

POWER TO GRANT ANTI-ARBITRATION INJUNCTION BY THE CIVIL COURTS: AN ANOMALY OR SAFEGUARD?

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Introduction

The arbitration regime in India has undergone significant changes in the recent past, wherein the lawmakers have made major efforts to implement every possible and much needed steps that have made India a suitable choice for the ‘seat’ of arbitration for foreign parties.

While the tide towards endorsing foreign arbitration has been steady, the likening for domestic arbitration has witnessed an impressive rise. Invariably, the drafters of domestic commercial contracts have started to emphasise much upon the importance of including arbitration [ad-hoc/ institutional] as a reliable alternate dispute resolution mechanism. However, there remain many unsettled positions under the extant setup that require further clarity. One such key issue that needs to be resolved is striking a balance between party autonomy and *kompetenz-kompetenz vis-a-vis* power of the civil courts to grant anti-arbitration injunction.

While there is no set precedent for tracking down a definite answer to this question, the authors of this article make a sincere attempt to analyse the judicial trend, which started as early as 2001. This article reflects upon some of the major judgments in the last two decades, which set out a judicial trend in matters concerning anti-arbitration injunctions. Let us first gather a quick understanding of an anti-arbitration injunction and how it impacts India's arbitration landscape.

Meaning of Anti-Arbitration Injunction: It is referred to as an act of seeking restraining orders from the jurisdictional Court against the initiation or continuation of arbitration proceeding. The grant of an anti-arbitration injunction is often taken against the rule of *kompetenz-kompetenz*, stipulated under Section 16 of the Arbitration and Conciliation Act, 1996 [“the Act”].¹

The Doctrine of kompetenz-kompetenz: In layman’s language, it asserts the idea that the tribunal has the competence to decide upon its own jurisdiction. The legislature, by way of Section 16 of the Act, ensures that all jurisdictional questions shall be dealt with by the tribunal itself. It is the cornerstone of all the interpretations concerning the provisions of the Act.

¹ The Arbitration and Conciliation Act, 1996, s 16.

In a recent case, *M/s N.N. Global Mercantile v. M/s Indo Unique Flame Ltd.*,² the Division Bench of the Supreme Court observed that the doctrine of *kompetenz-kompetenz* implies that “...the arbitral tribunal has the competence to determine and rule on its own jurisdiction, including objections with respect to the existence, validity, and scope of the arbitration agreement, in the first instance, which is subject to judicial scrutiny by the courts at a later stage of the proceedings...”

The doctrine of *kompetenz-kompetenz* is built on the premise that the arbitration agreement is separate and independent from the substantive underlying contract in which it is embedded. An extension to this premise further stipulates that an arbitration agreement exists and can be acted upon, irrespective of whether the main substantive contract is valid or not. There are catena of judgments that have harped upon the supremacy of the arbitral tribunal over the civil court's jurisdiction by placing reliance on the principle of *kompetenz-kompetenz*.

Analysing Judicial trend to understand the legal position of Anti-Arbitration Injunction suit in India

The jurisprudence on the subject matter was laid down by the Supreme Court in the case of *Kvaerner Cementation India Limited v. Bajranglal Agarwal*,³ [**“Kvaerner Cementation”**], wherein the Court heavily relied on the doctrine of *kompetenz-kompetenz*, and observed that by virtue of Section 5 read with Section 16 of the Act, the arbitral tribunal has the power to decide upon the existence and validity of the agreement and therefore, the jurisdiction of civil courts with respect to the same is barred. The judgment lost its radar until 2012 when the Supreme Court cited it in *the case of A. Ayyasamy v. A. Paramasivam & Ors.*,⁴ [**“A. Ayyasamy”**].

Thereafter, in the matter of *Modi Entertainment Network v. W.S.G. Cricket*,⁵ the Supreme Court extensively discussed the issue and laid down certain important guidelines for the Court to satisfy before using its discretion to grant an anti-suit injunction.

In *SBP & Co. v. Patel Engineering Ltd. & Ors.*,⁶ the Seven-Judge Bench of the Supreme Court held that Section 16 of the Act only ensures the tribunal's ability to decide upon its jurisdiction but the same does not mean that the jurisdiction of the civil court is prohibited.

² *M/s N N Global Mercantile v M/s Indo Unique Flame Ltd* 2021 SCC Online SC 13.

³ *Kvaerner Cementation India Limited v Bajranglal Agarwal* (2012) 5 SCC 214.

⁴ *A Ayyasamy v A Paramasivam and Ors* 2016 AIR SC 4675.

⁵ *Modi Entertainment Network v W S G Cricket* [2003] AIR SC 1177.

⁶ *SBP & Co v Patel Engineering Ltd. & Ors* [2006] AIR SC 540.

The aforementioned judgment was recently overruled by *Vidya Drolia & Ors. v. Durga Trading Corporation & Ors.*,⁷ wherein it was held by the Supreme Court that the scope of a civil court to examine the *prima facie* validity of an arbitration agreement include only (a) Whether the arbitration agreement was in writing? (b) Whether the arbitration agreement was contained in an exchange of letters, telecommunication etc? (c) Whether the core contractual ingredients qua the arbitration agreement were fulfilled? (d) On rare occasions, whether the subject -matter of the dispute is arbitrable?

In *Bhusan Steel Ltd. v. Singapore International Arbitration Centre & Ors.*,⁸ the Delhi High Court held that if there is a valid arbitration agreement between the parties then the suit for restraining or injuncting the arbitration proceedings is not maintainable.

The Calcutta High Court in *LMJ International Ltd. v. Sleepwell Industries Co. Ltd. & Anr.*,⁹ [**“LMJ International Ltd”**] refused to grant any restraining order against the other party from taking steps for an arbitration proceeding seated in London. The Court observed that the contract was signed with full awareness and attention by both the parties and thereby one cannot contest the contention of *forum non-conveniens*.

Likewise, the Delhi High Court in *Sancorp Confectionary v. Gumlik*,¹⁰ following the judgment of *LMJ International Ltd*, observed the supremacy of the arbitral tribunal in the matters relating to arbitration and refused to interfere with the arbitration proceedings initiated in the Singapore International Arbitration Centre. It was held that the tribunal is competent enough to decide upon all the matter related to arbitration.

Subsequently, the Supreme Court in *Chatterjee Petrochem Company & Anr. v. Haldia Petrochemicals Limited*,¹¹ emphasised on the decision laid down in *Ganga Bai v. Vijay Kumar & Ors.*,¹² and upheld that every person has an inherent right to bring a suit of civil nature unless it is barred by statute.

Further, in *World Sport Group v. MSM Satellite Singapore Ltd.*,¹³ [**“World Sport Group”**] the Supreme Court explicitly acknowledged the jurisdiction of the civil court in granting such injunction orders. It was emphasised that as per Section 9 of the Code of Civil Procedure, 1908,¹⁴ the civil courts of

⁷ *Vidya Drolia & Ors v Durga Trading Corporation & Ors* 2020 SCC Online SC 1018.

⁸ *Bhusan Steel Ltd v Singapore International Arbitration Centre & Ors* 2010 SCC OnLine Del 2236.

⁹ *LMJ International Ltd v Sleepwell Industries Co Ltd* 2012 SCC OnLine Cal 10733 (DB).

¹⁰ *Sancorp Confectionary v Gumlik* 2012 SCC OnLine Del 5507.

¹¹ *Chatterjee Petrochem Company & Anr v Haldia Petrochemicals Limited* 2013 SCC OnLine SC 1084.

¹² *Ganga Bai v Vijay Kumar & Ors* (1974) 2 SCC 393.

¹³ *World Sport Group v MSM Satellite Singapore Ltd* AIR 2014 4 SCC 968.

¹⁴ The Code of Civil Procedure 1908, s 9.

India have an inherent power to decide on any civil matter unless such jurisdiction is expressly barred.

Subsequently, the Calcutta High Court in *The Board of Trustees of Port of Kolkata v. Louis Dreyfus Armatures SAS & Ors.*,¹⁵ held that the civil courts can grant anti-arbitration injunction orders only in exceptional cases.

Thereafter, in the case of *McDonald's India Private Limited v. Vikram Bakshi & Ors.*,¹⁶ the Delhi High Court placed relied on the judgment of the *World Sport Group*. The Court, while providing clarity on the difference between anti-suit injunctions and anti-arbitration injunction, held that the civil court has the jurisdiction to entertain the suit of injunction related to arbitration, but such power can be used only in limited circumstances: like when the arbitration clause is null, void or inoperative. The principle of *forum non-conveniens* come into play only where there are more than one competing courts. In the case of anti-arbitration injunctions, the arbitral tribunals are the alternate to courts and do not qualify as competing court. It is a forum chosen by the party to avoid the proceeding of the civil courts; hence it cannot be considered as *forum non-conveniens* per se.

In *A. Ayyasamy*, the Supreme Court dismissed the application filed under Section 8 of the Act.¹⁷ The Court relied on the judgment of *Kvaerner Cementation* and held that the court can only overlook the arbitration clause/agreement when there is a serious allegation of fraud. Mere allegation of fraud simplicitor does not nullify the arbitration agreement.

In *Bharti Tele-Ventures Ltd. & Ors. v. DSS Enterprises Pvt. Ltd. & Ors.*,¹⁸ the Delhi High Court decided that a suit filed for declaring the arbitration agreement invalid or for issuing an injunction to arbitration is not maintainable.

In *Ravi Arya v. Palmview Investments Overseas*,¹⁹ the Delhi High Court held that all the objections in terms of the arbitration including grant on injunction should be raised before the arbitral tribunal.

In *Overseas Himachal Sorang Power Pvt. Ltd. & Ors. v. NCC Infrastructure Holdings Limited*,²⁰ the Delhi High Court held that the anti-suit injunctions are not similar to anti-arbitration injunctions. The civil court cannot grant anti-arbitration injunctions until it is proved that the arbitration proceedings were vexatious or oppressive in nature.

¹⁵ *The Board of Trustees of Port of Kolkata v Louis Dreyfus Armatures SAS & Ors* 2014 SCC OnLine Cal 17695.

¹⁶ *McDonald's India Private Limited v Vikram Bakshi & Ors* 2016 (4) ArbLR 250 (Delhi).

¹⁷ *A Ayyasamy v A Paramasivam & Ors* AIR 2016 SC 4675.

¹⁸ *Bharti Tele-Ventures Ltd & Ors v DSS Enterprises Pvt Ltd & Ors* 2018 (6) Arb LR 118 (Delhi).

¹⁹ *Ravi Arya v Palmview Investments Overseas* 2018 SCC OnLine Bom 19886.

²⁰ *Overseas Himachal Sorang Power Pvt Ltd & Ors v NCC Infrastructure Holdings Limited* 2019 SCC Online Del 7575.

In *National Aluminium Company Limited v. Subhash Infra Engineers Private Limited*,²¹ the Supreme Court relied upon the judgment of the *Kvaerner Cementation*, and held that any objections with respect to the validity or existence of the arbitration agreement can only be raised before the arbitrator by way of an application under Section 16 of the Act and the civil court does not have jurisdiction to go into such question in a civil suit. The same is contrary to the judgment of *Duro Felguera S.A v. Gangavaram Port Limited*,²² wherein it was held that the court needs to look into the validity and existence of the arbitration clause/agreement before appointing an arbitrator.

Eventually, in *Bina Modi & Ors. v. Lalit Modi & Ors.*,²³ [**“Bina Modi”**] it was observed by the Delhi High Court that if the statute has provided for the mode of obtaining the same relief before the Arbitral Tribunal, the Court under Section 41(h) of Specific Relief Act, 1963 [**“SR Act”**]²⁴ would not grant the same relief i.e., of an anti-arbitration injunction. Further, it was observed that the judgment of the *Kvaerner Cementation* is binding on the Court and hence it does not have the jurisdiction to decide upon the validity and existence of the arbitration agreement. Following the principle of party autonomy and competence-competence, the Court held that the same shall only be dealt with by the arbitrator.

The aforesaid judgement was later overruled by the Division Bench of Delhi High Court vide an order dated December 24, 2020.²⁵ The Bench observed that the Single Judge gravely erred by failing to exercise the jurisdiction vested in the Court, which statutorily required him to adjudicate the dispute between the parties. The Division Bench held that the issue falling under Indian Trust Act, 1882 cannot be the subject matter of arbitration since the same are excluded from the purview of the arbitral tribunal by necessary implication. The Division Bench also clarified that the reference made to Section 41(h) of SR Act in the impugned judgment is fallacious since under Section 16 of the Act, the Court cannot provide any relief in the present case, much less an equally efficacious relief.

Lastly, in *Balasure Alloys Limited v. Medima LLC*,²⁶ the Calcutta High Court denied the precedential value of the *Bina Modi* case, and ruled that the civil courts are well within its power to grant anti-arbitration injunctions order even against the foreign seated arbitration. The Supreme Court

²¹ *National Aluminium Company Limited v Subhash Infra Engineers Private Limited* (2020) 15 SCC 557.

²² *Duro Felguera S A v Gangavaram Port Limited* (2017) 9 SCC 729.

²³ *Bina Modi & Ors v Lalit Modi & Ors* 2020 (2) Arb LR 446 (Delhi).

²⁴ The Specific Relief Act 1963, s 41(h).

²⁵ *Bina Modi & Ors v Lalit Modi & Ors* (2021) (1) Arb LR 1 (Delhi).

²⁶ *Balasure Alloys Limited v Medima LLC* (2020) 9 SCC 136.

upheld the same by its order dated September 16, 2020.²⁷ The Court took a holistic view of the facts and relied on the judgment of *Olympus Superstructures Pvt. Ltd. v. Meena Vijay Khetan & Ors.*,²⁸ The Court held that the arbitration clause in the main agreement was wider and included matter connected with the main agreement within in its sweep, and thus, it would be inappropriate to invoke another arbitration clause of another agreement when the arbitral tribunal has already been constituted under the main agreement.

A Way Forward

In the authors' view, ousting the jurisdiction of the civil courts is not only an extreme position and an interpretation that stands against the very statute. While giving complete respect to the party's autonomy and Section 16 wherein the arbitral tribunal is empowered to decide the jurisdictional issue; the access to civil courts aids in imparting justice to an aggrieved party by giving it an additional legal remedy.

The concept of independent proceedings is not alien to the arbitral tribunal. However, the same cannot and should not be interpreted in a manner that treats the arbitral proceedings distinct to general relief that the civil court may grant. While the authors believe that the power of interference by the civil court should be restricted to certain exceptional situations so that the sanctity of the arbitration process remains intact, they are also of the opinion that the grant of an anti-arbitration injunction is a general remedy that is outside the jurisdiction of the arbitral tribunal. The power of the arbitral tribunal, while granting any relief which occurs post-initiation of the arbitration proceedings is undoubtedly supreme but at a pre-initiation stage, we certainly cannot bar the jurisdiction of civil court and take away the legal remedy available with the aggrieved party.

²⁷ *ibid.*

²⁸ *Olympus Superstructures Pvt Ltd v Meena Vijay Khetan & Ors* (1999) 5 SCC 651.