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Vidya Drolia V. Durga Trading Corpn:A

New Era Of Arbitration

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Background

“Justice delayed is justice denied”

To ensure that there is no delay in justice, as it is the most basic right of every human to have access to free, fair and speedy justice. But taking a glance at present scenario it is pretty clear that overburdened and understaffed courts are the two most prominent hurdles in achieving speedy delivery of justice.

To curb this shortcoming, ADR (Alternate Dispute Resolution) as a mechanism was devised, arbitration serves the same purpose. Arbitration, one of the alternate dispute resolution mechanisms, is beneficial for those who wish to avoid the rigorous drawn-out court proceedings. Arbitration is a private form of final and binding dispute resolution presided over by an appointed arbitral tribunal (one or three arbitrators, typically) acting in a quasi-judicial manner.

As per Black’s Law Dictionary, arbitration means- *“The submission for determination of disputed matter to private unofficial persons selected in manner provided by law or agreement”*.

Precedents

The statutory provisions laid down in the Arbitration and Conciliation Act of 1996 (and further the amendments introduced in 2015 and 2019) provide a very strong base to arbitration as a relatively new legal process.

But the statute maintains silence as to the subject matters which can go to arbitration. Is it an open-ended aspect that all matters without any check can approach arbitration? The case of Booz Allen Hamilton v. SBI finance Home¹ provided a list of subject-matters that are non-arbitrable, which is to say all other subject-matters that do not fall into those 6 types are arbitrable.

This case categorically said that all those rental agreements which are governed by special statutory provisions are not arbitrable.

The case of Himangni enterprise v. Kamaljeet Ahluwalia's² case adjudicated that all those rental agreements which are under the governance of Transfer of Property Act are non-arbitrable. This clash of 2 precedents made it extremely necessary for a fresh case to step-in and remove the anomalies.

Along with these 2 questions of arbitrable subject matters and arbitrability of rental agreements under Transfer of Property Act. There arose another question of the stages where the arbitrability of a subject matter can be challenged and before which forum court or arbitral tribunal?

¹ Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd., (2011) 5 SCC 532.

² Himangni Enterprises v. Kamaljeet Singh Ahluwalia, (2017) 10 SCC 706.

Introduction

‘Vidya Drolia v. Durga Trading Corpn.,’³ is the very recent as well as the most landmark case in the history of Indian arbitration as it provides the much-needed clarity on three questions.

1. What are the subject matters that are arbitrable?
2. Are rental agreements under the purview of Transfer of Property Act arbitrable?
3. Lastly, at what different stages arbitrability of a subject matter can be raised and before which forums?

With regards to the arbitrable subject matters, instead of giving a definite list of subject-matters, the Hon’ble Supreme Court in this case devised a *four-fold test*⁴ to decide that when a subject matter suffices the pre-requisites of these 4 tests, that subject matter is not arbitrable.

TEST 1- *“When cause of action and subject matter of the dispute relates to actions in rem, that do not pertain to subordinate rights in personam that arise from rights in rem.”*

A right in rem is a right exercisable against the world at large, as contrasted from a right in personam which is an interest protected solely against specific individuals.

TEST 2- *“When cause of action and subject matter of the dispute affects third party rights; have erga omnes effect; require centralized adjudication, and mutual adjudication would not be appropriate and enforceable.”*

Erga omnes, in Latin means ‘towards all’. This means the cases which have effect on all the people, third party, will fall into the category of non-arbitrable subject matters.

TEST 3- *“When cause of action and subject matter of the dispute relates to inalienable sovereign and public interest functions of the State and hence mutual adjudication would be unenforceable.”*

TEST 4- *“When the subject-matter of the dispute is expressly or by necessary implication non-arbitrable as per mandatory statute(s).”*

³ Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1.

⁴ Ibid.

To answer the 2nd question of whether rental agreements under the governance of Transfer of Property Act are arbitrable or not, the Hon'ble engaged these 4 tests-

TEST 1- The rights arising out of landlord-tenant agreement are subordinate rights in personam arising out right in rem as they predominantly affect the rights of the parties to the agreement and have no effect on any third person.

TEST 2- Landlord-tenant agreements are private to 2 individuals they cannot affect the rights of a third party. Thus, these agreements do not require centralized adjudication and can be resolved through mutual adjudication by means of arbitration as is the contention of the appellant at hand.

TEST 3- Landlord-tenant disputes do not relate to inalienable and sovereign functions of the State.

TEST 4- the agreements between landlord-tenant especially when they are governed by Transfer of Property Act, implies that this specific being a general statute the agreement is arbitrable.

Thus, in the very of Vidya Drolia⁵ the Hon'ble Supreme Court adjudged that- *"The provisions of the TP Act do not expressly or by necessary implication bar arbitration"*.

"Landlord-tenant disputes governed by the TP Act are arbitrable as they are not actions in rem but pertain to subordinate rights in personam that arise from rights in rem. Such actions normally would not affect third-party rights or have erga omnes affect or require centralized adjudication. Landlord-tenant disputes do not relate to inalienable and sovereign functions of the State". Thus, these rental agreements between landlord-tenant are arbitrable.

This case by answering the 3rd question, not only provided clarity as to a legal question. But also provided a firm footing to arbitral tribunal's jurisdictional power juxtaposed to courts with respect to arbitrability test.

The Hon'ble Supreme Court held that there are 3 stages at which the arbitrability of a subject-matter can be questioned.

⁵ Supra 3.

Stage 1 – Referral stage-

Before the court – at the very stage where an application has been filed under section 8- parties to be referred to arbitration where there is an arbitration agreement read with section 11 - appointment of arbitrators.

Stage 2- During proceedings-

The court held that the arbitral tribunals are empowered to rule on the arbitrability of a subject mid-proceeding.

This judgment gave a broad interpretation to section 16 of Arbitration and Conciliation Act, 1996 which though states that arbitral tribunal is competent to rule on its own jurisdiction. But sub-section 2 of this section provides a cap to this power by saying that “The question that arbitral tribunal does not have jurisdiction should be raised not later than the submission of statement of defence.”

This judgement came in consonance with the doctrine Competence-Competence which inherently empowers the adjudicating body to decide its own jurisdiction. In the case of 'N.N. Global Mercantile Pvt. Ltd. V. M/S Indo Unique Flame Ltd.⁶', the Hon'ble Supreme Court ruled that-

“The doctrine of kompetenz-kompetenz implies that the arbitral tribunal has the competence to determine and rule on its own jurisdiction, including objections with respect to the existence, validity, and scope of the arbitration agreement, in the first instance.”

Stage 3- Setting aside the arbitral award-

Again, the jurisdiction can be questioned before the court when an application is made under section 34 to set aside the arbitral award.

⁶ N.N. Global Mercantile (P) Ltd. v. Indo Unique Flame Ltd., (2021) 4 SCC 379.

Conclusion

Arbitration being a relative new field required a lot of judicial interpretation, the precedents though provided a lot of clarity but at the same time created a confusion with regards to the powers and jurisdictional engagements of the arbitral tribunal.

Moreover, case of 'SBP Co. v. Patel Engineering Ltd.',⁷ also created a conflict between the courts and arbitral tribunal with respect to jurisdictional powers. It said that arbitral tribunal is empowered to rule on its own jurisdiction only when there is a court referred arbitration. This meant the subordination of arbitral tribunal thereby refuting the main intention behind the inception of arbitration as a process.

Thus, in such scenario where there is a lot of confusion with respect to the position and powers of arbitral tribunal this case of 'Vidya Drolia v. Durga Trading Corpn.'⁸, is the much needed one. This case not only just provided clarity but at the same time also established arbitral tribunals as independent entities which are not subordinate to rather assisted by courts.

In a commercialised world in which we live in free, fair and speedy is a basic requirement, hence the upliftment and streamlining of arbitral tribunal's as provided by this case is the *singuo-non*.

THANK YOU

⁷ SBP & Co. v. Patel Engineering Ltd., (2005) 8 SCC 618

⁸ Supra 3