The Indian Journal for Research in Law and Management

Open Access Law Journal – Copyright © 2023

Editor-in-Chief – Prof. (Dr.) Muktai Deb Chavan; Publisher – Alden Vas

ARBITRABILITY OF CLAIMS OF OPPRESSION AND MISMANAGEMENT IN INDIA: NEED TO RETHINK?

Research question-Whether claims of Oppression and Mismanagement are arbitrable in India? Is there a need to rethink the Indian position and align it with other common law jurisdictions?

Abstract-

India has lately experienced a sharp increase in the usage of arbitration as a form of dispute resolution. The most important problem raised by the growing use of arbitration is whether or not claims currently subject to statutory remedies can be arbitrated. Chapter XVI of the Companies Act, 2013 provides for the provisions of Oppression and Mismanagement which provide protection to the minorities against any actions by the majority shareholders that could possibly prejudice or oppress their interests unreasonably. Section 210 of the English Companies Act, 1948, served as an example for many other common law nations, including India, as it first established such protection against oppressive actions. On one end of the spectrum, some decisions have taken the arbitration clause into consideration and have subsequently ordered the dispute to arbitration. In comparison, certain other rulings have ruled that oppression and mismanagement related disputes are inherently not subject to arbitration. The Indian arbitration law system has become more complex because of the incoherence in the jurisprudence on this topic. The current paper explores the frequently debated topic of whether

oppression and mismanagement disputes are arbitrable. It also aims to reassess India's legal stance on the arbitrability of claims of prejudice, mismanagement, and oppression in light of changes in other common law jurisdictions.

Keywords-Oppression, mismanagement, arbitrability, prejudice

Introduction-

The statutory provisions for preventing mismanagement and oppression in a company are found in Chapter XVI of the Act, which is comprised of Sections 241–246. In accordance with Indian law, there is a conflict between the National Company Law Tribunal (NCLT) and Section 8 of the Arbitration and Conciliation Act 1996, which establishes the power of the courts to refer cases to arbitration[1]. A party who has been mistreated by oppression, mismanagement, or prejudice commonly approaches the NCLT to request a range of reliefs. In response to such accusations, the opposite party submits an application to the NCLT under Sections 8 or 45 of the Indian Arbitration Act, 1996, based on whether the arbitration will take place in India or abroad, requesting that the dispute be sent for arbitration. Thus, the question of whether oppression, mismanagement, and prejudice claims are arbitrable has only been addressed in Indian law from the perspective of procedures conducted in accordance with Sections 8 and 45 of the Indian Arbitration Act, 1996[2].

In order to refer a dispute to arbitration under Section 8, it is not explicitly necessary for the dispute to be arbitrable. However, the situation warrants the tribunal's ability to render a decision. The term "arbitrability" has a few general definitions that have been established by judges over time. Experts commonly refer to the *Booz Allen & Hamilton Inc. v. SBI Home Finances Ltd*.[3] decision,

[1] The Arbitration and Conciliation Act, 1996, § 8.

[2] Shreyas Jayasimha and Rohan Tigadi, 'Arbitrability of Oppression and Mismanagement and Prejudice Claims in India: Need for Re-think?' (2018) 11 <NUJS L. REV>.

[3] Booz Allen & Hamilton Inc. v. SBI Home Finances Ltd., (2011) 5 SCC 532.

which clarifies the "distinction between the rights in personam and rights in rem concerning arbitrability." The former was determined to be arbitrable, whereas the latter was determined to be non-arbitrable[4]. As the arbitral tribunal only decided on purely contractual concerns, oppression and mismanagement issues were sent to the Company Law Board. The *Rakesh Malhotra v. Rajinder Kumar Malhotra*[5] decision, which ruled that only those conflicts can be referred to arbitration which the arbitrator is capable to adjudicate, reaffirmed the same viewpoint. It does not prevent the concerns from being directed to arbitration, though, if the party attempted to file a petition under the pretext of an oppression and mismanagement issue to obliterate an arbitration clause or if the petition is frivolous or vexatious, it cannot be permitted to succeed. Further, it was laid down in *Emgee Housing (P) Ltd. v. ELS Developers (P) Ltd*.[6] that even if the parties have an arbitration agreement and the dispute is covered by the arbitration agreement, the court or judicial authority will dismiss the application under Section 8 of the Arbitration and Conciliation Act if the claim's subject matter is limited to resolution by a public forum. In the case of *Dhananjay Mishra*[7], the NCLAT had to deal with an impugned judgement that denied a Section 8 application in a dispute involving oppression and mismanagement claims that were made in a company petition. An intriguing detail that came up in this decision was that the parties had voluntarily decided to nominate a sole arbitrator and that the Respondent had submitted an application under Section 17 of the Arbitration Act. However, the Appellant requested that the NCLT refer the problems to arbitration by filing a Section 8 application in the company case. The sole arbitrator held that the concerns raised in the company petition and the Section 17 application are distinct. The sole arbitrator held that ‘the powers

[4] Avinash Kumar, ‘Arbitrability of Oppression and Mismanagement Petitions in India’ <Statute Law Review> (2015) 36 (2) https://doi.org/10.1093/slr/hmv002.
[5] Rakesh Malhotra v. Rajinder Kumar Malhotra, (2015) 192 Comp Cas 516.
[6] Emgee Housing Pvt. Ltd. V. ELS Developers Pvt. Ltd., (2016) SCC Online Bom 2391.
[7] Dhananjay Mishra v. Dynatron Services Private Limited, 2019 SCC Online NCLAT 163.

accessible to NCLT to determine upon issues of oppression and mismanagement could not be exercised by the sole arbitrator'.

Tests Of Arbitrability-

The courts have differing views on the scope of arbitrability in India. The extent of arbitrability is still a subject of debate. To identify the range of conflicts that can be arbitrated in India, the courts have established the following tests:

The Remedies Test-

Under normal circumstances, every case which a regular civil court can decide, could also be decided by an arbitral tribunal. However, claims relating to oppression and mismanagement are unique because the NCLT has been bestowed with specific legislative powers that are not exercisable by regular civil courts[8]. For instance, the NCLT may order that company affairs be overseen, that the management be changed, that dishonest directors, managers, and officers of the company be fined for fraudulent conduct, misfeasance, and fraud, among other things, or that any other relief considered essential to end oppression and mismanagement be awarded. As a result, since an arbitral tribunal does not possess as much authority, courts and tribunals in India typically view accusations of oppression and mismanagement as unresolvable through arbitration[9]. In this regard, it should be highlighted that an arbitral tribunal can only decide disputes that conform with the terms of the contract considering that it is a creature of a contract[10]. Furthermore, unless expressly granted by the parties, India-seated arbitrations are not permitted to resolve disputes using equity principles[11]. It is interesting to note that in *Punita Khatter v. Explorers Travels and Tours Private Limited*, the NCLT bench adopted the position that the NCLT's jurisdiction could not be overturned even with the parties' assent[12]. Therefore, any

[8] Supra note 1 at 537.
[9] Jugnar Processors (P) Ltd. V. Rohtas Jugalkishore Gupta, 2014 SCC Online CLB 160.
[10] The Arbitration and Conciliation Act, 1996, § 28 (3).
[11] The Arbitration and Conciliation Act, 1996, § 28 (2).
[12] Punita Khatter v. Explorers Travels and Tours Private Limited, (2017) 201 CompCas178.

contract that aims to nullify the jurisdiction of the NCLT is invalid in that respect[13].

The Bifurcation of Claims Test-

Although the Indian Arbitration Act, 1996 requires that any dispute that is subject to the arbitration agreement be referred to arbitration, it does not permit the division of claims[14]. In this context, it is crucial to take into account that Indian court authorities are compelled to compulsorily present the parties to arbitration if the arbitration agreement includes the subject matter of the dispute under Sections 8 and 45 of the Indian Arbitration Act[15]. Nevertheless, if the dispute's subject matter is not entirely encompassed by the arbitration agreement, the Indian Arbitration Act, 1996 fails to include a provision mandating the claim covered by the arbitration agreement to be bifurcated and brought to arbitration[16]. However, courts and judicial authorities are aware that in an effort to invalidate valid arbitration agreements, parties may resort to filing frivolous, malicious, and "dressed-up" oppression, mismanagement, and prejudice applications[17]. As a result, they have advised against using a rigid formula when deciding whether to accept Section 8 or 45 applications. In this regard, it is significant to highlight that the judgements of Indian Courts and judicial authorities can be used to show whether a claim of oppression, mismanagement, and unjust prejudice has been made in a lawful way using an approach that involves two components. They are:

The Necessary Parties Test

As was previously indicated, courts and judicial bodies often decline to submit problems to arbitration if there exists no commonality amongst the parties to the dispute and the parties to the arbitration agreement. Legal strangers to the cause of action are commonly added as parties in oppression, mismanagement,

[13] Supra note 1 at 537.
[14] Sukanya Holdings (P) Ltd.v. Jayesh H. Pandya, (2003) 5 SCC 531.
[15] Chloro Controls India (P) Ltd. v. Severn Trent Water Purification Inc., (2013) 1 SCC 641.
[16] Supra note 10.
[17] Rakesh Malhotra v. Rajinder Kumar Malhotra, (2015) 2 Comp LJ 288.

and prejudice claims in an effort to get around the arbitration agreement. For example, in some circumstances the company's directors, who are not parties to the arbitration agreement, are included as parties to the petition in order to prevent bringing the dispute to arbitration. The "necessary parties" standard has been adopted by Indian courts and judicial bodies as a means of preventing such abhorrent tactics by some parties[18].

The Totality Test-

In order to determine whether a petition is vexatious or merely dressed up, it is necessary to read the petition in its whole, with special attention paid to the grounds and reliefs requested. The parties should be sent to arbitration if the NCLT/NCLAT determines after conducting such a thorough investigation that the reliefs requested in the petition may be awarded by an arbitral tribunal and that the petition's primary goal was to invalidate the arbitration agreement[19].

Indian Position-

According to the analysis above, Indian courts have deemed accusations of oppression and mismanagement to be principally inarbitrable, concluding that the NCLT's statutory jurisdiction cannot be overturned. While it is true that courts have occasionally diverged in their opinions, these divergent rulings appear to have been influenced by the particular facts of the cases in question. As a result, although a thorough review of the jurisprudence on this subject would seem to indicate that the Courts' positions on the arbitrability of oppression and mismanagement claims remain ambiguous, there seem to be early indications that the case law is beginning to shift against the arbitrability of such disputes in general.

Why is there a need to rethink Indian position?

International arbitral standards demand that the National Arbitral Legislation remain unrestricted, encouraging the parties to submit their problems

[18] Sidharth Gupta v. Getit Infoservices (P) Ltd., 2016 SCC Online CLB 10.
[19] Supra note 14.

to arbitration with the exception of the restriction of rescinding an arbitral ruling for violating national public policy. Thus, no such limitations on the scope of arbitrability should be established by the National Arbitral Legislation. This means that the impetus to clarify the arbitral legislation continues to be with the national courts. According to international criteria of arbitrability, the arbitration procedure must be independent of the whims of local courts[20]. Normally, without the involvement of the court, all conflicts are to be referred to arbitration. A number of formerly inarbitrable matters can now be arbitrated pursuant to the expanded meaning of arbitrability in American law. From the Indian point of view, this comparative discussion is crucial since India aspires to be recognized as a pro-arbitration jurisdiction[21]. Courts in the United States of America have given tribunals the authority to decide whether oppression and mismanagement disputes can be arbitrated. The US practice is unique in that it embraces a broad definition of arbitrability. Arbitrability was limited not only to the subject but also to the forum that gets to choose the issue first and whether or not a valid arbitration agreement was in place. It is safe to say that arbitrability in the US includes competence-competence as well as subject matter, which is the appropriate course of action.[22]

As demonstrated in the aforementioned considerations, courts have limited arbitrability in the Indian context, while arbitration tribunals have paid the price. Tribunals could have been constituted for evaluating the extent of their authority. It is undisputed that no oppression and mismanagement related disputes have ever been submitted to arbitration, but this is supported by the fact that courts do not rely on arbitrators to resolve disputes that are under their purview. The Indian

[20] Sai Anukaran, 'Scope of Arbitrability of Disputes from the Indian Perspective'<Asian international arbitration Journal> (2018) 14 (1).
[21] Debroy B and Jain S, 'Strengthening Arbitration and its Enforcement in India-Resolve in India NITI Aayog' (2015).
[22] Prakhar N.S. Chauhan and Prashant Singh, 'Lessons from the US: Arbitrability of oppression and mismanagement in India' (2021) 5(1) <Journal of Strategic Contracting and Negotiation> https://doi.org/10.1177/20555636211027333.

approach goes so far as to make the parties' consent irrelevant. Arbitrability should be viewed as the ability and suitability of arbitration to resolve disputes. It is the responsibility of the courts to refrain from interfering with pre-award arbitrability and to grant the parties their right to arbitration in accordance with their original agreements.

Conclusion-

The courts in India have inconsistently addressed the issue of the scope of arbitrability, frequently limiting it and by creating new tests to determine the arbitrability of disputes. The aforementioned analysis indicates that the prevailing legal position on this matter is that reliefs against oppression and mismanagement claimed under Sections 241 and 242 of the Companies Act, 2013, cannot be referred to arbitration, even if there is an existing arbitration agreement between the parties to such dispute. In comparison with the principles followed in the US, it is safe to conclude that India follows a restrictive approach when it comes to the arbitrability of disputes for a country which has been following a pro-arbitration approach in recent times. India must therefore reconsider its stance on the arbitrability of disputes by removing the uncertainty that hangs over the arbitration process in order to shed its reputation as an unfavorable seat for arbitration. Allowing the parties to arbitrate their issues with little intervention from the court is one potential option, with the caveat that the arbitral judgement may be thrown aside by the court if it violates public policy. Furthermore, the arbitrator should have the authority to decide on his own jurisdiction due to the komptenz-komptenz principle, and courts should avoid from exercising their jurisdiction when referring parties to arbitration beyond a "prima facie" perspective.