ANTI-ARBITRATION SUIT INJUNCTION, A RECIPE FOR DISASTER?

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An anti-arbitration injunction seeks to prevent the initiation or continuation of arbitral proceedings, including domestic, international commercial or even foreign seated arbitrations. In contrast thereof, anti-suit injunction seeks to prevent the initiation or continuation of court proceedings including a foreign court. A compare and contrast between the two may be summarised in the below tabular form:

SN	Anti-suit injunction	Anti-arbitration Injunction
1.	Intended to prevent court proceedings	Intended to prevent arbitral proceedings
2.	Issued against parties rather than against a court.	Issued against the parties and/or against the Arbitral Tribunal
3.	Issued by a court/tribunal.	Issued by a court.
4.	Raises the sovereignty concept issue even though through such injunction party is restrained and not the court.	No Sovereignty issue is involved as arbitral tribunal is a private body.

An injunctive relief is an **equity-based** remedy which is **discretionary in nature**. A civil court of competent jurisdiction possesses such power inherently. **Order XXXIX** of the Code of Civil Procedure, 1908 is a reflection thereof. But concept of anti-arbitration suit injunction is completely alien to Arbitration & Conciliation Act, 2015. But there are judicial pronouncements of various High Courts as well of Hon'ble Apex Court which upholds that anti-arbitration suit injunction is alive in law & can be granted by civil courts sparingly in utmost exceptional circumstances and those situations and circumstances are very well enumerated by the Courts too.

The following three principles which operates as fulcrum works as a guiding factor whenever courts are grappled with the question of granting or refusing to grant any injunctive relief, be it is regular court proceedings, arbitral proceedings or the court proceedings arising out of arbitral proceedings:

1. To set up and establish a prima facie case in favour of the plaintiff;
2. Balance of convenience lies in favour of the plaintiff &;
3. Plaintiff would suffer irreparable loss if injunction is not granted.

Keeping into account all the three above-mentioned factors, the Civil Court having subject matter jurisdiction grants/refuse the same.

REFERRAL CLAUSE & LEGAL STATUS OF ANTI-ARBITRAL INJUNCTION

Section 8 of the Arbitration & Conciliation Act, 2015 is the referral clause under the law, wherein any judicial authority, seized of a matter which is a subject matter of arbitration agreement and if any of the parties to the arbitration agreement or any person claiming through or under them applies at a particular point of time to such judicial authority, it may refer the parties to arbitration. Section 8 of the Act, 2015 refers to a situation where the matter pertains to domestic or international commercial Arbitration.

However, in case of foreign-seated arbitrations **section 45**[1] & **section 54**[2] of the Act, 2015 becomes operative. The referral law in case of foreign seated arbitrations is slightly different as compared to domestic and international commercial arbitrations. In case of foreign seated arbitrations, the judicial authority if prima facie finds that the alleged arbitration agreement is **null & void, inoperative or incapable of being performed** may refuse to refer the parties to arbitration. In all these three scenarios, the judicial authority may grant anti-arbitration injunction.

[1] Power of judicial authority to refer parties to arbitration governed under New York Convention, 1958 read with Foreign Awards (Recognition & Enforcement) Act, 1961.

[2] Power of judicial authority to refer parties to arbitration governed under Geneva Convention, 1958

Thus, legal existence of anti-arbitration suit injunction is a matter of dispute due to lack of its statutory recognition under the Act, 2015. However, courts on few occasions have assumed jurisdiction under section 8,9,45 & 54 of the Act, 2015.

Usually, these anti-arbitration injunction is sought by one of the parties to the arbitration agreement which alleges there does not exist any arbitration clause and as such arbitral proceedings are without any jurisdiction. This injunction is sought prior to initiation of arbitral proceedings. There may be another instance, where the arbitral proceeding has been commenced but during the pendency of proceeding, one of the party feels and satisfies the court, from which injunction is sought, that such proceeding is going to be vexatious or oppressive.

The statutory as well the case law jurisprudence on arbitration law is very well established that any plea with respect to the jurisdiction of the constituted Arbitral Tribunal, plea as to validity and existence of the arbitration agreement shall be decided by the Arbitral Tribunal itself[3]. Further to elaborate and make it clear that the decision of the arbitral tribunal on the determination the existence and validity of the arbitration agreement and the jurisdictional plea is amenable to **section 34** [4]of the Act, 2015. Thus, one may be inferred that **section 16(1) & section 16(2)** read with **section 5**[5] of the Act 2015 leaves almost no scope to grant any such injunction which seeks to restrain the initiation or continuation of the arbitral proceedings.

CASE LAW DEVELOPMENT AND ANTI-ARBITRATION INJUNCTION

In a judgment of the year 2001, **Kvaerner Cementation India Ltd. v. Bajrang Lal Aggarwal**[6] three Judges bench upheld that anti-arbitration injunction is not known to the Indian Arbitration regime because of section 5 read with section 16(1) & 16(2) of the Act, 2015 and thus the jurisdiction of civil courts for grant of anti-arbitration injunction suits is completely ousted by the statute. As a matter of fact, this judgment was reported in the year 2012. Thus, this judicial

[3] Section 16(1) & 16(2) of the Arbitration & Conciliation Act, 2015.
[4] **Application for setting aside arbitral awards**. (Recourse to courts against arbitral awards)
[5] **Extent of Judicial intervention**- *Notwithstanding anything contained in any other law for the time being in force, in matters governed by this part, no judicial authority shall intervene except so provided in this part.*
[6] (2012) 5 SCC 214.

precedence being unknown to the legal domain was not followed in a regular manner by the territory courts of India.

But we have a seven Judges Bench judgment, **SBP v. Patel Engineering** [7] where it was expressed that arbitral tribunal has power to rule on its own jurisdiction including the plea of validity and existence of the arbitration agreement to the complete exclusion of the courts is incorrect, the court shall also have power to decide these preliminary (threshold) issues. Thus, this seven Judges Bench case in a way gave **green signal** and **judicial recognition to anti-arbitration injunctions** where the court granting injunction is satisfied that the arbitration agreement is not valid in law. However, SBP case was criticised vehemently because of in contrast of the well-recognised and well-founded principle of ***Kompetenz-Kompetenz*.**

Then, in **Boghra Polyfab case**[8] the court upheld that the plea of validity and existence of arbitration agreement be chosen to be decided by the courts under **section 11 (6)** [9]of the Act, 2015. Thus, by following these judicial pronouncements, it is imperative that anti-arbitration injunction may be given if the court is satisfied that a valid arbitration agreement does not exist.

PRINCIPLES GOVERNING GRANT OF ANTI-SUIT INJUNCTION- MODI NETWORK CASE

In **Modi Network case**[10] the court gave guiding principles which may be applied while granting anti-arbitration injunctions. The Apex court in this case had to examine the action of the Division bench of Bombay high Court just justified in vacating the anti-arbitration injunction suit which restrained the respondents from initiating the arbitration in English court, the forum chosen by the parties as the forum of choice. While dealing with the matter, the Apex Court gave certain guiding principles to govern the grant of anti-suit injunction:

The court granting anti-arbitration injunction must satisfy itself:

1. The defendant must be amenable to the **personal jurisdiction to the court**;
2. If injunction is not granted, it would certainly **defeat the ends of justice** and may **perpetuate injustice further**;

[7] (2005) 8SCC 618.
[8] (2009) 1 SCC 267.
[9] Appointment of Arbitrator by Court where parties fail to appoint Arbitrator as per agreed procedure.
[10] Modi Entertainment Network & Anr. V. WSG Cricket Pte. Ltd. [2003 (1) SCR 480].

3. **Doctrine of comity of nations** must be borne in minds while granting/refusing to grant such injunctions;

The court further upheld that an anti-arbitration injunction should not be granted unless such a ground is coupled with a plea of either of the follows:

a. Forum non-convenience;
b. The initiation or the ongoing arbitral proceeding may be vexatious or;
c. Oppressive in nature.

THE CODE OF CIVIL PROCEDURE, 1908 & ANTI-SUIT/ARBITRATION INJUNCTION

In a landmark case of **Ganga Bai v. Vijay Kumar**[11] the court rightly explained the shape and size of **section 9** read with **Order XXXIX, Rule 1 & 2 CPC, 1908**. To quote the court, "*There is an inherent right in every person to bring suit of a civil nature and unless the suit is barred by statute one may, at one's peril, bring a suit of one's choice. It is no answer to a suit, howsoever frivolous the claim, that the law confers no such right to sue. A suit for its maintainability requires no authority of law and it is enough that no statute bars the suit. But the position in regard to appeals is quite the opposite. The right of appeal inheres in no one and therefore an appeal for its maintainability must have the clear authority of law. That explains why the right of appeal is described as a creature of statute.*"

In the matter of **Chatterjee Petrochem co. v. Haldia Petrochemicals**[12] Division bench of Supreme Court Judges, **Gopal Gowda** and **G. S. Singhavi,** refused to grant anti arbitration injunction while upholding that the arbitration agreement as alleged between the parties holds good in law, valid, operative and capable of being enforced.

In a recent matter of **WSG v. MSM Satellite** [13] The apex court while referring the matter to the arbitration under **section 45** of the Act, 2015 held that the court is duty bound to examine and consider whether or not an arbitration agreement is covered by New York Convention for enforcement of foreign awards, whether the agreement is null and void or incapable of being enforced. The facts of the case are such, where BCCI (Board of Cricket Control of India)

[11] (1974) 2 SCC 393.
[12] (2011) 10 SCC 466.
[13] World Sports Group (Mauritius) v. MSM Satellite Singapore (2014) 11 SCC 639

following a tender process awarded media rights for broadcasting of cricket tournament to MSM satellite for some years. After a year, BCCI terminated the contract with MSM and entered into a new contract with **WSG (World Sports Group).** WSG entered into a facilitation deed with MSM for Rs. 1.25 billion and agreed to relinquish its media rights and to facilitate such media rights of broadcasting from BCCI. Later it was alleged by MSM that WSG by purporting to fraudulent misrepresentation that it had media rights made a false representation and thus induced MSM to enter into such deed. Therefore, a fraud was alleged by WSG against MSM. MSM filed a suit in Bombay High court to decide the facilitation deed as illegal, meanwhile WSG relying upon the arbitration clause in the facilitation deed before Singapore International Arbitration Centre (SIAC) and thus MSM prayed from Bombay high court to grant injunction against the WSG for the invocation of the arbitration as the matter alleged therein involves fraud and as per the **Radhakrishnan**[14] judgment, disputes involving fraud and misrepresentation is not subject matter of arbitration because to determine and adjudicate upon fraud, detailed examination of documents and examination of witnesses' is essential for which courts are more competent to fix the matter rather than the Arbitral Tribunals. Division Bench of Bombay high Court relying upon the Radhakrishnan case, granted injunction against WSG for invoking arbitration. When the matter was appealed by the WSG in the Apex Court against the ruling of the Bombay High court, the Court made it emphatically clear that the precedent set out in Radhakrishnan case is not applicable in foreign seated arbitration awards. Thus, this case too set pro-arbitration and pro-enforcement stage in the arbitration regime of India. Thus, in this ruling, Hon'ble Apex court refused to grant anti-arbitration injunction.

INDIAN HIGH COURTS & ANTI-ARBITRATION INJUNCTION

1. CALCUTTA HIGH COURT

a. LMJ International v. Sleep well Industries Co. ltd & others decided on 29.08.17

The objection to enforcement of a foreign award is extremely limited. Moreover, in view of the order passed by the Division Bench in refusing to pass any order of injunction restraining commencement and/or continuation of the arbitration proceedings it cannot be said that the

[14] N. Radhakrishnan v. Maestro Engineers, (2010) 1 SCC 72.

award was passed in violation of any order passed by a superior Court. The relevant observations of the Division Bench in this regard are-

"***The intention of the parties to have their disputes resolved by arbitration cannot be doubted. The parties have entered into such contract with their eyes wide open. They have decided that all disputes are to be resolved, adjudicated and decided by arbitral tribunal to be constituted under the GAFTA Rules. The principal ground for avoiding the said Tribunal is of forum inconvenience. The additional grounds appeared to be that there is no agreement between the plaintiff and the defendant to refer any dispute arising out of the said contract to arbitration either as per GAFTA Rules, 125 in London or otherwise. In deciding the said issue, the reference is required to be made to the contract containing such arbitration clause. There cannot be any dispute that the obligation to make payment or avoidance of any such payment is arising out of a transaction covered by the contract which contains the arbitration the arbitration clause."***

In the instant case, there is no dispute that the said contract containing arbitration clause has been validly and duly executed by the parties. The ground to resist the said arbitration is that it involves prohibitive costs. The appellant was not compelled to execute the said agreement. The appellant precisely knew at the time of execution of the contract that in the event of any dispute arising out of the said contract, it would be governed by the GAFTA Arbitration Rules, 125. In absence of any demonstrable injustice or harassment being caused by reason of initiation of the arbitral proceedings or participation in such proceeding and having regard to the fact that the agreement is not in dispute, in our view, the plaintiff is not entitled to an order of injunction."

b. Board of Trustees of Port of Calcutta v. Louis Deryfus Amatures SAS decided on 11.08.2014 by Justice Soumtira Sen

This judgment is perhaps the only judgment available in Indian jurisprudence where Single bench of Calcutta High Court applied principle of anti-arbitration injunction and granted anti-arbitration injunction in a foreign seated arbitration. In this case, the respondent, a French company Louis Deryfus Amatures (LDA) initiated arbitral proceedings against Kolkata Port Trust (KPT), the plaintiff under the United Nations' Commission on International Trade Law Rules. This was on the basis of the **Article 9** of a bilateral investment treaty (BIT) between the Government of India and the Government of France on the reciprocal promotion and protection of investments created during 1997, which was the subject matter of challenge. The origin of

the dispute was the awarding of a contract for operation and maintenance of various berths of the Haldia Dock Complex of KPT, which was executed by KPT in favour of the Haldia Bulk Terminals Pvt. Ltd. (HBT). KPT had raised various points to challenge the investment arbitration proceeding, although the core of the case was the argument that the arbitration agreement incorporated in the BIT was inoperative as between the KPT and LDA. The Court had observed that the essential consideration is the existence of a valid arbitration agreement between the parties. If such an agreement exists, there is no escape from arbitration and the parties shall be referred to arbitration. The Court also held that unless the facts and circumstances of a particular case demonstrate that the continuation of such foreign arbitration would cause "demonstrable injustice", a civil court in India would not exercise its jurisdiction to stay the foreign arbitration. It had further observed that a BIT, which has been entered into by two sovereign nations, create rights for the investor of a contracting party and, therefore, cannot be questioned by KPT. The Court had laid down three circumstances under which an anti-arbitration injunction can be granted:

1. If an issue is raised whether there is any valid arbitration agreement between the parties and the Court is of the view that no agreement exists between the parties;
2. If the arbitration agreement is null and void, inoperative or incapable of being performed; or
3. Continuation of foreign arbitration proceeding might be oppressive or vexatious or unconscionable.

c. Lafarge India Pvt. Ltd. v. Emami Reality & others' decided on 15.09.16

In this case too, the Division Bench of Calcutta High Court denied the anti-arbitration injunction. Reliance was placed on section 5 read with section 8(3) of the Act, 2015 by the plaintiff. Section 5 read with section 8(3) of the Act, 2015 gives a reflection of minimal judicial intervention either in initiation or commencement of arbitral proceedings. The court refused to grant anti-arbitration injunction after examining the merits of the case.

d. Balasore Alloys Pvt. Ltd. v. Media LLC decided on 16.09.2020

The judgment in Balasore alloys reaffirms the SBP Patel engineering case concerning the ambit of civil court jurisdiction in granting anti-arbitration injunction and dismisses the ruling in **Kvaerner Cementation (supra)** case. A dispute arose, as to the seat of arbitration, Balasore Alloys Ltd. (the plaintiff) contended that the seat of arbitration is Kolkata as per the Purchase

Order (PO) and the respondent, Medima LLC was of the stand that the seat would be International Chamber of Commerce (ICC), London as per 2018 agreement. A single judge bench of High court upheld that the civil courts' power to grant anti-arbitral injunction is always there especially when the original civil jurisdiction lies with the High Court of the particular state. The Court upheld that SBP case impliedly overruled the Kvaerner cementation case on two counts: first, the Kvaerner cementation case is of 2003 and SBP is of 2007; secondly it is of three judges' bench case while SBP is of seven judges' bench case. However, in this case, the court refused to grant anti-arbitration injunction as the plaintiff could not satisfy the court as to the fact, how the seat London is ***forum non-conveniens*** or if the arbitral proceedings would commence, be vexatious or oppressive. Thus, there is no gainsaying of the fact that civil court possess the power to grant anti-arbitration injunction but such power must be exercised sparingly and with abundant caution and care.

2. DELHI HIGH COURT

a. Sancorp Confectionary v. Gumilk, decided on 19.10.2012

In this case the court relying upon the judgment of division bench of Calcutta High court in the matter of LMJ International case and denied to interfere with initiation of arbitral proceedings in Singapore International Arbitration Centre (SIAC).

b. Mac'D v. Vikram Bakshi, decided on 21.07.2016.

Para 52 of the judgment is noteworthy to quote here:

One of the meanings of the expression null and void which was considered by the Supreme Court, was where the arbitration agreement is affected by some invalidity right from the beginning, such as lack of consent due to misrepresentation, duress, fraud or undue influence. This is clearly not the case in the present proceedings. Insofar as the word inoperative is concerned, it is said to cover those cases where the arbitration agreement has ceased to have effect, such as the case of revocation by the parties. Another instance of the agreement having become inoperative is where it ceases to have effect because an arbitral award has already been made or there is a court decision with res judicata effect concerning the same subject matter and parties. Importantly, it has been expressed that the mere existence of multiple proceedings is not sufficient to render the arbitration agreement inoperative. Thus, the mere existence of the proceedings before the Company Law Board would not amount to rendering the arbitration agreement as being inoperative. Furthermore, the Supreme Court observed that

an arbitration agreement would not become inoperative or incapable of being performed where allegations of fraud have to be enquired into and the court cannot refuse to refer the parties to arbitration as provided in section 45 of the 1996 Act on the ground that the allegations of fraud have been made by the parties which can only be enquired into by the court and not by the arbitrator. Clearly, the Supreme Court held that in the case of arbitrations covered by the New York Convention, the court could decline to make a reference of a dispute covered by the arbitration agreement only if it came to the conclusion that the arbitration agreement was null and void, inoperative or incapable of being performed and not on the ground that the allegations of fraud or misrepresentation had to be enquired into while deciding the dispute between the parties. It is, therefore, clear from the observations of the Supreme Court in World Sport Group (supra) that the rule is for a reference to arbitration under section 45 unless the court comes to the clear conclusion that the arbitration agreement is null and void, inoperative or incapable of being performed. This principle would also apply in the case of a party seeking an anti-arbitration injunction in respect of an agreement under the New York Convention. In other words, unless and until a party seeking an anti-arbitration injunction can demonstrably show that the arbitration agreement is null and void, inoperative or incapable of being performed, no such relief can be granted in the suit or as an interim measure therein.

c. Himanchal Sarang Power Pvt. Ltd. v. NCC infrastructure, decided on 13.03.2019.

In this case, Delhi High court reiterated the principle that grant of anti-arbitration injunction is an exception rather than a rule and thus must be used with utmost caution. The court denied anti-arbitration injunction of the SIAC arbitration.

d. Bina Modi v. Lalit Modi, decided on 03.03.2020.

This judgment delivered by **Hon'ble Justice Endlaw** turned the wheels of anti-arbitration injunction jurisprudence in a diametrically opposite direction. A trust was set up my Modi family for managing Assets & properties of Modi family. Dispute arose between the trustees under a trust deed dated April 9, 2014. One of the trustees, Lalit Modi, filed an application seeking emergency measures before the International Chamber of Commerce (ICC), Singapore, against the other trustees. The other trustees commenced anti-arbitration injunction suits before the Delhi High Court, seeking a declaration that the arbitration proceedings are

unenforceable and are contrary to the public policy of India. The main contention of the plaintiffs in the instant case was that, the question of arbitrability of a subject matter cannot be left open to be decided by the Arbitral Tribunal or the courts of Singapore or even by emergency arbitrator and that such forums would also be *forum non conveniens*, oppressive, manifestly unfair, unreasonable and prejudicial to the interest of the plaintiffs. But the Delhi High court dismissed the suit upholding that availability of an alternative remedy under section 16 of the Act, 2015 and thus rejected the plea for anti-arbitration injunction.

3. BOMBAY HIGH COURT

a. Ravi Arya v. Palmview Investment overseas, decided on 12.02.2019.

In this case, while refusing to grant anti-arbitration injunction to the plaintiff, the court made it emphatically clear that all the contentions/objections must be determined by the Arbitral Tribunal itself.

CONCLUSION

A two-judge Bench of the Supreme Court in **National Aluminium Company Ltd v. Subhash Infra Engineering Pvt. Ltd**[15]relied on *Kvaerner Cementation (supra)* and refused to grant an anti-arbitration injunction on the ground that the proper remedy was to raise issues of jurisdiction under Section 16 of the Act before the arbitral tribunal and the civil courts cannot have jurisdiction to go into such questions.

This was followed by *Bina Modi (supra)*, which set the cat among the pigeons by observing that *McDonald's* was not binding since it was passed without considering *Kvaerner Cementation (supra)*. The plaintiffs thereafter filed an appeal before the Division Bench of the Delhi High Court. By an order dated March 5, 2020, the Court restrained the defendant from proceeding with the emergency arbitration proceedings, till further hearing of the said appeal. This order was challenged before the Supreme Court, and the same was dismissed.

[15] Civil Appeal 6606 of 2019, decided on 23.08.2019.

Antrix Corporation Ltd. v. Dewas Multimedia[16]

Where an arbitrator has already been appointed and intimation thereof had been conveyed to the other party, a separate application for appointment of arbitrator is not maintainable in law. And it is a fit case where anti-arbitration injunction may be granted.

ANTI-ARBITRATION & FOREIGN SEATED ARBITRATIONS

The Supreme Court in its various judgements has made it clear that it has jurisdiction to stay the foreign seated arbitration proceedings or in other words it can grant anti-arbitration injunctions against foreign seated arbitration but the party claiming before it has to prove that the grounds mentioned under the section 45 of the 1996 act are made out. The court shall grant anti-arbitration injunction if following grounds are proved by the party claiming, the grounds are stipulated as under-

1. The agreement is ***"null and void"*** because of contrary actions of the parties or by the adverse conduct of the parties. *For instance*, if parties go against the agreed terms of the agreement or the agreement is affected by some invalidity right from the beginning, lack of consent due to misrepresentation, duress, fraud or undue influence.

2. That the arbitration *"**agreement does not exist**". For instance*, a party may claim that the arbitration agreement has not been entered into between the parties or the dispute is not covered under the arbitration clause.

3. If the arbitration agreement is *"**inoperative**"* an agreement is said to be inoperative when the parties have *revoked the agreement*.

4. An arbitration agreement is *"**Incapable of being performed**"*, if the arbitration agreement is ***vague*** and the terms of the agreement are ***ambiguous*** and this results in inability to establish arbitration into motion. *For instance*, the basic principles of drafting an arbitration clause like **seat, venue, laws applicable, composition and appointment of the arbitrator are not provided for in the clause then such an arbitration agreement is said to be incapable of being performed.**

5. The arbitration proceedings are ***"oppressive and vexatious",*** if the arbitration agreement is invoked to **cause *annoyance* or to cause *mental agony* and harassment to the**

[16] FAO (OS) (Comm.) 67/2017, decided on 30.05.2018

defendant and so to cause him to do or not do some action. This is purely an *abuse of process of law.*

Therefore, jurisdictionally it is held that if section 45 conditions are proved by a party in foreign seated arbitrations then injunctions can be granted by Indian courts.

The law of granting or refusing to grant anti-arbitration injunction is premised upon equity which is to impart justice and iron the wrinkles causing injustice to the parties. This power is an inherent power lies in a court of competent jurisdiction over the subject matter. On the other side, where the whole arbitral process is germinated and developed on party autonomy and least judicial intervention, the legislative intent is quite clear to ensure minimal judicial intervention in the arbitral process. In this background, the courts granting anti-arbitral injunctions are supposed to be more alert and cautious while exercising this power. Only after proper weighing both the aspects, a judicious, real and practical approach is to be adopted by the courts while granting such injunctions.