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RESEARCH ARTICLE

A CRITICAL ANALYSIS ON THE RIGHTS OF PARTIES FOR DISPUTE RESOLUTION THROUGH ARBITRATION

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Abstract

In dispute settlement where the rights of party to a arbitration is concerned, the Arbitration law is not absolute and which is controlled by the important mandatory provisions. However, the party autonomy principle is somewhere violating the principle of natural justice and public policy as well which are the fundamentals of the law of the land of particular country. Mainly all countries are having their Arbitration law of their own have recognized the party autonomy principle. The author would like to begin his research paper with brief history of Arbitration law in India and impact of UNCITRAL Model Law, 1985 to the Arbitration law and also the important provisions regarding Party Autonomy. In India, Arbitration has a long history as a method of dispute resolution. In ancient time, the people used to submit their disputes to a group of wise persons of their community i.e. called the panchayat and their decision was having a binding effect. The present law of arbitration is the effect of Bengal Regulations in 1772 passed during British period. The Bengal Regulation provided that the court to refer to the arbitration the matters concerning accounts, breach of contract and partnership deed with the consent of the parties. Till 1996, there were three statutes governing the law of arbitration in India- Whether the parties may agree on everything for Arbitration.What is the autonomy available to the parties during Arbitration proceedings? Whether there is any restriction on such autonomy or it is absolute. Whether principle of natural justice apply to the Arbitration proceeding.
The Indian Arbitration Act, 1940,
The Arbitration (Protocol and Convention) Act, 1937 and
The Foreign Awards (Regulation and Enforcement) Act, 1961

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Introduction:-

By repealing all the above laws the Government of India enacted The Arbitration and Conciliation Act, 1996 to modernize the arbitration law and to implement the UNCITRAL Model Law.

Party discretion is a backbone and a corner stone of the Arbitration Law. It is a central point of Arbitration proceeding. The Arbitration is chosen and structured as a dispute resolution by the agreement of the parties for the procedure and authority. If the parties to the dispute are failed to select Arbitration, their dispute would be settled by the court. The reason to select Arbitration rather than litigation is that Arbitration provides speedy justice with confidentiality. In constituting the Arbitration, the parties agree on the form of Arbitration institution, procedure to be followed by the Arbitration tribunal, place of Arbitration and the governing law etc. In other words we can say

that the parties are free to choose the arbitrators, venue, law, procedure and almost everything regarding the resolution of the dispute. Thus the parties structure the Arbitration by their choice and as agreed by themselves. Arbitration is a private court which is presided over by private judge. The judgment of the arbitrator is known as the award which is binding on both the parties. Arbitration is a formation of agreement between the parties, therefore party autonomy is soul and heart of all Arbitration contract. However, this autonomy is not absolute and it is subjected to public policy and applicable law of the land. Further, the intervention of court is also necessary where there is biasness on part of the arbitrator, misconduct of the proceedings etc.

Under section 89 of CPC says that the Arbitration as a mode of dispute resolution with the consent of party. The judiciary also felt need of the alternative dispute resolution because of large number of pending cases before court, minimum number of judges and delays. The Arbitration permits the parties to adopt their own procedure during the Arbitration and does not allow the court to interfere except in few cases. It is recognized that the court shall refer the disputes to arbitration, when an action is brought by one party to the court in a matter which is the subject of an arbitration agreement, if another party so requests. Party autonomy is the base of Arbitration but it does not mean that it is absolute. The Model Law as well as the national laws prescribes the provision in their Arbitration law which limits the autonomy of the parties for the betterment of Arbitration proceedings. Though, party autonomy is the base of the Arbitration agreement, it can be criticized on many grounds such as public policy, natural justice etc. Further, what we can say regarding party autonomy is power makes a man corrupt and absolute power makes a man absolutely.

Arbitration Law and Rights Of Party

- **Meaning of Arbitration**

The Arbitration can be defined as a "mechanism for the resolution of disputes which take place usually pursuant to an agreement between two or more parties, under which parties agree to be bound by the decision to be given by the arbitrator according to law or, if so agreed, other considerations, after a fair hearing such decision being enforceable by law".

Further the Arbitration can also be defined as "the process by which a dispute or difference between two or more parties as to their mutual legal rights and liabilities is referred to and determined judicially and with binding effect by the application of law by one or more persons (arbitral tribunal) instead of by the court of law."

It can be inferred from the above definitions that Arbitration is a method of dispute resolution through the arbitral tribunal between the parties and it is alternate to the litigation. Further, we can add that it is cost effective, speedy justice and less technical.

- **The notion Party Autonomy**

The notion Party Autonomy can be defined as "freedom of the parties to construct their contractual relationship in the way they see fit"

Further, it can also be defined as "self arrangement of legal relations by individuals according to their respective will". Now we can say that it is all depend upon the parties themselves to arrange their Arbitration agreement freely without any control. This principle has been recognized under UNCITRAL model law and hence adopted by member states.

Party autonomy is a central point of Arbitration. The Arbitration is selected through an agreement of the parties. If the parties are failed to select the Arbitration then their contractual disputes would be settled by the court of law. The parties prefer the Arbitration because of confidentiality, speedy justice and sometimes the matter is very technical then it is to be decided by the expert arbitrator. In forming the Arbitration, the parties may agree on the ad hoc Arbitration or institutional Arbitration or self appointed arbitrators, the Arbitration rules, procedure, governing law place of Arbitration etc. Thus the parties have a full right to form the Arbitration as they agreed. Furthermore, the principle of separability supports the party autonomy as Arbitration agreement survives even though the contract was declared invalid. The UNCITRAL Model Law, Arbitration Law of UK and Arbitration Law of India also recognize this principle.

Everybody has freedom to make a private contract. In selection of governing law in the contract the party autonomy was recognized. The principle of freedom to make a contract is closely related with the party

autonomy. The party autonomy is affected by the regulatory laws if the private contract is regulated by laws of the land. The party autonomy in Arbitration has been developed and expanded since around 1980s.

The author thinks that there are some problems that may arise out of Arbitration agreement. Generally the domestic bargains for Arbitration do not arise from the free process of market force. In many cases, Arbitration agreement reflects the position of the party who is economically dominant. If the agreement is entered into the court has a very limited power in respect of giving effect to that agreement and that the court turns a blind eye to their unilateral character. These are happening, generally, domestic consumer Arbitration and employment contract where the other party is always at the dominant position and that can abuse it. The damages is at least less. In such a situation, maintaining power balance and equality of the parties before Arbitration is the requirement as the economically dominant parties will otherwise make the rules in their support and further there are very limited ground to challenge the an Arbitration agreement and hence it may become unfair to the economically dominant party because there is no provision for appeal against the order.

- **Party Rights and UNCITRAL Model Law and Arbitration Law**

Under the UNCIRAL model law the party autonomy principle was adopted without any opposition. This is confirmed by the words stated in UNCIRAL model law that "Subject to the provisions of this law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings" and that "in matters governed by this law, no court shall intervene except where so provided in this law," these provisions are making confirm the principle of party autonomy.

Awards made under the direction of the parties when contrary to the public policy of the state, would be refused recognition and enforcement. This poses to be a limit to party autonomy as parties' freedom is restricted.

Sections 18 and 19 of the Arbitration and Conciliation Act, 1996 corresponds to Articles 18 and 19 of UNCIRAL Model Law on International Commercial Arbitration,1985 makes provision which extends the autonomy of the parties. Article 19 of UNCIRAL model law provides that parties are free to adopt their own procedure in Arbitration and also provides that the Arbitral tribunal is not bound to follow the procedure enshrined in the CPC, 1908 and Indian of Evidence Act, 1872.it is because the Arbitration emerges from the private contract between the parties and therefore the parties themselves determine the procedures to be followed in the arbitral proceedings. Thus we can say that this power of the parties to create procedures for their own remains uncontrolled by outsider. But section 18 of ACA, 1996 which corresponds to Article 18 of the UNCITRAL Model Law on International commercial Arbitration limits the powers of the parties to create their own procedure. This provides that all parties shall be treated equally and they shall be given full opportunity to present their case completely. This is the fundamental principles of fairness. Thus the tribunal must follow this fairness principle in their work and thereby limit the power of the parties to create the rules for the Arbitration.

Furthermore, the contents of the Arbitration agreement has a big impact on the parties' right because such an agreement eliminates the parties' right to recourse the judiciary to te great extent.

Under Arbitration and Conciliation Act, 1996 which corresponds the UNCITRAL Model Law also, there are many provisions which give the party autonomy. These are as follows

The parties are free to agree on-

1. Procedure for appointing arbitrator
2. Procedure for challenging arbitrator
3. Procedure to be followed by the arbitral tribunal in conducting the proceedings
4. Place of arbitration
5. Language to be used in arbitral proceeding
6. Number of arbitrators

Unless the parties have agreed that no reasons are to be given, the arbitral award shall state the reasons upon which it is based.

The author can criticize the above freedom of the parties on the basis of dominant position of one party on other that in case of determining place of Arbitration, language to be used in arbitral proceeding and

number of arbitrator the party who is strong can frame the procedure as he wish and thus he can misuse his dominant position.

Furthermore, there is one provision that party can agree that no reasons to be recorded in the award. This autonomy is against the rule of natural justice i.e. there must be reasoned decision in all cases. The parties shall not be given such freedom because without any reason in the award no one can understand the award properly and hence it is harmful for both the parties. Finally, if the matter principles of natural justice are violated while deciding the case then that award shall be deemed to be passed without jurisdiction and hence award shall be annulled.

If we see Section 33 of the United Kingdom Arbitration Law which is the mandatory provision to be followed, we find that section 33(1) (b) makes provision that the arbitral tribunal shall adopt such procedures which is suitable to the situation and circumstances of the particular case for avoiding unnecessary delay or expense. Now we can say that to avoid unnecessary delay and expenses the arbitral tribunal can rule on such procedure which perhaps override the parties' agreement. However, this provision is made for the fairness of the parties. This can be done only where there is an agreement on the procedural point.

Furthermore, the Arbitration law of various countries imposes a time limit for declaring an award. But there are other laws such as UNCITRAL Model Law, Arbitration and Conciliation Act, 1996(India) and Arbitration Act, 1996(UK) which imposes obligation on the arbitrator to act without unnecessary delay. The parties also agreed themselves on a long period of time for submission of memorial. Here, there is conflict of powers between the arbitrator and the parties' agreement. Now the question is that what will prevail? Here the parties' agreement shall be considered by the arbitral tribunal in the light of arbitrator's obligation and duties (to avoid unnecessary delay and expenses).

Restraints On Party Autonomy Under Uncitral Model Law And Arbitration Law

It is well settled principle that party autonomy is the corner stone of the Arbitration. The question here is whether this autonomy is absolute and there is no limitation or restriction on them. Now we can say although the parties have a great deal of autonomy in the Arbitration agreement in the manner in which they agree, their autonomy is subject to many restrictions. Under the law there are certain basic principles which the party cannot ignore or violate under any situation. These principles are enumerated under various provisions of Arbitration law and the UNCITRAL model law as well as the principles of natural justice which are applicable to all judicial and quasi-judicial authorities and tribunals which would also constitute a fair hearing.

Section 18 of Arbitration and Conciliation Act, 1996 which corresponds to Article 18 of the UNCITAL model law on International commercial Arbitration. In this section two principles are enshrined. These are as follows

1. Application of the term Equality in Arbitration

Where the parties entered into an agreement to refer their matter before the Arbitration and they have created their own rule to apply thereon even though they are required to be treated equally otherwise there will be no justice at all. Thus in the Arbitration proceedings there should be bias less conduct on the part of the arbitrator and if the biasness of the arbitrator is proved then the appointment as well as award be annulled. The biasness may occur due to number of circumstances like friendship with other side, pecuniary relief taken from one side or hostility to a party that would affect the equality between the parties.

2. Option to present case

This is very important requirement of arbitration that each party shall be given full opportunity to present their case completely. If we section 18 and Section 34(2)(b) of the Arbitration and Conciliation Act,1996 we find that if a party was not given proper notice of the arbitral proceeding or otherwise failed to present the case before arbitral tribunal, then the resulting award to be annulled when challenged.

3. The concept of natural justice

The Arbitration law defines the arbitral tribunal as a sole arbitrator or a panel of arbitrators. The Arbitration tribunal is body being a quasi-judicial authority and hence we can say that the judges should not be appointed as arbitrators. In India, all judicial as well as administrative authorities are required to follow the principles of natural justice in the proceedings. Further in case of D.C. Saxena v. State of Haryana,it was held by the court that if the statute is silent on the matter, the natural justice principle has to be followed. The principles which constitute the essential norms of Arbitration, they are as follow

1. Nemo judex in causa sua, i.e. no man can be a judge in his own cause

2. No party shall be condemned unheard, i.e. each party must have opportunity of cross examination of witnesses examined by other side.
3. Each party is entitled to know the reasons for the decisions.
4. The person who hears the case must decide finally.
5. If the matter principles of natural justice are violated while deciding the case then that award shall be deemed to be passed without jurisdiction and hence award shall be annulled.

Other Mandatory Provision under UNCITRAL Model Law and Arbitration Law

The UNCITRAL Model Law was not intended to grant absolute party autonomy in Arbitration proceedings. It was intended to promote balanced autonomy to the parties with safeguards in the form of mandatory provisions which must be followed. The Arbitration and Conciliation Act, 1996 as well as the UNCITRAL Model Law make some mandatory provisions which limit the autonomy of parties. These are as follows

1. Arbitration agreement shall be in writing
2. The parties shall be treated equally and be given full opportunity to present his case
3. The exchange of statements of claim and statements of reply between the parties to the arbitration;
4. Advance notice of tribunal to be given to the parties and such statement to be communicated to the parties.
5. Assistance of the court by tribunal for getting fair hearing.
6. The award under Arbitration law is equated with an ordinary award
7. Arbitration award must be in writing and signed by the arbitrator and copy to be delivered to the parties.
8. Termination of proceedings
9. Correction and interpretation of award.

Principle of Public Policy

The Arbitration is based on the party autonomy principle. However, the party autonomy is not protected if it is exercised against the public policy as we can say that the public policy is a good defense to recognize and enforce the arbitral award. Public policy restricts the parties not to legalize immoral and illegal agreements. However, the public policy is interpreted by the judiciary to encourage the party autonomy. The principle of public policy includes different types of social, culture and moral values. It is very much dynamic and it varies with time and place. The principle of public policy limits the autonomy of the parties. It is because the procedure formed by the parties for the resolution of their dispute must not be inconsistent with the public policy. Public policy is the fundamental principle of the country and hence any award which is against it then that award shall not be recognized and enforced. The expression public policy is very vague in nature, however the SC has interpreted “contrary to public policy” when it is against

1. The fundamental policy of the country
2. Interest of the country
3. Morality or justice
4. Legal norms

Public Policy And Party Rights

Before we start the effect of public policy on party autonomy we have to know about the public policy first and then the implication of it.

Public Policy

It is sociological concept which comprises the society’s culture, moral, values, belief etc. which is accepted and applied in the society. Public policy is dynamic in nature which varies with time and place. Many almost all countries have accepted it as a fundamental principle of the country and hence any violation of this principle will lead the order or award as null and void. In case of Arbitration proceedings it makes limit on the party autonomy. It is a good ground for challenging the award and then makes the award unenforceable. The Judiciary of different States has interpreted the expression ‘public policy’ in different way. The public policy is very vague in nature, however the SC of India has interpreted “contrary to public policy” when it is against the fundamental policy of the country, Interest of the country, Morality or justice, Legal norms.

Judicial interpretation: Party autonomy and public policy

If we see the history of party autonomy, it was not always approved and accepted by the judiciary because they felt that the arbitration which was based on part autonomy is a dangerous for the judiciary regarding

their jurisdiction. They were feeling fear that party autonomy will restrict the power of judiciary to intervene to the Arbitration agreement. The judges of many country was not allowing to the parties to choose the law for their own.

In America, the court used to invalidate the Arbitration agreement observing it as encroachment on the judicial power and hence against the public policy. This view was gradually changed when the US Arbitration Law came into existence. The court then felt the importance of party autonomy and recognized it and further held that the court's role is limited in Arbitration agreement only to ensure that the agreement is enforced according to their terms. But the court held in a case that the parties to the Arbitration are free to form their Arbitration agreement as they think fit but with certain limitations. The court further suggested that one of the limitations is public policy. Where the choice of the parties is against the public policy of the country, it would not be enforced.

In India, the public policy principle is well established. The SC of India in a case struck down the judgment of the High Court wherein it was held that the arbitrator could not be removed on the ground of bias because of lack of specific provision in the Arbitration agreement. The SC applied the public policy principle and allowed the case and held that any agreement violating the public policy principle shall be declared invalid.

Conclusion:-

To sum up as per the above study the author comes to the conclusion that since the party autonomy is the base for the Arbitration and it cannot be discarded due to some irregularities in the Arbitration proceedings. However, the Arbitration law makes provision which limit the party autonomy because that provision must be followed anyhow. Further the author has tried to criticize the party autonomy on the basis of principle of natural justice and the public policy principle. The Judiciary of different States has interpreted the expression 'public policy' in different way. The public policy is very vague in nature, however the SC of India has interpreted "contrary to public policy" when it is against the fundamental policy of the country, Interest of the country, Morality or justice, Legal norms. The author thinks that Arbitration agreement reflects the position of the party who is economically dominant. If the agreement is entered into the court has a very limited power in respect of giving effect to that agreement and that the court turns a blind eye to their unilateral character. These are happening, generally, domestic consumer Arbitration and employment contract where the other party is always at the dominant position and that can abuse it. Finally the author is of the view that there must not be an absolute autonomy to the parties. Though the Arbitration law has given the party autonomy, there are some other provisions which limit that autonomy. We can say that to some extent the party autonomy principle is controlled by the same Arbitration law but sometimes it is uncontrolled without the express provision in the Arbitration law and more few provisions required for arbitration proceeding keeping in view of the principle of natural justice in the interest of parties.

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