Test of 'real apprehension of bias' in arbitration

The modern arbitration law enacted during British India is an outcome of transition from a self-imposed society to a law-regulated society. But we must not forget that the common law of arbitration was based on the belief that an arbitrator was an honest man. Why then, this notion is now in the firing line?

"Honest men dread arbitration more than they dread lawsuits" -- Russel

In our country justice delivery system in the form of 'Panchayats' has been practised since time immemorial. Panchayat was headed by five elderly wise men known as 'Panchs'. It was a social custom that entire village would meet and the Panchs would hear the dispute and give decisions. The process was neither costly nor time-consuming and was fully transparent. Panchs were treated as 'Parmeshwars' and nobody dared to disobey them.

But why honest men today dread arbitration more than they dread lawsuits? Deterioration in the quality of social values, advent of western culture and complexities of modern world may be the reasons.

An arbitral tribunal, ideally, should be impartial, disinterested and unbiased. The Supreme Court in the case of International Airport Authority of India Vs K. D. BALI [AIR 1998SC1099] observed that "it is well settled that there must be purity in administration of justice as well as in the administration of quasi-justice as are involved in the adjudicatory process before the arbitrators. It is well said that once the arbitrator enters in an arbitration process, he must not be guilty of any act that can possibly be construed as indicative of partiality or unfairness. It is not a question of the effect that the misconduct on his part had upon the result of the proceeding, but of what effect it might have possibly produced. It is not enough to show that, even if there was misconduct on his part, the award was unaffected and was in reality, just. An arbitrator must not do anything which is not in itself fair and impartial."

Pawan Agarwal

What is Bias?

Bias is a state of mind, which sways one's judgement and renders one unable to exercise one's functions impartially. The dictionary meaning of bias is 'leaning of the mind towards or away from something'. A predisposition to decide for or against one party without proper regard to the true merits of the dispute is bias. Bias has been held synonymous with partiality. The word has been held to refer views in respect of a subject matter as well as to the mental attitude towards another person.

Nemo Judex in Causa Sua Potest

The rule of bias is based on the old maxim 'nemo judex in causa sua potest' which means no person can

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be a judge in his own cause. Thomas Jefferson in one of his letters to George Wythe mentioned in July 1776: "Judges should always be men of learning and experience in the law of exemplary morals, great patience, calmness and attention; their mind should not be distracted with jarring interests."

It is the cardinal principle that any judgement should be free from bias or partiality and that the order must be passed by a judge who is free from any bias or prejudice. **This rule is based on two principles.**

I. No one can be judge in his own case, and
II. Justice must not only be done but seen to have been done too.

If a pecuniary interest exists then there is real likelihood of bias and reasonable suspicion. In Sirpur Paper Mills Ltd. Vs. CWT 1970 77 ITR 6 (SC) the Supreme Court observed that the power of revision conferred on the Commissioner is quasi-judicial and must be exercised with unbiased mind, considering impartially the objections raised by the aggrieved party. So also in Shankuntala Devi Vs. CIT 1971 82 ITR 416 (Cal) that if there are any inquiries and investigation against the party aggrieved, the materials must be provided and any bias should not be considered.

The maxim is applicable precisely when the court is concerned not with a case of actual injustice but with the appearance of injustice, or possible injustice.

In Maxwell Vs. Dept. of Trade (1974) 1 Q. B. 523 Lawton L.J. expressed a similar idea when he said, "Doing what is right may still result in unfairness if it is done in the wrong way." It is because the assurance that justice has been seen to be done is, in itself, an important element in the public confidence in the settlement of disputes.

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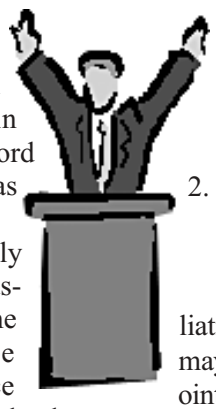
In stringer Vs. Minister of Housing (1970) 1 W. L. R. 1281 where the question was whether the Minister had "Precluded himself from acting with fairness and impartiality both in appearance and in fact, Lord Widgery C.J. observed as follows:



"It is again absolutely basic to our system that justice must not only be done but must manifestly be seen to be done. If justice was so clearly not seen to be done, as in question here, it seems to me that it is no answer to the applicant to say: " well, even if the case had been properly conducted, the result would have been the same." That is mixing up doing justice with seeing that justice is done."

Disclosure by arbitrators

Section 12 of the Arbitration and Conciliation Act, 1996 provides that the arbitrator before accepting his appointment shall disclose in writing to the parties such matters as are likely to give rise to justifiable doubts about his independence or impartiality. The same holds good throughout the arbitral proceedings and any time after his appointment such situations arise, he must disclose the same in writing to the parties. There is nothing complicated about this. All that is required is a simple letter from the arbitrator e.g. "*Dear Mr. applicant, I am pleased to give my consent to act as arbitrator. To the best of my knowledge, there are no circumstances likely to give rise to justifiable doubts as to my independence or impartiality. I shall also keep the parties informed if any such circumstances arise during the arbitral proceedings. Thanking You.*"

Procedure for removal of a biased arbitrator

The appointment of an arbitrator may be challenged only if:

1. Circumstances exist that give rise to justifiable doubts as to his independence or impartiality or,
2. He does not possess the qualification agreed to by the parties [Sec.12 (3)]

The Arbitration and Conciliation Act provides that a party may challenge an arbitrator appointed by him also. But this can be done only for those reasons of which he becomes aware after the appointment has been made. [Sec.12 (4)]

Challenge procedure

A party may challenge an arbitrator in terms of Sec. 13 of the Arbitration and Conciliation Act. This he must do within 15 days of the constitution of the Arbitral tribunal or becoming aware of the grounds for challenge as mentioned earlier. The reason for the challenge should be sent to the Arbitral tribunal in writing. The challenge may result into the following:

1. The challenged arbitrator may withdraw from the office.
2. The other party may agree on the challenge and terminate the

appointment of the arbitrator.

3. In case, events mentioned above in (1) and (2) do not happen the Arbitral tribunal may decide upon the challenge.

If the challenge is not accepted, the arbitral tribunal shall continue the Arbitration proceedings and make an award.

The aggrieved party may make an application for setting aside the award in terms of sec. 34 of the Act.

It may so happen that an arbitrator was disqualified at the time of reference but this fact was known to the party at that point of time. In such cases, leave to revoke authority of such an arbitrator cannot be granted. However, he will be disqualified to continue as an arbitrator, if he is in fraudulent collusion with the opposite party or is indebted to one of the parties

Failure or impossibility to act (Sec. 14)

The mandate of an arbitrator shall terminate if:

a) He becomes de jure or de facto unable to perform his functions or for other reasons fails to act without undue delay; and
b) He withdraws from his office or the parties agree to the termination of his mandate.

If a controversy remains concerning any of the grounds referred to in clause (a) above, a party may, unless otherwise agreed by the parties, apply to the court to decide on the termination of the mandate.

When the authority of an arbitrator is terminated, a substitute arbitrator may be appointed. It is done by the same procedure as was used at the time of appointing the arbitrator who has been substituted.

However, Section 34 of the Act does not expressly provide for the

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circumstances contemplated by Section 13(5) as a ground for setting aside an award. The Amendment Bill 2003 proposes an amendment to Section 34 incorporating therein the grounds of challenge provided in Section 12 and 13.

Tests of real likelihood of bias

It is well said that once an arbitrator enters into the arbitration he must not be guilty of any act, which can possibly be construed as indicative of partiality or unfairness. However, there should be a real likelihood of bias. The reviewing authority must take into account the entire evidence placed before it. The question to be asked is whether a reasonable man would in the circumstances infer that there is a real likelihood of bias? The court must look at the impression, which other people have. This follows from the principle that justice must not only be done but seen to be done. So, if right-minded people think that there is a real likelihood of bias on the part of arbitrator, he must not continue as an arbitrator. It does not matter whether he was really prejudiced. What is important is real likelihood of 'Bias' not merely surmises or conjectures.

REF.; Supreme Court decision in PARTHASARTHI VS STATE OF A. P. AND OTHER (1974, 3SCC459)

A reasonable apprehension of bias in the mind of a reasonable man can be ground for removal of the arbitrator. A predisposition to decide for or against one party without proper regard to the true merits of the dispute is bias. However, there must be a reasonable apprehension of that predisposition which must be based on cogent material.

(Ref. Transport Dept. Madras Vs. Manuswamy Mudaliar AIR 1988 SC 2232)

Concept of 'real danger of bias'

Recently, the apex court, in the case of Kumaon Mandal Vikas Nigam Ltd Vs. Girija Shankar Pant and Ors (2001) 1 SCC 187examined the issue of bias. The Court discussed a number of relevant English decisions. It opined that there ought to exist a real danger of bias. The test, therefore, is as to whether a mere apprehension of bias or there being a real danger of bias? If there are positive and cogent evidences in this context, the administrative action cannot be sustained.

Real or reasonable apprehension of Bias

In porter Vs Magill (2002)1ALLER 465 the House of Lords modified 'the real danger test' propounded in earlier English

decision. The Court took note that test of real likelihood of bias and real danger test has been criticised by the High Courts of Australia. This was on the ground that they tend to place inadequate emphasis on the public perception of the irregular incident. The court noted that 'the reasonable apprehension of bias' test was in line with the test adopted in most common law jurisdictions.

Thus the reference to real danger was deleted as it was felt that those words no longer serve a useful purpose. So, the question to be asked is whether the fair minded and informed observer would conclude that there was a real apprehension of bias?

Bombay High Court's view

Recently, the Bombay High Court had an occasion to examine the issue of bias in the case of Saurabh Kalani Vs Tata Finance Ltd 2003(4) Mh. L. J. 812. The court examined in detail all the three tests as mentioned above, including the test of real apprehension of bias. In this case, it was alleged that there were justifiable doubts as to the independence and impartiality of the arbitrator on the ground that the arbitrator had acted as an advocate for the respondent. Rejecting the same the arbitrator stated that he acted as an advocate only in respect of Tata International Ltd., another group company which had no connection with the respondent and that the respondent was an independent entity having a separate business and at no stage did he act as an advocate of the Company.

In the Present petition the respondent stated that the at no stage the arbitrator had been employed either by Tata International Ltd. or by any other company in the Tata Group of companies though between the years

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1981 and 1987 he was the head of the legal department of Tata International Ltd. but he ceased to be in its service. For fifteen years thereafter he had been practising independently as an advocate of the High Court. The court opined that no right thinking person knowing of the connection of the arbitrator with a group company of the respondent would feel that there was any real possibility of bias. The fact that he ceased from the employment of the said group company nearly 15 years back would make an allegation of bias clearly untenable.

In Locabail Ltd Vs Bayfied Properties (2000) 1ALLER 65 the court has observed that "the greater the passage of time between the event relied on as showing a danger of bias and the case in which the objection is raised the weaker (other things being equal) the objection will be."

In the instant case the court opined that there were no justifiable doubts about the independence and impartiality of the arbitrator. The arbitrator had no affiliation, contact or interest with the claimant, least of all in the dispute of the petitioner. The arbitrator's employment with the Tata International Ltd. ended over 12 years before the present reference. Employment in the distant past with another public company, though in the same group, was not such as would warrant invocation of the circumstances spelt out in section 12 of the Act. A professional in the legal profession who discharges the role of an arbitrator is expected to bring to his task a sense of objectivity and a high degree of dispassionateness.

Exception to the rule

If the parties are aware of the bias of the arbitrator and yet allow the arbitral proceedings to continue, the court will not release them from the bargain. So if a party stands by a partial arbitrator, knowing him to be a partial, it cannot challenge the award afterwards on the ground of the arbitrator being not impartial or independent. (ref. AIR 1956 cal 11. AIR 1987 bom 335 and AIR 1963 Punj 56)

Amendment Bill 2003

The sub-section (1) of section 12 of the existing Act of 1996 reads

Section 12 of the Arbitration and Conciliation Act, 1996 provides that the arbitrator, before accepting his appointment, shall disclose in writing to the parties such matters as are likely to give rise to justifiable doubts about his impartiality.

as follows:-

'When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose in writing any circumstances likely to give rise to justifiable doubts as to his independence or impartiality. (emphasis supplied)'

The Amendment Bill proposes to replace the words "any circumstances likely" by the following words:

"The existence of any past or present relationship, either direct or indirect, with any of the parties or any of their counsel, whether financial, business, professional, social or other kind or in relation to the subject matter in dispute, which is likely."

It is obvious that the legislatures by proposing this Amendment have emphasised on independence and impartiality of the arbitrators. Once the said Bill is passed it will be the duty of the arbitrator to disclose the details specified in the section before taking up the assignment.

Conclusion

Thus it can be seen that the Arbitration and Conciliation Act, 1996 does not provide any judicial remedy or an institutional mechanism for replacement of an arbitrator at an initial stage after discovery of a strong likelihood of bias on his part. The omission of any curative mechanism has rendered the new salutary provisions related to disclosures by arbitrators quite inadequate.

If ultimately it is held by the court that the arbitrator was biased, the whole arbitration exercise goes waste besides the resultant loss of considerable amount of time, money and energy of the disputing parties. It is submitted that some mechanism should be provided for redressing the grievances of the affected parties to bring credibility to the institution of arbitration. Indian arbitral bodies should also take initiative and frame rules as to 'bias of an arbitrator'. The International Bar Association has prepared rules of ethics for international arbitrators, which also contains 'elements of Bias' (see annexure). In the similar lines, rules can be framed for domestic arbitrators by arbitral bodies like Indian Council of Arbitration or International Centre for Alternative Dispute Resolution.

ANNEXURE

Article 3 of the 'Rules of Ethics for International Arbitrators' of the International Bar Association is reproduced below:-

Article 3: Elements of Bias

1. The criteria for assessing question relating to bias are impartiality and independence. Partiality arises where an arbitrator favours one of the parties, or where he is prejudiced in relation to the subject matter of the dispute. Dependence arises from relationships between an arbitrator and one of the parties, or with someone closely connected with one of the parties.
2. Facts that might lead a reasonable person, not knowing the arbitrator's true state of mind, to consider that he is dependent on a party, create an appearance of bias. The same is true if an arbitrator has a material interest in the outcome of the dispute, or if he is already taken a position in relation to it. The appearance of bias is best overcome by full disclosure.
3. Any current direct or indirect business relationship between an arbitrator and a party; or with a person who is known to be a potentially important witness; will normally give rise to justifiable doubts as to a prospective arbitrator's impartiality or independence. He should decline to accept an appointment in such circumstances unless the parties agree in writing that he may proceed. Examples of indirect relationships are where a member of the prospective arbitrator's family, his firm, or any business partner has a business relationship with one of the parties.
4. Past business relationship will not operate as an absolute bar to acceptance of appointment, unless they are of such magnitude or nature as to be likely to affect a prospective arbitrator's judgement.
5. Continuous and substantial social or professional relationships between a prospective arbitrator and a party, or with a person who is known to be a potentially important witness in the arbitration, will normally give rise to justifiable doubts as to the impartiality or independence of a prospective arbitrator.

Acceptance of Regulatory Forms from Members & Students received on e-mail authenticated by Digital Signatures

The Institute has decided to accept some of the regulatory forms (list given below) received through e-mail authenticated by digital signatures. Public Key Infrastructure and Digital certificates under Sub-CA setup of the Institute is a step towards achieving electronic filing. The Institute ultimately wants all e-mail communication with its members & students to be digitally signed. Accordingly, the following forms in respect of which no documents are generally required to be accompanied will be verified and processed if the said forms are received through e-mail authenticated by digital signatures.

Members:

- Form 6, form of application for grant of certificate of practice
- Form 9, form of application for restoration of name in the register
- Form 117, Form of application for approval of trade or a firm name
- Request for change in professional address/ e-mail/ mobile/ fax/ telephone numbers

Students:

- Form 105, Certificate of service to be issued by the member under whom industrial training was received
- Form 108, Certificate of service under articles (completion of articles)
- Form 115, Completion of Audit Service
- Form 109, Certificate of Service on Termination of Articles (Form 109 can be issued through e-mail authenticated by digital signature if digitally signed request is received from the member)
- Request for change in address/ e-mail/ mobile/ fax/ telephone numbers

The payment of requisite fee in the above cases wherever required will be accepted through payment gateway.

Members & Students are encouraged to use the aforesaid service which will eliminate the need of postal/ fax communication with the Institute and provide better means of tracking their requests. However, it is clarified that submission of forms/ requests as stated above by the members and students would be optional.

Important to Note: The facility can be used only by students & members who have obtained digital signature/ certificate. Members/ Students who do not have a digital signature/ certificate and desirous of applying for it can visit the Institute website www.icai.org/digital/index.html.

The regulatory forms referred above can be viewed on the Institute website as follows:

Members: www.icai.org/members/mem_online_forms.html
Students: www.icai.org/students/stu_online_form.html

Filled in forms will have to appended in the body of the e-mail using Format->Rich Text option and send it to the Institute through digitally signed e-mail. Depending on the region the student/ member/ firm belongs, e-mail ID of that region may be used. E-mail IDs of various regions are as follows:

Southern Region (Chennai): sro@icai.org
Western Region (Mumbai): wro@icai.org
Eastern Region (Kolkatta): ero@icai.org
Central Region (Kanpur): cro@icai.org

The subject of the e-mail should be the Membership Number (or) Firm Registration Number (or) Student Regn. Number as the case may be followed by hyphen(–) and Regulatory Form Number. Exp. If member with membership number 123456 is submitting Form 6, then the subject should be 123456 – Form 6. On acceptance of the digitally signed e-mail at the Institute, an acknowledgement will be sent to the concerned student or member or firm as the case may be.