IS THERE A FUTURE FOR THE ARBITRABILITY OF TRUSTS IN INDIA?

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Trusts have evolved drastically, being put to manifold uses ranging from charity to estate planning. However they are commonly used as commercial vehicles in the form of private investment mechanisms. As with any other field, disputes of a wide-ranging nature have, and continue to develop with regards to trusts. Allowing for the possibility of such dispute, the India Trust Act, 1882, pro-vides the opportunity for all parties involved in the trust to resort to civil courts. However, the act in no way provides exclusive jurisdiction solely to public fora, i.e., Courts, paving the way for the arbitration of trust disputes in India.

The development of arbitration of trust disputes however, came to a grinding halt with the holding of the Apex Court in *Shri Vimal Kishor Shah & Ors. v. Mr. Jayesh Dinesh Shah & Ors.* [1] ("Vimal Shah") that cases arising out of a Trust Deed and the Indian Trust Act can no longer be n decided by arbitrator(s) despite the existence of an arbitration agreement between the parties. This decision, which was based on the Court's understanding of arbitrability as laid down in *Booz Allen and Hamilton Inc. v. SBI Home Finance Ltd.* [2] ("Booz Allen"), rendered all trust disputes in India to be inarbitrable.

Arbitrability in India

Not all matters are capable of being referred to arbitration with certain matters reserved for the court alone. If a tribunal purports to deal with such matters, the resulting award will be unenforceable. The Arbitration Act, allowing for this principle, empowers the court to set aside an award if the court finds that, "*the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force.*"

The substance of jurisprudence pertaining to arbitrability in India has developed by way of judicial interpretations, the most significant of which is the Booz Allen. The Supreme Court elaborated the law pertaining to disputes which could be subjected and, resolved by way of a private forum i.e., an arbitral tribunal. Having enumerated a list of non-arbitrable disputes, including disputes arising out of criminal offences, matrimonial and tenancy disputes, the Court went on to lay down two tests to determine categories of disputes which would be inarbitrable.

The first test seeks to differentiate between rights *in rem* and rights *in personam* and the consequent impact on the arbitrability of disputes arising out of the respective rights. Those rights exercisable against the world at large are classified as rights *in rem* and in all such disputes, Courts shall refuse to refer parties to arbitration, regardless of the existence of an arbitration agreement between the parties. For example, any and all disputes which hinge on the validity of intellectual property rights fall outside the ambit of subject matters considered to be arbitrable in India. Rights *in personam*, on the other hand, are rights that are traditionally *inter partes* and as a consequence, all actions *in personam* are ones done or directed against or with reference to a specific person. Judgements *in personam*, therefore, pertain not to the status or condition of property, but rather are judgements as against a person. As a general rule, Indian courts have held disputes arising out of such rights to be arbitrable.

The second test laid out in Booz Allen lays emphasis on the nature of the statute under which the disputes arise. Disputes arising out of a special statute which are reserved for exclusive jurisdiction of special courts, such as matters reserved for small causes courts, are considered to be inarbitrable in India. In essence, all categories of disputes which, either expressly or impliedly, are required to be adjudicated upon by a specialized body under a statute are not amenable to arbitration.
Expanding on this test, courts have found that disputes arising out of a number of statutes impliedly exclude arbitration such as lease deed disputes.[3] More recently, the Supreme Court expanded on the list of non-arbitrable disputes in Vimal Shah by rendering "*cases arising out of a Trust Deed and the Trust Act*" to be inarbitrable. While deciding a dispute between beneficiaries to a trust deed, the court expounded a twofold rationale behind holding trust disputes to be inarbitrable despite an express clause referring all disputes to arbitration.

Firstly, the Court, drawing an analogy with a Will, found that the beneficiaries / legatees (as the case may be) were not parties to the Trust Deed / Will as they were not required to sign the agreement. As a necessary consequence therefore, the Trust Deed could not be construed to be an "arbitration agreement" within the meaning of Section 7 of the Arbitration Act.

Secondly, the Supreme Court held that the Indian Trust Act, in and of itself, constituted a 'complete code' which, by way of its provisions, dealt with each subject in a comprehensive manner, ranging from the formation of a trust to its management as well as legal remedies available for the settlement of disputes under the Act. While recognizing that the Act did not provide for an 'express bar' to the application of other Acts to resolve disputes under the Indian Trust Act, the Court found there to be an implied exclusion of arbitration as a mechanism of dispute resolution.

By way of its decision in Vimal Shah, the Supreme Court brought an end to arbitrations premised upon a trust deed, even those containing a valid arbitration clause, and imposed a blanket ban on the arbitrability of disputes arising from the Trust Act.

Analysis

The Court's decision, however, suffers from a number of infirmities which do not sit well with India's evolving pro-arbitration stance, meriting a review of the judgement.

The Court's primary rationale centres around the fact that a trust deed remains unsigned by the beneficiaries to the deed, and consequently, does not constitute an arbitration agreement. While on bare understanding, this appears to be the correct interpretation of the law, the Court chose to ignore the Doctrine of Direct Benefits, utilised across jurisdictions to join non-signatory parties to an arbitration when such non-signatories have directly benefited from or under the agreement containing the arbitration clause.[4] This was also the view adopted by the Bombay High Court prior to the decision in Vimal Shah.[5]

The doctrine prevents non-signatory parties from simultaneously partaking in the benefits of the agreement, while avoiding their obligations to arbitrate under the same agreement.

In a direct parallel, Vimal Shah involved trustees who sought to avoid arbitration as envisaged under the trust deed while concurrently claiming benefits under the deed. As a consequence, the Court ought to have extended the application of the arbitration agreement to the non-signatory, as it has done in a number of cases previously.

Even if we were to analyse the analogy extended by the Court, equating a Will with a Trust Deed, the Court's position runs afoul of the decision in *Raghu Nandan Sharma v. Vijay Kumar and Ors.*,[6] held that an arbitration clause contained in a will is binding upon the sons, regardless of whether the children are signatories to the will or not, and consequently constitutes a valid arbitration agreement under Section 7 of the Arbitration & Conciliation Act, 1996.[7]

Lastly, but perhaps most tellingly, the Court propounded its decision heavily relying on the factual scenario in Vimal Shah, where a trust was established for the benefit of children below the contracting age, without establishing their consent to arbitrate and consequently rendering the arbitration agreement *non est*. However, the decision erroneously arrived at a conclusion rendering disputes arising from all forms of trusts inarbitrable, regardless of whether the key element of underage non-signatory beneficiaries was replicated in the dispute or not.

In essence, despite basing its decision on vital characteristics of the Trust Deed, the decision in Vimal Shah has the effect of rendering disputes arising out of commercial trusts to be inarbitrable despite the commercial trust deed having no commonalities with the trust deed in Vimal Shah.

The International Outlook

While India's status quo vis-a-vis arbitration of trust disputes remains rooted in the Dark Ages, the world has moved on. Most recently, the International Chamber of Commerce in 2018 issued a revised version of its arbitration clause, making it applicable to all parties to the clause, as well as non-signatory beneficiaries which derive any benefit under it. Arizona, Jersey and a number of other jurisdictions have followed suit, including the Bahamas, Liechtenstein, and potentially, New Zealand, having drafted and implemented tailored legislation for the resolution of trust disputes.

The lack of clarity augurs a bumpy road ahead for the arbitration of trust disputes however, a positive first step justifying India's pro-arbitration stance would be to acknowledge the judgement in Vimal Shah to be erroneous and subsequently bringing about legislative change along the lines of the clause proposed by the International Chamber of Commerce.

ENDNOTES:

[1] Shri Vimal Kishor Shah & Ors. v. Mr. Jayesh Dinesh Shah & Ors., AIR 2016 SC 3889.

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

[3] Binsy Susan and Himanshu Malhotra, *Arbitrability of Lease Deed Disputes in India – The Apex Court Answers*, KLUWER ARB. BLOG (Feb. 19, 2018), http://arbitrationblog.kluwerarbitration.com/2018/02/19/arbitrability-lease-deed-disputes-india-apex-court-answers/.

[4] Carlos A. Maycotte, *Direct Benefits Estoppel -- Compelling Non-Signatories to Arbitrate*, FITCH (Apr. 16, 2015), https://www.fitchlp.com/blog/2015/04/direct-benefits-estoppel----compelling-non-signatories-to-arbitrate.shtml.

[5] Mr Jayesh Dinesh Shah & Ors v. Kaydee Family Trust & Ors., 2013 SCC OnLine Bom 394.

[6] Raghu Nandan Sharma v. Vijay Kumar and Ors., 2008 (3) ILR (Raj) 55.

[1] The Arbitration and Conciliation Act,1996, §7, No. 26, Acts of Parliament,1996 (India).