4. Conditionality of Bail be Reviewed. While the session court and higher courts consider the application for a grant of bail, the issue regarding the security amount as surety becomes quite evident under present circumstances. Many of the accused who are financially weak find it beyond their ability to submit the surety amount or find a guarantor of bond for the grant of their bail and continue to be in detention, which should have been avoided. On the other hand, the affluent and the wealthy find the system to their advantage, wherein by giving the security or the bond, the bail facility is readily available. The existing statistical data regarding the undertrials in custody indicates a pattern wherein most undertrials are those of the deprived class.
5. Creation of Awareness Amongst the Law Enforcement Agencies. It has been observed in several cases wherein, in cases of bailable offence, the police have refrained from using their power to release the accused on bail. Certain times, such actions are due to ignorance, and on the other, these are done with deliberate reluctance, reflecting upon an innate urge to misuse the power allocated to the police. The judiciary must take cognisance of these activities very closely and hold accountable those who defy the regulations that antagonise the accused seeking bail.
6. Adherence to the Guidelines of the Apex Court. In its prior judgment, the Supreme Court has granted the undertrial bail, considering each case's merits. For instance, in the case of Shaheen Welfare Association v. Union, the Supreme Court also directed that the state Chief Secretaries be made aware of such orders and ensure compliance in the undertrial cases[38]. The court also opined that such constructive initiative would help unclutter the overcrowded prisons facing hygiene issues due to occupancy beyond their existing capacities. It must be ensured that the apex court guidelines are followed in principle, and bail should be a right rather than an exception.

There is a serious need to address the complexity of having a significant representation of undertrial cases in prison. The issue has existed for a long time without any practical measures. The law commission, in its various reports, has highlighted the problem. Even the Supreme Court has expressed its grave concern over the matter. Still, the undertrial's status in both bailable and non-bailable offences in India is a significant concern. Being accused of a crime should not deny any individual the basis of fundamental rights, which are the foundation of our constitution. A joint effort of the judiciary, the executive, and the legislative is mandatory to address the undertrials' concerns regarding the grant of bail. Early reforms in this regard will help improve the status of pending bail cases nationwide.

NAVIGATING THE JURISPRUDENCE ON ARBITRABILITY OF DISPUTES IN INDIA: AN ANALYSIS

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Abstract

Private conflicts involving two or more parties can be resolved using the technique of arbitration. It acts as a substitute for resolution of conflicts through courts. arbitration allows a party to select a neutral, fair-minded and elastic forum for adjudication of disputes and give them a significant amount of control. The legal regime for conducting arbitration in India is governed by the Arbitration and Conciliation Act, 1996. An arbitration agreement that the parties have signed serve as the foundation for the arbitration process. Arbitration is the best and most preferred alternative for businesses and parties to resolve commercial disputes since the adjudication of disputes by courts is a time-consuming procedure. The arbitrability of an issue means whether the subject matter can be settled through arbitration or should it only be decided by the state courts. A private forum cannot be used to resolve some disputes as they are thought to be exclusively the province of the courts. Arbitration act does not specify the disputes that can be resolved through arbitration, as a result one is dependent on the interpretation given by the courts. Courts over a period of time has laid down different criteria to propound on the arbitrability. Authors in this article have analysed the ruling given by the Supreme Court and have concluded that private fora are as capable as the court system to decide the dispute. Judicial intervention should be kept minimal, as by trusting the processes like arbitration the burden on the judiciary can be lessened to a great extent and can provide effective justice to people.

Keywords- *Arbitration, Disputes, Resolution, Forum*

I. Introduction

Arbitration is a technique of resolving private disputes between two or more parties who have consented to use this mode. It serves as an alternative to decision-making by legally mandated courts. It gives an opportunity to the parties to exercise a substantial degree of autonomy by enabling them to appoint a neutral, unbiased and a flexible forum of adjudication[1]. The legislation in India that governs domestic arbitration, international commercial arbitration, enforcement of arbitral awards, and conciliation is the Arbitration and Conciliation Act, 1996[2].

[1]Archana Balasubramanian, Lalit Munshi and Vaishnavi Vyas, Deciphering Arbitrability of Disputes In Light Of Recent Judicial Pronouncements, available at https://www.mondaq.com/india/arbitration--dispute-resolution/1089100/deciphering-arbitrability-of-diputes-in-light-of-recent-judicial-pronouncements (Visited on 14th Aug 2023).

[2]Gazette of India, Extraordinary, Part II, notified on 22nd August, 1996, vide notification No. G.S.R 375(E), dated 22nd August, 1996.

The edifice of arbitration can be structured on arbitration agreement signed between parties for resolution of their dispute. Adjudication of disputes by courts is a time-consuming process, hence, arbitration is ideal and favoured method for businesses and parties to settle commercial issues. Accordingly, arbitration is a voluntarily agreed-upon method in which the parties to a dispute settle their differences with an arbitrator who is privately appointed, rather than by court. Both parties must abide by the arbitrator's ruling, and the court may order enforcement of the award. In India and globally, arbitration is commonly used to settle disputes since it is fast and affordable, predominantly, in the areas of commercial disputes, infrastructure, and in investment related issues.

In common parlance, arbitrators can resolve any dispute that may be resolved by courts. But in reality, the notion of arbitrability has sparked a number of critical issues ever since the passage of the Arbitration and Conciliation Act. Given the significance attached to arbitrability, it would be helpful to first comprehend what it includes. A dispute's arbitrability determines whether it can be resolved through arbitration or should be left solely in the hands of the state courts. Certain matters are considered to be solely to be reserved within the domain of courts and therefore adjudication by a private forum in barred.

There is little clarity regarding the concept of arbitrability, because the Indian Arbitration and Conciliation Act, 1996 does not list the issues that can be settled by arbitration. Therefore, one is dependent on the court to propound the test for assessing the arbitrability of issues. Indian courts have frequently addressed the issue of whether or not conflicts should be arbitrated by setting out helpful criteria for its conclusion. The Supreme Court has consistently suggested a multiple factors to be assessed to determine whether a disagreement may be settled through arbitration.

II. Concept of Arbitrability

In the beginning of the nineteenth century, there was no distinct law governing arbitration, instead, the rules governing arbitration were incorporated in schedules contained in civil procedural regulations that were fully related to arbitration. However, neither the Code of Civil Procedure 1859 nor its successor, the Code of Civil Procedure 1882, addressed the essential topic of the types of conflicts that may be resolved with arbitration. The first comprehensive law in India to codify the subject matter of arbitration, the Arbitration Act 1899, was similarly silent on this significant aspect. This version was replaced by the Arbitration Act 1940, which likewise had a murky understanding of the term arbitrability.

The Arbitration and Conciliation Act,1996, which is existing regime on arbitration law in India, is based on UNCITRAL 's[3] Model Law on International Commercial Arbitration of the year 1985. *The Model Law on International Commercial Arbitration* covers all incidental aspects of arbitration in its endeavour to universalize arbitration law on a global scale. However, it expressly leaves the issue of arbitrability up to the national legislation of the states to address. Only reference to arbitrability in the UNCITRAL

[3] United Nations Commission International Trade Law.

Model is in Article 36(1)(b)[4]. A court can refuse to enforce the award if it believes that the dispute's subject matter cannot be settled through the arbitral procedure.

According to Article V(2)(a)[5] of the New York Convention[6], the arbitral award may not be executed if the dispute's subject matter is not amenable to arbitration under the local legal system.

Further, the Arbitration and Conciliation Act, 1996, section 2(3)[7], also makes a vague indication to the concept of arbitrability. Additionally, section 34(2)(b)(1)[8] of the Indian Arbitration Act, explains that an award made by arbitral tribunal can be declared as unenforceable if subject matter of the dispute cannot be settled through arbitration. However, other than these references, the 1996 Act contains no information that provides clarity on the arbitrable issues. So, it can be inferred that, owing to lack of clear legal provisions in the 1996 Act and without any express or implied constraint on the arbitral tribunal's authority, the majority of civil and commercial disputes may be settled by an arbitral tribunal

III. Arbitrability and Facades of Arbitrability

Generally speaking, assessing arbitrability necessitates identifying the sorts of conflicts that may be handled by arbitration and those that must only be settled through the

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[4]Article 36 - (1) Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only:

(b) if the court finds that:

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or

(ii) the recognition or enforcement of the award would be contrary to the public policy of this State.

[5]Article V (2) - Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country. of the difference is not capable of settlement by arbitration under the law of that country;

[6]The New York Arbitration Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 10 June 1958.

[7]Arbitration and Conciliation Act 1996, Sec 2(3) which states that "this part shall not affect any other law for the time being in force by virtue of which certain disputes may not be submitted to arbitration.

[8]Section 34, Arbitration and Conciliation act 1996- Application for setting aside arbitral awards

(2) An arbitral award may be set aside by the Court only if-

(b) the Court finds that--

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

(ii) the arbitral award is in conflict with the public policy of India.

[Explanation 1.--For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if,--

(i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or

(ii) it is in contravention with the fundamental policy of Indian law; or

(iii) it is in conflict with the most basic notions of morality or justice.

courts. Both the New York Convention and the Model Law are referring to disputes that are 'capable of settlement by arbitration'[9].

In different contexts, the word "arbitrability" has distinct connotations.SC in the landmark case of *Booz Allen and Hamilton Inc. v. SBI Home Finance Ltd & Ors*[10], has laid the following three question to be answered relating to the characteristics of arbitrability that are relevant to the arbitral tribunal's authority:

(I) "Whether the disputes, given its nature, can be settled by private persons who are chosen as adjudicating authority by parties, or would it be appropriate for public fora i.e., courts to settle them".

(ii) "Whether the dispute is covered under the scope arbitration agreement? Specifically, whether the issues fall within the category of "excepted subjects excluded from the scope of the arbitration agreement" or is listed or defined in the agreement to be determined by arbitration"

(iii) "Has arbitration been requested by the parties in their disputes? That is, if the conflicts are subject to the arbitral tribunal's jurisdiction".

There are certain categories of proceedings which are reserved by the legislature for adjudication by public fora such as courts. The Arbitration and Conciliation Act recognises that certain disputes are not capable of being resolved through arbitration without specifying those disputes and without listing which matters are non-arbitrable.

Under India's current legal system, arbitrability is the norm, whereas non-arbitrability is the exception. The 1996 Act- The Arbitration and Conciliation Act, which is founded on Model Law, also uses the principle of negligible court involvement, a strategy, that is widely favoured across the world[11]. Since, the 1996 Act does not explicitly address the issue of arbitrability or offer any definitive clarification on the types of conflicts may be brought to arbitration, which invariably means that clarification from the court is required for the issues that can be resolved through arbitration, Hence, the jurisprudence in this regard has developed, largely, through judicial pronouncements.

IV. Developing the Jurisprudence on Arbitrability: The Booz Allen Case

At the onset it is pertinent to mention that any discourse on the issue of arbitrability in India, must start with the verdict of Supreme Court's in the case of *Booz Allen and Hamilton Inc v. SBI Home Finance Ltd. & Others*[12], which established a standard for deciding whether a dispute's subject matter qualifies for arbitration in India or not.

In *Booz Allen*, the Supreme Court had to decide whether or not a mortgage dispute in India can be resolved through arbitration. The Court provided a negative response to this query.

In the said case the Supreme Court stated that the "nature of rights" should be taken into consideration when deciding the arbitrability. The apex court stressed that the "nature of

[9]Section 5 Arbitration and Conciliation Act 1996- 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 where so provided in this Part.

[10]Booz Allen and Hamilton Inc. v. SBI Home Finance Ltd & Ors., (2011) 5 SCC 532 (India).

[11]https://www.ibanet.org/nonarbdisputesindia (Visited on 16th Aug 2023).

[12](2011) 5 SCC 532.

rights" should be the criterion used to determine arbitrability as it must be remembered that issue of arbitrability entails upon a question that whether the disputes deal with the enforcement action against an individual or against property, where rights or those who are not parties to the arbitration agreement may also be implicated.

Court said cases related to mortgaged property relate to actions in rem. Actions in rem refer to the actions determining title to property and rights of the parties, not merely among themselves but also against all persons at any time claiming an interest in that property whereas actions in *personam* refer to actions determining rights and interests of parties themselves in the subject matter of the case[13].

Consequently, the court where a lawsuit is ongoing that court should not order the parties to arbitrate a issue if it cannot be resolved through arbitration, even if the parties have agreed upon arbitration as the forum for settlement of such disputes.

Typically, and conventionally all issues concerning the rights in *personam* can be subjected to arbitration, while all disputes involving rights in rem must be decided by courts &public tribunals and disputes involving property are not appropriate for private arbitration. But this is not a strict or unbending law. Arbitration has traditionally been seen as a viable option for resolving disputes involving subordinate rights in *personam* resulting from real property rights.

The provisions of both the Civil Procedure Code of 1908 and the Transfer of Property Act of 1882 were also analysed by the Court, and it inferred that both acts clearly stipulate that mortgage suit must be decided by courts than by arbitrators.

The decision Apex Court in *Booz Allen* was a breakthrough verdict, that confirmed the significance of determining the question of arbitrability before hand in case parties want to opt for arbitration. Following the Supreme Court's ruling in the Booz Allen case, courts and parties often rely on the ratio and list of non-arbitrable issues provided in that case.

Court delineated certain disputes as not arbitrable. Observation of the courts can be enumerated as under:

(i) "Criminal offences being crime against state cannot be resolved using private forum;

(ii) matrimonial disputes concerning divorce, judicial separation, restitution of conjugal rights, and question of a custody of child in case of divorce;

(iii) guardianship of a child;

(iv) insolvency and winding up of a company matter;

(v) testamentary matters (grant of probate, letters of administration and succession certificate); and

(vi) ejection or tenancy matters administered by special law where the occupant enjoys legal protection against ejection and only the definite courts are conferred authority to grant ejection or decide the disputes.[14]"

[13]Id. At Para 23.

[14]Booz Allen and Hamilton Inc. v SBI Home Finance Ltd &Ors., (2011) 5 SCC 532 (India), Para 22.

V. Arbitrability of Fraud: Understanding The Ambit

Another issue which is frequently encountered by the courts is the arbitrability of the fraud. Fraud, as it is commonly understood, is the suppression or production of a false representation by speech or action, which results in financial loss for the person who depended on the representation. Fraud is defined in section 17[15] of the Contract Act of 1872,

In *Abdul Kadir Shamsuddin Bubere v. Madhav Prabhakar Oak*[16], the Supreme Court gave the first authoritative precedent on the issue of fraud. The 1940 Act, which has since been abolished, was the act under which the ruling was made. The Court determined that when a party which is subjected to charge of fraud, requests that the matter be handled in public court, it is sufficient cause for the court to decline the order to arbitration or to issue a reference to arbitration.

However, the court cannot be persuaded to submit a case to arbitration just because certain claims have been made that the books of accounts are incorrect or that particular items are inflated. The court decided that it would only decline the referral to arbitration in situations involving allegations of fraud of a "severe character" while relying on an English decision in *Russel v. Russel*[17] given in 1880. English court decided that grave accusations of fraud could be basis for courts to decline reference to arbitration.

This case postulates the start of a period that served as the foundation for several High Court and Supreme Court rulings over the course of the subsequent fifty years. However, ever since this verdict, the court is still required to make the distinction between fraud of "severe character" and "simple fraud" in a situation where there is an allegation of fraud.

In *N. Radhakrishnan v. Maestro Engineer*[18], there was partnership between Radhakrishnan and the respondents to constitute a partnership firm for the purpose of carrying on the business of Engineering Works under the name and style of "Maestro Engineers." Eventually, disagreements developed between the parties, and one of them made severe accusations against the other party about irregularities in the account books and financial manipulation. A request to submit the parties to arbitration was made in accordance with Section 8 of the 1996 Act.

In above instance, the Supreme Court after referring to its earlier ruling in *Abdul Kadir* decided that an arbitrator cannot resolve substantial charges of irregularities in partnership business finances and financial manipulation. The Court determined that the instances involving serious allegations of frauds should be settled by courts because it is more suited and prepared to deal with such complicated & serious matters.

In this case[19], the Supreme Court ruled that a fraud-related dispute or disputes that contains substantial allegations of fraud should be resolved by the courts by taking into

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[15]Sec 17 of Indian Contract Act 1872. "a fact knowing it to be untrue, knowingly active concealment of a fact, making a promise without intending to keep it, or any other act which is capable of deceiving and is committed by a party to a contract, or with his participation, or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract."

[16](1962) 3 SCR 702

[17]Russel v. Russel, 50 Md. App. 185 (1981) 436 A.2d 524

[18](2010) 1 SCC 72.

[19]N. Radhakrishnan v. Maestro Engineers, (2010) 1 SCC 72. Also at 2009 (13) SCALE 403.

account thorough examination of extensive evidence which is presented by both parties. The Court further emphasised that the dispute would not be submitted to arbitration on public interest grounds, if there were serious allegations of fraud. The Court agreed with the contention that the arbitrator is not a competent authority if extensive material evidence in form of oral submission and based on documents is presented in order to establish misconduct.

The verdict of SC in N. Radhakrishnan was indorsed by courts on various occasions.

After this decision most of the court ruled that allegation in regard to fraud are not to decide through arbitration.

But apex court in the case of *Swiss Timing Ltd. v. Commonwealth Games 2010 Organising Committee*[20], drew attention to the fact that the ruling in N. Radhakrishnan went against the rules established in the case of *Hindustan Petroleum Corporation Ltd. v. Pinkcity Midway Petroleums*[21] . In Hindustan Petroleum case, the Supreme Court had ruled that when a dispute was covered by an arbitration agreement, a civil court was required to refer the parties to arbitration.

In *Swiss Timing* case, the sole judge held that the comments made in the case of *Hindustan Petroleum* provided the correct legal framework and further declared that the decision in *N. Radhakrishnan* was legally flawed for two reasons.

First of all, the court in *N. Radhakrishnan*, did not follow the ruling in *Hindustan Petroleum*.

Second, the bench in *N. Radhakrishnan* did not consider the clause included in Section 16[22] of the Arbitration Act,1996, which talk about the arbitral tribunal's ability to decide cases within its purview or in other words the doctrine of *kompetenz - kompetenz*[23]. As a result, the sole judge in *Swiss Timing* case came to the conclusion that the *N. Radhakrishnan* ruling was not accurate in stating the law and could not be relied upon.

After *N. Radhakrishnan* major ruling on the issues was given in the case of *A.Ayyasamy v. A. Paramasivam*[24] and Ors. In this case partnership deed was signed between two brothers. They entered into a deed of partnership for carrying on hotel business and this partnership firm has been running a hotel with the name 'Hotel Arunagiri' located at Tirunelveli, Tamil Nadu. Dispute arose between the two brothers regarding the financial misappropriation of funds. Partnership Deed encompassed a clause which specified that any dispute regarding the partnership deed will be settled with the assistance of arbitration. In this case the Supreme Court divided the issue of fraud into *fraud simpliciter* and complex *frauds* in order to form a dual criterion to evaluate the arbitrability of fraud. The Court noted that the consequences of accusation of fraud simpliciter would not be invalidated the arbitration agreement. Serious claims of fraud, however, are to be considered as non-arbitrable and should only be decided by a civil court.

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[20]Swiss Timing Ltd. v. Commonwealth Games 2010 Organising Committee, (2014) 6 SCC 677.

[21]Hindustan Petroleum Corporation Ltd. v. Pinkcity Midway Petroleums, (2003) 6 SCC 503.

[22]Section 16-Competence of arbitral tribunal to rule on its jurisdiction.

[23]This principle lays down full autonomy to tribunal with least interference by the courts in arbitral proceedings. In absence of this principle, arbitrator would not be able to rule on their own jurisdiction.

[24]A. Paramasivam v. Ayyasamy, (2016) 10 SCC 386.

The Court determined that significant allegation of fraud had to include the following:

I. "it is related to a criminal offense; or
ii. issues are intricate in nature and the verdict on these issues can be decided only by the civil court after taking into account large evidence; or
iii. the grave accusations of forgery/fabrication of documents in regard to the plea of fraud is being alleged; or
iv. the arbitration agreement is alleged to have been induced by fraud; or
v. the fraud pervades the whole contract, including an arbitration agreement."

In this case Apex court reiterated that civil courts must handle matters if there is a serious allegation of fraud and arbitration should not be resorted to. However, if the claims are of a nature of fraud simpliciter character, the Arbitral Tribunal can address such matters. The Supreme Court further decided that only the courts would have the authority to decide cases in which there was a serious allegation of fraud, document fabrication or forgery, and in such cases, fraud could nullify the entire contract and can affect the validity of the arbitration clause, which can further render the arbitration clause to be unenforceable.

The court clearly acknowledged that the 1996 Act's statutory framework does not obstruct any disputes from being resolved through arbitration, but went on to determine that where charges of fraud relate to the internal operations of the party and outcome of such allegation will have no impact in the public, then under such circumstances, arbitration agreement should not be circumvented.

Nevertheless, the Court issued a warning, stating that when one of the parties asserts an allegation of fraud in an attempt to circumvent the arbitration agreement, the Court should conduct a thorough investigation and only decide on the matter after concluding that there are credible claims of fraud and that the Court is the appropriate venue to resolve the issue rather than sending the parties to arbitration.

Accordingly, the court in *A. Ayyasamy* decided that it was primarily the responsibility of the party which is refusing to submit to arbitration, to demonstrate that the issue was not arbitrable.

So, by establishing two types of fraud, simple fraud and complex fraud, that cannot be arbitrated, *A. Ayyaswamy* case further muddled the situation and instead of removing the conundrum added to the confusion.

In 2019, the Supreme Court had the chance to address the subject matter of arbitrability of fraud once more in the case of *Rashid Raza v. Sadaf Akhtar* In this ruling, the Supreme Court recognized two criteria for identifying complicated fraud.:

i. First thing first, it must be established if the plea affects the arbitration provision as well as the rest of the contract, rendering it invalid.
ii. Secondly, the courts necessarily should also decide if the accusations of fraud are related to the parties' in their private dealings and as such have no bearing on the public at large than in such case they are arbitrable.

In *Avitel Post Studioz Limited v. HSBC PI Holdings (Mauritius) Limited*[25] case court

[25](2020) SCC Online SC 656.

emphasized on the fact that only when allegations of fraud vitiate arbitration agreement that subject matters mentioned could not be resolved by arbitration. In above mentioned case, the Supreme Court inquired whether HSBC in whose favour award was made, had a strong enough case to have the Award enforced in India.

While contesting the implementation of the award, *Avitel* argued that since the allegations of fraud were connected to significant criminal offences, such disputes could not be resolved by arbitration.

The Court specified two tests to ascertain the non-arbitrability when serious accusation of fraud is alleged which are:

i. Where the Court is of the view that the arbitration agreement itself is void because fraud; or
ii. Where claims of arbitrary, dishonest, or malicious behaviour against the State or its agencies is raised, as a matter public policy, issue becomes non arbitrable.

A three-judge panel of the Hon'ble Supreme Court conducted a detailed analysis of the law on arbitrability in current set-up in *Vidya Drolia v. Durga Trading Corporation*[26]. The Hon'ble Supreme Court also looked at the arbitrability of fraud while the broader moot question with which apex court was dealing was, the law on the arbitrability of landlord and tenant conflicts. Accordingly, the court ruled that it would be entirely erroneous to perceive arbitration as a poor or inadequate adjudication method incapable of handling a law's public policy provision.

Court in this case increased the ambit of the tests for determining arbitrability, and stated where rights of third party is involved or where arbitration is not between two parties to agreement or matter involves state as a party and there is special legislation to deal with issue such matters cannot be resolved through arbitration.

The existing decisions reveals how challenging it has been to decide whether fraud is arbitrable and, more importantly, it can be seen how several criteria have been specified, thus, increasing the possibility of court involvement.

Under the 1996 Act, power has been conferred upon arbitral tribunal to call for an aid for the recording of evidence under Section 27.After examining all the evidence, the tribunal may reach a decision and make an award similarly to how courts do and there is no need to bifurcate the issues of fraud into fraud of simple character and fraud of complicated character. The Supreme Court itself has proposed new distinctions after recommending this distinction in Ayyaswamy, demonstrating that this distinction is unnecessary and impracticable.

The Law Commission had also recommended inserting sub-section (6) to Section 16 of the Act in its 246th Report, giving the tribunal the authority to issue an award despite allegations of fraud. It gave parties the choice to bring the issue of arbitrability before the arbitrator prior to making of the award, following the *Kompetenz-Kompetenz* principle. Further, if tribunal disallowed the issue the parties can raise before the court at the post-award stage. While challenging the award.

As a result, it can be concluded that fraud, as it is defined in Section 17 of the Contract Act, invalidates freely given consent and renders a contract voidable but not void from

[26]Decided on 28 February, 2019.

the beginning. The contract may be continued by the party whose consent was gained by deception. Swiss Timing stressed that unless there is a prima facie determination that there is no genuine arbitration agreement exist, a court should direct parties to arbitration.

In many countries, fraud has already been codified as arbitrable. Making necessary changes in legislation in India will show India's dedication to advancing arbitration and adhering to international standards. Arbitrability fraud's is an issue that has generated a lot of discussion as seen above and on which the courts have struggled to establish a clear picture.

VI. Arbitrability: Widening the Scope

i. Arbitrability in Intellectual Property Disputes

IP rights, such as trademarks, copyrights, patents, and industrial designs, are typically referred to as negative rights since they grant the right holders the authority to prohibit others from exploiting their intellectual property.

Regarding the arbitrability of intellectual property disputes, recent decisions in *Eros International Media Limited v. Telemax Links India Pvt. Ltd. and Ors*[27], determined by the Bombay High Court decided that while the underlying copyright is a "right in rem" that is enforceable against all people, the specific contractual issue regarding its infringement is a "right in *personam*." The dispute was determined to be arbitrable as a consequence.

Some High Courts ruled that because copyright, trademark infringement and passing off are essentially property rights that operate against the public at large, they cannot be subjected to arbitration. Contrarily, certain High Courts ruled that as issues involving trademark or when copyright is transferred to others by entering in to assignment agreement or to licence it, it constitutes right in personam involving infringement or passing off and would be subject to arbitration. So, nature of rights is taken into consideration to decide about the arbitrability of Intellectual property disputes.

ii. Arbitrability in Consumer Disputes

It is crucial to consider the potential of resolving consumer conflicts through arbitration as India progresses toward establishing a regime that is really supportive of arbitration. The issue of the arbitrability of consumer disputes was extensively discussed by the Apex Court in the case of *Emaar MGF Land Limited v. Aftab Singh and Others*[28]. The issue befell as a result of grievances of home buyers against the builder who failed to give flats to customers on the date specified in the flat buyer's agreement. The builder made an application under Section 8 of the arbitration Act 1996, pursuant to the arbitration clause in the buyer's agreement when the homeowners' move to the National Consumer Disputes Redressal Commission for resolving the issue. The NCDRC[29] decided that consumer disputes are not arbitrable as interest of general public is involved.

[27] 2016(6) Bom C R321.

[28] (2019) 12 SCC 751.

[29] National Consumer Disputes Redressal Commission.

The NCDRC's verdict was affirmed by the Supreme Court following an appeal. It then decided that the remedy provided under CPA which is specific law dealing with consumer disputes, is along with the provisions of additional law in force for at present. It reaffirmed the logic laid in the *Booz Allen* case for categorizing issues as rights in rem and rights in personam. As a result, if a person decides to submit disputes to the consumer forum in the first instance than such application is maintainable.

It is important to emphasise the judicial perspective when deciding whether or not social and welfare law-related disputes can be arbitrated. For instance, the Apex Court ruled in *Premier Automobiles Ltd. v. Kamlekar Shantaram*[30], *Wadke of Bombay and Ors* that the Industrial Disputes Act, 1947, pursuant to which the labour courts and tribunals are constituted, are competent authority to resolve industrial disputes involving workers' rights. As a result, the ID Act completely nullifies the ability of civil courts to hear industrial disputes.

As a result, it can be safely inferred that the courts' intention is very clear, the Consumer Protection Act and the Industrial Disputes Act, 1947 main aim is to defend the interests of consumers and workers by giving them specific rights. Consequently, a consumer or a worker cannot be forced to give up their ability to file a lawsuit in court by choosing arbitration instead.

iii. Arbitrability in Trust deeds

Trusts in India have changed over time from being primarily altruistic in character to being an efficient business vehicle for succession and estate planning. Using arbitration to decide trust conflicts is a good alternative, since it has the benefits over litigation which includes confidentiality, party autonomy, limited curial review and lastly saving cost and time.

Having said that, arbitration in trusts-related disputes is typically seen as being impractical. The High Court of Bombay's ruling on the appointment of an arbitrator was heard in appeal made to Supreme Court of India in *Shri Vimal Kishor Shah &Ors. v. Mr. Jayesh Dinesh Shah & Others*[31], Court had to decide on issues arising from a family trust deed. It decided that dispute arising out of trust deeds are not arbitrable notwithstanding the arbitration clause in that deed between trustees, trustees and beneficiaries, and beneficiaries.

However, it can be said that the Supreme Court disregarded certain significant aspects while holding that trust deeds are not arbitrable. In first instance the Supreme Court stated that a trust deed cannot be taken as a contract, much less an arbitration contract as defined by Section 7 of the Arbitration Act.

The Supreme Court ruled that because beneficiaries are not signatories to trust deeds, which contain arbitration clauses, they cannot be regarded as "parties" to the arbitration agreement under the Arbitration Act.

The following issues have been disregarded by the Supreme Court in coming to above conclusion:

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[30](1976) 1 SCC 496.

[31]2016 (8) SCALE 116.

- To begin with, the legitimacy and enforceability of an arbitration agreement cannot be determined just by the parties' signatures.
- Secondly, as a result of the amendment made to section 8, in 2015, this section now provides that in addition to party to arbitration agreement reference can also be a be sought by "*persons claiming through or under*" an arbitration agreement Accordingly, the aim of amendment to sec 8 was to include those persons who are not signatories to an arbitration agreement but whose rights and obligations are nonetheless impacted by the underlying agreement in the definition of "party" to the arbitration agreement.
- Third, the Supreme Court has shown a lack of understanding for the common law doctrine known of Estoppel or Deemed Acquiescence, which states that a party is not permitted to avoid arbitration.

Indian Trusts Act, 1882, regulate the Private trusts in India. The ambit of the Trusts Act contains a wide variety of trust-related issues, such as trust formation, trustee duties and accountabilities, trustee rights and authorities, beneficiary rights and responsibilities etc. Although the Trusts Act grants civil courts the power to direct some legal remedies, it says nothing about providing them the exclusive power to settle disputes between the settler, trustees, and beneficiaries. Conflicts which arise out of a trust deed under the Indian Trust Act, 1882, were therefore included by the SC in this verdict[32] as the seventh category of disputes that could not be resolved by arbitration.

Therefore, the legal stance on the arbitrability of conflicts up to 2016 was based on two assertions: the "nature of rights" principle, in which, the Supreme Court, divide conflicts into seven groups; and second, the "exclusive forum of adjudication" principle, which prohibits the determination of issues using arbitration where special laws and specific tribunals are constituted to decide issues.

VII. The New Dawn in Arbitrability: The Vidya Drolia case

In *Vidya Drolia and Ors. v. Durga Trading Corporation*[33], an appeal was made against the ruling of Calcutta high court in which arbitrator was appointed in a dispute between landlord and tenant. The SC had to decide regarding the arbitrability of landlord tenant disputes. Despite the fact that the query was restricted to the issue of whether or not tenancy disputes can be arbitrated but given the conundrum revolving around this matter, the Supreme Court decided it was imperative to assess position on arbitrability under Indian law and also look into the concept of arbitrability prevalent in other countries to seek direction.

A four-part test has now been recognized by the Apex Court to determine when a subject matter cannot be arbitrated. The Supreme Court held that, disputes are not arbitrable when the cause of action and/or subject-matter of the dispute:

- "*deal with actions in rem*, that do not relate to subordinate rights in *personam* that arise from rights *in rem*;

[32]Shri Vimal Kishor Shah &Ors. v. Mr. Jayesh Dinesh Shah &Ors.,2016 (8) SCALE 116.

[33]2019 SCC OnLine SC 358.

- has impact on third party rights, or have *erga omnes*[34] effect, and necessitates centralized settlement, and common settlement would not be suitable;
- deal with immutable autonomous and public interest functions of the State; and
- is specifically or by necessary implication non-arbitrable under a special legislation[35]."

The court emphasised that the dispute cannot be decided with the help of arbitration if any of the aforementioned questions were answered in the affirmative. However, the Supreme Court reiterated that these rules are not "watertight compartments, "nonetheless, they would be highly useful in determining whether a certain dispute would be subjected to arbitration under Indian law or not. Furthermore, even though the *Vidya Drolia* verdict has demystified the concept of arbitrability in regard to fraud, consumers, and tenancy matters, one might not agree with the Supreme Court's fleeting remark on the subject of the arbitrability of "intra-company" issues, which once again leaves the door open for the court to get involved.

VIII. Conclusion

Notion of arbitrability has undergone a substantial metamorphosis over past decade in which judicial rulings have established the proper course of action to be followed. The courts have repeatedly decided on the arbitrability of cases and have favoured employing arbitration to resolve disputes. The judgement cited above suggests that private forums are equally competent as courts are for resolving disputes like fraud, consumer matters, tenancy matters etc and they may serve to relieve the strain on the courts and can offer people efficient justice.

Apex court has elucidated times and again on the arbitrability, but the verdict in *Vidya Drolia* has propounded the test that determines the criteria to be adopted while assenting the arbitrability. It is a positive step forward for arbitration specifying how far courts can interfere in the dispute resolution process between two private parties. But still it will be seen how courts across the country follow the approach laid down in the judgement of *Vidya Drolia*. However, the current judicial trend is to support the referral to arbitration, which is appropriate given that the arbitral tribunal is qualified to decide every dispute that may be settled by the courts.

[34]An erga omnes means obligations and rights towards all. It is kind of an implied duty of any person or state also not to infringe the rights of anyone by performing his duty or during exercising his rights.

[35]Shahezad Kazi and Gladwin Issac, India: Supreme Court Of India Clarifies 'What Is Arbitrable' Under Indian Law And Provides Guidance To Forums In Addressing The Question, available at https://www.mondaq.com/india/trials-amp-appeals-amp-compensation/1023030/supreme-court-of-india-clarifies-what-is-arbitrable-under-indian-law-and-provides-guidance-to-forums-in-addressing-the-question (Visited on 28th Aug 2023).