

CAUTION! ENHANCED JUDICIAL INTERFERENCE IN ARBITRATION

Introduction

In the recent case of *Lalit Kumar Modi v. The Board of Control for Cricket in India and others*,¹ the Bombay High Court (“**Court**”) made a deviation from the existing procedure for challenging the appointment of arbitrator(s). The issue before the Court was whether courts could interfere in the proceedings of a Disciplinary Committee (“**Committee**”). The Court placed the Committee on the same footing as an arbitral tribunal and relied on the provisions of the Arbitration and Conciliation Act of 1996 (“**Act**”), particularly section 13, to conclude that courts cannot interfere in the proceedings on any ground. However, the Court itself interfered with the proceedings of the Committee, contrary to its findings. The present newsletter aims at analyzing the abovementioned case and discusses the impact of such contradictory judgment on arbitration law.

1. Brief facts

Mr. Lalit Kumar Modi (“**Petitioner**”) was the Commissioner of the Indian Premier League (“**IPL**”) organized by the Board of Control for Cricket in India (“**Respondent**”), a society registered under the Tamil Nadu Societies Registration Act, 1975.

Respondent issued show cause notices, on April 26, May 6, and May 31, 2010, to the Petitioner with respect to his conduct as the Commissioner of IPL. For the decision making process, the Committee was duly constituted by the Respondent. On July 6, 2010 the Petitioner served a letter on the Respondent and members of the Committee in which he raised objections on the appointment of certain members of the Committee on grounds of bias. The Petitioner then filed a Writ Petition in the Bombay High Court against the Respondent and Committee members on the ground of prejudice. The petition was disposed of on July 15, 2010, stating that the objections on the constitution of the Committee must be challenged before the Committee itself. The Committee, thereafter, heard the objection and rejected Petitioner’s request for exclusion of certain members and passed a preliminary order on August 11, 2010. Against the said order, the Petitioner moved the Court under writ jurisdiction.²

2. Contentions of the Parties

2.1 Petitioner’s Contentions

Petitioner’s primary contention was that the Committee had applied an erroneous test of “Real Danger of Bias” as against the correct test “Real Likelihood of Bias”. The Petitioner

¹ Decided on September 15, 2010

² Article 226 of the Constitution of India

relying on Supreme Court's decisions in *Manak Lal, Advocate v. Dr. Prem Chand Singhvi and others*³, *Ranjit Thakur v. Union of India and others*⁴ and *P.K. Ghosh, I.A.S and another v. J.G. Rajput*⁵, further argued that the Supreme Court has consistently applied the test of "Real Likelihood of Bias" for determining whether any grounds exist for removal of arbitrator(s).

The Petitioner contended that the fact that the show-cause notices sent to the Petitioner were substantially relied upon for making the order against him, shows the bias of the Committee members. The Petitioner argued that under these facts and circumstances of the case, the allegations of bias made against the member of the Committee are "so clear and unanswerable" that the Court must entertain the petition on merits.

2.2 Respondent's Contentions

Respondent raised preliminary objection and argued that the writ is not maintainable in the Court. The Respondent relied on the judgment of the Court in the previous petition, dated July 15, 2010, under which the Petitioner was directed to raise the issue of bias before the Committee itself and argued that the Petitioner has already availed that remedy. The Respondent further stated that the Petitioner can challenge the constitution of the Committee along with the challenge against the final order of the Committee.

Respondent relying on *Kumaon Mandal Vikas Nigam Ltd. v. Girija Shankar Pant and others*⁶ and *Rameshwar Prasad and others v. Union of India and another*⁷ further argued that the Committee had applied the correct test of "Real Danger of Bias" which is the applicable principle.

The Respondent also contended that the allegations of bias cannot be examined as the Committee is a mere fact finding committee and its findings are not binding in nature. The Respondent argued that any body initiating disciplinary proceedings has to arrive at some *prima facie* opinion before initiating departmental inquiry against a member of a club and merely because the Respondent had arrived at an opinion, which reflected in the show-cause notices, it cannot be alleged that the members had any bias or prejudice against the Petitioner.

3. Decision of the Court

After hearing both the parties at length, the Court upheld the principle that the objection as to the constitution of a domestic tribunal or a disciplinary committee must be raised before the respective tribunal or committee itself and in case the tribunal or committee rejects such an objection, the aggrieved person can raise this objection along with the challenge against the final order of the tribunal or committee. In order to determine the legislative intent, the Court placed the Committee on the same footing as an arbitral tribunal and relied on

³ AIR 1957 SC 425

⁴ AIR 1987 SC 2386

⁵ (1995) 6 SCC 744

⁶ (2001) 1 SCC 182

⁷ AIR 2006 SC 980

section 13 of the Act⁸ which lays down the procedure for challenging the constitution of arbitral tribunal. The Court concluded that the allegation of bias can be raised under a challenge to the final order under section 34 of the Act.

However, contrary to its findings, the Court from the facts and circumstances of the case examined the matter on merits and remained silent on the issue whether the test of “Real Danger of Bias” has replaced the test of “Real Likelihood of Bias”. However, it applied the test of “Real Likelihood of Bias” to determine the element of bias in the members of the Committee. Finally, the Court held that no apprehension or likelihood of bias existed against the Petitioner and disposed of the petition.

Conclusion

This decision seems to defeat the main intent of the legislature for enacting the Act (*particularly section 13*), i.e. speedy justice and minimizing judicial interference. Section 13 of the Act is the modified version of its corresponding provision, i.e. Article 13, under the UNCITRAL Model Law on International Commercial Arbitration.⁹ Under Article 13 the aggrieved party has a right to appeal to a court immediately if the challenge on appointment of arbitrator(s) is unsuccessful. However, the Indian legislature made a departure from this provision and with a view to prevent dilatory tactics of the parties and to limit the interference of courts, did not allow recourse to Courts at the stage of rejection of challenge.

In the instant case, the Court despite accepting the fact that the courts cannot interfere in arbitral proceedings and disciplinary proceedings, interfered in the proceedings on merits. This judgment has opened the floor for judicial interference in arbitral proceedings merely on grounds of possibility of existence of clear and unanswerable bias. The legislative intent to exclude the courts is likely to be indirectly defeated, much to the detriment of the Act’s efficacy.

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⁸ Section 13 of the Act allows the parties to arbitration to mutually agree between themselves to a procedure to challenge the appointment of arbitrator(s). If they do not agree upon such a procedure, the section provides for an alternative procedure, according to which the objection on appointment of arbitrator(s) is to be raised, first, before the arbitral tribunal itself. In case the objection is rejected, the arbitral tribunal shall go on to pronounce a final arbitral award. It is at this stage only, i.e. after completion of arbitral proceedings, can the aggrieved party raise the objection in a Court along with a challenge against the final award.

⁹ United Nations Commission on International Trade Law (UNCITRAL) prepared a Model Law on International Commercial Arbitration for unification of law on arbitral procedures. The Model Law was adopted on June 21, 1985. The Act has been enacted by making certain modification to the Model Law.