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A Study on the Evolution and Development of Law of Arbitration in India

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ABSTRACT

The principal objective of this research paper is to trace the Evolution of the law of arbitration in India and to carefully analyse the various stages of its development. Apart from litigation there are other alternative methods of dispute resolution which are quick and effective in nature. Arbitration is one such method. This paper starts with the Concept of Arbitration during the ancient times, where the author talks about the Arbitral bodies such as the Puga, the sreni and the Kula which existed during the Vedic era and the rules of arbitration written in the Hedaya which were followed during the Muslim Rule. This paper goes on to describe the various acts enacted by the British Empire to give a legislative structure to the law of arbitration in India. Thereafter the author has tried to analyse the various acts enacted by the Indian government which were heavily Influenced by International treaties and Conventions. Finally, the author has analysed the Law for arbitration which is presently in-effect in our Country, that is the Arbitration and Conciliation Act of 1996 along with the amendments made to it till 2019.

Through this paper the author has come to Conclusion that in India the law of arbitration is still in development stage. The law of arbitration in India is still growing and the summit is yet to be touched by this branch of law. Indian Government has taken various significant steps to make the law for arbitration more efficient. Slowly but steadily India is establishing itself as an arbitration friendly country.

I. INTRODUCTION

It has been noted that misunderstanding and conflict commonly arise whenever two people get together for the purpose of transaction or business. Such misunderstanding & conflict needs resolution, which should be quick and effective. Apart from litigation, there are other alternative methods of dispute resolution which are quick and effective in nature. Arbitration is one such method.

Fundamentally arbitration is a dispute resolution mechanism through which the parties to the

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dispute sort out their dispute through a third person called the arbitrator. The origin of Arbitration can be traced back to the reign of King Solomon, who used the biblical theory to settle disputes between two mothers where each one was claiming the right on the baby boy and the issue was who the true mother of a baby boy was[2].Subsequently, all rulers used arbitration to resolve commercial and territorial disputes. For India, Arbitration is not a new concept; it has been in use since the Vedic times. The law for Arbitration has been continuously evolving and developing throughout our country's history.

During the industrial Revolution there was rapid growth in worldwide business and commerce. To keep up with the rapid economic growth and in order to avoid drawn out litigation, arbitration is seen as the preferred dispute resolution mechanism. Presently, the judicial system is still struggling with the high pendency of on-going cases because of which a speedy redressal has become a dream for litigants, who fears the litigation because of the delay in resolution of issue. As arbitration process promises a speedy remedy to the parties, it is considered as one of the most efficient dispute resolution method.

However, arbitration has its own shortcomings. These drawbacks of the arbitration process are corrected time and again in order to develop a smooth and efficiently functioning process. Whenever laws relating to arbitration are enacted, some loopholes are noticed, which led to the enactment of the present Arbitration and Conciliation Act, 1996 which is based on the UNCITRAL model. This act has further been amended in 2003, 2015 and 2019.

II. EVOLUTION AND DEVELOPMENT OF LAW OF ARBITRATION IN INDIA

Laws of Arbitration in Ancient Times

1) Hindu Law

For India, Arbitration is not a new concept; it has been in use since the Vedic times, the proof of which can be found in the Pradvivaca Upanishad. The first treatise that talked about the common use of arbitration in the Vedic era was Brhadaranayaka Upanishad, which was written by sage Yajnavalkya. It also mentioned three distinct arbitral bodies, namely:

1) A group of person, who belonged to different tribes and sects but they used to live together in the same locality, this group of persons were called **The Puga**

2) A council of artisans and tradesman who belonged to different tribes and sects but were connected to each by being in the same profession, this group of persons were called **The Sreni**

[2] https://en.wikipedia.org/wiki/Hebrew_Bible

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3) A group of people who are members of one family and are bound by family ties, this group is called **The Kula**

Collectively, these bodies were known as "panchayats" and the members of these panchayats were called as the "Panchas". These panchayats conducted proceedings which were informal in nature and didn't have any complex technicalities like a municipal court.

The orders and decisions given by these panchayats were final and binding on both the parties. However, a party aggrieved with the decision of the kula can appeal to the sreni and it can appeal to the puga where the party is aggrieved with the decision of the sreni. Where the party is not satisfied even by the decision of the puga, it can put an appeal to the Pradvivaca. Even though these panchayats were non-governmental, the municipal courts were capable to review their decisions.

These panchayats used to deal with various kinds of disputes, such as matrimonial and contractual disputes and sometimes even disputes of criminal nature. The King used to act as the ultimate arbiter of all the disputes. However, with the changing times, the social, cultural and economic environment of the country also changed which made the functioning of such arbitral bodies outmoded and inadequate in some form or the other, but in spite of this these arbitral bodies are still prevalent in rural India.

2) Muslim Law

Imam Abu Hanifa along with his disciples Abu Yusuf and Imam Mohammad systematically compiled the Muslim law in the commentary, which came be known as the Hedaya. At that time all the Muslims in India were governed by the Islamic laws contained in the Hedaya[3]. The Hedaya among other things also laid down the provision for arbitration. In Arabic language the word used for arbitration is "Tahkeem" and the word "Hakam" is used to describe an arbitrator. In Muslim law an arbitrator was required to have the essential qualities of a Kazee- an official judge presiding over a court of law.

Where both the parties to the dispute are Muslim, the entire arbitral process is governed by shariah law both substantively and procedurally. However, where only one party is Muslim, the non-Muslim party can decide whether or not to follow the shariah laws in settling the dispute.

As per shariah law, an award made under any other law will be considered as a foreign award, even if it fulfils most of the conditions of the shariah law. Such awards would be enforceable

[3] O.P.Malhotra, 'The law and practice of Arbitration and Conciliation', 1st edn, (Lexis Nexis-Butterworths Publication: New Delhi 2002) p- 5.

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by the courts, although the courts don't have the powers to review the reasoning of the arbitrator or the merits of the dispute. However, the court does have the power to examine the formal conditions such as the validity and the existence of the arbitration agreement, whether the award deals with all the merits of the case and whether the award has been made by all the arbitrators[4].

3) Laws During British Rule

The East India Company between the years 1772 and 1827 gave a legislative structure to the law of arbitration in India, by enacting new rules and regulations in the three presidency towns namely Bombay, Calcutta and Madras. These rules and regulations did lacked uniformity and clarity in details; however they brought a significant change in the prevailing panchayat system.

The Bengal Regulations of 1787, 1793, and 1795 brought significant changes in the procedure by enabling the courts to refer cases, with the consent of both parties to arbitration and they further empowered the courts refer cases whose value was less than ₹ 200 to arbitration and also disputes relating to debts, disputed bargains, partnership account and breach of contract. These provisions laid down the procedure for conducting arbitration. The Bengal Regulation of 1802, 1814 and 1883 extended the limits of jurisdiction of arbitration by making procedural changes.

Furthermore, the Regulation of 1816 authorised the district munsifs in the Presidency town of Madras, to hold Panchayats for sale disputes in connection with real estate and personal property. The Regulation VII of 1827 provided for settlement of civil disputes in the Presidency town of Bombay. These provisions remained in force until 1862 that is until the Civil Procedure Code 1859, was extended to the Presidency towns as well.

The Code of Civil Procedure Act 1859:

After the legislative council was established for India in1834, it enacted the Code of Civil Procedure Act 1859. The aim for enacting such act was to codify the procedures that the civil courts would follow. Arbitration in suits was given under sections 312 to 325 of the code and sections 326 and 327 talked about arbitration without court intervention. However at that time this code was not in force in the presidency towns like Calcutta, Bombay and Madras. Therefore the aforementioned provisions were not in force in presidency towns until the code came into force in these towns in 1862.

The Code of Civil Procedure Act 1859 was repealed by the Code of Civil Procedure Act 1877,

[4] O.P.Malhotra, 'The law and practice of Arbitration and Conciliation', 1st edn, (Lexis Nexis-Butterworths Publication: New Delhi 2002) p- 6-7

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which itself was later revised in 1882. However the provisions relating to arbitration were mutatis mutandis reproduced in sections 506 to 526 of the new Act.

Indian Arbitration Act 1899

The Indian Arbitration Act was enacted by the legislative council in the year 1899. This act was the first substantive piece of legislation which talked about arbitration in India. However, it was only applicable in the presidency towns like Calcutta, Bombay and Madras.

This act broadened the scope of arbitration, as it defined the term 'submission' to mean 'a written agreement to submit present and future differences to arbitration whether an arbitrator is named therein or not'. Before this, the term 'submission' was only limited to 'subsisting disputes'. Therefore before enactment of this act, a contract to refer disputed matters to arbitration came under 3 statutes, namely, (a) the Code of Civil Procedure; (b) the India Contract Act; and (c) the Specific Relief Act. Furthermore under the contract Act and the Specific Relief Act, a contract about referring existing or future disputes to arbitration, could not be specifically enforced. Therefore, the law of arbitration was not satisfactory.

In the case of Dinkarrai vs. Yeshwantrai[5], the Bombay High Court observed that the Indian Arbitration Act was unnecessarily complex, and the legislature must bring in reforms to restore its relevance.

The Schedules to the Code of Civil Procedure 1908

The Code of Civil Procedure 1882 was repealed by the new Code of Civil Procedure 1908. In this new code the provisions relating to arbitration were included in the second schedule. The provisions relating to the law of arbitration which extended to other parts of the country was contained in the first schedule of the code, on the other hand the second schedule talked about arbitration outside the scope and operation of the 1899 Act. The second schedule mostly related to arbitration in suits while briefly providing arbitration without intervention of a court.

Arbitration (Protocol and Convention) Act 1937

The main aim of the Arbitration (Protocol and Convention) Act 1937 was to give effect to the Geneva Convention on the Execution of Foreign Arbitral Awards 1927 and Geneva Protocol on Arbitration Clauses 1923 and. Only those matters that were considered 'commercial' under the law in force in India came under the purview of this act[6]. This act was mainly concerned with the procedure for filing 'foreign awards', enforcement of such foreign awards and the

[5] AIR 1930 Bom 98

[6] O.P.Malhotra, 'The law and practice of Arbitration and Conciliation', 1st edn, (Lexis Nexis-Butterworths Publication: New Delhi 2002) p-10

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conditions that needed to be fulfilled for such enforcement and the operation of this act was based on reciprocal arrangements[7]. The provisions of this act were later amended and consolidated in the Arbitration and Conciliation Act of 1996.

The Arbitration Act of 1940

The judicial rebuke and the hue and cry made by of the commercial community led to the enactment of a consolidating and amending legislation i.e. The Arbitration Act of 1940. This Act appeared to be a comprehensive and self-contained Code. Its provisions are summed up as under:

1) The act made provisions for (a) arbitration with court-intervention, in cases where no suit was pending before the court; (b) arbitration without court-intervention; and (c) arbitration in suits i.e., arbitration with court-intervention in pending suits. Further provisions were made for all 3 types of arbitration

2) The act interpreted the term 'written agreement' as a written agreement to send the present and future disputes to arbitration, whether or not an arbitrator is present or not.[8]

3) The act also introduced deeming provisions in order to include the provisions under the First Schedule.

4) This act came up with the provision to protect the arbitration agreement from being vitiated because of the presence of some lacuna

5) The courts were empowered by the act to remove an arbitrator and the umpire and to get a substitute for them in order to ensure that arbitration should not fail by reason of misconduct or want of diligence

6) The act empowered the courts to deal with the awards judicially after they had been filed before it. This enabled the courts to pass judgments, with the discretion to modify, remit or set aside the award.

7) General provisions were made by the act that the courts should approve the arbitral awards by a judgement as to the validity, existence and effect of the awards or of 'arbitration agreement' between the parties. The legislature's intention behind enacting these provisions, was 'to make only one court where all matters connected with the "arbitration-agreement" or "award" can be filed.[9]

[7] Ibid p-10
[8] O.P.Malhotra, 'The law and practice of Arbitration and Conciliation', 1st edn, (Lexis Nexis-Butterworths Publication: New Delhi 2002) p-11
[9] Ibid

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Drawbacks of the Arbitration Act of 1940

After the country got its independence in 1947, the trade and industry received a great boost and industrial and commercial community started to favour settlements of disputes through arbitration. This increased the emphasis on proceedings of arbitration which exposed the shortcomings and infirmities in the Arbitration Act 1940. These shortcomings were as follows:

The provisions regarding the power and duties of the arbitrators were inadequate. The act didn't say anything about the shortcomings in private contracts between individuals. The rules and procedure for filings awards was different for every High Court. There was a lack of provisions that prohibited an arbitrator or umpire from resigning at any time in the course of the proceedings, which resulted in parties incurring heavy losses in situations where the arbitrators or umpire acted mala fide. The act also failed to make distinction between the 'agreement' made in advance to submit future differences and a 'submission' made after a dispute had arisen.[10]

In the case of Guru Nanak Foundation v Rattan Singh and Sons[11], the Supreme Court held that under the Arbitration Act of 1940, the proceedings have become highly technical, also because of its unending prolixity at every step; it can lead to a legal trap to the unwary.

The Foreign Awards (Recognition and Enforcement) Act, 1961

Many considered the New York Convention of 1958 as one of the most effective instance of International legislation in the entire history of commercial law'. India was a signatory of the said convention and the main aim of the Foreign Awards (Recognition and Enforcement) Act, 1961, was to give effect to the New York convention.

The Supreme Court of India in the landmark case of Renusagar Power Co Ltd v General Electric[12] held that the main object of the aforementioned act was to promote and encourage international trade by making speedy settlement of disputes arising in trade possible through arbitration.

The United Nations Commission on International Trade Law (UNCITRAL); Model Law

In 1966, the United Nations General Assembly established United Nations Commission on International Trade Law with the aim to promote the International trade law in order to promote the International trade. The UNCITRAL is regarded as the core legal body in the UN, which helps in avoiding duplication of efforts and to promote consistency, efficiency and coherence

[10] Tractor export v Tarapore Co AIR 1971 SC 1,11
[11] AIR 1981 SC 2075- 76
[12] AIR 1985 SC 1156.

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in the harmonisation of trade law.

Travaux Preparatories – The UNCITRAL, in the year 1982 adopted a set of guidelines which helped in assisting institutions with regard to arbitration under the UNCITRAL Arbitration Rules 1976, with the aim of assisting the countries who had adopted these Rules or a modified version of them.

Model Law - The Model Law on International Commercial Arbitration was a result of the guidelines provided in the Travaux Preparatories. It was designed for the use in all legal and geographical regions. The United Nations Commission International Trade Law (UNCITRAL), on 21 June 1985, adopted the full context of this Model Law on International Commercial Arbitration. The United Nation General Assembly recommended to all the countries across the globe to enact modern arbitration legislation based on the Model Law. This had a major influence on the Indian law and therefore these guidelines were codified in the Arbitration and Conciliation Act 1996.

III. ADOPTION OF MODEL LAW IN INDIA

The Model law, with the exception of a few provisions, was adopted in its entirety in India, in the form of the Arbitration and Conciliation Act 1996.

The following provisions were adopted by the act:

a) The form and definition of arbitration agreement

b) The duty of the courts to refer the parties to arbitration where a suit is brought before the court in breach of the arbitration agreement

c) The power of courts and tribunals to provide interim measures of protection in support of an arbitration agreement

d) The composition of the arbitral tribunal;

e) Appointing arbitrators

f) Grounds to challenge an arbitrator

g) The termination of the mandate of an arbitrator because of his failure to act

h) Provisions for substitution of an arbitration when his mandate is terminated

i) The procedure for arbitration

j) The Enforceability of arbitral awards and appeal against them

Arbitration and Conciliation Act, 1996:

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The Arbitration and Conciliation Act came into force on the 25th day of January, 1996 and it contained the laws relating to arbitration. The act is not exhaustive and is of consolidating and amending nature. The Arbitration and Conciliation Act, provides rules and regulations for both Domestic and International commercial arbitration and also enforcement of foreign arbitral awards. It also provides new rules and regulations regarding conciliation. This act proceeds on the basis of the UN Model Law, so as to make laws relating to arbitration in India accord with the laws adopted by the United Nations Commission on International Trade Law (UNCITRAL).

Objective of the Act

The objective of the Arbitration and Conciliation Act, 1996 was as follows;

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.[13]

Constitutional validity of the Act:

The constitutional validity of the Arbitration and Conciliation Act was upheld by the Supreme Court in the case of Babar Ali v Union of India[14]. In this case the court held that there is no question of the Act being unconstitutional, as judicial review is available for challenging the award in accordance with the procedure laid down in the Act.

IV. DRAWBACKS OF THE ARBITRATION AND CONCILIATION ACT, 1996

1) Section 9 of the act can be misused by the parties, as they may not take the required initiative to constitute the arbitral tribunal, after they have obtained interim measures and this may delay the process

2) Section 14 of the act says that the mandate of the arbitrator shall terminate, however it doesn't provide any information on which party will pay the arbitrator for services rendered by him and what will the quantum of fees.

3) Section 15 of the act provides for appointment of the substitute arbitrator after termination of his mandate, however there is no mention of the time within which the the substitute arbitrator shall be appointed.

4) The Arbitration and Conciliation Act was enacted with the sole aim to provide quick and

[13] Dr. Avtar Singh, Law of Arbitration and Conciliation, Eastern Book Company-Lucknow, Eighth edn, 2007, P1

[14] (2000) 2 SCC 178

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speedy settlement of dispute, however there is no provision in the act that enables the arbitrator to give the award quickly. Thus object of the Act has not been fulfilled till now.

5) If the aggrieved party wants to challenge the award it has to start again from the district court

V. AMENDMENTS MADE TO ARBITRATION AND CONCILIATION ACT, 1996

The Arbitration and Conciliation Act, 1996 was first amended in the year 2003. Later in the year 2014-15, the 246th Law Commission Report recommended further changes to the act and thus the act was again amended in the year 2015.

The 2015 Amendment was a boon for the parties who had succeeded in their dispute before the arbitral tribunal, as in the un-amended version of the act if an arbitral award was challenged before the court, even on issuance of notice by the court it would as good as a stay, but because of the amendment a specific stay has to be granted. This amendment also sought to narrow down the interpretation of the term "Public Policy of India" and the intent behind this was to give importance to the award of the arbitral tribunal and grant finality to the same. This amendment also tried to make the whole process speedier by setting a period of 90 days within which the arbitration proceedings have to be started by the party obtaining any interim order from the court. Interference of courts in arbitration proceedings were also restricted by this amendment. Also it prohibited the courts from entertaining any application

in a matter where arbitration proceedings had already commenced. It was also confirmed by this amendment that when an arbitral tribunal passes any interim orders, they are to be enforced effectively, as prior to this amendment these interim orders were not enforced effectively as the provisions of Civil Procedure Code were not made specifically applicable to them.

In 2017, a committee was formed; the chairman of this committee was justice Srikrishna. This committee recommended further changes to the act and to give impetus to institutional arbitration, this resulted in the Arbitration and Conciliation Act (Amendment), Act, 2019. Following amendments were made by the 2019 amendment act:

1) Section 2(ca) was added in the act which gives a definition of an 'arbitral institution' i.e. an institution designated by the Supreme Court or a High Court under the Act.

2) The amendment empowered the Supreme Court and the High Court to designate arbitral institutions for the purpose of appointment of arbitrators. Also these institutions would be graded by the Arbitration Council of India. In cases where such graded institutions are not available, the chief justice of High Court will maintain a panel of arbitrators for the purpose of performing the functions of such institutions

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3) This amendment has also introduced the Arbitration Council of India, which will be set up by the central government and will have a Chairperson who is a judge of the Supreme Court or Chief Justice of The High Court or an eminent person who has specialised knowledge about arbitration proceedings. The main purpose of the council is to encourage and promote Alternative dispute resolution mechanisms by framing policies and guidelines for the operations and maintenance of professional standards in matters relating to arbitration

4) The act was also amended to state that the process of pleadings (statement of claims and defence) must be completed within a period of 6 months from the date of appointment of the arbitrator. Also awards must be made by the tribunals within a period of 12 months from the date of completion of pleadings.

5) The amendment also provided some qualifications and pre-requisites which a person must have in order to qualify as an arbitrator. Further, the amendment also prescribed some general norms which are to be followed by the arbitrator.

VI. CONCLUSION AND SUGGESTIONS

It is clear that over the years arbitration has developed and evolved as an ideal mechanism for settling the disputes that also saves courts time and helps the parties by providing them with quick remedial measures.

After analysing all the facts and circumstances, it can certainly be stated that in India the law of arbitration is still in development stage. The law of arbitration in India is still growing and the summit is yet to be touched by this branch of law. No doubt that Indian Government has taken various significant steps to make the law for arbitration more efficient. Slowly but steadily India is establishing itself as an arbitration friendly country. There have been several amendments in the law for arbitration, which intends to make the law better and more efficient so that it becomes most preferred platform for quick resolution of disputes.

According to me these are the steps that can be taken to make arbitration more effective and efficient:

1) Awareness – The Government must try to spread the knowledge about the arbitration and other forms of alternative dispute resolution in the country, so that people become aware about the existence of this better and more efficient alternative to the normal litigation process. It is a common knowledge that our Courts are already over-burdened with cases and because of this there is a huge delay in adjudicating matters and because of this the parties end up spending huge amount of money and their time and energy are wasted. Therefore people, first must made

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aware about these alternative dispute resolution mechanisms and then they should be encouraged to file their cases in arbitral tribunals which will save their time, money and energy.

2) Implementation – The existence of a proper legislation for arbitration will not be enough, it should also be strongly implemented through proper implementing agencies

3) Development of Infrastructure – In order to develop the process of arbitration a lot of things are required to be improved. The buildings in which the tribunals are to be constituted should be well equipped for the purpose of the arbitral process. All the relevant books must be available so that no kind of delay is caused because of scarcity of books. Internet access should also be available at all the tribunals.

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