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OSCILLATING POSITION OF INDIA ON ANTI-ARBITRATION INJUNCTION: A CONTRARIAN ANGLE

POSIÇÃO OSCILANTE DA ÍNDIA SOBRE A INJUNÇÃO ANTI-ARBITRAÇÃO: UM ÂNGULO CONTRÁRIO

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Abstract: Court rendering justice system is yet the usual choice of the people with consistent vested faith on the judiciary as compared to the other dispute resolution mechanism. However, in the recent past, Arbitration has emerged as a shining line by facilitating party autonomous and fast-track resolution process. Certain undefined principles in the context of arbitration have lowered the image of the Indian Arbitration regime in the International field. One such translucent concept is Anti-Arbitration Injunction (AAI) regarding which no explicit legislative framework or judicial pronouncement exists. The conflict of court power and arbitral tribunal competency has always been a contentious point. This further exaggerates when both coincide or overlap each other's jurisdiction. The issue of jurisdiction in the matter of AAI is highly controversial and it further gets complicated in absence of any definite international guideline or domestic legislative framework. In such a situation, the judiciary gets a level playing field to interpret or to exploit the gaps in the law. The approach of the Indian judiciary on the subject-matter remains to be vague and without any consensus in the precedents. In the first instance, the author explicates the remedy of an Anti-Arbitration Injunction and the facets attached to granting of such injunction. Walking ahead, the author discusses the mechanism of the endowment of AAI by courts focusing on dual situations of restriction and favour to arbitration. Thereafter, the author endeavours to highlight the major controversies raised out of the conflicting decisions of the Indian judiciary in dealing with the issuance of AAI. In this milieu, the author discusses varied notable judicial pronouncements covering numerous involved intricacies. On the latter segments, AAI is showcased in the light of investment regime. Lastly, the author expresses their understanding, finding and suggestion on the present subject-matter of AAI.

Keywords: Anti-Arbitration Injunction. Judicial Pronouncement. Investment Arbitration.

Resumo: O sistema de justiça ainda é a escolha usual do povo com uma fé consistente no judiciário, em comparação com o outro mecanismo de resolução de disputas. No entanto, no passado recente, a Arbitragem surgiu como uma linha brilhante ao facilitar o processo de resolução rápida e autônoma das partes. Certos princípios indefinidos no contexto da arbitragem baixaram a imagem do regime de Arbitragem indiano no campo internacional. Um desses conceitos translúcidos é a Injunção Anti-Arbitracional (AAI), em relação à qual não existe uma estrutura legislativa ou pronunciamento judicial

explícito. O conflito de poder judicial e competência do tribunal arbitral sempre foi um ponto polêmico. Isto exagera ainda mais quando ambos coincidem ou se sobrepõem à jurisdição um do outro. A questão da jurisdição na questão da AAI é altamente controversa e se complica ainda mais na ausência de qualquer diretriz internacional definida ou estrutura legislativa doméstica. Em tal situação, o Judiciário obtém igualdade de condições para interpretar ou para explorar as lacunas da lei. A abordagem do judiciário indiano sobre o assunto continua a ser vaga e sem qualquer consenso nos precedentes. Em primeira instância, o autor explica o recurso de uma medida cautelar anti-abuso e as facetas ligadas à concessão de tal medida cautelar. Seguindo adiante, o autor discute o mecanismo de dotação da AAI pelos tribunais, concentrando-se em situações duplas de restrição e favorecimento da arbitragem. Depois disso, o autor se esforça para destacar as principais controvérsias levantadas pelas decisões conflitantes do judiciário indiano ao lidar com a emissão da AAI. Neste meio, o autor discute vários pronunciamentos judiciais notáveis cobrindo inúmeras complexidades envolvidas. Sobre estes últimos segmentos, a AAI é mostrada à luz do regime de investimentos. Finalmente, o autor expressa sua compreensão, achado e sugestão sobre o assunto atual da AAI.

Palavras-chave: Injunção Anti-Arbitragem. Pronunciamento Judicial. Arbitragem de Investimento.

Introduction

Court rendering justice system is yet the usual choice of the people with consistent vested faith on judiciary as compared to the other dispute resolution mechanism. A gradual shift from burdened courts to the Alternate Dispute Resolution processes due to the cumbersome functioning of the courts and intolerant delay. However, in the recent past, Arbitration has emerged as a shining line by facilitating party autonomous and fast track resolution process.(PTI, 2013) The attempts of legislature and the Indian judiciary in past decades have facilitated the arbitration process to be one of the potent statute in whole Asia.(Tyagi, 2020) Certain undefined principles in context to arbitration have lowered the image of Indian Arbitration regime in the International field. One such translucent concept is Anti-Arbitration Injunction (AAI) regarding which no explicit legislative framework or judicial pronouncement exists.(Ojasvi Sharma, 2020)

In the civil remedy, the AAI has emerged as a new junction where the judiciary and the legislature has to stall and pounder on the four corners of the exercise of AAI. The question of AAI comes into sight in instances where one party from the dispute in arbitration approaches the court to obtain a restrictive order for prohibiting the continuous of arbitral process. The aim of the AAI is to eliminate the parallel proceedings of litigation as well as arbitration. The conflict of courts power and arbitral tribunal competency has always been a contentious point. This further exaggerates when both coincides and overlap each other's jurisdiction. The international law principle requires the domestic courts to facilitate the arbitration process. However, the court system always tends to be apprehensive in

consigning the power to arbitral tribunals. The issue of jurisdiction in matter of AAI is highly controversial and it further gets complicated in absence of any definite international guideline or domestic legislative framework. In such situation, the judiciary gets a level playing field to interpret or to exploit the gaps in law. The approach of Indian judiciary on the subject-matter remains to be vague and without any consensus in the precedents.

In the first instance, the author explicates the remedy of Anti-Arbitration Injunction and the facets attached to granting of such injunction. Walking ahead, the author discusses the mechanism of endowment of AAI by courts focusing on dual situations of restriction and favour to arbitration. Thereafter, the author endeavours to highlight the major controversies raised out of the conflicting decisions of the Indian judiciary in dealing with issuance of AAI. In this milieu, the author discusses varied notable judicial pronouncements covering numerous involved intricacies. On the latter segments, AAI is showcased in the light of investment regime. Lastly, the author expresses their understanding, finding and suggestion on the present subject-matter of AAI.

An Insight into Anti-Arbitration Injunction

Anti-Arbitration Injunction (AAI) is a remedy of injunction which a party can exercise by asking for a restricting arbitration proceeding in counter to other party who initiates or engages in arbitral proceeding by invoking arbitration agreement which was earlier entered by the parties.(Ajay Bhargava, 2020) The remedy of AAI can be prayed at any stage of arbitration like at commencement, during the proceeding and even after the hearing concludes, however, final award must not be pronounced by the tribunal.(Jyoti Dastidar & Aman Chandola, 2020) This remedy is dearth of statutory acknowledgment in the major Indian statute on arbitration, i.e., the Arbitration and Conciliation Act 1996.(Pandita, 2019) But the Indian judiciary has time and again thrown light on this concept of AAI. Generally, the invocation of Arbitration requires the court to further refer the parties for arbitration where arbitration agreement exists and is valid under Section 8 of the Act.(Pandita, 2019) If this regular exercise results in defeats the justice principles the court ought to grant an AAI. The judicial trends have revealed the reluctant nature of the court in approaching the concept of AAI. The very purpose of arbitration is to limit judicial intervention and to provide autonomy to parties. On the similar lines of the objective, the *kompetenz-kompetenz* principle is recognized in the Act under Section 16(4), however, the principle is often considered not conducive to AAI.(Priyanka Ajjannavar, 2020) A keen observation in the statutes provides

that the Section 41(b) of Specific Relief Act (SRA) enumerates about powerlessness in granting of injunction to restrict party from bringing any suit in a court. Going by the bare reading of the provision it reflects that the provision implies that it is only when a matter relates to lower court than the court in which the injunction is sort is competent to render AAI. Following the same, the interpretation which comes out with respect to the foreign arbitration is that the grant of AAI is completely outside the purview of domestic courts in India.

The concept of AAI appears to be simple but the application of this principle involves lot of range of controversies. The domestic courts are placed on higher pedestal in the adjudication system than the tribunals and therefore, the courts are in position to exploit the authority needed to be given to arbitral tribunals especially in ruling their own jurisdictions. The decision on its own jurisdiction is encompassed in the *kompetenz - kompetenz* principle which lies on the bed-rock of Arbitration Laws.(Greta Niehaus, 2021) The stand of the legislature on the aspect of AAI remained undefined and vague. It is a wide interpretative field and few scholars have opined that under Section 8(3) and Section 45(4) of the Act the principle is implicitly imbibed.(*Anti-Arbitration Injunction*, 2020) Section 45 provides for execution of foreign award and elaborates on the judicial intervention to be made if agreement is found to be null and void. The judiciary has pricked that the power to give injunction in foreign arbitrations is suggestive in the said provisions. Not only on the domestic front but also in international law arena the concept of AAI failed to find adequate respect in form of statutory recognition. The major regulatory conventions ruling the international transaction like New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 and the United Nations Commission on International Trade Law Model Law on International Commercial Arbitration 1985 which itself does not expressly speaks about this concept. (Sahasrabudhe, 2020) But interestingly there is also no prohibition on the applicability of AAIs and hence, it is difficult to attach illegality to the use of AAIs by the courts. Taking advantage of this position, the Indian domestic courts have presumed that they are in the legal capacity to order such injunctions even it tends to undermine one of the pillars of arbitration laws, i.e., *kompetenz - kompetenz* principle.

Endowment of Anti-Arbitration Injunctions by Judiciary

Courts have an authority of issuing injunction orders like the arbitrators, however, the courts exercise such power devoid of issues that are majorly faced by arbitrators.(Yash More

and Thakur, 2020) But, the court in such exercise of power do face concerns of transnational comity, majorly, in instances where restraining order are issued against foreign state. Herein, the court can issue injunction orders of two kinds: *one*, order to restrict arbitration; and *two*, order favouring arbitration.(Yash More and Thakur, 2020)

Injunction Order Restricting Arbitration Proceedings

The court has the authority to issue restraining order of arbitral proceeding which goes to the extent of even restricting the execution of the award. Such restricting orders pertaining to arbitration proceeding in form of injunctions are also known as AAI, as earlier mentioned.(K.R.Avinash, 2014) A major concern arises on the principle of territoriality when an injunction is granted against a foreign arbitration.(K.R.Avinash, 2014) The former ICC President, Mr. Stephen Schwebel, has remarked a criticism on the nature of injunction as it is divergent of the principle of New York Convention and the very foundation of International Law.(*International Arbitration*, 2020) The grant of AAI against foreign arbitration has wide implication as the court would not allow the party to go for arbitration. This would render the arbitral award unenforceable and non-binding. On the contrary the New York Convention aims to recognize and enforce the foreign awards. Hence, the AAI goes inconsistent with the principles enumerated in International Convention. The domestic courts often find it difficult to digest that there power to adjudicate can be ousted by the way of an arbitration agreement and so in several instances, the courts have constrained themselves to transfer the power to the tribunals for recognition of *kompetenz – kompetenz* principle. Also, in several instances the tribunals has taken a dominant position over the domestic court even after granting of AAI taking the premise of *kompetenz – kompetenz* principle, the arbitral tribunal has continued to carry the arbitral proceedings.(Himpurna California Energy Ltd. V. Republic of Indonesia, XXV YBCA 186 (2000)

Injunctions made in favour of Arbitration

Intercession of court in arbitral matter is finite; however, issuing AAI is quite beneficial as it positively pushes the parties to discharge their duties to resolve the dispute as agreed in the arbitration agreement. AAI can act as an safeguard mechanism against abuse of absolute power of arbitral tribunal. Much national legislation has recognised the New York Convention or UNCITRAL Model Law to provide court assistance to the arbitral process.

Certain provisions of UNCITRAL defines how the court can support arbitration to flourish, for instance, Articles 11,13,14, 16, 17.[1]Herein, it is pertinent to cite *Pertamina* case[2] which dealt with the issues of AAIs and Anti-suit Injunction. The court of U.S gave an anti-suit injunction as prayed by the U.S based corporation. The opposite party received a judgment in its favour which annulled the award later the party took the plea of fraud to make an appeal but the court did not admit the petition as the litigation took considerable time and the matter was resolved. Also, Pertamina did not avail any such remedy earlier and engaged in deceitful act by instituting suits in Cayman Island. The court pointed out the intentional filing of the law suit to diminish the effect of U. S. Court decision. By lingering the resolution process, the court upheld the inherent power of the court to safeguard its decision from being undermined by institution of suits in other jurisdiction. The path opted by the U. S. Court is tending to give advantage to arbitration proceedings and safeguarding the process from ill-motivated suits. It is imperative that even while that the party autonomy in arbitration should be given due importance especially in commercial dispute the objective of enforcing party autonomy lies in the core argument that the whole commercial intent would be defeated if the parties who once agreed on the certain terms are given passage to diverge from their contractual commitments. The 246th Law Commission Report has specified that the courts should refer any dispute related arbitration agreement to the arbitral tribunal to deal with issues pertaining to arbitral agreement.(India, 2014)

Shaky Foundation Prepared by Indian Judiciary

Legislature's Dilemma on Anti-Arbitration Injunction

The field of arbitration in India is mainly regulated by the Indian Arbitration and Conciliation Act 1996 which is influenced by UNCITRAL Model law, however, the similarity between the Model law is contentious.(Subramanian, 2018) Unlike the model law, the act enumerates Section 9 which prescribes for interim measures by the court. The horizon of this provision extent to every stage of arbitral process. The Order XXXIX of CPC[3] is also remotely conjoint with the arbitral process, however, specific applications are not implied to avoid delay in the resolution mechanism. The Indian judiciary has been prompt to designate

1 Ben Giaretta and Akshay Kishore, *Anti-arbitration Injunctions: Mixed Signals From India*, ASHURST (January 01, 2015) *available at* https://www.ashurst.com/en/news-and-insights/legal-updates/anti-arbitration-injunctions-mixed-signals-from-india/ (visited on March 02, 2021).

2 *KBC v. Pertamina*, CIVIL APPEAL NO. 121 OF 2003.

the order with a enormous import and has interpreted the competency of the court to issue AAI (Modi Entertainment Network and Anr. v. WSG Cricket Pte Ltd., AIR 2003 SC 1177) and Anti-suit injunctions (*Tractor Export, Moscow v. M/S Tarapore and Co*., AIR 1971 SC 1). under this provision of CPC. The Section 9 has wide ranging implication and due to the enlarged scope of the provision it is assumed that the civil court can grant injunctions and on similar lines wherein the party approaches the court to ask for injunction with respect to arbitration no stretch of imagination goes against the competency of the court to deal with the matter.(Mr. Puneeth Nagraj, 2011) The unsettlement with respect to interpretation of this law can be when question arises that Section 9 is elucidated in Part 1 of the Act then how the same will apply to foreign seated arbitration. Also, there is nothing which Part 2 of the Act mentions about grant of interim relief. Another contention is with regard to the judicial competency to order AAI in cases of extra-territorial implications. Nonetheless, courts have considered the competency to grant interim relief as subsidiary to the power of granting the main relief. Therefore, to touch the corner stone of justice the court can become harbinger and issue interim relief even in cases of foreign seated arbitration.

The stipulation under Section 5 of the Act further poses threat on the use of AAI by the courts. The law indicates that until and unless the Act expressly provides for judicial intervention in matters of arbitration the judicial play should be reserved. Granting interim measures in foreign arbitration is not specified by the Act and hence, cast a shadow on the court's competency to render the remedy of AAI. The Section 5 can be diluted for domestic arbitration on grant of AAI but a doubt remains unanswered with respect to international commercial arbitration. The status of Section 45 of the Act takes us to application of AAIs even on foreign seated arbitrations. It is settled that the consequent effect of Article 8 of the Model Law and Article 45 are identical. (Kishan Gupta, 2020)The legislation continues to cast uncertainty on the position of India in granting AAI. In this devoid, the Indian Courts have come up with different interpretation regarding their own competencies to issue AAI. The Apex Court has not authoritatively pronounced any decision to settle this position of law. Now, we should pounder on certain judicial approaches in form of decision by various High Courts and unnerve approach of the Supreme Court on the present subject-matter.

Anti-Arbitration Injunction: A Judicial Arsenal of Remedy

The single bench of the Delhi High Court in a recent judgment of *Bina Modi and Ors. v. Lalit Modi and Ors,2011* brought shadow of uncertainty on the question of powers of Indian

judiciary in granting anti- arbitration injunctions. The jurisdictional issue came before the court when a dispute arose out of a trust deed wherein one member of the family trust attempted to invoke arbitration to settle the instant dispute against other trustees. Rest of the trustee approached Delhi High Court to ask Anti-arbitration injunction as a remedy and prayed before the court to declare the agreed arbitration agreement as null and void. The major issue contended before the High Court was whether the courts has authority to disseminate an order for Anti-Arbitration injunction. A similar stand was taken by the judiciary in the case of *Roshan Lal Gupta v. Parasram Holdings,2009* on the same reasoning applied by this case. The single bench majorly cited the case of *Kvaerner Cementation India Limited v. Bajranglal Agarwal and Anr.*,2012 to reach to its decision. This judgment of 2012 negatively decided the question on jurisdiction of civil court to bring anti-arbitration injunctions.

The *Kvaerner Cementation* case is a decade old judgment of the Apex Court which didn't recognise the intricacies arising out of inter-disciplinary conjunction among different laws of recent times with Arbitration and Conciliation Act 1996.(Choudhary & Goyal, 2020) The relief prayed in this case was anti-arbitration injunction but the opposition contended that there was no arbitration agreement among the parties, hence, the arbitration proceedings lacked jurisdiction. The rationale of the judgment to hold that civil court is not competent to adjudicate the questions related to objections raised on the question of validity or existence of arbitration agreement was Section 16 of the Act along with purpose of the said legislation. But, the court did not forget to mention that there will be continuous application of Section 34 of the Act for challenging the award in a Civil Court.

The debar of civil court *in toto* in matters of jurisdictional decisions regarding tribunals competence was not even admitted in the *SBP and Co. v. Patel Engineering Limited,2005* in such circumstance one can assume that the *Kvaerner Cementation* case is not a good law and is *per incurium*. On similar lines, the *Kvaerner Cementation* case failed to respect the verdict of the court in *Chatterjee Petrochem Company and Anr. v. Haldia Petrochemicals Limited and Ors.*,2014 which affirms to the decision of *SBP and Co.* case. Further, the case of *World Sport Group (Mauritius) Ltd. v. MSM Satellite (Singapore) Pte. Ltd.*,2014 vividly stated that Section 9 of the Civil Procedure Code 1908 imbibes the power to civil court with the authority to issue injunction against initiation of an arbitration proceeding. What one has to look is facts and circumstances of the case to decide the matters of injunction in arbitration. Interestingly,

certain judgments of the Supreme Court have acknowledged the *Kvaerner Cementation* case's decisions.

*A. Ayyasamy v. A. Paramasivam,2*016 drawn a line to demarcate between two types of proceedings before the court related to anti-arbitration injunctions (1) wherein a party constitute the tribunal but the other party reaches the court to declare the proceeding invalid; and (2) one party reaches the court to file suit and the opposite party makes an application for arbitration initiation. *Kvaerner Cementation* case has given a different version for both the cases: in the first case, the decision furthered to exclude the jurisdiction while in the second case the court power extent to determine the issues related to validity and existence of agreement along with the nature of dispute whether arbitrable or not. The *Ayyasamy* case did not state anything relevant about overruling of *Kvaerner Cementation* case by *SBP and Co.* case. A keen observation would reveal that the both kinds of cases demarcated by the *Ayyasamy* case in substance remains same. Under the provision of Section 8 of the Act, the court is competent to adjudicate whether a matter is arbitral or not, whilst post 2015 amendment the provision necessitated that the parties should be referred to arbitration in cases where there is existence of arbitration agreement. The explicit mention of this provision attempts to limit the application of Section 9 of CPC. Consequently, the range of application of Section 9 is confined which is very base for *Kvaerner Cementation* rule.

In the latter case of *National Aluminium Company Limited v. Subhash Infra Engineers Private Limited and Anr.*,2019 the Apex court placed reference on the observation made in the case of *Kvaerner Cementation* and mentioned that question related to agreement is within the ambit of arbitrator's power. The court walked blindly not dissecting the case of *Kvaerner Cementation* and irresponsibly left the fact that *Kvaerner Cementation* case is inappropriate decision in the view of *SBP and Co.* case. The *Kvaerner Cementation* case is more tending towards the limited judicial interference approach which is the very object of bringing an arbitral proceeding. The situation remains blurred due to the conflicting decisions of the courts in above pronouncements which cast doubt on the binding nature of the verdicts and also decreases the value of the precedents.

The above issue has also been taken up in the case of *Mcdonald's India Private Limited v. Vikram Bakshi and Ors.,2016* wherein the division bench of the Delhi High Court clarified that it is permissible to issue anti-arbitration injunction in cases where the question to grant injunction arises. The problem related to arbitration agreement whether it is null, void or inoperative, the civil court is capable and can go ahead with granting injunctions.

Surprisingly, the single bench in *Bina Modi* case gave value to *Kvaerner Cementation* case and even after referring to *Mcdonald's* case declared it not a good law as the latter case was not giving recognition to the *Kvaerner Cementation* case.

A distinct issue emerged before the single bench in *Bina Modi* case pertaining to Section 41(h) of the Specific Relief Act, 1963 which debar the grant of AAIs when "*equally efficacious relief can certainly be obtained by any other usual mode of proceeding*"(Anjali Anchayil, 2020).The single bench interrelating the provision of SRA stated that it is granting an efficacious relief and consequently, there is no reason to endow the civil court with the power to grant injunction. This reasoning is shadowed as in cases when remedy is procedurally inefficient so it cannot be essentially systematic. In cases where the conundrum relates to arbitrability and jurisdiction then it is pertinent that such matter is dealt by the court mechanism and prescribing the same affair to arbitral tribunal does not seem correct.

The binding nature of the larger bench decision of a High Court on the lower bench diminished in the cases when the larger bench failed to recognise legal principles stated by the Apex Court. This principle was enumerated in the case of *Pal Singh v. National Thermal Power Corporation Limited*,2002 and was cited by Single judge decision in *Bina Modi* case.

The Indian judiciary can issue AAI in counter to foreign-seated arbitrations as per the verdict of the Calcutta High Court in the case of *Balasore Alloys Limited v. Medima LLC*.,2020.Whilst rendering this pronouncement, the High Court in reference to the *Bina Modi* case stated that the observation of the *Bina* case is of "no precedential value"(Yash More and Thakur, 2020).In the instant case, one of the party is an Indian company, Balasore Alloys Limited, which contracted with a US Based company, Medima LLC for selling of carbon ferro chrome. Medima was given a sole-distributary rights in countries like Canada and USA. In the agreement, the parties agreed to the arbitration clause for resolution of dispute. The point of contention was the jurisdiction as the agency agreement provided International Chamber of Commerce (ICC) to have jurisdiction but the purchase orders required Kolkata as the arbitration place. On arising of dispute, Medima invoked the jurisdiction of ICC, UK in turn Balasore instituted an Anti-Injunction Suit in Calcutta High Court to prohibit the proceedings in the foreign seat. The court refused to give an interim injunction against the foreign arbitration proceeding, however, it was held that the domestic courts are competent to disseminate AAI in foreign seated arbitration. Also, the court remarked that Balasore Co. failed to proof that London is a forum non-conveniens and only on the fact that there were multiple proceedings the agreement cannot be regarded as

inoperative. The court referring to the *Modi Entertainment Network v. W.S.G. Cricket* verdict affirmed the instances when AII can be granted. Instances when there is parallel proceedings, the injunction can be given when: (1) it amounts to oppression and vexation; (2) proceeding instituted in *forum non conveniens*; (3) the very nature of collateral proceedings results in injustice; (4) only granting injunction would do the justice. It is noteworthy that the following instances were enumerated for anti-suit injunction in the *Modi Entertainment* case. Hence, it is difficult to assume that the replicas of the instances can be applied for the anti-arbitral injunctions too.

In frequent time interval the courts in India have attempted to explore different dimensions of the concept of AAI. In the decision of *Board of Trustees of the Port of Kolkata v. Louis Dreyfus Armatures SAS & others*,2014 the court spilled the instances wherein AAI can be issued on the request of the parties: (1) if existence of an agreement is in question and the court opines that there exists no such agreement on arbitration among the parties; (2) if the agreement itself is unable to be executed, ineffective or null and void; and (3) if the court finds that the foreign seated arbitration leads to operation and vexatious effect. In relation to incapacity as a ground to claim an AAI the Calcutta High Court in *Devi Resources Limited v. Ambo Exports Limited,2019* remarked affirmatively that incapacity or unsoundness of mind wherein the competency of the finite can be a ground to claim AAI. Further, in *Himachal Sorang Power Private Limited v. NCC Infrastructure Holdings Limited*,2019.The principles on AAI was rendered such as : the principle for AAI and Anti-suit injunctions are not undisguisable, courts only tend to grant AAI when the proceedings is oppressive or vexatious; in cases where the court is satisfied on the contention of res judicata then such proceedings can also be termed as oppressive. The prohibition to continue a fresh proceeding can be granted where there arises issue of law or fact or of law and fact; lastly, the court encouraged to opt for arbitral process in cases wherein the party reaches the court.

The division bench in *Bina Modi* case took contrary stand by upholding the jurisdiction of the court affirmatively to deal with arbitration injunction suits. In circumstances in where the party can exhibit that the agreed terms were null and void or cannot be performed. In the judgment, the inherent and substantive rights were upheld as dispute arising out of the trust deed were non-arbitral and so the permanent injunction should be granted as prayed by the party. The observation of the court was relied on the ruling of *Vimal Kishor Shah v. Jayesh Dinesh Shah,2016* which specifically prohibited disputes related to trust deed as a arbitral dispute. In the following words the court departed from the single bench view and stated

that *"…we are of the considered view that the learned Single Judge gravely erred by failing to exercise the jurisdiction vested in the Court, which statutorily required him to adjudicate, whether the disputes between the parties, in relation to the Trust Deed, were per se referable to arbitration."*(Law, 2021) *"It is the Arbitral Tribunal that evidently lacks jurisdiction and not this court, which has the inherent jurisdiction to determine whether the disputes are arbitrable, particularly when, as in the present case, the ends of justice would otherwise be defeated."*(Law, 2021)

The learned division bench on ousting the jurisdiction of Indian court by the single bench held to be erred in law as the parties were Indian nationals as well as the assets of the trust were located in India. The division bench remarked that the interpretation of Section 41(h) of SRA is inexact because in the light of the facts and circumstances of the present case, the provision is not rendering any equally efficacious relief. Further, the court ventured to Section 2(3) of the Act which keep certain dispute out of the purview of arbitration. The reliance on Section 16 by the single bench was criticised as the case SBP and Co. has validated that the Section is only an enabling law and is far to bestow exclusive jurisdiction on the tribunal.(*International Arbitration*, 2020)

In a pronouncement by Andhra Pradesh High Court in *Cultor Ford Science v. Nicholas Piramal,2002* the court took fact and circumstances into consideration and stated that there was investment of money and time by the parties whilst venturing into the arbitral proceeding and the agreement was formed with the consent of the parties. Hence, AAI cannot be rendered to the party. While in *Union of India v. Dabhol Power*,2006 the Delhi High Court took into account that there is no complete exclusion of the jurisdiction of the court for granting such injunction in the light of Section 45 of the Act. Where ever the circumstances necessitate, the courts will always have a recourse to AAIs for meeting the ends of justice. In a dispute *MSM Satellite (Singapore) Pvt. Ltd. v. World Sport Group (Mauritius) Limited.,* (2010) where both the parties were foreign nationals and the subject matter involved was located in India, the Indian Judiciary allowed issuing of injunction. This implies that the Indian courts is competent to issue AAIs subject to Section 8 and 16 of the Act.

Anti-Arbitration Injunction in Investment Regime

The complex arena of international investment law poses further challenges when it coincides with arbitration issues. A issue in international investment involves two parties, one is foreign investor and the other is the state in which the investment is made.(*International Arbitration*, 2020). Under International Centre for Settlement of Investment Disputes

(ICSID) Convention, Article 26 stands contrary to AAI as it states that if the parties have consented for arbitration regulated under this convention then other remedy would be excluded. Hence, if the parties in investment disputes agree for arbitration under ICSID, the resultant effect would be giving up of other remedies. Even this convention gives recognition to the *kompetenz - kompetenz* principle under its Article 41(1).(Borthakur, 2019) If one looks the combine effect of Article 26 and 41(1) it provide the state to be at defiance under the convention. Also, it does not go well with the Investor-State Dispute Settlement (ISDS) method given under bilateral investment treaty as it may allow the party to avail resorts to domestic courts instead of international arbitration.

There are several precedents which sketches the development of AAI with respect to International Investment Arbitration. In the pronouncement of *Attorney-General v. Mobil Oil NZ Ltd.,1989* there came a dispute pertaining to this subject where in parallel proceedings in the court and tribunal under the ICSID convention were made. The domestic high court ordered stay of courts proceeding till the finality of award from the tribunal. The decision was made in compliance with Article 26 of the convention and on the same lines giving showering nature of exclusivity to the above stated provision the case of *Maritime International Nominees Establishment v. Republic of Guinea* was pronounced. In the case of *SGS v. Pakistan* the Pakistan government prayed for injunction against the on-going arbitration and the Apex court of the nation allowed the prayer, however, the tribunal step ahead and denied to follow the verdict of the court. The tribunal stated that in no manner the International Law obligates us to go with the decision of the court and the major duty is to safe guard the interest of right to access in international dispute resolution regime. A non-signatory state of ICSID Convention is flexible in resorting to domestic courts to ask for remedy of injunction for investor state arbitral proceeding. The said rule does not apply in cases where Bilateral Investment Treaty provides something otherwise in that context. The courts have reluctantly in many jurisdiction have taken an authoritative approach in granting AAIs by expanding their power trespass the jurisdiction of the tribunal.

The major question that came up in *British Caribbean Bank Ltd v. The Government of Belize,2018* to resolve was whether in a dispute related to transaction under BIT the court can issue injunction against arbitration. The court elaborately reasoned that when a BIT specifically mentions about an international arbitration then there is no question on resorting to other remedies including the remedy to go to domestic court. A distinct observation was also made regarding parallel proceeding which a domestic court can bring along with a

arbitral proceeding if the court is of the view that the arbitral process amounts to operation. The court cautioned that this opt out rule should only be resorted in rarest of rare cases to safeguard any abuse. The Indian courts have also faced dilemmas while dealing with inter-application of AAIs and international investment. The case of *Union of India v. Vodafone Group Plc,2017* and *Union of India v. Khaitan Holdings (Mauritius) Ltd. &Ors, 2019.the* court has uplifted the competency of domestic courts in exercising their in-issuing injunction against arbitration raised from international investment treaty. The proviso was explicated with respect to this rule that if the process amounts to vexation, operation or leads to diminishing of legal mechanism then only the rule inherent jurisdiction of court would come into play.(Ananya Pratap Singh, 2020) The court further went on to state that the Arbitration and Conciliation Act is not qualified to deal with matters of arbitration under a BIT dispute which has the seat in a foreign state. Hence, it is difficult to state that the Indian Courts can engulf such jurisdictional power from the act. It is worth to mention that India has not rectify the ICSID Convention and therefore, the is not obligated to go by the principles stated in Article 26 and Article 41(1) of the Convention(Palada Dharma Teja and Shashwat Bhaskar, 2019). But, the UNCITRAL Model rules is suggestive for less intervention of court and encouragement to arbitral tribunal to deal with the dispute under the heading of International Investment Arbitration.

Another apprehension which is raised in expanding the jurisdiction of the court is that in matter of investment the domestic court would obviously tend to favour its national government and hence, there can be element of biasness if the court decides the matter. Further, the court processes are expensive and lethargic which can undermine the commercial effect and significance of investment treaties. The regulations of the international law are premised on the ground of principle of comity between the nations. In area of investment, a foreign investor is susceptive and apprehended of the approach under taken by the post state and the regime of investment treaty is a structured in a way to protect the interest of the foreign investor. When a party approaches a domestic court for restraining arbitration it implies the unsuccessfulness on the part of the party to oblige its duty not only under the agreed contract but also under the regime of international law. Following the same, the interpretation of the whole interplay of different regulation and principle indicate that the allowing the domestic court to exercise the jurisdiction to grant AAI is opposite to the underlying aims of BIT. The countries which are not signatory to ICSID Convention would rely on arbitration regulations governing the arbitration in investment disputes, nonetheless,

it is expected by the international fraternity that some restrain must be exhibited to avail any such remedy which is contrary to the foundation of the ICSID Convention.

Conclusion

The uncertain position of AAI is going contrary to the India's objective to reach the pinnacle of commercial arbitration. In absence of any vivid guidelines or affirmed principles it seems difficult to sketch a spectacular arbitration regime. A crystal clear demarcation must be attached that when a court has to oblige the terms of the agreement and when a challenge could be admitted arising out of the arbitration agreement. Various jurisdiction have recognised the AAIas a feasible remedy even there remains certain uncertainty in its application and implementation. The international conventions have also not provided express recognition to this principle leading to divergent approach adoption by various nation. India remains a distant convenor to provide any clarity on the use of the remedy. The courts have focused on the question to grant AAIs as and when prayed by the party but has failed to establish whether such remedy even finds space in the Indian Legal set-up.

The general trend which we have observed in the above-mentioned pronouncements compels us to conclude that the Indian judiciary has presumed the jurisdiction regarding AAIs as their inherent power. Like in other injunction cases, also for AAIs, the court sits to examine whether the claimant is fulfilling the requisite for grant of injunction. This is an anomaly presented by the Indian Judiciary as arbitration has always been regarded as separate dispute resolution mechanism and the approach of the court equating general matters with arbitration injunctions does not seem conducive. The court have failed to appreciate the nature of exceptional remedy. The author is of the view that the Apex Court of the nation is opting for a "wait and watch approach" as it neither tends to introduce any principle or guidelines on AAI application in India. The court appears to be little apprehended when the matter is of international arbitration. The judicial self-restrain does not appear to be effective as it will not dissolve the threats of judicial transgression in such matters of AAI.

The best method to deal with the present conundrums is to find an equilibrium state and balance approach. The court can exercise the jurisdiction and grant the distinct remedy with caution and only in rare circumstances. The effective application of issuing this remedy would efficaciously remove any sort of threat of abuse in the arbitration process. Consequently, this can be an advantageous option for the International Arbitration process to be more constructive. The judicial perspective should tend towards favouring arbitration

and only in circumstances of fraud, non-arbitrable matters or jurisdictional issues, the court should take the matter in hand. The authority should be exercised by the court only when the balance of conveniences requires them to do so and the granting of injunctions can prevent arbitration from abuse. The pending a global consensus on the instant matter makes a fertile field for India and offers a constructive opportunity to structure an exhaustive and effective guidelines or principles pertaining to AAIs with respect to domestic as well as international arbitration.

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