litigation process, which was quite dilatory and costly affair, parties often resorted to alternative dispute resolution methods. The question of enforceability of the decisions by such mechanisms, however, was a very unmanageable issue that compelled the parties to knock the doors of the courts. The arbitration as a method of dispute settlement was resorted to by the English merchants and traders. In India, the earlier laws relating to arbitration were based on the English Arbitration Laws and the first statutory enactment on arbitration law was the Indian Arbitration Act of 1899, which was not a complete code in itself and extended to the matters that were not before a court of law for adjudication. Besides, the provisions relating to arbitration could be found in the Code of Civil Procedure, 1859, which was repealed later on by the Act of 1882 that was further replaced by Code of Civil Procedure of 1908. In 1940, however, the law on arbitration was consolidated and redrafted on the pattern of the English Arbitration Act of 1934. However, due to the globalization in the fields of trade and commerce, the Arbitration Act of 1940 proved to be inadequate in meeting the requirements of both the domestic and international commercial disputes. The Arbitration Act of 1940 was repealed by the Arbitration and Conciliation Act, 1996 (hereinafter, the 'Act'). This Act marks the beginning of a significant era in the history of legal and judicial reforms in India. Besides conciliation and the matters connected to it, the Act aims to consolidate and amend the law relating to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards. The Act is in conformity with the Model Arbitration Law framed by the United Nations Commission on International Trade Law (UNCITRAL), especially to address international commercial disputes. The Act minimizes the supervisory role of the courts by allowing the appointment of arbitrators and leaving all the contentious issues to be decided in arbitration in accordance with the terms of the arbitration agreement between the parties.

II.INTERFERENCE OF COURTS IN MATTERS OF ARBITRATION:

Settlement of disputes through arbitration is a statutory right and where not prohibited by any other law in force in India, it can be resorted to by the parties by entering into a contract containing arbitration clause in it or by making a separate arbitration agreement in accordance with Section 7 (2) of the Arbitration and Conciliation Act, 1996. By the arbitration agreement, which is either in the form of a contractual clause or as a separate agreement, the parties may submit all or certain disputes that have arisen or may arise between them in respect of defined legal relationship, whether contractual or not (Section 7(1) of the Act). On account of validity of the arbitration agreement, the courts cannot intervene into matters of arbitration as they have been prohibited under section 5 of the Act. Rather the courts are under an obligation to refer the parties to arbitration in terms of their arbitration agreement under section 8 of the Act (Paranjape, 2011, p. 95- 96). Additionally, the court is under the duty to refer the parties to arbitration under Section 8 of the Act where on one hand one of the parties has moved to the court for settlement of the dispute despite the existence of the valid arbitration agreement with the other party to the dispute, and the subject matter of action before the courts is the same as that of the arbitration agreement, and on the other hand the other party before submitting his first statement on the substance of the dispute, makes an application to the court for referring the matter to arbitration (Kurlwal, 2011, p. 277). The word 'matter' in Section 8 refers to the entire subject matter of arbitration agreement and the court does not allow the division of the cause of action, that is, one to be decided by the court and the other to be decided by way of arbitration, as was made clear by the Supreme Court in the case of Sukanya Holding (P) Ltd. v. Jayesh H. Pandya & another, AIR 2003 SC 2252. Besides that the court cannot stay the arbitral proceedings and the same terminates either with the final award of the arbitral tribunal or by an order of termination of the arbitral proceedings made by the tribunal in pursuance of Sub-Section (2) of Section 32 of the Act.

III. RES JUDICATA AND REFERENCE TO ARBITRAL TRIBUNAL:

Unless, the parties determine the procedure to be followed by the arbitral tribunal in the course of proceedings, Section 19 of the Arbitration and Conciliation Act 1996 gives the discretion to the arbitral tribunal to determine its rules of procedure, whereby it is not under an obligation to follow the procedure contained in the Code of Civil Procedure, 1908 or the Indian Evidence Act, 1872. Based upon such agreement between the parties or the determination of the arbitral tribunal, the tribunal follows the procedure and resolves the dispute and makes either an interim award, which is also the part of the award, and in the end gives a final award with mandate of the arbitral tribunal comes to an end. After the termination of the proceedings of the arbitral tribunal, the question which arises is whether the reference for the second time on the same dispute to arbitration is barred by the principle of arbitration? It is true that the courts in India often encounter the problem of application of doctrine of res judicata in an award made by the arbitral tribunal. In order to find a solution to this problem, it is imperative to comprehend the concept of res judicata and its application to a suit before the law court.

Section 11 of the Code of Civil Procedure embodies the doctrine of res judicata, which has a wide application and extends to the arbitration awards besides litigation, since the award of the arbitral tribunal has same applicability as the decree of a Civil Court. Section 11 of the Code of Civil Procedure provides: "No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between

parties under whom they or any of them claim, litigation under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court." Thus the doctrine of res judicata is a procedural provision and cannot be invoked in the same Court in the same matter by the same parties when the matter has been decided finally by the Court, and this is done to preserve the effect of the judgment given by the Court. Res judicata, however, does not bar making of an appeal, since it is a mere extension of the law suit to the higher Court having appellate jurisdiction.

The doctrine of res judicata refers to the binding effect of the judgment in a prior case on the claims or issues in subsequent litigation. It also means the judged matter. Res judicata is a species of estoppel and has two primary applications. One where it is referred as true res judicata, which prevents a party from suing on a claim or cause of action that has or could have been determined by a competent court in a final and binding judgment, and the second application of res judicata may be referred as collateral estoppel or issue estoppel, which prevents for the second time the litigation of the specific issues actually litigated and determined by a final judgment, where the issues were essential to the judgment (Wong, 2005, p. 53). On these points, the Courts in the later law suits are required to find as to which of the two applications is attracted so that it can bar the re-litigation with regards to the other as many causes of action may apply to the same facts and vice versa.

In India, a distinction has been made between res judicata and issue estoppel.Whereas res judicata debars a court from exercising its jurisdiction to determine the suit if it has attained finality, the doctrine of issue estoppel is invoked against the party. Consequently, if such issue is decided against him, he would be estopped from raising the same in the subsequent proceedings.1 In Bhanu Kumar Jain v. Archana Kumar, AIR 2005 SC 626, the Supreme Court HELD that the doctrine of res judicata creates a kind of estoppel, viz. estoppel by Accord.

Another sub-set of doctrine of res judicata as applied by the Indian Courts is the 'Constructive res judicata', a rule engrafted in Explanation IV of Section 11 of the Code of Civil Procedure, restricts any claim to be raised in a subsequent proceeding wherein an earlier proceeding such claim could have been raised and decided. Thus the doctrine of constructive res judicata seeks to bar determination and enforcement of claims which the party failed to raise in the appropriate forum as was HELD by the Supreme Court in Ramachandra Dagdu Sonavane (D) by L.Rs. v. Vithu Hira Mahar (Dead) by Lrs. & Ors.2, AIR 2010 SC 818.

In the matters of reference to the arbitral tribunal, the doctrine of res judicata is attracted in a way it applies to the suit in a law court. Nonetheless, the doctrine is not applicable to the interim award made under Section 31 (6) of the Act, whereby the arbitral tribunal is empowered to make an interim arbitral award on any matter with respect to which it may make final arbitral award. In the matters of arbitration, the doctrine of constructive res judicata has no application (Paranjape, 2011,p. 199). Thus where a reference to arbitration does not include the whole claim, a subsequent reference of such left out claims will not be barred by the doctrine of constructive res judicata. The Calcutta High Court in Sudhir Kumar v. J.N. Chemicals, AIR 1985 Cal. 454 applied the doctrine of res judicata and prohibited issuance of subsequent award on the basis of making of the arbitration agreement between the parties to dispute in arbitration.

In Venture Global Engineering v. Satyam Computers Ltd. & Another, AIR 2008 SC 1061, where the Supreme Court HELD that the foreign award was enforceable in India and an application could be made under Section 34 of the Act of 1996 for setting aside the award even in case of foreign awards. Following the decision of the Supreme Court in Venture Global, in one of the most significant judgments, the Delhi High Court in Anita Garg v. Glencore Grain Rotterdam B.V. (O.M.P. No. 138/2011 & I.A. Nos. 2250-51/2011, HELD that the appellants were barred by res judicata to make an application as the they had defended the execution petition filed by the respondent. The petition was preferred under Section 34 of the Arbitration and Conciliation Act, 1996 against the interim award and the final award rendered in an international commercial arbitration and the learned single judge of Delhi High Court held that the foreign award was enforceable. Thus the doctrine of res judicata would also apply to the foreign awards. However, a recent ruling of the Constitutional Bench of the Supreme Court on September 6, 2012, on the question of international commercial disputes seated outside India in the case of Bharat Aluminium Co. v. Kaiser Aluminium Technical Service Inc., Civil Appeal No. 7019 of 2005 , overruled the earlier decision of Bhatia International v. Bulk Trading S.A., (2002) 4 SCC 105, where the Supreme Court allowed provisions of Part I of the Arbitration and Conciliation Act relating to interim relief and setting aside of the arbitral award to international arbitration disputes seated outside India, which consequently permitting the Indian Courts to challenge the foreign awards, as was laid down earlier in Venture Global case. In Bharat Aluminum it was HELD that in case of foreign award, the Court having jurisdiction over the subject matter of award would continue to be the court to which an enforcement application would lie. Thus, it is clear that where the seat of arbitration in case of international disputes is in India, then only the Courts in India can apply relevant provisions of Part I of the Act and can enforce that award. This further makes it clear that doctrine of res judicata is also applicable to the foreign awards made outside India and the same are enforceable or annulled by the foreign courts having jurisdiction on the subject matter.

IV. CONCLUSION:

The Arbitration and Conciliation Act, 1996 governs arbitration, whether domestic or international commercial arbitrations, and is in compliance with Model Arbitration Law framed by the UNCITRAL. In all the cases of domestic arbitration and also where the seat of arbitral tribunal is in India in case of the international commercial arbitration, the doctrine of res judicata, which is a codified principle under Section 11 of the Code of Civil Procedure 1908, would apply. Its application to arbitration bars the further reference to arbitration on the same dispute. Where all the disputes referred to arbitration are decided, then no second award can be made again on the ground that an arbitration agreement to refer the dispute to arbitration still exists between the parties. The same is not permissible where all the disputes have been decided as the arbitration agreement merges with the final award. However, where some of the matters were not raised earlier, the doctrine of constructive res judicata would have no application, as the law governing arbitration is based upon a mutual contract between the parties to refer the dispute to arbitration, the same cannot be barred by the doctrine of constructive res judicata. The doctrine of res judicata also has no application to the interim awards made by the arbitral tribunal, but have application only to the final award.

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