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FROM ADHESION TO COHESION- RECONTEXTUALIZING THE APPLICATION OF THE GROUP OF COMPANIES DOCTRINE UNDER THE LAW OF ARBITRATION

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Introduction

By declaring the need to advert to the 'Seventh Generation' sustainability principle (also called the *'Great Law of the Iroquois'- "which requires all decision making to withstand for the benefit of seven generations down the line"*), the Supreme Court ("**Court"**) in its landmark decision, *Municipal Corporation of Greater Bombay v. Ankita Sinha and Others* ***(Ankita Sinha Case)***[1] has confirmed: the nature of ecological imbalance at present will have an egregious impact on the communities, the National Green Tribunal ("**NGT**") being a social-centric forum cannot be a mute spectator and has the responsibility to arrest irreparable environmental damages, and thus, the NGT is well-within the contours of its statutory powers when taking suo moto cognizance of environmental exigencies. The Civil Appeal in the matter of Ankita Sinha Case was a result of the suo motu cognizance taken by the NGT pursuant to an article that was published on The Quint which discussed about the adverse impact of mismanagement of solid waste at the Deonar Dumping site of Mumbai on the environment and the health of the people living around that vicinity. The report from the inspection that was undertaken pursuant to the orders of the NGT revealed that the landfill site had failed to comply with the provisions of the Solid Waste Management Rules, 2016, and thereafter, the Municipal Corporation of Greater Bombay (**Bombay Municipal**) was directed to pay a sum of Rs. 5 crores for the damage that was caused to the environment. In consequence, the Bombay Municipal filed a Civil Appeal against the order of the NGT before the Court. The Court in its judgement undertook an interpretation of the legislative intent behind the creation of the NGT while referring to Law Commission Reports and relevant case laws, some of which have

[1] *Municipal Corporation of Greater Bombay v Ankita Singh* 2021 SCC OnLine SC 897

been touched upon in this paper in the later chapters, to observe the suo motu powers of the NGT in deciding environmental disputes.

At present, India has only one forum i.e. the NGT that is largely equipped to deal with technical matters of environmental disputes. Now, the effect of any disbalance in the ecosystem will be suffered by the people, including other inhabitants, of the system. While we do have a specialised body like the NGT to adjudicate environmental disputes in India, often parties to a contract agreement concerning matters of construction, energy, and similar others, prefer arbitration as a mode of dispute resolution for issues central to their agreements. This paper aims to discuss the scope of arbitrability of environmental disputes in India in light of the wide jurisdictional powers enjoyed by the NGT vis-a-vis the controversies that might emanate from the tussle between the suo motu powers of the NGT and the doctrine of party autonomy exercisable by the parties in determining the procedure for adjudication of disputes central to their arbitration agreements.

NGT's Scope of Power in Adjudicating Environmental Disputes

The NGT is a special forum which is the creation of a statute, and at present, it has the sui generis powers to hear all environment-related matters.[2] It has, therefore, been reckoned as well that the creation of the NGT was to disburden other courts from hearing matters that fall within their jurisdiction, and hear substantial questions relating to the environment law with scientific and technical issues.[3] The Court has clarified that the NGT is primarily concerned with the protection of the environment (involving a private, government, individual or any other body as a party, representing either one or both the sides in a suit). In this capacity, the NGT is empowered to settle and adjudicate and thereafter pass orders relating to all environment-related questions.

> *"21. The NGT, therefore, was intended to be the competent forum for dealing with environmental issues instead of those being canvassed under the writ jurisdiction of the Courts. It was explicitly noted that the creation of the NGT would allow for the Supreme Court and High Court to avoid intervening under their inherent jurisdiction when an alternative efficacious remedy would become available before the specialized forum."*[4]

Upon referring to the 186th Law Commission Report[5] along with the observations laid down in the case of *DG NHAI v. Aam Aadmi Lokmanch* ***("Lokmach case")***, it is established that the

[2] *Paramjit Kaur v. State of Punjab* [1999] 2 SCC 131

[3] The National Green Tribunal Act, 2010, s 4

[4] Municipal Corporation Greater Bombay (n 1), para 21

[5] Law Commission of India, Report No 186: Proposal to constitute environment courts (2003)

NGT's powers are compensatory in nature only to the extent of compensating the people who are affected by environmental hazards, its role is remedial in nature which is based on the reflexive exercise of powers, wherein the powers can be exercised to modify and monitor schemes that are related to the environment, and that the restitution powers aim to roll out distributive and corrective justice in the society only.[6]

Following reasoning has been outlined in the 186th Law Commission Report:

> *"Likewise, we have not thought it fit to enable the Environmental Courts, to have judicial review powers exercised by the High Court under Art. 226 of the Constitution of India. We have felt that it is sufficient to vest original civil jurisdiction as exercisable by a Civil Court, in the Environmental Courts. If we vest powers of Judicial review as under Art. 226, then there may be need to subject the orders to the writ jurisdiction of High Courts as held in L. Chandra Kumar v. Union of India. No doubt, the Environment Court exercising powers of a Civil Court or as an appellate Court in civil jurisdiction, may be technically amenable to writ jurisdiction of the High Court but inasmuch as we are providing an appeal to the Supreme Court, the High Courts may decline to interfere on the ground that there is an effective alternative remedy of appeal on law and fact to the Supreme Court, as explained later in this Chapter."* [7]

Further, the *Lokmach case* has also fairly demonstrated the scope of jurisdictional powers that the NGT has been vested with, i.e. quasi-judicial power embodying both appellate over regulatory bodies' orders and directions under Section 16 of the National Green Tribunal Act, 2010("**Act**"),[8] and original jurisdiction power under Sections 14,15 and 17 of the Act.[9]

The Doctrine of Party Autonomy

The Court has consistently upheld in a series of judgements that 'party autonomy' is the guiding *grundnorm* for the arbitration laws in India like the Arbitration and Conciliation Act, 1996 ("**1996 Act**") and across the globe,[10] and represents a very central component of valid contractual agreements, including arbitration agreements ("**agreement**").[11] The doctrine of 'party autonomy' in its true form allows a party to exercise their freedom in choosing certain aspects of an agreement, which includes determining their rights and obligations, delineating the preferred dispute resolution mechanism, and the procedure for conducting the same, among others.[12] Due to its

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6 *DG NHAI v. Aam Aadmi Lokmanch* 2020 SCC OnLine SC 572

7 Law Commission of India *Proposal to constitute environment Courts* (n 5), Chapter II

8 National Green Tribunal (n 3), s 16

9 National Green Tribunal (n 3), s 14,15,17

10 *Amazon Investment Holdings LLC v. Future Retail Limited & Ors* 2021 SCC OnLine SC 557

11 ibid

12 *Centrotrade Minerals and Metal v. Hindustan Copper* [2017] 2 SCC 228

speedy and effective remedial nature, most of the parties engaged in the industry of commercial business like construction, oil & gas, real estate management, and similar others are preferring arbitration or negotiation as an alternative mechanism to courts for resolution of their disputes. The growing inclination of parties to an agreement to mutually consent to arbitration is largely due to their freedom to determine the place of arbitration, laws to govern the substance of the dispute, and laws to govern the procedure of the arbitration. The liberty of the parties to an arbitration to choose the laws that will govern the procedural and substantive aspects of the dispute is contained in the UNCITRAL Model Law and the 1996 Act,[13] both of which have been adopted by India. The jurisprudence around arbitration laws in India has evolved with Indian Courts allowing Indian parties to arbitrate outside India too.[14] It has allowed them to recognize the freedom of the parties to choose either/both foreign and/or domestic laws[15] for governing the arbitration proceedings.[16] Recently, emergency awards have also been conferred with validity[17].

Globally, there is a push for referring environmental disputes, both in public and private matters, to arbitration over litigation in courts. This is primarily due to the need for a faster delivery of justice in environmental matters and flexibility of parties to choose the procedure for settlement of their disputes. Here, it should be kept in mind that any environmental exigency will have a direct impact on all the inhabitants of the ecosystem, whether the cause of concern has its genesis in a contract or is a result of the sole act of a public authority. At present, the Court has outlined the jurisdictional powers of the NGT in India to take suo motu cognizance of matters concerning environmental exigencies, without clarifying whether party autonomy in arbitration agreements involved in environmental disputes will override the NGT's suo motu powers. The next chapter of this paper will be limited to analysing the foreseeable conflicts that may arise due to lack of clarity in, and overlapping of, procedural laws governing environmental disputes in India at the moment.

The Foreseeable Tussle between NGT & Party Autonomy

Besides several legislations, rules, and policies that currently exist to address the climate change concerns in India,[18] the Constitution of India mandates for the preservation of life and liberty of

13 Uncitral Model Law on International Commercial Arbitration, 1985; Arbitration and Conciliation Act, 1996

14 *Bhatia International v. Bulk Trading S.A.* [2002] 4 SCC 105

15 *PASL Winds Solutions Pvt. Ltd. v. GE Power Conversion India Pvt. Ltd.* 2021 SCC OnLine SC 331

16 *Addhar Mercantile v. Shree Jagdamba Agrico Exports* 2015 SCC OnLine Bom 7752.

17 Amazon Future Retail, n 10

18 National Solar Mission (started in 2010); National Mission for Enhanced Energy Efficiency (approved in 2009); National Mission on Sustainable Habitat (approved in 2011); National Water Mission; National Mission for Sustaining

every person by recognising their right to a healthy environment as a fundamental right,[19] demanding the State to take steps to safeguard the natural flora and fauna,[20] and establishing that the duty of every citizen of India is to endeavour for the protection and preservation of the natural environment and its constituents.[21] Additionally, the Polluters Pay Principle and the Public Trust Doctrine play a key role in the adjudication of environmental disputes in India.[22] Towards achieving the objective of implementing the laws and principles, there are courts and tribunals like the NGT that are empowered to adjudicate on environmental disputes, with the latter having been created recently in 2010.

Implication of Special Nature of NGT

The NGT is neither an administrative nor a constitutional body[23] but is a special creation of a statute that has been granted with wide jurisdictional powers to deal with various kinds of disputes involving environmental law violations and hear appeals against orders passed by regulatory agencies.

> *Excerpt: "41. ...Suffice it to say that the NGT is not a tribunal set up either under Article 323-A or Article 323-B of the Constitution, but is a statutory tribunal set up under the NGT Act. That such a tribunal does not exercise the jurisdiction of all courts except the Supreme Court is clear from a reading of Section 29 of the NGT Act.....".*[24]

It is therefore a specialised judicial body with limited powers of a court such as the original jurisdiction, appellate jurisdiction, etc., while not having the liberty to invalidate any law nor exercise power for judicial review, among others. Given the complex nature of environmental disputes as they concern different arenas of subjects, including science, economics, politics, trade, technology, and diplomacy, parties to commercial contracts often exercise their liberty to choose the law that will govern the arbitration disputes and concurrently demarcate their rights and obligations by allocating environmental risks through the inclusion or exclusion of indemnity clauses in such contracts. What remains unaddressed in the Court's recent decision allowing the NGT to take suo motu cognizance of environmental exigencies are procedural concerns that may arise due to uncertainty about the nature of the rights involved in an environmental dispute.

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the Himalayan Ecosystem (approved in 2014); National Mission for a Green India (approved in 2014); National Mission for Sustainable Agriculture (approved in 2010); National Mission on Strategic Knowledge for Climate Change

19 *Tata Housing Development Company Ltd. v Aalok Jagga and Ors.* [2020] 15 SCC 784

20 Constitution of India, art 48A

21 Constitution of India, art 51A

22 *M.C. Mehta vs Kamal Nath & Ors* [1997] 1 SCC 388

23 *Tamil Nadu Pollution Control Board v. Sterlite Industries (I) Ltd* [2019] 19 SCC 479

24 ibid

Identifying the nature of the rights involved in an environmental dispute is particularly important in the context of determining the arbitrability of the same before an arbitral tribunal. The Court in *Vidya Drolia & Others v. Durga Trading Corporation* (**Vidya Drolia**) [25]propounded a four-fold test for identifying whether a subject-matter of a dispute is arbitrable or not, which are as follows:-

(1) when cause of action and subject matter of the dispute relates to actions in rem, that do not pertain to subordinate rights in personam that arise from rights in rem.

(2) when cause of action and subject matter of the dispute affects third party rights; have *erga omnes* effect; require centralized adjudication, and mutual adjudication would not be appropriate and enforceable;

(3) when cause of action and subject matter of the dispute relates to inalienable sovereign and public interest functions of the State and hence mutual adjudication would be unenforceable; and

(4) when the subject-matter of the dispute is expressly or by necessary implication non-arbitrable as per mandatory statute(s).

In a subsequent matter of *Suresh Shah v. Hipad Technology India Private Limited* (**Suresh Shah**)[26] the Court further clarified that arbitrability of a particular subject-matter is also contingent upon whether the same is governed by a general statute or a special statute, and if it is the latter, then the dispute is non-arbitrable. In addition to this clarification, the Court remarked that the jurisdiction of an arbitral tribunal is limited to disputes concerning or arising out of the terms and conditions of the agreement in question.

The idea that environmental disputes impact almost all the inhabitants of our ecosystem whether directly or indirectly might give a fair impression that environmental disputes are right in rem. Additionally, the fact that the NGT is a special creation of the statute i.e. the NGT Act and has its sui generis power to take suo motu cognizance of environmental disputes, might also appear to satisfy one of the grounds of the four-fold test laid down in the Vidya Drolia case. However, upon referring to the earlier discussed case of Suresh Shah, and *Eros International Media Limited v. Telemax Links India Pvt. Ltd.*[27] where the Bombay High Court ruled that all Intellectual Property cases are not essentially 'right in rem', particularly the ones involving specific parties and so cannot be said to be non- arbitrable, it seems only plausible to place environmental disputes on the same footing. It could be argued that the Bombay High Court's reasoning was largely based on the idea that intellectual property rights do not impact the interests of everyone in the world except for the parties concerned, while environmental disputes regardless of their origin impact the inhabitants

25 *Vidya Drolia & Ors v. Durga Trading Corp* 2019 SCCOnLine SC 358

26 *Suresh Shah v. Hipad Technology India Pvt Lyd* 2020 SCCOnLine 1038

27 *Eros International Media Limited v. Telemax Links India Pvt. Ltd* 2016 SCC OnLine Bom 2179

of our ecosystem. Nevertheless, it the author's opinion that while following the precedent set in Suresh Shah's case, it should also be taken note of that environmental disputes arising out of, or in relation to, an agreement will impact private rights of the parties to the agreement, who might have also allocated environmental risks through the inclusion of indemnity clauses in such agreements. Moreover, Section 89 of the Code of Civil Procedure clearly states that "if the court deems fit, it can allow arbitration, mediation or conciliation for settlement of disputes between parties outside the court"[28] which is expressly inclusive of environmental-related disputes. Thus, the arbitral tribunal cannot be ousted of its jurisdiction to hear matters concerning the environment, and environmental disputes arising out of commercial contracts should be subject to commercial arbitration in India.

Scope of Suo Moto cognizance

For maintainability of a suit before the NGT, following three conditions must be fulfilled: a) the dispute must be civil in nature, b)the dispute must necessarily arise out of the implementation of enactments specified in Schedule I of the NGT Act, and c) dispute must have a substantial question relating to the environment. Since there are no precedents so far where awards relating to environmental disputes have been aside under any of the grounds mentioned in Section 34 of the 1996 Act, there is a two-fold concern that exists at the moment: procedural constraints arising out of ambiguity in the law, and imminent threat to the interests of the stakeholders i.e. the parties to a contract. Addressing the concerns, the Court while clarifying the legislative intent behind the creation of the NGT did not mention whether the scope of the Act will have an overriding effect on the 1996 Act. Further, it is unclear whether the NGT can take suo motu cognizance of contract-related environmental disputes against parties' already-decided procedure for dispute resolution mechanism. Here, the repercussions of compromising with the parties' autonomy could be adverse. This is because the private parties to a contract/agreement might have agreed upon laws from different jurisdictions that will be applicable to their contractual disputes. Forceful imposition of Indian laws and litigation procedures as followed before the NGT upon parties including those who are foreign might be an inconvenience, especially for those who are unfamiliar with the domestic litigation procedures. Parties, whether Indian or foreign, will also be burdened with engaging lawyers and incurring expenditure on complex and lengthy litigation procedures in India if directed to proceed with their disputes before the NGT. Moreover, the NGT has its principal bench in New Delhi with four other regional benches at Bhopal, Pune, Kolkata, and Chennai. This is a geographical limitation that the parties to a contract might face due to the restricted and fixed

[28] Code of Civil Procedure, 1908, s 89

number of benches of the NGT, while a similar difficulty will not be faced upon choosing arbitration as arbitral tribunals can be set up anywhere based on the parties' choice of convenience. Another dimension to this procedural tussle lies in the enforcement of the awards. Pursuant to the ratification of The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 ("**the New York Convention**"), an award passed by a foreign tribunal can be enforced in India.[29] Further, it has been clarified through a catena of judgements that the Apex Court or High Courts do not sit in appeal to the awards passed by a tribunal[30] and that the courts cannot go into the merits of the awards unless the grounds as specified under Section 34 of the 1996 Act have been fulfilled.[31] Encouraging the arbitrability of environmental disputes in international/domestic arbitrations will create a more sustainable environment, but might also provide leeway to private parties to escape liability through the inclusion of indemnity clauses in their agreements. Nevertheless, it is very likely that the NGT being a special judicial body created for hearing environmental matters, might raise objections to the decision rendered by a tribunal through an award in the matter of environmental disputes. So, does the 'special' nature of the NGT allows it to interfere with a valid award on the ground that it might have repercussions on the ecosystem? In the case of *Md. Army Welfare Housing Organization v. Sumangal Services (P) Ltd* [32], it was observed that a tribunal is not a court of law, its orders are not judicial orders, and its functions are not judicial functions, and therefore, it could not exercise its power ex *debito justitiae* i.e. 'as a matter of right' .

The arbitrator's jurisdiction "being confined to the four corners of the agreement, he can only pass such an order which may be the subject matter of reference". However, the NGT being a special judicial body, subject to the limitations on its powers to invalidate a law as has been discussed earlier, can exercise certain functions which are judicial in nature. One of the foreseeable possibilities is that the NGT might justify its actions for interfering with an award on the grounds that the decision of the arbitral tribunal is against the fundamental policy of India due to its adverse impact, either directly or indirectly, on the inhabitants of the ecosystem. Hence, based on the findings so far and the existing jurisprudence, it cannot be conclusively determined whether the NGT's suo moto power extends to allowing it to interfere with the awards or not.

Suggestive Steps that can be taken by the Courts in India

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29 *PASL Winds Solutions* (n 15).

30 *Associate Builders v. Delhi Development Authority,* [2015] 3 SCC 49.

31 Arbitration and Conciliation Act, 1996, s 34 (2)

32 *Md. Army Welfare Housing Organization v. Sumangal Services (P) Ltd* [2004] 9 SCC 619

As has already been duly acknowledged, arbitrability of environmental disputes in contractual agreements cannot ideally take place without the impleading of parties to the suit and against parties' consent. Therefore, the Judiciary can try to take a different approach wherein it can acknowledge that any dispute regardless of its origin (i.e. arising out of a contract or individual act) will become public in nature if such dispute concerns environmental sustainability. The rationale behind this, as has already been established, is that environmental disputes directly impact the people who are its inhabitants. Since Sections 9 and 34 of the 1996 Act do not envisage the NGT as a forum that is empowered to pass interim orders or set aside an award that is detrimental to the public policy of India, parties in such case can first approach either a District Court or a High Court who will then direct them to the tribunal. The rationale behind this is to allow the courts to segregate the in rem issues from in personam, if any, from the dispute before them, In furtherance of this, efforts by the parties to a contract should be directed towards introducing changes in the drafting of arbitration clauses, wherein powers of the tribunal could be limited to only commercial matters in a dispute, in order to incorporate the above-suggested procedure for resolution of environmental disputes.

Conclusion

The discussion so far in the above analysis was from a futuristic perspective of what could happen in the event of a procedural clash between the two forms of adjudicatory mechanisms for environmental disputes that currently prevail in India. In current times, there is no single body in India that is fully equipped to handle all types of technical issues in environmental disputes, because instances have occurred where even the NGT has erred in its judgement (for example- the NGT has discussed strict liability in its judgements when the concept of absolute liability already exists in the Indian legal jurisprudence).[33] Therefore, it cannot be guaranteed that the NGT would under all circumstances be correct in interfering with an award/arbitration proceeding on the ground that the arbitrators/arbitral tribunals are inefficient to deal with a particular environmental matter. Arbitration has the scope of widening the chances of conducting a more efficient adjudication of environmental disputes, largely due to the fact that parties have the option to appoint the arbitrators or institutions who can appoint arbitrators, which provides them with a wider pool of options to choose people from who have expertise in a particular subject-matter of a dispute. However, it is not untrue that even arbitrators can err in their judgement. In any case, it seems more feasible to encourage arbitrability of environmental disputes over litigation before

[33] *Jalbiradari and Anr. v. Ministry of Environment & Forests Through its Secretary and Ors* 2016 SCC OnLine NGT 188

the NGT because it is party-friendly due to its familiarity and flexibility across jurisdictions, and it is relatively speedier due to less formal procedure compared to litigation. In conclusion, it remains an unsolved task for both the Parliament as well as the Court to provide more clarity on the scope of jurisdictional powers of the NGT and the arbitral tribunals in the matter of environmental disputes.