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Extent of judicial intervention in the arbitral regime: Contemporary scenario

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Abstract
This paper provides with a critical analysis of the 2015 amendments in the Arbitration and Conciliation Act, 1996 which aims at the segregation of the arbitral regime from the judicial intervention. The aim of these amendments was to preserve the sanctity of the arbitral regime as any aiding mechanism to relieve the overburdened Indian Judiciary. However, with the excessive judicial intervention in the arbitral proceedings, the purpose was getting dissolved. The issue before addressed herein is the extent to which these amendments have successfully managed to minimize the role of the judicial system and made arbitration an effective regime to deliver justice. Addressing this issue, certain irregularities in the intention of the legislature while making the amendments with respect to the spirit of the Arbitration Act have been highlighted.

Keywords: 2015 Amendments, *Competence Competence*, Judicial intervention in arbitration, appointment of arbitrators

1. Introduction
Prior to the 2015 amendments in the Arbitration and conciliation act 1996, India's journey in fastening the judicial pendency and disposal of cases has been extremely ineffective and subject to criticism. One of the major issues with the arbitration regime was the copious judicial intervention in the arbitration procedures that stood in contradiction to the whole aim behind setting up of this regime which was to unburdened the excessively burdened judicial system of India. This paradox and certain anomalies were recognized by the legislation that led to certain amendments in 2015 which led to a restriction on the active participation of the judiciary in the matters dealt by the arbitration. The Law Commision of India initiated the project to revolutionize the arbitration regime and amend the Act in 2010 [1]. The final report was submitted in 2014 and the Parliament and the President sanctioned the same in August 2015 [2].Post the 2015 amendment, the arbitration tribunal was given enhanced powers resulting from the reduced role of the judicial system in the purview of arbitration regime. However, how effective these amendments are in practicality is yet to be assessed.

1.1 Scope of this paper
This paper is a comparative analysis of the effect of the 2015 amendments on the extent of judicial intervention with respect to Arbitration and Conciliation Act (Part I of the Act). It analysis to what extent the amendments have been effective in liberating the arbitration tribunals from the restricting judicial regime [3]. The intention of the legislation to minimize the judicial influence in the arbitration regime is evident from the insertion of Section 5 that urges to reduce any sort of judicial intervention unless specified in the statutes itself and promote speedy disposal of the matters referred for arbitration. Section 5 of the Act has been derived from Article 5 of the Model Law [4] that provided with a limited view of the appropriateness of the Court's intervention in the arbitration matters. The idea behind the insertion of this section is not to blatantly negate all sorts of intervention by the judiciary, however, it is to restrict court intervention and to exclude all other remedies. This exclusions is neither restricted to certain defined stages of arbitration nor to the pendency of the proceeding solely. The excluded remedies involve the interim measures provided under Section 9, at the stage of reference to arbitration under Section 8 in pending actions or at the stage of appointment of arbitrators under Section 11. The amendments being further discussed are on the lines of Section 5 which aims to get rid of judicial intervention to a large extent to avoid any stalling of such matters.

1.2 Diminishing Judicial Intervention: Analysis of the 2015 Amendments
Prior to the amendment Section 8 provided the provision for the parties in dispute to refer the matter to the court irrespective of whether there was an existence of an arbitration agreement which is the prerequisite for seeking reference under Section 8 [5]. It laid a discretionary power on the courts to decide whether to refer the matter further to the arbitration tribunal if there is an arbitration agreement on the same subject matter as that of the dispute [6]. However, to curb these enhanced discretion in the hands of the courts, the 2015 amendment interchanged the word 'may' to 'shall'. This made the section preemptory imposing an obligation on the courts to refer the matter to the arbitration tribunal under an application made by a party to the arbitration agreement or any person claiming through or under him, not later than the date of submitting his first statement on the substance of the dispute, in case there is a prima facie existence of a valid agreement [7]. This in turn gives the arbitration tribunal to adjudge the validity of the arbitration agreement and check whether it has the competent jurisdiction to further adjudicate the matter under Section 16 of the Act. It throws light to the concept of *Competence Competence* envisaged under Section 16 of the act which empowers the arbitration tribunal to solely judge its own competence in a matter along with the validity of an arbitration agreement. The insertion of the term 'shall' in the first subsection of Section 8 makes it mandatory on the

courts to refer the parties to the tribunals in case the above mentioned conditions are fulfilled [8].

The second subsection, provides the party applying for reference to the tribunal to also file an application asking the court to call upon the other party to produce the original arbitration agreement in case they themselves fail to have the original or a duly certified copy. The effect of these amendments made under Section 8 led to significant changes in the functioning of the proceedings of the arbitration. Under first subsection, non-signatories to the agreement could also be referred to the arbitrational tribunal seated in India with the insertion of the term 'parties claiming through them' [9]. It became mandatory for the courts to refer the parties to the arbitration tribunal in case of a prima facie valid arbitration agreement that yet again condensed the discretionary power of the courts.

Furthermore, the purpose of diminishing the role of the judiciary is evident from the amendment of Section 11 of the Act. The amendment in Section 11 brought some insertions and structural changes to the section that drastically changed the procedure and nature of appointment of arbitrators. One of the main points of contention that arose under section 11 over the years is whether the function of the Chief Justice under the said section is an administrative function or a judicial function. In the case of *S.B.P & Co. vs. Patel Engineering Ltd*. [10], it was contended that since Section 11 vests the power of appointment of arbitrator on the CJI, and not the court, it is an administrative function which will lack any precedential value. However, the Court rejected this argument and ultimately held that it was a judicial function. Further, the recent case *of State of West Bengal vs. Associated Contractors* [11] recognized the issue of CJI not being the court per se and the requirement to replace CJI to the required competent courts i.e. High Court and Supreme Court. This, was taken up in the ordinance and in 2015, the word CJI was replaced to the either 'Supreme Court or High Court judges and was held to be an administrative function of appointment of arbitrators.

Further, there was insertion of two subsections namely 6A and 6B in Section 11 of the Act. Sub-section 6A stated that for the appointment of arbitrators the arbitration agreement of the dispute has to be examined. Also, this appointment of the arbitrator to adjudicate the disputes matter is in no form delegation of any judicial power. This amendment were made to undo the wide powers conferred in the hands of the CJI in the Patel Engineering decision. It recognized the Chief Justice of India's power to decide his competence and jurisdiction to adjudicate a dispute, the validity of the arbitration agreement and the existence of the condition for the exercise of the power and qualifications of the arbitrator or arbitrators. More so, it was held that the Chief Justice can delegate his power under section 11 only to another judge of that court [12]. However, this was revoked by the Ordinance that allowed the Supreme Court or High court to assign any other institution or competent person to make the appointment of arbitrator, which cannot be challenged on the grounds of delegation of judicial duties.

The newly amended subsection 7 states that the decisions made under subsections (4), (5) and (6) are non-appealable and final including no latent patent appeal to lie against it. Further, post amendment, under subsection 14, for the purpose of determination of the fee of arbitrators, there will be a cap on the fee that an arbitrator may charge in an ad-hoc domestic arbitration, which will be based on the dispute amount [13]. This amendment somewhere seeks to recognize the supremacy and finality of the judicial decisions which creates a sense of irregularity in the scheme of arbitration as envisaged under Section 5 of the Act.

Another recent amendment that recognized the independence of the arbitration tribunals was in the case of granting interim measures under Section 17. Prior to the 2015 amendment, any interim measures granted by the tribunal under Section 17 were not enforceable, which led to the parties seeking the same under Section 9 from the courts. This led to the dilution of the motive of unburdening of the judiciary as the Courts had to intercede to deal with applications of grant of interim measures which were enforceable under Section 9.

However, post the amendment, the role of the judiciary has been minimized due to several insertions in Section 9 which have to be read in light of Section 17 of the Act. Sub-section (2) has recently been inserted in Section 9 that gives the power to the court to grant interim measures only before the tribunal has been constituted for the matter and in case it does pass an order for interim measures, the arbitral proceedings shall be commenced within 90 days from the date of such order, or within such further time as the Court may determine. Moreover, subsection 3 was added that restricted the power of the court to not deal with any such application once the arbitral tribunal has been constituted and shall refer the same to the tribunal. It is then the discretion of the arbitration tribunal to grant interim measures under Section 17 of the Act. This remedy will only be entertained by the court in case the decision by the tribunal is challenged on the grounds of non-efficacy. Post amendment the interim measures granted by the tribunal are enforceable and the tribunals have the authority to make all types of orders for interim measures as the Court ever had. This amendment has recognized the supremacy of the tribunal and at the same time conferred with the intent of the legislation under Section 5 to minimize judicial interference for the effectiveness of arbitration as an alternate dispute resolution mechanism.

1.3 Blurring of the objective of the Ordinance: Insertion of 29 A

The insertion of this entirely new section was opposed by the Chairman of the Law commission of India, however it was inserted under the ordinance passed in 2015. This amendment raises certain question regarding its effectiveness to reduce judicial intervention.

This insertion imposes a time limit of twelve months on the arbitral proceeding from the arbitral tribunal enters upon the reference. This time limit on the consent of the parties can be extended by 6 months. However if the award is not made within the time limit defined, the mandate of the arbitrator terminates unless the Court on the application of either parties deems fit to extend the time period. This gives the court enhanced discretion to adjudge whether the delay in making the award or proceedings were due to a sufficient cause or not. Excessive powers have been conferred on the Courts to reduce the fees of the arbitrator(s) not exceeding 5 per cent for each month of such delay. Moreover, the court can command substitution of one or all arbitrators while extending the period.

The scheme of the act to diminish active role of the judiciary as evinced by insertion of Section 5 seems to blur. Section 29 A foists court intervention on the parties who wish to seek a further time extension above 18 months of arbitral proceedings. It is a highly impractical time bar set by the legislature since maximum arbitrations in India take a minimum time of 2 years for deciding the award. This makes judicial intervention more likely and essential thus creating a dependency of the arbitral regime on the courts. Further, the insertions of the term 'may' and 'sufficient cause' in context of courts granting extensions, creates a wide scope of discretion and arbitrariness by the Courts.

Moreover, such judicial intervention will further adjournment of the arbitral proceedings due to the enormous amount of pending cases in their docket. The power conferred on the courts to impose a penalty on the arbitrators' fee would gravely affect the relationship between the courts and the arbitral tribunal. This would in turn effect the efficiency of the arbitral tribunals to provide aid to the burdened Indian judiciary.

2. Conclusion

2.1 Potential Applicability of the Amendments

Arbitration is a trending dispute resolution mechanism in India which has undergone sever amendment in its functioning and effectiveness. The potential applicability of the above mentioned amendments is still a contention that is being raised. However, there seems to be irregularity in the intention of the legislature while making such amendments with respect to the spirit of the Act. While on one hand, there have been amendments in Section 8, Section 9, Section 11 and Section 17 that reduce the scope of judicial intervention to a large extent and uphold the supremacy of the arbitration tribunals in the arbitration regime, but on the other, insertion of Section 29 A nullifies the effect of the same. The inclusion of arbitration in the justice system was with the intention to reduce the pendency of cases with the courts and enhance the disposal of cases outside courts. However, Section 29 A enforces overambitious time standards which are certainly impossible for the tribunals to adhere to. This to a certain extent retains judicial influence on the arbitration proceedings and a dependency of the tribunals on the courts to avoid any harsh repercussions of the delay with the Courts have the power to impose. Though these are academic criticisms, it is yet to be analyzed in its potential applicability in the arbitration regime.

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