International Journal of Research in Social Sciences
Vol. 9, Issue 3, March - 2019,
ISSN: 2249-2496 Impact Factor: 7.081
Journal Homepage: http://www.ijmra.us, Email: editorijmie@gmail.com
Double-Blind Peer Reviewed Refereed Open Access International Journal - Included in the International Serial Directories Indexed & Listed at: Ulrich's Periodicals Directory ©, U.S.A., Open J-Gate as well as in Cabell's Directories of Publishing Opportunities, U.S.A

THE SETTLEMENT OF INDUSTRIAL DISPUTE OF STRIKE THROUGH ARBITRATION IN INDIA

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ABSTRACT

Arbitration is the most traditional form of private dispute resolution. Like conciliation, arbitration involves a third- party intervention in a conflict resolution process. However, in arbitration, the third-party intervenes with the agreement of the parties and with the power to make a decision. Because of the power to make a decision, arbitration may be classified with litigation as an adjudicatory process. Arbitration differs from litigation, however, in that it may take place outside the court system and may not be subject to courtroom procedures such as rules of evidence or appeal. Arbitration is the also the method to settle the industrial dispute like strike. Strike is the powerful weapon in hand of employees for the fulfill of their demand. section 10A of the Industrial dispute Act 1947 provide that where any industrial dispute exist or is apprehended the employer and workman may, at any time before the dispute is referred to a labor court, industrial tribunal or a national tribunal, refer the dispute to arbitration buy mutual agreement. The agreement should be in prescribing form. Section 10A (4-A) of the Industrial Dispute Act, 1947 is directly deal with the strike and arbitration. According to Section 10A (4-A) where an industrial dispute has been referred to arbitration, the appropriate government may prohibit the continuance of any strike in connection with that dispute. This type of arbitration is called Voluntary arbitration. The various commissions and committees including the Indian Labor Conference have recommended voluntary arbitration as the preferred mode of dispute settlement. In the voluntary arbitration the parties have liberty to make by mutual agreement a reference to a private Arbitrator or Arbitrators' of their choice apart from the presiding officers of labor court, industrial tribunal and national tribunal. The efficacy of arbitration is largely buttressed by reliance on state intervention. No wonder that "this method does not appear to have much attraction for Indian Industry". But due to change of time voluntary arbitration appears to the best method for settlement of all industrial

disputes. The dispute can be resolve speedily and in less than a year, typically in a few months .Mahatma Gandhi ji encouraged the method of voluntary arbitration for resolving industrial conflicts. The Bombay Industrial Relation Act 1946 also recognized voluntary arbitration as one of the mechanism for the settlement of industrial dispute. Section 10A of IDA 1947 provide the scheme of voluntary arbitration as one of method of settlement of dispute with the some essential elements like (a) the voluntary submission of dispute to an arbitrator under an agreement in writing by both the parties to dispute. (b) The appropriate government shall refer the dispute to the arbitrator as per agreement between the parties. (c) Arbitrator being acceptable to both the parties, his award is binding. Arbitration and Conciliation Act was passed in 1996. This Act provides the arbitration as mean of settlement of commercial dispute. Section 10 (1) of the 1996 Act deal with the number of arbitrators in arbitral tribunal and provides that the number of arbitrators shall not be even number. The award of arbitrators has been accorded the status of a decree under Code of Civil Procedure. 1908. Under the Act of 1996 a salutary provision making it mandatory for the arbitrators has been made that he has to give reasons for the award. In this research paper I am discussing the meaning and scope of arbitration under the Arbitration and conciliation Act of 1996 as well I m discussing the arbitration is the way or method to settle the strike dispute under the Industrial Dispute Act 1947.

INTRODUCTION

The word "arbitration has not been clearly defined in the Arbitration and conciliation Act, 1996[1], nor has it been the Arbitration Act, 1940.section 2(1) (a) of the Arbitration and Conciliation Act, 1996, defines "arbitration" very vaguely as "any arbitration whether or not define administrated by permanent arbitral institution". Thus it is necessary to define arbitration in the contest of some judicial decisions and legal authorities. 'Arbitration' has been defined by Romily, M.R. in the case of *Collins v. Collins*[2] as "a reference to the decision of one or more person, either with or without an umpire, of a particular matter in difference between the parties." Thus, arbitration is not adjudication by a statutory body like a Court of

[1] Arbitration and Conciliation Act,1996 (Act 26 of 1996).
[2] 28 186; (LJ Ch 1858) 26 Beav 306

law.

The arbitration law therefore seeks to encourage parties to settle their dispute and differences privately either by mutual concessions or by mediation of a third person. The court litigation being expensive and time-consuming, the law wishes it to be resorted to sparingly. In arbitration, two or more parities submit their dispute to the judgment of a third person, called the 'arbitrator' who decides the dispute in a judicial manner. Arbitration is a mechanism for the resolution of dispute which take place usually pursuant to an agreement between two or more parties, under which parties agree to be bound by the decision to be given by the arbitrator according to law or, if so agreed, other considerations, after a fair hearing such decision being enforceable by law[3].

Halsbury's laws of England has defined arbitration which is as follows: "An arbitration is the reference of dispute or difference between not less than two parties, for determination after hearing both sides in a judicial manner by a person or persons other than a court of competent, jurisdiction." The essence of arbitration without assistance or intervention of the Court is settlement of the dispute by a tribunal of the own choice of the parties[4].

In Amarchand v. Ambica Jute Mills[5], the supreme court relying on has defined[6] arbitration as "a particular method for the settlement of dispute. Parties not wishing the laws delay know or ought to know that in referring a dispute to arbitration they take arbitrator for better or worse and that his decision is final both as to fact and law."

Arbitration can be one of best method to settle the dispute of strike issue. A strike is a powerful weapon in the hands of workers and their unions to get their demands accepted. A strike generally involves quitting of work by a group of workers for the purpose of pressurizing their management. Section 2(q) of the Industrial dispute Act, 1947 define a strike as "a cessation of work by a body of persons employed in any industry acting in combination or a concerted refusal, or a refusal under a common understanding, of any number of persons who are or have

[3] Saharay.Madhusudan, "*Test Book on Arbitration & Conciliation with Alternative Dispute Resolution*" 1 (Universal Law Publication Co. New Delhi, 2nd ,2011)
[4] *Ibid*
[5] AIR 1966 SC 1036: (1963) 2 SCR 953
[6] Russel on Arbitration, 16th Edn., p.54

been so employed to continue to work or to accept employment "strike is a direct method of direct action adopted by the workers and their union. When workers and their unions fail their objectives and settle the dispute through any of the means, they resort direct action, which refers to exerting pressures on employers by resorting to tactics like strike. If both the parties want to settle their dispute of strike than arbitration can be useful method under the industrial dispute Act 1947[7].

Objective

1. To discuss about the increasing of strike in the commercial and business industry.
2. To discuss about the arbitration can be strong way or method for settlement the industrial dispute

HISTORICAL BACKGROUND OF ARBITRATION AND DEVELOPMENT OF ARBITRATION IN INDIA

The origin of arbitration can be traced back to 4000 B.C., homers iliad. China, India and Italy among other countries claim to be the first countries where the process of arbitration for settlement of dispute had begun. In ancient India, there were different grades of arbitration, such *as Puga, serni, Kula* and *Panchayat.* Puga is a board of person belonging to different sects and tribes residing in the same locality. Serni is an assembly of tradesmen and artisans belonging to different tribes. Kula is a group of persons found by family ties. According to Colebroke *Panchayat* is a different system of arbitration subordinate to regular court of law. From the decision of *Puga,* appeal would lie to *Pradvivace* and finally to the king[8]. In British India, arbitration for settlement of dispute has tacit as well specific recognition under different Regulations. The Regulations of 1781 contained a provision that "the judge do recommended and so far as he can without compulsion, prevail upon the parties to submit to the arbitration of one person to be mutually agreed by the parties." the Regulation of 1787 contained provision for encouragement by the court to refer suit to arbitration with the consent of the parties. The Bombay Presidency Regulation VII of 1827 provide for resolution of civil dispute by arbitration. But the arbitration agreement was required to be in writing and the arbitrator was

[7] Industrial Dispute Act, 1947 (ACT NO. 14 OF 1947)
[8] Chanbasoppa v. Baslingaya AIR 1927 Bom 565 : 51

to be named who had to make the award within specified time[9].

The Act VIII of 1857 codified the procedure of Civil Courts in which Section 326 and 327 dealt with arbitration in suits. Finally, a separate enactment under the title of the Indian arbitration Act was passed in 1899 which was base on the English Arbitration Act, 1889. The Indian Arbitration Act 1889 came into force July 1, 1889. His Act however contained to be applied only to matters which were not before a court of law for adjudication. In 1908, The Code of Civil Procedure was re-enacted containing the provision relating to arbitration in the second schedule. It was in 1940 that the Indian law on arbitration was consolidated and redrafted in the form of Arbitration Act, 1940 on the pattern of the English Arbitration Act, 1934. While the English Arbitration Act, 1934 was subsequently modified by the Act of 1950 followed by the Arbitration Act of 1979, the Indian Arbitration Act, 1940 remained in force until it was replaced by the new Arbitration and Conciliation Act, 1996[10].

The globalization of trade and commerce and the need for effective implantation of economic reform during the preceding decade necessitated re-drafting of the Indian arbitration Act of 1940 with a view to ensuring smooth and prompt settlement of domestic as well as international commercial dispute. The Law Commission of India, in its 76th report in November, 1978 had already recommended the need for updating the arbitration the Arbitration Act of 1940 to meet the new challenge of the modern developing economy of the country. Besides, several other representative bodies of trade and industry and legal experts also proposed drastic changes in the existing arbitration law which suffered from several lacunae and defects. As a result of these demands, the arbitration and conciliation Bill, 1996 was promulgated by the President to meets the needs of business community for speedy settlement of commercial dispute. Since the Parliament could not pass the Bill within the stipulated time, the Ordinance had to be re-promulgated twice until it was finally passed as the Arbitration and Conciliation Act, 1996 which received the assent of the President of India on 16th August 1996. The Act has been brought into effect from 25th January 1996, the day the relevant Ordinance was passed. It may be stated that arbitration which had lost its sanctity as

[9] *Supra note.3 at 4*
[10] *Supra Note*.1 at 5

an alternative dispute resolution system was gradually being substituted by newer techniques such as conciliation, mediation and negotiation which have now been statutory recognized by the Arbitration and Conciliation Act 1996[11].

The working of Arbitration Act of 1996 over the years has shown that it does not sufficiently fulfill the requirement of domestic as well as international arbitrators in certain specific areas. Therefore, the Government of India has introduced the Arbitration and conciliation. The Amendment Bill Inter-alia seeks to employer arbitral tribunal to issue effective interim measures at par with the authority of court and provide for an effective mechanism of carrying them out. For this purpose the existing section 9 and 17 of the Act are proposed to be drastically amended and two new sections namely section 24-A and 24-B are being inserted for providing an efficacious mechanism of imparting interim measures. These changes sought to be brought about by the proposed Amendment Bill would go a long way in increasing the efficacy of arbitral tribunal in effective adjudicating the matters brought before it[12].

INTERNATIONAL PERSPECTIVE

It may further be pointed out that efforts were already being made by the United Nations to work out a comprehensive uniform Model arbitration Law at the international level which could be uniformly adopted by the member countries with suitable modification keeping in view their domestic needs and national laws. For this purpose, Model law on International Commercial Arbitration was adopted in the United Nations Commission on International Trade Law (hereinafter referred to as UNCITRAL) on 21st June, 1985 in its 18th Annual session. The General Assembly, in its Resolution dated 11th December, 1985 recommended that all state should adopt UNCITRAL Model Law on International commercial arbitration. India, being a member country has adopted the UNCITRAL Model Law by enacting the Arbitration and Conciliation Act, 1996 with a view to bringing about uniformity in arbitration procedures and meets the needs of international commercial arbitration in its commercial

[11] Gupta.s.p, "The Arbitration & Conciliation with Alternative Dispute Resolution 12 (Allahabad Law Agency, Faridabad. 3rd edn , 2015)
[12] *Ibid.*

transactions with foreign countries[13].

With the increasing role of international trade and developing economy, the risk of commercial dispute has also grown substantially. Therefore, the importance of international dispute resolution mechanism including arbitration as a means of resolving trade dispute has assumed greater importance in recent decades. The recent trends in international commercial arbitration which is emphasis on :

1. Greater party autonomy and non-intervention of court in the arbitral process;
2. Preference for institutional arbitration instead of ad hoc arbitration;
3. Recourse to arbitral process instead of court litigation.

With the enactment of this Act, the Arbitration (Protocol and Convention) Act, 1937; the foreign Awards (Recognition and Enforcement) Act, 1961 and the Arbitration Act, 1940 stand repealed. The Justification for adopting the Model law on International Commercial Arbitration lies in the fact with the liberalization and globalization on Indian Economy in recent past more and more non-resident Indians and Foreign Investment Institutions are entering the Indian Market which necessitated re-drafting of the Arbitration Act of 1940 to be made more responsive to the change in Indian economy[14].

SCOPE OF ARBITRATION LAW

The law of arbitration is based on the principal of withdrawing the dispute from the ordinary courts and enabling the parties to substitute a domestic tribunal consisting persons of their own choice called as arbitrators. As defined by Russell who is an authority on Arbitration law "an arbitrator is neither more nor less than a private Judge of a Private court (called an arbitral tribunal) who gives a private judgment (called an award **)"[15].** There is another synonymous term commonly used, that is 'mediator'. But there is a definite distinction between an arbitrator and mediator. Arbitrator is person to who differences or dispute are submitted by the parties and he adjudicates on behalf of the parties. His functions are, therefore. Quasi-judicial in nature. A mediator, on the other hand, is one who is requested to mediate or

[13]Z.M. Sahid Siddogi and Afzal Wani (ed.), Labour Adjudication in India (ILI, 2001).
[14] N.V. Pranjaype, "Law relating to Arbitration and Conciliation in India" 8 (Central Law Agency, 5th edn. Allahabad 2013)
[15] Supra note.6 at 104

intervene in the matter of the parties as a friend to bring about an amicable settlement. The settlement brought about by him is not an award within the meaning of Arbitration Act. Again the provision of the settlement brought about by mediator is not an award as observed by the Supreme Court in *Wali mohd. Kar v. Habibullah Kar*[16] .

The Indian law relating to arbitration provided that any disputes or difference relating to commercial matters including shipping, sales, purchase, banking, insurance, building construction, ,technical assistance, scientific know-how, patents, trademarks, management consultancy, commercials agency, labour etc., arising between the parties who agree or have agreed for arbitration, shall be determined and settled in accordance with the Arbitration and Conciliation Act,1996 and the rules framed there under.

The connotation of the term 'commercial' in context of Arbitration Act has been considered by the Supreme Court in its decision in *R.M. Investment and Trading Co. Pvt Ltd. V. Boeing Company*[17] wherein the court observed:

"while construing the expression "commercial" in section 2 of the Act, it has been borne in mind that the Act is calculated and designed to sub serve the cause of facilitating international trade and promotions thereof by providing speedy settlement of disputes arising in such trade through arbitration and any expression or phrase occurring therein should receive a liberal construction[18].

In *Atiabari Tea Co. Ltd v. State of Assam*[19] the Supreme Court observed that activity such as commodities for money or other commodities, carriage of persons and goods by road, rail, air or waterways, contracts, banking, insurance. Transactions in stock exchange, supply of energy, postal and telegraphic services etc. may be called as commercial intercourse within the meaning of Article 301 of the constitution which relates to freedom of trade, commerce and intercourse.

[16] AIR 1984 sringar LJ 56 (j&k).

[17] AIR 1994 SC 1136

[18] Koch navigation v. Hindustan petroleum, AIR 1989 SC 2198).

[19] AIR 1961 SC 232 (259).

The Supreme Court in *Kamini Engineering Corporation V. De Traction*[20], however, ruled that a contract for merely rendering technical assistance in electrification of railways did not involve consultancy into active business and therefore such a contract would not be construed to be 'commercial' in nature .

The 'arbitration agreement ' constitutes one of the important segments of the law of arbitration, section 7 of the Arbitration and Conciliation Act,1996 postulates that,' Arbitration agreement' means a written agreement between the parties to submit any present or future differences or disputes to arbitrations, whether an arbitrator is named therein or not . thus it would be seen that an agreement providing for arbitration must have definite parties, such an agreement should be in writing and there should be an intention of the parties to have their differences and disputes referred and decided through arbitration[21].To sum up,(1) parties (2) dispute and (3) finality of the decision may be treated as three essential of an arbitration clause in the agreement stipulating that in case of any dispute or difference arising out of contract, the matter shall be referred to the arbitrator whose decision shall be final and binding on the parties[22]. Nor is it obligatory to use the word arbitrator or arbitration in the phraseology of the agreement. The arbitration agreement may be a self contained document or it may be in the form of a clause in the contract, but it must be necessarily in writing. The essence of the arbitration agreement lies in the face that the parties should intend to take a reference to arbitration and should be *ad idem* in this regard.

ADVANTAGE OF ARBITRATION[23]

It must be stated that among the available dispute resolution alternatives to the courts, arbitration is by far the most commonly used as well as intentionally. The reasons for this are as follows:

1. The decision (award) of arbitral tribunal is final and binding on the parties. While several mechanisms can help parties reaching an amicable settlement, all of them depend upon goodwill and cooperation of the parties. A final and enforceable decision

[20] AIR 1965 Bom.114
[21] Union of India v. janki Prasad agarwal, AIR 1986 All 15.
[22] Smt.Rukmani Gupta v. The collector, jabalpur, AIR 1982 SC 479.
[23] *Supra note.* 14 at 15

by amicable settlement can generally be obtained only by recourse to arbitration because arbitral tribunals are not subject to appeal. Arbitral awards may be challenged only on a very few limited grounds.

2. Arbitral awards enjoy much greater international recognition than judgments of national courts. The 'New York Convention' facilitates enforcement of awards in all contracting states.
3. Neutrality and mutuality are perhaps the most redeeming features of arbitration process. At least in matters such as (I) place of arbitration (ii) language to be used (iii) procedure or rules to be applied (iv) Nationality of arbitration and (v) legal representation, the parties can place themselves on equal footing.
4. Arbitration offers parties a unique opportunity to designate persons of their choice as arbitrators, which is not possible in case of courts. This enables the parties to have their dispute resolved by people who have specialized competence and expertise in the relevant field.
5. Arbitration is faster and less expensive than litigation in courts.
6. The element of confidentiality which is wanting in judicial proceedings is an attribute of arbitration system. Arbitration hearings are not public and only the parties receive the copies of arbitral award.

SETTLEMENT OF STRIKE DISPUTE THROGH ARBITRATION

The Entire adjudicatory and ancillary machinery of the Industrial Dispute Act, 1947 resolve around the 'Industrial Dispute', as defined in section 2(K).But the expression industrial dispute is a misnomer; it does not deal with the law relating to industry as enterprises. The expression industrial law with respect to an industrial enterprise would, apart from the law relating to labor employment, comprehend other branches of law such as cooperate laws and fiscal and commercial law as well. The parliament, therefore, advisedly proposed the word 'labor' in preference to the word 'Industrial', in labor Bill 1997, which lapsed with the dissolution of the Parliament in 1999.Furthermore. The use of the word 'Labor law' also accords well with international comity as it is in usage in the western countries instead of the word industrial as used in India.

The industrial dispute Act, 1947 was enacted with the object of making provision for investigation and settlement of industrial and for other ancillary purposes. It provides a

> novel approach untrammeled by normal court procedures for settlement of industrial dispute. For this, it provides adjudication machinery for settlement of industrial dispute[24].

VOLUNTARY ARBITRATIOM

Section 10A of the Industrial Dispute Act, 1947 provides for voluntary reference for an existing or apprehended industrial dispute between an employer and workman by mutual consents at any time before the dispute has been referred for adjudication under section 10. The arbitration agreement however has to be in writing and in the form as prescribed under the rules, specifying the person's or persons to be arbitrators or arbitrators. It is not necessary that arbitral reference is made only to a private persons or persons. Such references can be made even to the presiding officers of labor courts or tribunal or national tribunals.

This section also makes further provisions in connection with the arbitration. Like adjunction, provision has also been made to prohibit strikes and lockout during the pendency of arbitral proceedings. The arbitrator is required to investigate the dispute and summit the award to the appropriate government like the adjudication award.

The Supreme Court stated the advantage of voluntary arbitration in the area of industrial jurisprudence, *in Karnal Leather Karamchari Sanghatan v. Loberty Footwera Co*[25]. in the following word:

> The voluntary arbitration is a part of the infrastructure of dispensation of justice in the industrial adjudication. It appears to be the best method for settlement of industrial dispute. The dispute can be resolved speedily and in less than a year, typically in a few months. The tribunal's adjudication of reference under section 10 (1) often drags on for several years, thus defeating the very purpose of the industrial adjudication. Arbitration is also cheaper than litigation with less legal work and no motion practice. It has limited document discovery with quicker hearings and less formal than trials. The

[24] O.P.malhotra, Arbitration of Labour Dispute 27 (ILI, Delhi, 2001).
[25] 1990 Lab IC 301, 367 SC.

greatest advantage of arbitration is that there is no right of appeal, review or writ petition. Besides, it may as well reduce company's litigation costs and its potential exposures to ruinous liability apart from redeeming the workman from frustration.

10A (4-A) of The Industrial dispute Act, 1947 Where an industrial dispute has been referred to arbitration and a notification has been issued under sub-section (3-A), the appropriate Government may, by order, prohibit the continuance of any strike or lockout in connection with such dispute which may be in existence on the date of reference. It may also be point out that the government may prohibit continuation of strike only where it was acted under sub section 3-A and has thus given other employers and workman who were not party to the arbitration agreement, to be given a opportunity to the heard in respect of matter in dispute. It may further be observed in this connection that the provisions of sub- section (4-A) are enacted on the lines of the provisions contained in sub-section (3) of the section 10 of the Industrial Dispute Act, 1947[26].

JURISDITION OF THE ARBITRATOR:

It is the parties who confer by appointment of an arbitrator power to decide the dispute which is referred to the arbitrator. He has no other source of power of jurisdiction. It is from the agreement of references that he draws his power to investigate the dispute. He has nothing like wider or narrower jurisdiction of his own. The narrowness or width of his power depends upon the width or narrowness of the dispute which is referred to him. In ultimately analysis therefore, it is to the term of reference that one has to look to find out whether a wider question us referred to the arbitrator or it is only a narrower question which has been referred to him for investigation and making a report to the government**.** *Singareni Collieries Co. v. Salim M. Merchant*, In this case, the foundation of the jurisdiction of the arbitrator is the reference on a specified dispute to him and is confine to the precise question referred for adjudication. The general rule which is applicable to the civil courts that a larger relief claimed would include

[26] *Supra note*.7

the lesser relief cannot be made applicable to the case of an arbitrator. The arbitrator has to limit himself to the investigation of that dispute which is reefed to him[27].

LIMITATION-

The period of six months incorporated in section 10a(4-a) of the act cannot be held to be mandatory and such an interpretation of the provision will not be consonance with the other provisions of the act and will not keep in line with the intention of the legislature. it will destroy the beneficial intention of the legislature if a grammatical meaning is ascribed to the same. the period was so indicated in the section so as to enjoin the rule the application be made within a reasonable time and also to enable the rule the labor court to examine the claim more meticulously. Though he statute has prescribed stipulated period to perform the duty nevertheless the period of limitation is never treated as a mandatory requirement. if that be so, a reasonable interpretation would be that period of six months mention in section 10a (4-a) of the industrial dispute act be treated as only a directory provision[28].

Conclusion:

The basic purpose of labour arbitration is quite different from commercial arbitration. They run along parallel trucks. Labour arbitration is a collective bargaining process to maintain industrial peace and harmony, whereas commercial arbitration is simply an alternative to litigation. Labour arbitration is guided by public policy and arbitration resolutions are not secret. But in case of commercial arbitration the role of public policy is very limited and privacy and confidentiality are the most valued features of commercial arbitration. Furthermore, renegotiations and further arbitrations are part and parcel of labour arbitration. However, in both the arbitrations inclusion of non-signatories at the discretion of arbitrators is imperative.vbn

[27] 1892 (42) FLR 488

[28] K.S.R.T.C Central and another v. Govinda Setty and another, 1997 (76) FLR 424 (Kant)