Challenges in implementation of ADR System in Subordinate Courts

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OVERVIEW

Two sets of laws that govern the lives of citizens –

- **Substantive laws**
- **Procedural laws**

OVERVIEW

Alternative Dispute Resolution (ADR) is a procedural method by which parties would like to resolve their disputes outside the court

OVERVIEW

The Courts normally deal with ADR in two circumstances:

- **In regular suits –**
  - **Section 89 of the Code of Civil Procedure (CPC)**
  - **Section 8 of the Arbitration & Conciliation Act, 1996 (ACA)**

OVERVIEW

The Courts normally deal with ADR in two circumstances:

- **Petitions filed under the ACA**

  - **Section 9, 27, 29, 34, 36 and 37 of the ACA**

SECTION 89 – CPC

Blending judicial and non-judicial dispute resolution mechanism

As per Section 89;
Where it appears to the Court that there exist elements of a settlement which may be acceptable to the parties, the Court shall formulate the terms of settlement and refer the same for:

(a) Arbitration; (b) Conciliation; (c) Judicial Settlement including settlement through Lok Adalat; or (d) Mediation

SECTION 89 – CPC

***Afcons Infrastructure Ltd. Vs. Cherian Varkey Consturction Co. (P) Ltd.* – 2010 (8) SCC 24**

1. **After the completion of pleadings, a hearing to consider recourse to ADR process under Section 89 CPC is mandatory, but actual reference to an ADR process in all cases is not mandatory**

SECTION 89 – CPC

Afcons Infrastructure Ltd. Vs. Cherian Varkey Consturction Co. (P) Ltd. – 2010 (8) SCC 24

2. **Where the case falls under an excluded category there need not be reference to ADR process. In all other case reference to ADR process is a must**

SECTION 89 – CPC

***Afcons Infrastructure Ltd. Vs. Cherian Varkey Consturction Co. (P) Ltd.* – 2010 (8) SCC 24**

3. **Where the case is unsuited for reference to any of the ADR process, the court will have to briefly record the reasons for not resorting to any of the settlement procedures**

SECTION 89 – CPC

Afcons Infrastructure Ltd. Vs. Cherian Varkey Consturction Co. (P) Ltd. – 2010 (8) SCC 24

4. **If a matter has to be referred to arbitration, it has to be by means of a joint memo or joint application or a joint affidavit of the parties before the court, or by record of the agreement by the court in the order-sheet signed by the parties**

SECTION 89 – CPC

***Afcons Infrastructure Ltd. Vs. Cherian Varkey Consturction Co. (P) Ltd.* – 2010 (8) SCC 24**

5. **There can be a valid reference to conciliation only if both parties to the dispute agree**

SECTION 89 – CPC

Afcons Infrastructure Ltd. Vs. Cherian Varkey Consturction Co. (P) Ltd. – 2010 (8) SCC 24

6. **If the reference is to arbitration or conciliation, the court has to record that the reference is by mutual consent. Nothing further need be stated in the order sheet**

SECTION 89 – CPC

Afcons Infrastructure Ltd. Vs. Cherian Varkey Consturction Co. (P) Ltd. – 2010 (8) SCC 24

7. **If the parties are not agreeable for either arbitration or conciliation the court has to consider which of the other three ADR processes (Lok Adalat, Mediation and Judicial Settlement) is suitable and appropriate and refer the parties to such ADR process**

SECTION 89 – CPC

Afcons Infrastructure Ltd. Vs. Cherian Varkey Consturction Co. (P) Ltd. – 2010 (8) SCC 24

8. **In all these four ADR processes, the case does not go out of the stream of the court when a reference is made. The court retains its control and jurisdiction over the case, even when the matter is before the ADR forum**

SECTION 89 – CPC

***Afcons Infrastructure Ltd. Vs. Cherian Varkey Consturction Co. (P) Ltd.* – 2010 (8) SCC 24**

9. **If the Judge in charge of the case assists the parties and if settlement negotiations fail, he should not deal with the adjudication of the matter, to avoid apprehensions of bias and prejudice**

SECTION 8 – ACA

When a matter is brought before the Court by a party, ignoring an arbitration clause

As per Section 8;
A judicial authority, before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party to the arbitration agreement or any person claiming through or under him, so applies not later than the date of submitting his first statement on the substance of the dispute, then, notwithstanding any judgment, decree or order of the Supreme Court or any court, refer the parties to arbitration unless it finds that prima facie no valid arbitration agreement exists

SECTION 8 – ACA

The primary difference between Section 8 ACA and Section 89 CPC is that under Section 8, the parties would be referred to arbitration whereas under 89 CPC, the Court asks the parties to choose one or other ADRs including Arbitration and parties may choose accordingly

SECTION 8 – ACA

***Amarchand Vs. Ambica Jute Mills* – AIR 1966 SC 1036**

The Essence of Arbitration is that a dispute is referred by parties to a tribunal of their own choosing. Parties know or ought to know that in referring a dispute to arbitration they take to arbitration for better or worse, and that the arbitrator's decision is final and the parties should not be relieved from a tribunal they have chosen because they fear that the arbitrator's decision may go against them.

SECTION 8 – ACA

K.K. Modi Vs. K.M Modi **– 1998 (3) SCC 573**

(i) The agreement must comply with the requirements as stated under Section 7 of the Arbitration and Conciliation Act, 1996

(ii) The agreement must also be legally valid in accordance with the provisions of the Indian Contract Act, 1872

SECTION 8 – ACA

***Enercon (India) Ltd. & Ors. Vs. Enercon GmBH & Anr* – 2014 (5) SCC 1**

An arbitration agreement is valid so far as the intention of the parties to resolve the disputes by arbitration is clear

SECTION 8 – ACA

Magma Leasing & Finance Limited & Another Vs. Potluri Madhavilata & Another **– 2009 (10) SCC 103**

Section 8 is in the form of legislative command to the court and once the pre-requisite conditions are satisfied, the court must refer the parties to arbitration – no option is left to the court and the court has to refer the parties to arbitration

ARBITRATION & CONCILIATION ACT

One of the main objects and basis of the Act is for speedy disposal with least court intervention and giving party autonomy

Section 5 specifically provide that notwithstanding anything contained in any other law for the time being in force, in matter governed by this Part, no judicial authority shall intervene except where so provided in this Part

ARBITRATION & CONCILIATION ACT

***Guru Nanak Foundation Vs. Rattan Singh and Sons* –**

AIR 1981 SC 2075

The way in which the proceedings under the Act are conducted and without an exception challenged in courts, has made lawyers laugh and legal philosophers weep, in view of unending prolixity, at every stage providing a legal trap to the unwary.

ARBITRATION & CONCILIATION ACT

- Law Commission of India brought out Report No. 246 on 05 August 2014
- The Arbitration & Conciliation (Amendment) Ordinance 2015, came into force on 23 October 2015
- Arbitration & Conciliation (Amendment) Act 2015 was passed, assent received on 31/12/2015 – deemed to have come into force on 23 October 2015

SECTION 9 – ACA

Courts get jurisdiction to interfere in an Arbitration process under Section 9, when a party approaches for interim protection

SECTION 9 – ACA

Under the amended law, where, before the commencement of the arbitral proceedings, a Court passes an order for any interim measure of protection, the arbitral proceedings shall be commenced within a period of ninety days from the date of such order or within such further time as the Court may determine.

SECTION 9 – ACA

Similarly, once the arbitral tribunal has been constituted, the Court shall not entertain an application, unless the Court finds that circumstances exists which may not render remedy provided under Section 17 efficacious

SECTION 17 – ACA

Section 17 ACA empowers the Arbitral Tribunal with the same powers of court as under Section 9

Any order issued by the arbitral tribunal under this section shall be deemed to be an order of the Court for all purposes and shall be enforceable under the CPC, in the same manner as if it were an order of the Court

SECTION 17 – ACA

***Alka Chandewar Vs. Shamshul Ishrar Khan* – CDJ 2017 SC 792**

The court can take contempt either under the provisions of the Contempt of Courts Act or under the provisions of Order 39 Rule 2A CPC, against a person who violates the interim order passed by an Arbitral Tribunal, on application by the Arbitral Tribunal

SECTION 27 – ACA

The arbitral tribunal, or a party with the approval of the arbitral tribunal, applies to the court for assistance in taking evidence

The Court may, issue the same processes to witnesses, ordering that the evidence be provided directly to the arbitral tribunal.

SECTION 29A – ACA

New Section 29A is inserted – prescribes a time frame of 12 months or an extended period of 18 months for the making of an award, from the date the arbitral tribunal enters upon the reference

SECTION 29A – ACA

The extension of the period may be on the application of any of the parties and may be granted only for sufficient cause and on such terms and conditions as may be imposed by the Court.

Application shall be disposed of by the Court as expeditiously as possible – within a period of sixty days from the date of service of notice on the opposite party.

SECTION 34 – ACA

Application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award

Application shall be filed by a party only after issuing a prior notice to the other party

SECTION 34 – ACA

An arbitral award may be set aside by the court only on 7 grounds:

1. **Party was under some incapacity**

2. **Arbitration agreement is not valid**

3. **Party was not given proper notice**

SECTION 34 – ACA

An arbitral award may be set aside by the court only on 7 grounds:

4. Award deals with a dispute not contemplated by or on matters beyond the scope of the submission

5. Arbitral tribunal or arbitral procedure was not in accordance with the agreement

SECTION 34 – ACA

An arbitral award may be set aside by the court only on 7 grounds:

6. Subject-matter of the dispute is not capable of settlement by arbitration

7. Award is in conflict with the public policy of India

SECTION 34 – ACA

Conflict with public policy of India:

- **Making of the award was affected by fraud or corruption**
- **Contravention with the fundamental policy of Indian law**
- **Conflict with the most basic notions of morality or justice**
- **Patent illegality appearing on the face of the award**

SECTION 34 – ACA

ONGC Ltd. Vs. Western Geco International Ltd. **–**

2014 (9) SCC 263

Associate Builders Vs. Delhi Development Authority **–**

2014 (13) SCALE 226

1. **Judicial Approach**
2. **Principles of Natural Justice**
3. **Wednesbury's Principle of Reasonableness**

SECTION 34 – ACA

***Ganges Waterproof Works (P) Ltd Vs. Union of India* –**

AIR 1999 SC 1102

Arbitrator is the sole judge of the quality as well as quantity of evidence and it will not be for the court to take upon itself the task of being judge of the evidence before the arbitrator

SECTION 34 – ACA

***K.V. Mohammed Zakir Vs. Regional Sports Centre* –**

2009 (9) SCC 357

Court should not substitute its own view for the view taken by the arbitrator while dealing with the proceedings for setting aside an award

SECTION 34 – ACA

***West Bengal State Warehousing Corporation & Anr. Vs. Sushil Kumar Kayan & Ors.* – 2002 AIR (SC) 2185**

Award made by an Arbitrator can be set aside if the Arbitrator acts beyond jurisdiction – if the Arbitrator acts beyond the arbitration clause

SECTION 36 – ACA

Where the time for making an application to set aside the arbitral award under section 34 has expired, then such award shall be enforced in accordance with the provisions of CPC in the same manner as if it were a decree of the Court

Filing of an application under section 34 shall not by itself render the award unenforceable

EFFECT OF AMENDMENT IN COURT PROCEEDINGS

- **Amendment made effective as on 23/10/2015**

- **As per Section 26; nothing in the amended Act shall apply to arbitral proceedings commenced before 23/10/2015, unless otherwise agreed by parties**

- **And shall apply in relation to arbitral proceedings commenced on or after 23/10/2015**

EFFECT OF AMENDMENT IN COURT PROCEEDINGS

Divergent Court views:

Amendment applicable to court proceedings for arbitrations commenced prior to 23/10/2015

1. **Madras High Court in**

   New Tirupur Area Development Corporation Limited Vs. Hindustan Construction Co. Ltd.

   – Application No. 7674 of 2015 in O.P. No. 931/2015

EFFECT OF AMENDMENT IN COURT PROCEEDINGS

Divergent Court views:

Amendment applicable to court proceedings for arbitrations commenced prior to 23/10/2015

2. **Calcutta High Court in**

   ***Tufan Chatterjee Vs. Rangan Dhir* –**

   CDJ 2016 Cal HC 523

EFFECT OF AMENDMENT IN COURT PROCEEDINGS

Divergent Court views:

Amendment applicable to court proceedings for arbitrations commenced prior to 23/10/2015

3. **Bombay High Court in**

   Rendezvous Sports World Vs. BCCI

   CDJ 2016 BHC 2320

EFFECT OF AMENDMENT IN COURT PROCEEDINGS

Divergent Court views:

Law prevailing at the time of commencement of the arbitration will apply till the disposal of the setting aside application and amended Act will not apply to court proceedings for arbitrations commenced prior to 23/10/2015

1. **Delhi High Court in**

   Ardee Infrastructure Pvt. Ltd. Vs. Anuradha Bhati

   CDJ 2017 DHC 013

EFFECT OF AMENDMENT IN COURT PROCEEDINGS

Divergent Court views:

Law prevailing at the time of commencement of the arbitration will apply till the disposal of the setting aside application and amended Act will not apply to court proceedings for arbitrations commenced prior to 23/10/2015

2. **Calcutta High Court in *Saraf Agencies Pvt. Ltd and Ors. Vs. Federal Agencies for State Property Management and Ors* – CDJ 2017 Cal HC 084**

EFFECT OF AMENDMENT IN COURT PROCEEDINGS

Divergent Court views:

The full bench of Supreme Court comprising of Justice Dipak Misra, Justice A.M Khanwilkar and Justice Mohan M. Shantanagoudar are hearing the connected SLP's on this divergent views

Q&A

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Thank You