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"Arbitration Law and Growing Importance of Independence of an Arbitrator"

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ABSTRACT

In recent era, significant difference is seen in the dispute management strategy being followed by whole world and with passage of time the mechanisms of dispute resolution had been developed from the King's Courts to Court of Laws and, now, a speedier and effective way of dispute resolution is device. This mechanism is Alternate Dispute Resolution or ADR which is both cost and time effective remedy for resolution of disputes. Even though ADR mechanism has been very successful because of its time and cost friendly approach still it is criticized because it works at an informal, family like and friendly atmosphere and thus, may appears as an easier way of resolving dispute. Such criticisms always pave their way so the only way of ensuring the efficiency of ADR and arbitrator is to ensure that the arbitrators are impartial and independent of nature and are able to impart justice easily and without any issue. As is said by English Court, "[t]here can be no more serious or substantial injustice than having a tribunal which was not, ex hypothesis, impartial, determine parties' rights." [2]

Key Words: Alternate Dispute Resolution, Arbitration, Independence, Impartiality, Arbitrator etc.,

INTRODUCTION

Arbitration can be understood as a method of dispute resolution under the Alternate Dispute Resolution (ADR). In Arbitration, the parties themselves choose that they will use arbitration as a method of dispute resolution, if in case a dispute arises in between them. All the disputes in between them will be decided as per the terms and conditions of agreement which are decided and agreed upon by both the parties. Everything from making terms of agreement and choosing the number of arbitrators is up to the discretion of the parties to the agreement. the person who resolves dispute between the parties is called as an Arbitrator.

Arbitration is often called as a quasi-judicial process, thus, one of its guiding principle is Impartiality, Fairness and independence of the arbitrator during arbitration proceedings. However, it is seen that the arbitrators are mostly interested in the result of an arbitration agreement, thus, it makes very important that the arbitrator is impartial so that no one can question arbitration proceedings. A Judge is state's servant and thus, he has wide responsibilities to general public and society. He has to work according to public policy, but in case of an arbitrator, their responsibilities and powers are decided by the private entities which appoints them or by other arbitral institutions. The rules given by law of the country

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[2] ASM Shipping Ltd of India v TTMI Ltd of England, CA 16 Oct 2006

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binds Judicial Magistrates, but this is not same with arbitrators. Their powers totally depend upon the agreement making parties and only limited to things which are declared illegal by law. such level of independence to an arbitrator can corrupt whole legal structure if not kept in proper check.

Independence, impartiality of an arbitrator is an ethical concept. Thus, it is needed that a different approach be taken when dealing with such complicated and important matters as independence of an arbitrator. It is argued by the scholars that the concept of morality is always present in law. This means that the concept of independence, fairness and impartiality of an arbitrator very important. It is said that, "if a judgement is unfair then the community has inflicted a moral injury on one of its members'"[3] the law of arbitration can be described as, "the most ethical institution in the society of labour relations; arbitrators exercising their ethical powers as to what is good or bad, right or wrong"[4]

In Arbitration agreement, arbitrator holds a very important position. they have an important position because an arbitrator is the person who resolves disputes between the parties of the agreement. Thus, we can say an arbitrator has a very central role and the parties to agreement have this belief that the arbitrator will do sound dispute resolution. He will be independent and impartial of both the parties. It is very important that the arbitrator be purely impartial and independent because then only parties will opt to have their dispute resolution in form of arbitration procedure.

In India, the supreme Court of India have given a landmark judgement in the case of Voestalpine Schienen GmBH v. Delhi Metro Rail Corporation Limited[5] and highlighted the importance of independence of an arbitrator.

WHAT IS ARBITRATION?

The concept of Arbitration can be traced back to the ancient India's age old system of the Village Panchayat. The decision of the all the "*Panchs*" together Panchayat was of great value and importance. It was assumed that they speak the opinion of God and thus, it was not further questioned. With time this concept changed with new developments in society. The system of Panchayats though, is still prevalent in many rural areas, but people believe more in the power and judgements of the Court's and Judges. In case of any dispute people used to approach the Courts, but now, a new system of Dispute Resolution, with the name of Alternate Dispute Resolution (ADR) has been introduced to the people. This concept is both time and money friendly in nature.

[3] Dworkin, R., Law's Empire 1, Oxford: Hart Publishing, 1998, Alam, Naser, Independence and Impartiality in International Arbitration an Assessment, National Commissioner, International Chamber of Commerce Bangladesh.
[4] Marx, Herbert L, Arbitration as an Ethical Institution in Our Society, The Arb. Jour., Vol. 37 No. 3, Sep. 1982.
[5] Arbitration Petition (civil) no. 50 of 2016; decided on: 10.02.2017

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Brief History

During the 20th Century, the Arbitration law in India was governed by the Indian Arbitration Act, 1859 with limited application. Then, it was replaced by the Arbitration act, 1940.then after some time, the Arbitration act of 1940 was replaced by the Arbitration and Conciliation Act of 1996. The new act of 1996 was made to meet the ever growing complexities and developments of the society, new economic reforms, globalisation etc. this act acted as a better and quick remedy to settle disputes related to the both domestic and international commercial disputes. This was made possible through measures such as mediation, arbitration and conciliation. The concept of conciliation was not present in the act of 1940, but it was introduced in the act of 1996.

The act of 1996 was made with aim to cover whole international and commercial arbitrations and also conciliations as also domestic arbitration and conciliations.[6] It aims to make law related to arbitration efficient, fair and capable to complete all demands of recent developments in the society

THE CONCEPT OF INDEPENDENCE AND IMPARTIALITY

The concept of both independence and impartiality looks same but in reality they have a very simple difference. The meaning of independence of an arbitrator means that the arbitrator is independent of any pressure from any of the parties and has power to work on sole discretion.

While the term partiality is more difficult to understand. It is a state of mind in which talks about special favour or bias towards one party. It can be proved only by facts. An independent arbitrator does not have any personal or working relationship with the parties. He must also not have any link with the arbitrator. He must not be dependent on any of the parties etc. While an impartial arbitrator does not favour any particular parties, he knows that justice is important and thus he imparts it properly. Thus, one can say that impartiality ensures that justice be given while Independence of an arbitrator sees that Justice is done.

Practically, Independence is comparatively easy to measure because one can find about the reality of independence of an arbitrator simply by finding out the level of relationship between the arbitrator and the parties. It is seen that whether there is any link between the parties and the arbitrator, this can define their whole relationship. While as mentioned above, the concept of impartiality is an abstract concept and thus subjective in nature. It totally depends up on the thinking of the arbitrator. It can be find out through external deeds only. However, no matter the differences between them, in reality both of them are important for ensuring justice.

[6] Dr. N.V. Paranjape, Law Related to Arbitration & Conciliation in India, pg. no. 1 para 3, 7th edition, Central Law Agency, Allahabad, 2016.

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The main requirement why an arbitrator must be independent an impartial in nature is that the parties must be neutral in nature so that he can guarantee fair trial. If it is not impartial or independent in nature, then they cannot give proper justice to the parties who have appointed them.

When we demand that an arbitrator is independent and impartial in nature. Then, it is that they are independent and neutral and also conduct fair proceeding.

AMENDEMENT TO THE ARBITRATION AND CONCILIATION ACT, 1996

The Arbitration and conciliation act, 1996 was made to consolidate and amend the law relating to domestic arbitration, inter alia, commercial arbitration and enforcement of foreign arbitral awards etc. [7] While making this law the legislature considered the United Nations Commission on International trade Law ("UNCITRAL") Model law.

However, the provisions of this act does not have any provision related to neutrality, independence etc. of the act. The Law commission of India in its first report (176th Report) made various recommendations and suggestions for amending the act. Then the Law Commission on its Report number 246 in 2004 suggested many other amendments. Then the Arbitration and Conciliation Act (Amendment Act), 2015 was made as an amendment of the previous 1996 act. Further, this act came into effect on 23rd October, 2015.

PARAMETERS FOR APPOINTMENT OF AN ARBITRATOR

In Reliance Industries Ltd. & others vs Union of India[8] the Supreme Court held that it is important to find out whether any doubts as to impartiality, neutrality and independence of an arbitrator is arising. Further, the experience, integrity and qualification of the arbitrator must also be considered before appointing an arbitrator.

LEGISLATIVE PROVISIONS

Section 12 of the Arbitration Act, 2015 says,

"**Section 12. Grounds for challenge:**

(1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose in writing any circumstances likely to give rise to justifiable doubts as to his independence or impartiality.

(2) An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall, without delay, disclose to the parties in writing any circumstances referred to in sub-section (1) unless they have already been informed of them by him.

[7] Sneha Bhawani & Swatilekha Chakraborty, Independence and impartiality of Arbitrators: A Step Close Towards Alternate Dispute Resolution, Vinod Kothari Consultants, 05 July 2018, 7.51 P.M., http://vinodkothari.com/blog/independence-and-impartiality-of-the-arbitrators-a-step-closer-towards-alternate-dispute-resolution-by-sneha-bhawnani-swatilekha-chakeaborty/#_ftn6

[8] Arbitration Petition number 27 of 2013

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(3) An arbitrator may be challenged only if—

(a) circumstances exist that give rise to justifiable doubts as to his independence or impartiality, or

(b) he does not possess the qualifications agreed to by the parties.

(4) A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made."[9]

One of the most significant changes which were made under the new act is the amendment of Section 12 of the act. This amendment was made with an aim to remove the possibility of partiality or biasness by the arbitrator. One such amendment says that the person who is approached by the parties to become an arbitrator, then such person must give disclosure about any past or present relationship with the parties because of which any doubt can arise about the neutrality or independence of the arbitrator. The disclosure must be according to the 6th schedule of the new Amendment Act. Further the 5th Schedule of the act tells us about the guiding principles which can be used to check the independence and neutrality of the arbitrator.

If the relationship between the person who is approached to work as an arbitrator and any of the parties is found as the forbidden relationship as given in 7th schedule of amendment act. Then that arbitrator will not be eligible to act as an arbitrator.

CASE REVIEW

1. Voestalpine Schienen GmBH v. Delhi Metro Rail Corporation Limited (DMRC)[10]

In this case the main issue was that that if an arbitration clause is made with provision the arbitrator must be chosen from a panel of arbitrators, then will it be opposing the law related to impartiality and eligibility of an arbitrator as per section 12 of the act. It is important to know that the Apex Court have also contended that the arbitrator must be independent and impartial in nature. There must be no doubt about the independence of the arbitrator.

The judgement given in the cases of Voestalpine Schienen GmBH vs. Delhi Metro Rail Corporation Limited tries to interpret the meaning and importance of the terms "neutrality", "independence", and "impartiality" to the parties for imparting proper justice to the society.

Case Background

Delhi metro Rail Corporation had awarded a contract to the Petitioner for supply of rails. The arbitration agreement between the parties gave a procedure for the constitution of a panel in which the DMRC will forward a name of five persons from the panel maintained by the respondents and the Plaintiff would choose its nominee arbitrator from the said panel.

[9] Section 12 in The Arbitration and Conciliation Act, 1996
[10] Arbitration Petition (civil) no. 50 of 2016; decided on: 10.02.2017

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When the respondents gave the names, the petitioner refused to accept the list as it had the names of serving or retired engineers, either of the respondents, Government Departments or Public. The petitioners are of opinion that they do not qualify as independent arbitrators. After rejecting the list, the Petitioner filed a petition under the Act for appointment of an independent arbitrator. They said that the arbitrators are not independent arbitrators. According to them they do not have the status of an independent arbitrator given the amendment of section

Main Issue of the Act.

The main issue raised was, "whether the arbitration clause about choosing an arbitrator from the list of Arbitrators, given by the respondent, violates the amended section 12 of the Arbitration and Conciliation Act?"

Ratio decidendi

The supreme court was of view that despite providing a list of members by the DMRC, the primary discretion of selecting five members from the panel and then forwarding it to the petitioners, was present with the DMRC. Then the petitioner has to choose one person and then nominate him as their arbitrator. Then the two arbitrators, one selected by the petitioner and one by the respondent (that too from the five-person list given by the respondent), will choose the third arbitrator from the five-person list which was provided by the DMRC or the respondents.

As per the Supreme Court, this arrangement can have following consequences;

a) the petitioner has a very limited choice to choose one person from a list given by the respondent. Thus, they do not have a free choice to choose a person from the panel list made by the respondents.
b) The power which the respondents have to make a five-person list was unnecessary and can create a reasonable doubt in the mind of any person or even petitioner that the respondents have chosen their favourite persons.

The Supreme Court said that the two arbitrators which are nominated by the parties should have full freedom to choose a third arbitrator from the panel. Further, it was said that it is needed that there must be a broad panel of persons to choose an arbitrator from. This is also needed so that there may not be issues between the parties, nor there be any reason for doubt over impartiality of the proceedings. Thus, the parties were asked to make a broad panel within two months of the passing of judgement.

CURRENT CHALLENGES FACED BY THE ARBITRATION

As the concept of ADR is getting popular, the concern of the legal society about "privatisation of Justice" has been increased considerably. If we look at the present scenario, then it is a true and valid concern. The idea of ADR as a resolution method is, although, a new idea but its popularity has been increased with each passing year. The main reason

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behind this is that both the parties have an opportunity to frame their own ideas and apply them as per their wishes, unless they are not illegal in nature.

Not only in domestic arena, but also in international arena, this concept of arbitration and mediation has been immensely popular.

The main problem is that the arbitrators are usually appointed by the parties themselves, and thus they are not obliged in the same way to society as the Judges are. Thus, in order to know more details about the arbitrator, it is very important that proper analysis of the arbitrator's background must be done by the parties beforehand.

"an arbitr*ator not only has to be independent and impartial, but also appear to be that way.*"[11]

The main reason behind this is that this standard is used for legitimizing whole arbitration system. The purpose behind this is to look at the concern of the persons who are afraid of modern trend and criticize this dispute resolution system by calling it a sham and biased. At times it is seen that bias behaviour of a person cannot be easily proved and thus, for this reason the standard which is set by this principle becomes all the way more relevant. Biasness can be proved only by fact and appearances, and thus by this method, the biasness can be easily proved.

Another problem which being faced by the advocates of arbitral system of dispute resolution, in developing countries, is that the population of these countries have a constant hostile attitude towards this mechanism. The primary reason behind this is that people are not aware of this system and its benefits. They do not have any knowledge about the way this system works. It is human psychology to distrust things which they have no knowledge about. Thus, most people believe that justice can be given only by a Judicial Officer and not by any other person, then if such persons will be told that an arbitral proceeding can be done in which same purpose, as that of a Judicial Magistrate, will be achieved by an arbitrator but without the need of any desk or stringent environment, then they will find it hard to believe.

Up till now the advocates of arbitration system have not discovered a perfect answer for the concerns of the person who do not trust the Arbitral System of dispute resolution. For reasons such as these and other such similar reasons, it is very important that an arbitrator upholds all his values and do not only show neutrality and Independence of an arbitrator during the arbitration proceedings but also show all these qualities in his overall appearance a personality. This will substantially benefit whole ADR system. By following this principle,

[11] Riodev, The double requirement that the arbitrator be independent and impartial, Global Arbitration News, 5 July 2018, 10.28 PM, https://globalarbitrationnews.com/the-double-requirement-that-the-arbitrator-be-independent-and-impartial-20150227/

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we will not only deal with the concerns of various people, but also effectively deal with the criticisms of people who are not even trying to understand the mechanisms of this concept.

CONCLUSION

It is needed that both the arbitrators must be Impartial, Neutral and Independent in nature. This is very important for imparting proper justice to parties who have opted to this mechanism of dispute resolution. This will not only solve the dispute properly but also contribute in legitimising the concept of Arbitration. It is therefore in the hands of people who have knowledge about this dispute mechanism system to make it popular. If the concept of ADR is promoted properly and it becomes popular then it can also help in reducing the burden of Courts.

The most important step for doing this is that ensuring that an arbitrator is Independent, Impartial and Neutral in nature. This will help in boosting the confidence of general people in ADR mechanism. The people must be made understand that it is better to stay in a closed room along with an arbitrator and resolve matter according to the provisions which are approved by them instead of going to court and waiting their chance whole day. Thus, this explains that the Double requirement of an Arbitrator i.e., to be impartial and independent is very necessary, not only in nature but also in their appearance. This is one such important pillar over which whole arbitral system rests.