Res Judicata in Arbitration: Ensuring Efficiency and Finality

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Introduction:

In the realm of dispute resolution, the applicability of principle of res judicata has the potential to act as a catalyst in achieving finality based on a fundamental doctrine that there must be an end to the litigation. The principle of res judicata has predominantly been applied in litigation before the courts, however, its applicability in domestic arbitration has been limited.

It is noted that in commercial contracts especially construction contacts spanning over a number of years, the commercial disputes between the same parties tend to stem from similar or identical issues, although owing to reference of disputes to distinct/different tribunals at various intervals of times, the parties tend to revisit identical issues before separate tribunals. This can result in distinct awards that may be contrary to each other. Therefore, applying the principle of res judicata will not only streamline these multiple proceedings before different arbitral tribunals but will also result in expeditious resolution of dispute.

Understanding the principle of Res Judicata

Corpus Juris defines res judicata as "a rule of universal law pervading every well-regulated system of jurisprudence, and is put upon two grounds, embodied in various maxims of the common law; the one, public policy and necessity, which makes it to the interest of the State that there should be an end to litigation — interest republicae ut sit finis litium; the other, the hardship on the individual that he should be vexed twice for the same cause — nemo debet bis vexari pro eadem causa" *[Corpus Juris, Vol. 34, p. 743]*

The statutory embodiment of the principle is contained in S.11 of the Code of Civil Procedure, 1908 *("CPC")* and the Hon'ble Supreme Court in the case of ***The Jamia Masjid v. Sri K V Rudrappa (Since Dead) By Lrs. & Ors. (2022) 9 SCC 225*** delineated the following essential ingredients for its applicability:

(i) The matter must have been directly and substantially in issue in the former suit;

(ii) The matter must be heard and finally decided by the Court in the former suit;

(iii) The former suit must be between the same parties or between parties under whom they or any of them claim, litigating under the same title; and

(iv) The Court in which the former suit was instituted is competent to try the subsequent suit or the suit in which such issue has been subsequently raised.

It is pertinent to note that for res judicata to apply, the judgment of the former suit must have attained finality. The Hon'ble Supreme Court in the case of ***Canara Bank v. N.G. Subbaraya Setty and Anr. (2018) 16 SCC 228*** has dealt with the issue of finality of a judgement in a former suit, and observed that once the judgment of the court of first instance is appealed against that judgment, it ceases to be *res judicata and becomes res subjudice*.
Hon'ble Supreme Court held that no hard and fast rule can be applied and it would be dependent on the entirety of fact and circumstances of each case, to ascertain whether to proceed with the second proceeding on the basis of res judicata of to adjourn and / or stay the second proceeding awaiting the outcome in the first proceeding.

Another facet of res judicata is ***"constructive res judicata"*** *enunciated* in Explanation IV of Section 11 of the CPC. The Hon'ble Supreme Court in the matter of Samir ***Kumar Majumder v. The Union of India & Ors., 2023 SCC OnLine SC 1182*** has held that the principle requires parties to a litigation to bring forward their whole case, and bars the same parties to open the same subject of litigation which might and ought to have been brought forward, but which was not brought forward because of negligence, inadvertence, or even accident or omission.

Applicability in arbitral proceedings

In arbitral proceedings the parties possess the autonomy to determine the procedural framework governing the proceedings, and arbitrators as such are not strictu sensu bound by the provisions of CPC.

However, there are a long line of judgements that have laid down that the res-judicata applies to arbitration proceedings. In one such case namely, ***K.V. George v. Secretary to Government, Water and Power Department, Trivandrum***, ***(1989) 4 SCC 595,*** it was held that "*principle of res judicata or for that the principles of constructive res judicata apply to arbitration proceedings and as such the award made in the second arbitration proceeding being Arbitration Case No. 276 of 1980 cannot be sustained and is therefore, set aside."*

The Hon'ble Delhi High Court in ***Gammon India v. NHAI 2020 SCC OnLine Del 659*** takes note of *K.V. George (supra)* in reiterating that principles of res judicata apply to arbitration. The learned single judge has observed that *"It is the settled position in law that the principles of res judicata apply to arbitral proceedings. The observations of the Supreme Court in Dolphin (supra) also clearly show that*

principles akin to Order II Rule 2 CPC also apply to arbitral proceedings. The issue as to whether any claims are barred under Order II Rule 2 CPC or whether any claim is barred by res judicata is to be adjudicated by the arbitral tribunal and not by the Court. Keeping in mind the broad principles which are encapsulated in Order II Rule 2 CPC, as also Section 10 and Section 11 of the CPC, which would by itself be inherent to the public policy of adjudication processes in India, it would be impermissible to allow claims to be raised at any stage and referred to multiple Arbitral Tribunals, sometimes resulting in multiplicity of proceedings as also contradictory awards."

The Hon'ble Court has also rightfully observed the multiplicity of proceedings before different Tribunals creates immense confusion and the same must be brought to an end. Although at the same time the court has left it for the respective arbitral tribunals to determine if the claims before them are barred by principles of res judicata or principles which are encapsulated in Order II Rule 2 CPC.

A peculiar situation may arise when an award in the former proceeding has been challenged under Section 34 of the Arbitration and Conciliation Act, 1996 ("***Act***") and a subsequent arbitral tribunal dealing with a dispute between the same parties arising out of same contract on overlapping issues is called upon to apply the doctrine of res judicata. The question arises whether the tribunal constituted subsequently should consider the award by the first tribunal as res judicata or not? To grasp the potential scenario, one needs to examine the legislative provision that establishes the "finality" of an award.

Section 34 of the Act provides recourse to a court against an arbitral award by moving an application for setting it aside under Section 34 of the Act. The following provision i.e. Section 35 of the Act falling in Chapter VIII provides that "**subject to this part**" an arbitral award shall be final and binding on the parties. Section 36 of the Arbitration & Conciliation Act confers power upon the Court to stay the operation of arbitral award on appropriate terms and conditions.

Therefore, a holistic reading of the relevant provisions of the Act reveals that the finality of an award is subject to its challenge under Section 34 of the Act; applying the principle laid down in *Canara Bank (supra)* the award after challenge under Section 34 of the Act becomes res-subjudice. Although it is to be borne in mind that a challenge under Section 34 of the Act is not really akin to appeal and is constricted to examination on grounds prescribed under Section 34 of the Act. A Court exercising jurisdiction under Section 34 of the Act is not sitting in appeal and is not really examining the merits of the award but is only examining the award on limited scope available under Section 34 of the Act.

However, within its limited jurisdiction, the Court in Section 34 of the Act is empowered to set aside the award. Therefore, atleast to that extent it can be concluded that the award loses its character of finality during the pendency of a challenge under the provisions of the Act and more so in cases where the operation of award has been stayed by the Court on appropriate terms and conditions.

The observations of Hon'ble Supreme Court in *Canara Bank (supra)* also postulates a similar situation in the context of civil suits and provides that in appropriate cases the hearing in a second matter, may be adjourned or stayed in order to await the outcome of appeal in the first case. It has been observed by the Hon'ble Court that:

> *"As has been stated, the judicious use of the weapon of stay would, in many cases, obviate a Court of first instance in the second proceeding treating a matter as res judicata only to find that by the time the appeal has reached the hearing stage against the said judgment in the second proceeding, the res becomes sub judice again because of condonation of delay and the consequent hearing of the appeal in the first proceeding. This would result in setting aside the trial Court judgment in the second proceeding, and a de novo hearing on merits in the second proceeding commencing on remand, thereby wasting the Court's time and dragging the parties into a second round of litigation on the merits of the case."*

However, it remains to be seen that unlike courts, the mandate of arbitral tribunal is limited by constraints of time under the provisions of the Act. The extension of mandate of arbitral tribunal is governed by provisions of Section 29A of the Act. As such, adopting an approach by a subsequent arbitral tribunal to stay the proceedings or defer the same during the pendency of a challenge to the decision of arbitral award in the first proceedings would present its own set of challenges.

At the same time, if the subsequent arbitral tribunal chooses to ignore the applicability of res judicata or for that matter, do not consider the award in the former proceedings as "final" and proceeds to decide the disputes, it will open a different set of challenge for the parties. E.g., if the subsequent arbitral tribunal decides to proceed with the adjudication and eventually takes a different or contrary view on the same subject matter which was also a subject matter of dispute before the first arbitral tribunal, then there will be two conflicting decisions on the same subject matter of dispute, bypassing the fundamental principle of doctrine of res judicata that there must be an end to the litigation and that a person cannot be vexed twice for the same cause.

It would perhaps also place the party who has suffered the first award in an advantageous position to take up an additional ground of subsequent conflicting view / different view by another arbitral tribunal.

It appears that while the doctrine of res judicata undoubtedly is a fundamental principle of law and is applicable to arbitral proceedings, its actual application to arbitral proceedings is not free from challenges.

The purpose of introducing the 1996 Act was to provide for speedy disposal of the parties. The Arbitral Tribunals by applying the bar of res judicata can prevent re-litigation of issues and accelerate the arbitration process, leading to timely resolution of disputes. However, owing to lack of finality to an arbitral award during the process of challenge before courts, its application by a subsequent tribunal is not easy.

A decision by a subsequent arbitral tribunal to await the outcome of Section 34 challenge against the first award could potentially derail the entire arbitration proceedings and defeat the purpose of expeditious disposal.

On a positive note, in considering the bar of res judicata, the tribunals will confer finality to arbitral awards, assuring that once a decision is rendered, it represents the conclusive resolution of the dispute. This finality enhances the enforceability of awards and promotes compliance with arbitral decisions. In the absence of bar of res judicata the parties will merely end up agitating the issues repeatedly by one way or the other. Consequently, both the parties will end up filing cross challenges and executions of contradictory awards. This scenario not only breeds confusion but also prolongs the dispute unnecessarily.

It will also safeguard the integrity of the arbitral process by preventing parties from circumventing awards through successive proceedings.

Conclusion

It is incumbent upon the arbitrators to apply principles akin to res-judicata and Order II Rule 2 of CPC to disputes before them in order to further the ends of arbitration. In the absence of access to arbitral awards in different commercial disputes (which are not in public domain), it is hard to determine if the principle is being applied or considered by the arbitrators and to what extent.

The author, however, has not come across any precedent wherein an arbitral award under Section 34 of the Act has been set aside on the ground that the arbitral tribunal proceeded to pass an award even where there existed a bar of res judicata. However, considering the settled law, as has been reiterated in ***Hope Plantations Ltd. v. Taluk Land Board, Peermade, (1999) 5 SCC 590***, that principles of estoppel and res

judicata are based on public policy and justice; it would be very well within the scope of Section 34 of the Act to set aside such an arbitral award.