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ARBITRABILITY OF LABOUR DISPUTES IN THE INDIAN CONTEXT

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ABSTRACT

Industrial Arbitration or Labour Arbitration refers to a process wherein there is a conflict between the management and the workers or a labour union under a collective-bargaining agreement and after all other attempts to resolve the issue have failed, the dispute is referred to an honest and objective third party for its resolution. Industrial Arbitration consists of two key arbitration elements, i.e., arbitration of rights and arbitration of interests. Arbitration of rights refers to the resolution of a dispute between labour and management over the application of an existing labour agreement whereas arbitration of interests denotes a dispute between labour and management during the course of negotiating a new labour contract. Industrial Arbitration is a private mechanism discharging a public policy like national labour policy.This would ultimately contribute to the arbitration process's success. Disputes related to discharge, dismissal, layoffs, victimization and retrenchment of workers which could not be easily settled by mutual negotiation is capable of being resolved by the arbitration mechanism.

Introduction

An arbitrator's role in the realm of industrial disputes is complex since he cannot function like a judge of a court of law vested with the inherent judicial power, nor is he guided by a stream of precedents meticulously encoded or indexed for easy reference. Unlike lawmakers, arbitrators are not empowered to convert a constituency's opinions into broad standards of behaviour. Nor are they investigators equipped with summons powers and time to unearth obscure facts and settle complex inconsistencies[2].

There are three chief forms of industrial arbitration.

1. **Conventional or Voluntary Arbitration**
   In Voluntary Arbitration, it is up to the disputants to determine whether to employ arbitration for resolving their dispute. Neither the law nor the government compels them to opt for arbitration. However, the law can regulate the time limit within which the parties must choose arbitration. The United States of America, Canada, and England are among the primary countries where this technique is used. In the United States of America and Canada,

, p. 99. https://naarb.org/proceedings/pdfs/1958-93.pdf (last visited. Nov. 3, 2022).

it is referred to as Grievance Arbitration, which operates in the private sector to resolve challenged dismissals and rights' disputes.

2. **Compulsory Arbitration**
   As the name suggests, in this method, the law compels the disputants to submit to arbitration, or the government would insist on the inclusion of a clause in the employment contract requiring the parties to submit to arbitration. The government may limit the application of compulsory arbitration to specific industries, at its discretion. Workers are normally forbidden from striking in industries covered by the Arbitration clause.
3. **Final Offer Arbitration/Last Offer Arbitration/Pendulum Arbitration**
   This form of arbitration mandates that the arbitrator chooses between the employer's last offer and the union's final claim. Pendulum Arbitration is founded on two implicit assumptions that the reference to arbitration is mandatory, and it is a specific alternative to the right to strike. Pendulum Arbitration acts as an impasse deterrent, it is said. The potential of absolute defeat in arbitration generates an effective incentive for the parties to engage in actual negotiation that leads to an agreement.

INDUSTRIAL ARBITRATION IN DIFFERENT COUNTRIES

Industrial arbitration as a means of settling labour disputes has been adopted by many countries in the world, such as, the United States of America, Canada, the United Kingdom and many other European countries.

In New Zealand, the Industrial Conciliation and Arbitration Act, enacted in 1894 was the world's first compulsory system of state arbitration, which outlawed strikes. The Act was brainchild of then Minister of Labour William Pember Reeves. It granted legal status to unions and allowed them to bring disputes before a Conciliation Board comprised of members elected by employers and workers. The Industrial Conciliation and Arbitration Act, 1894, designated trade unions and individual employers or industrial unions of employers as responsible parties in wage and other employment condition negotiations. In event of a dispute, the parties were required to deliberate it at district Boards of Conciliation. If this process failed, the case was to be heard by a national Court of Arbitration. Thus, arbitration remained the cornerstone of New Zealand's industrial relations system until 1973, when the Act was superseded by a new Industrial Relations Act. Thus, arbitration remained the cornerstone of New Zealand's industrial relations system until 1973, when the Act was superseded by a new Industrial Relations Act[3].

In 1919, the United Kingdom, the Industrial Courts Act was passed with a view to establish an Industrial Court and Courts of Inquiry in connection with Trade Disputes, as well as to make additional measures for the resolution of such disputes, and to extend for a limited time certain

[3] New Zealand History, *Arbitration Act becomes law 31 August 1894*, https://nzhistory.govt.nz/strikes-outlawed-the-industrial-conciliation-and-arbitration-act-passes-into-law (last visited. Nov 4, 2022).

provisions of the Wages (Temporary Regulation) Act, 1918[4]. The Industrial Court (the Court) is a statutory Tribunal Non-Departmental Public Body, which provides for voluntary arbitration in industrial disputes. It also has statutory authority to resolve disputes between trade unions and employers regarding the disclosure of information for collective bargaining purposes[5].

In the United States of America, arbitration is instituted during the contract implementation stage, that is, when the parties to the collective bargaining agreement bring up disputes asserting rights or compelling the performance of obligations arising from the collective bargaining agreement's provisions. Because the subject matter focuses on grievance or interpretation of the collective bargaining agreements, it is considered Grievance Arbitration. However, when compared to the United States, the conditions within which the labour arbitration mechanism operates in India are relatively broad. Because there is no category of industrial disputes in India, an arbitrator's assistance may be sought at both the Contract Negotiation and Contract Implementation stages. In America, where the voluntary arbitration apparatus is in full bloom, the view that an Arbitrator should have the same powers as Courts of Equity, such as the Supreme Court is supported. Labour arbitration is incorporated into a collective bargaining agreement, which, in accordance with Section 301(a) of the Labour-Management Relations Act[6] of the United States, is legally binding against the union and its management. Arbitration clauses included in the collective bargaining agreement are legal in this case, regardless of conventional contract law concepts concerning contract enforceability.

With the enactment of the Industrial Relations Ordinance, which was later replaced by the Industrial Relations Act, the Industrial Arbitration Court (IAC)[7] was established in Singapore on 24th October 1960, in view of resolving cases pertaining to employer-employee relations and trade disputes. The founding president of the Industrial Arbitration Court was Mr. Charles Gamba, who was in power till 1964. One of the most eminent cases settled by the IAC was in 1969 wherein it held that the management of a company, Metal Box (Malaysia) Ltd, had the power to establish shift duties and restrict working hours because such concerns were no longer a topic for collective bargaining. In 1966, in case before it, the IAC directed the Port of Singapore

[4] Legislation Government UK, *Industrial Courts Act 1919,*https://www.legislation.gov.uk/ukpga/Geo5/9-10/69/enacted (last visited Nov. 4, 2022).

[5] Industrial Court, *Adjudicating on Trade Union Recognition and Collective Bargaining*, https://www.industrialcourt.gov.uk/ (Nov. 4, 2022).

[6] 29 U.S. Code, §§ 151.

[7] Council of Asean Chief Justices, *Industrial Arbitration Court*, https://cacj-ajp.org/singapore/legal-system/dispute-resolution-processes/specialised-tribunals/industrial-arbitration-court/ (last visited. Nov. 4, 2022).

Authority (PSA) to pay $4 million in back wages in arrears to about 11,500 employees under a new collective agreement signed[8] the previous year.

ARBITRABILITY OF LABOUR DISPUTES IN THE INDIAN CONTEXT

The Arbitration and Conciliation Act, 1996, does not provide the type of disputes which are arbitrable i.e.., capable of being resolved through the arbitration mechanism. Since the legislation does not the question of arbitrability of disputes, the task has fallen into the hands of the judiciary and purview of judicial interpretation. The question of whether labour disputes are arbitrable or not under the Arbitration and Conciliation Act, 1996 has arisen before the courts in many instances.

In Kingfisher Airlines v. Captain PrithviMalhotra[9], the issue of arbitrability of industrial disputes first arose, wherein the several labour recovery proceedings initiated by former Kingfisher Airlines pilots and other employees. The cases were brought before specially constituted labour tribunals in order to recover unpaid pay and other salary perks. In the present case, Kingfisher Airlines challenged the labour court's jurisdiction by using the arbitration clause in the employment agreements. Kingfisher submitted an application under Section 8 of the Arbitration and Conciliation Act, 1996, seeking reference to arbitration agreement[10]. The application was denied, and the labour court retained authority over the proceedings.

Kingfisher Airlines aggrieved by the labour court's decision move the Bombay High Court, which upheld the order of the labour court and supported the view that labour disputes are not arbitrable under the Arbitration and Conciliation Act, 1996. The Supreme Court in Booz Allen & Hamilton v. SBI Home Finance[11] had observed that *"the question is not whether the claim is in personem or in rembut whether the resolution of the dispute has been exclusively reserved for adjudication by a specific court or tribunal for public policy reasons"*. The Court held that the adjudication of labour and industrial disputes is reserved for the judicial fora established under the Industrial Disputes Act, 1947[12]. The Bombay High Court further stated that the Industrial Disputes Act provides for a unique process for arbitration in matters of labour disputes. It was further observed that if extra judicial methods of resolving labour disputes were to be adopted, the reference to and resolution by arbitration would have to be governed by the specific

[8] National Library Board, Singapore Government, *Establishment of the Industrial Arbitration Court*, https://eresources.nlb.gov.sg/history/events/8285bacf-fb95-4bae-b2f2-221c5342d432 (last visited Nov. 4, 2022).

[9] *Kingfisher Airlines v. Captain PrithviMalhotra*, 2013 (7) Bom CR 738.

[10] The Arbitration and Conciliation Act, 119, § 8, No. 16, Acts of Parliament.

[11] *Booz Allen & Hamilton v. SBI Home Finance*, (2011) 5 SCC 532.

[12] SmaranSitaramShetty, *Arbitration of Labor Disputes in india: Towards a Public Policy Theory of Arbitrability*, Kluwer Arbitration Blog, (Nov. 26, 2017), http://arbitrationblog.kluwerarbitration.com/2017/11/26/arbitration-labor-disputes-india-towards-public-policy-theory-arbitrability/ (last visited. Nov. 5, 2022).

provisions of the Industrial Disputes Act, 1947 (and the attendant rules made thereunder), not the Arbitration and Conciliation Act, 1996[13].

From the above judgement of the Bombay High Court in the Captain PrithviMalhotra case, it can be inferred that claims under the Industrial Disputes Act, 1947 are not arbitrable under the Arbitration and Conciliation Act, 1996, and when they are arbitrable, they must strictly comply with the standards and procedures of the Industrial Disputes Act. Thus, labour and industrial claims are not inherently non-arbitrable but are only arbitrable in certain circumstances.

In another case, a similar view was endorsed. In Rajesh Korat v. Innoviti,[14] application for reference to arbitration before the labour court was allowed and parties were referred to arbitration. The Karnataka High Court stated that there are compelling public policy reasons to ensuring that labour and industrial disputes are decided solely by courts and tribunals established under the Industrial Disputes Act. The Court held that the Industrial Disputes Act is a self-contained code, and that the Arbitration and Conciliation Act has no relevance to subjects controlled by the Industrial Disputes Act. Thus, any arbitration of labour disputes must follow the method outlined in the Industrial Disputes Act of 1947, rather than the Arbitration and Conciliation Act, 1996.

VOLUNTARY ARBITRATION AND THE INDUSTRIAL DISPUTES ACT, 1947

The industrial relation policy of the Government of India aims envisages prevention and peaceable settlement of labour disputes and promotion of amicable industrial relations. The Industrial Dispute Act, 1947 was the first labour legislation that presented the concept of employing Alternative Dispute Resolution (ADR) methods to resolve labour disputes. Section 2(k) of the Industrial Dispute Act, 1947 defines Industrial Dispute as *"any dispute or difference between employers and employers or between employers and workmen or between workmen and workmen, which is connected with the employment or non - employment or terms of employment or with the conditions of labour of any person."*

Voluntary Arbitration is desirable as a method of resolving industrial disputes because it is founded on the principle of 'Voluntarism' which implies that it lets the parties to choose their own trusted person or group to resolve their dispute and thus pave way for industrial peace. The fact that the parties have opted for voluntary arbitration does not always mean that the Collective Bargaining process has failed. The fact that the parties, rather than requesting that their dispute be adjudicated by a court, have chosen voluntary arbitration is indicative of mutual trust and confidence among the parties. Through voluntary arbitration, the parties seek to arrive at a mutually acceptable pre-arranged decision given by a third person. Voluntary arbitration is a means of resolving industrial disputes with a view in to keep peace and harmony in an industry

[13] Ibid.

[14] *Rajesh Korat v. Innoviti* , 7 IJAL (2018) 120.

for a longer period. To activate this machinery, the disputants must express their "free consent" through a written agreement expressing their intention for voluntary arbitration. Arbitrators do not have to be lawyers; they might be laymen. However, arbitrators must be people who are respected and recognized for their qualities, such as, impartiality, honesty, integrity, subject matter expertise, and experience in the matter referred to.

When enacted, the Industrial Disputes Act, 1947 is devoid of provisions for Voluntary Arbitration. Following the inception of the Planning Commission and the First Five Year Plan, there was a reconsideration for the ideal framework for the resolution of labour disputes. The Five-Year Plan declared that differences should be settled by impartial investigation and arbitration. Nonetheless, despite stated government policy and concerns, no legal mechanism was in place to encourage collective bargaining and voluntary arbitration until 1956. Grave criticisms of the conciliation machinery led to the adoption of Section 10A relating to Voluntary Arbitration through the Industrial Disputes Miscellaneous Provisions (Amendment) Act, 1956, which endeavoured to accord legal validity to the Voluntary Arbitration system. However, the Arbitrator's 'Award' remained on a lower pedestal than the 'Settlement' reached during conciliation proceedings and the 'Award' given by an adjudicator, such as the Industrial Tribunal, in terms of the binding nature of the decision. On the recommendation of the National Commission on Labour in 1969, National Arbitration Promotion Board (NAPB) was established with a view to encourage mutual settlement through Collective Bargaining and Voluntary Arbitration. The NAPB has been entrusted with the responsibility of drawing the Panel of Arbitrators to enable the parties to select the right person(s) as arbitrators. Indian Labour Conference and the Industrial Truce Resolution emphasized the need for a widespread acceptance of voluntary arbitration for resolving industrial disputes.

Section 10A (1) of the Industrial Disputes Act specifies that the employer and the affected workers may, at any time, by written agreement, submit their existing or anticipated dispute to an arbitrator[15]. The existence or prospect of an industrial dispute is required to opt for voluntary arbitration. Mere consent of the parties to refer a non-industrial dispute to voluntary arbitration does not confirm the reference. If the parties are willing to refer their dispute to arbitration, they must do so prior to the government exercising its referral power[16] under Section 10. It appears that by imposing a time limit for the parties to exercise their right to refer the dispute to arbitration, the legislature has placed voluntary arbitration on a lower pedestal as the parties are supposed to act before the government refers the dispute to one of the adjudicatory authorities mentioned in Section 10(1) of the Act[17]. However, Section 43 of the Indian Labour Code, 1994, has eliminated this flaw. If the parties disagree over the choice of arbitrator, they may authorize the NAPB to nominate one or more arbitrators. In the event of parties choosing an even number

[15]The Industrial Disputes Act, 1956, § 10A, No. 41, Acts of Parliament, 1956.

[16] The Industrial Disputes Act, 1947, § 10, No. 14, Acts of Parliament, 1947.

[17] Ibid.

of arbitrators, the Act requires them to appoint an umpire, whose decision shall prevail when the arbitrators are evenly divided in their opinions, as per Section 10A (1-A) of the Act. The principle of voluntarism that governs the arbitration process dictates that the Arbitral Award must have precedence over the Adjudicator's decision, in case both the proceeding have been simultaneously taking place and there is inconsistency between the two.

An Arbitration Agreement is an integral instrument of the arbitration process. In case of voluntary arbitration in labour disputes, the Arbitration Agreement must be signed by the employer, any officer of a trade union, and five authorised representatives of the workers, according to Rule 8A of the Industrial Disputes (Central) Rules, 1957. The question before the Patna High Court in *State of Bihar v. NathuniPandey*[18] was whether the attestation of the Arbitration Agreement by the President alone on behalf of the trade union was sufficient to validate the agreement. The Industrial Disputes (Bihar) Rules, 1961, necessitates that the Arbitration Agreement on behalf of the workers be signed both by the President and the Secretary of a trade union. The Patna High Court declared the agreement to be void. However, a different view was adopted by the Punjab High Court in *Faridabad Glass Works (P) Ltd. v. Presiding Officer, Industrial Tribunal*[19] wherein the Arbitration Agreement had been signed by the General Secretary only and the Court held that this situation could be corrected by simply getting the agreement signed by the President. The Delhi High Court in *Mineral Industry Association v. Union of India*[20] held that where the employer is body corporate, there would be "sufficient compliance" if the agreement is signed by an agent of such an employer or by an attorney or a duly authorised agent on behalf of the employer - a body corporate[21]. Section 10A (3) commands that a that a copy of the Arbitration Agreement be forwarded to the Conciliation Officer and to the Appropriate Government, which it shall publish the same within one month from the date of its receipt in the Official Gazette.[22] In *Landra Engineering and Foundry Works v. Punjab State*[23], the Punjab & Haryana High Court held that the provisions of Section 10A (3) are directory and not mandatory. The Madhya Pradesh High Court in *Modern Stores v. Krishnadas*[24] held that the statutory requirements provided in section 10A (3) are partly mandatory and partly directory. Following the conflicting views of the different High Courts on the matter, the Supreme Court voiced its opinion on the matter in *Karnal Leather KarmachariSanghatan v. Liberty Footwear Co*.[25]. In this case, the Arbitration Agreement was

[18]*State of Bihar v. NathuniPandey*, (1973) Lab. I.C. 1492 (Pat.)

[19]*Faridabad Glass Works (P) Ltd. v. Presiding Officer, Industrial Tribunal*, AIR 1965 P H 498.

[20]*Mineral Industry Association v. Union of India*, AIR 1971 Delhi 160, 1971 (22) FLR 363

[21]Ibid, para. 9.

[22] The Industrial Disputes Act, 1956, § 10A (3), No. 41, Acts of Parliament, 1956.

[23]*Landra Engineering and Foundry Works v. Punjab State*, (1969) Lab IC 52 (P & H).

[24]*Modern Stores (Cigarettes) v. Krishnadas Shah*, (1970) Lab IC 196, 203 (M.P.) (D.B.).

[25]Karnal Leather KarmachariSanghatan v. Liberty Footwear Co., 1990 AIR 247, 1989 SCR (3)1065.

not published by the Appropriate Government in the Official Gazette prior to pronouncement of the award. The Supreme Court directed the Government to publish the Arbitration Agreement in the Official Gazette within four weeks' time and held that noncompliance of the statutory prerequisites is fatal to the arbitral award.

Section 18 (3) of the Industrial Disputes Act states that an arbitration award in a case where a notification has been issued under sub-section (3A) of section 10A which has been enforced shall be binding on the parties of the industrial dispute[26]. Besides, Section 18 (3) also provides the categories of persons such award shall be binding on. It also enables workers who are not parties to the Arbitration Agreement but are concerned in the dispute to present their case before the arbitrator. In order to prevent parties from bearing the brunt of cumbersome litigation, the provisions of the Industrial Disputes Act, 1947 are the only statutory provisions applicable to voluntary arbitration of industrial disputes. Section 11 (1) of the Act provides procedural flexibility to the arbitrator, which implies that he is free to choose, follow or evolve the arbitration procedure.However,such procedure should conform to the statutory provisions and relevant of the Act and should not be repugnant to the principles of Natural Justice. In *NaniGopalSarkar v. Heavy Engineering Corporation Ltd.*[27], the Supreme Court held that a plea for challenging the validity of arbitral award on procedural grounds must be taken at the initial stage and not later. When people voluntarily choose Arbitration and select an arbitrator of their choice, it implies that they respect his procedural fairness, integrity, and honesty. As a result, challenges on Awards based on procedural flaws should not be entertained, unless the arbitrator's procedural structure is evidently unjust. Besides, the Judiciary's unwillingness to intervene in the disputed Arbitral Award enables the Arbitration apparatus to flourish in the field of Industrial Relations.

CONCLUSION

In the last decade or so, ADR mechanisms have accomplished their goal of devising an alternate approach for addressing and resolving issues that avoided the perceived overwhelming expense and inefficiency of the court system. The way ADR has incorporated and institutionalized into the very fabric of the judicial system of India is remarkable. In the arena of industrial relations, ADR mechanisms enable swift and efficient resolution without resolution of disputes more quickly and without jeopardising the relationship between the workers and the management. Thus, use of ADR in labour disputes ensures industrial peace and harmony. ADR mechanisms take into account the needs, interests, and solutions, and it has the potential to foster healing. It is voluntary, timely, confidential, and mutually agreed upon, which contributes to its success in effectively resolving labour disputes. Unlike traditional courts, it is intended to produce results

[26] The Industrial Disputes Act, 47, § 18 (3), No. 14, Acts of Parliament, 1947.

[27]inNaniGopalSarkar v. Heavy Engineering Corporation Ltd., (1990) 3 SCC 173.

that are tailored to the specific circumstances of individual cases, as opposed to imposing solutions through litigation.

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