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August, 2015

Questioning the Legal Correctness of the SC's Jurisdictional Expansionism of Consumer Forums in respect of Matters Subject to Arbitration Agreements

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QUESTIONING THE LEGAL CORRECTNESS OF THE SC'S JURISDICTIONAL EXPANSIONISM OF CONSUMER FORUMS FOR ARBITRATION AGREEMENTS: AN ANALYSIS OF RELEVANCE OF FAIR AIR ENGINEERS TO PRESENT DISPUTES

Mr. Axay Satagopan[*]

ABSTRACT

The present essay seeks to analyze the justifiability of Jurisdictional Expansionism of Consumer Forums by the Supreme Court and the NCDRC, with a specific emphasis on the decisions of the Supreme Court, conferring upon the Consumer Forums, the jurisdiction to adjudicate upon matters which are subject to arbitration agreements, notwithstanding S8 of the 1996 Act, in the light of the interpretation accorded to S3 of the 1986 Act. This essay seeks to question the legal soundness and logical tenability of the interpretation of S3 of the 1986 Act, in light of S8 of the 1996 Act, focusing on the relevance of the Fair Air Engineers case, which, despite its obsolescence due to the repeal of the 1940 Act, under S34 of which it was decided, to present day disputes. The author concludes, after a perusal of the various decisions in this regard, and upon critically analyzing the same, that the position in this regard is flawed and inconsistent, both in respect of other judicial precedents, delivered by the Supreme Court, as well as in respect of the attempted reconciliation of the two ostensibly conflicting statutes. The present essay elaborates upon the lacunae present in the law, as stands presently, and suggests the implementation of a few changes, in order to clarify and render consistent the law thereof.

INTRODUCTION

The present essay seeks to analyze the justifiability of Jurisdictional Expansionism of Consumer Forums by the Supreme Court and the NCDRC,

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with a specific emphasis on the decisions of the Supreme Court, conferring upon the Consumer Forums, the jurisdiction to adjudicate upon matters which are subject to arbitration agreements, notwithstanding S8 of the Arbitration & Conciliation Act (1996 Act), in the light of the interpretation accorded to S3 of the Consumer Protection 1986 Act.(1986 Act.)

To that end, this essay is divided into six sections, which deal with, respectively, firstly, the relation between the 1986 Act, and other laws in force, with an emphasis on S3 of the 1986, its entailment and interpretations given thereof, secondly, principles with respect to the ouster of jurisdiction of the Consumer Forums, thirdly, the reference of a matter to arbitrations, under the 1996 Act, vide S8, while noting the substantive differences between S8, and its predecessor, S34 of the repealed Arbitration Act, 1940 (1940 Act), accompanied by an analysis of the pertinent judicial pronouncements on S8, fourthly, the effect of arbitration agreements on the jurisdiction of Consumer Forums, focusing on decisions rendered in that regard by the Supreme Court of India, fifthly, a critical analysis of the decisions of these decisions, in light of decisions given under S8 of the 1996 Act, followed by a conclusion.

RELATIONSHIP BETWEEN THE 1986 ACT AND OTHER LAWS IN FORCE

S3 of the (1986 Act) pertains to the relationship between the 1986 Act and other legislations already in force and subsequently enacted, and the nature of the remedies available under the 1988 Act, w.r.t. remedies available the under other legislations. S3 of the1986 Act expressly states that the provisions of the Act shall be "in addition to and not in derogation of the provisions of any other law for the time being in force."[1] The title of S3 is "Act not in derogation of any other law"[2] The phraseology of the operative part of the provision, read in conjunction with the title, evidences

1 S3 of the 1986 Act reads: 3. Act not in derogation of any other law: The provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force.

2 *Id.*

the parliamentary intent with respect to the 1986 Act, in that it is not intended to have any overriding effect.[3] The purpose of the 1986 Act is the provision of an alternate remedy, albeit subject to the qualification that its invocation does not result in the derogation of other laws. Therefore the provisions are intended to supplement, not supplant other subsisting legislations.[4] It can be stated therefore, that S3 lays down two rudimentary characteristics of the remedies available under the 1986 Act, which are, firstly, that the remedies are additional, i.e. they exist besides those remedies already available to the aggrieved party, from other laws already in force, and secondly, they are not in derogation to provisions of other laws already in force, i.e. they do not take away, and therefore impair the operation or objective of other laws already in force.[5] The phraseology of the operative part of the provision (specifically the use of the word 'and' between "in addition to" and "not in derogation of") suggests that *both* these characteristics ought to be satisfied consequent to the invocation thereof under the 1986 Act, for such an invocation to be sustainable as valid. It follows therefore, that under the 1986 Act, no remedy can be provided, the provision of which will have the result of frustrating the remedy, objectives or the provisions of another law, already in force. Where therefore, there is scope for potential conflict, the phraseology of S3 of the 1986 Act implies that the legislative intent was not to undermine other subsisting legislation through its enactment or to treat it as superseding other existing relationships. Simply put, the provisions of the 1986 Act ought not to abrogate the substantive implications of other operative legislations.

PRINCIPLES OF JURISDICTIONAL OUSTERS

A cardinal principle of ousters of jurisdiction is that they have to be express and specific. The mere fact that a statute confers jurisdiction, in respect of a certain matter to a specific authority does not in itself imply

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3 *State of Karnataka v. Vishwabharathi House Building Cooperative Society* (2003) 2 SCC 412.

4 Id.

5 Merriam Webster's Dictionary defines "derogate" as: "to take away a part so as to impair."

the parliamentary intent with respect to the 1986 Act, in that it is not intended to have any overriding effect.[3] The purpose of the 1986 Act is the provision of an alternate remedy, albeit subject to the qualification that its invocation does not result in the derogation of other laws. Therefore the provisions are intended to supplement, not supplant other subsisting legislations.[4] It can be stated therefore, that S3 lays down two rudimentary characteristics of the remedies available under the 1986 Act, which are, firstly, that the remedies are additional, i.e. they exist besides those remedies already available to the aggrieved party, from other laws already in force, and secondly, they are not in derogation to provisions of other laws already in force, i.e. they do not take away, and therefore impair the operation or objective of other laws already in force.[5] The phraseology of the operative part of the provision (specifically the use of the word 'and' between "in addition to" and "not in derogation of") suggests that *both* these characteristics ought to be satisfied consequent to the invocation thereof under the 1986 Act, for such an invocation to be sustainable as valid. It follows therefore, that under the 1986 Act, no remedy can be provided, the provision of which will have the result of frustrating the remedy, objectives or the provisions of another law, already in force. Where therefore, there is scope for potential conflict, the phraseology of S3 of the 1986 Act implies that the legislative intent was not to undermine other subsisting legislation through its enactment or to treat it as superseding other existing relationships. Simply put, the provisions of the 1986 Act ought not to abrogate the substantive implications of other operative legislations.

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that it consequently deprives all other authorities, which would otherwise ordinarily be able to exercise concurrent jurisdiction, in respect of the same matter, of their jurisdiction.[6] Thus, provisions which state that the dispute "shall be put before/decided" by a certain judicial or quasi-judicial body only serve to confer jurisdiction on such bodies, and not bar/oust the jurisdiction of the consumer forums. Therefore, the operative statute cannot be said to have ousted the jurisdiction of an authority, unless it does so either expressly, or through the use of such terms, which would necessarily lead to the inference of such an ouster. Furthermore, it is imperative that ouster clauses be interpreted strictly. Likewise, the mere presence of a Special Act doesn't in itself preclude the applicability of the 1986 Act, or oust the jurisdiction of the Consumer Forums established under the Act.[7] For the jurisdiction of the Consumer Forums to be ousted completely, there has to be an express ouster of the jurisdiction of the Consumer Forums.[8]

Where multiple forums have jurisdiction, in respect of a dispute, the consumer has the discretion to institute the action in the forum of his choice. The mere presence of other alternate forums for redressal does not bar or abrogate the jurisdiction of the Consumer Forums.[9] Where however, any inconsistency exists between substantive requirements, rules or other aspects between provisions of a specialized legislation and those of the more generalized legislation, such as the 1986 Act, the latter will have to yield in those respects, to the provisions of the specialized legislation.[10] For e.g. S24-A of the 1986 Act prescribes a 2 year limitation period. The MTOG Act prescribes a 6 month limitation period. Even if an action is instituted in a consumer forum, in respect of a matter covered by the MTOG Act, the limitation period prescribed under the MTOG shall prevail over

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6 *Coljax Laboratories Ltd v State of Goa* (1995) Goa LT 325, where the Court held that an interpretation which takes away the jurisdiction of a competent authority, in the absence of an express ouster provided in law will not be favored.

7 *The Chairman, Thiruvalluvar Transport Corporation v The Consumer Protection Council* 1995 AIR 1384, 1995 SCC (2) 479.

8 Id.

9 *Kishore Kumar v. Chairman, ESI* AIR 2007 SC 1819; *Trans Mediterranean Airways v. Universal Exports* 2011 (4) RCR (Civil) 472, 2011 (10) SCALE 524.

10 *Thiruvalluvar Transport Corporation* supra note 10; *Diamond Overseas v All Cargo.*

S24 of the 1986 Act.[11] Therefore, in the event of a repugnancy, the Special legislation's provisions shall, in that regard, and to that extent, nullify and invalidate the operation of the provision of the general legislation, which produced the repugnancy.[12]

REFERENCE TO ARBITRATION UNDER THE ARBITRATION & CONCILIATION ACT, 1996

S8 of the 1996 Act deals with the power of judicial authorities, to refer parties to arbitration, where the said parties have entered into to an arbitration agreement.[13]

S8(1) provides that a judicial authority, before which an action is instituted, in a matter which is the subject of an arbitration agreement shall refer the parties to arbitration, provided that the party desirous of having such a reference made, makes an application signifying such desire, within the prescribed stage of progression of the trial.[14] S8(3) is a non obstante clause, which provides that neither an application for reference

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11 Id.; *Trans Mediterranean Airways v. Universal Exports* 2011 (4) RCR (Civil) 472, 2011 (10) SCALE 524.

12 Id. , *Ethiopian Airlines v. Ganesh Narain Sahoo* AIR 2011 SC 3495.

13 S8 of the 1996 Act reads: 8. Power to refer parties to arbitration where there is an arbitration agreement.—
1. A judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement shall if a party so applies not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration.
2. The application referred to in sub-section (1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof.
3. Notwithstanding that an application has been made under sub-section (1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made.

14 It is evident therefore, that the judicial authority is not obligated to refer the matter to arbitration, unless at least one of the parties to the arbitral agreement is desirous of having the matter heard and adjudicated upon by an arbitrator or arbitral tribunal, as stipulated in the arbitral agreement, and therefore makes an application to the judicial authority for a reference of the matter to arbitration. S8 therefore, does not impose an absolute embargo on judicial authorities from determining matters, which are the subject of arbitration agreements. Where a party does not make the application, as prescribed under S8(1), or otherwise cause to be initiated, arbitral proceedings before the arbitral tribunal, the judicial authority continues to have jurisdiction in respect of the matter before it, notwithstanding the fact that such matter is the subject of an arbitration agreement.

to arbitration nor the pendency of the original action before the judicial authority precludes the arbitral tribunal from initiating or continuing arbitral proceedings, or passing an arbitral award. The intent behind this provision is to minimize the employment of dilatory tactics by the party desirous of avoiding arbitration.[15] It also reflects the legislative intent of conferring primacy to arbitral tribunals, in respect of determining disputes, which constitute the subject matter of arbitration agreements.

S8 is patterned on Art. 8 of the UNCITRAL Model Law,[16] though it does not intercalate it verbatim. It markedly departs from the language of Art. 8 in two respects, firstly, it contains the word "judicial authority" instead of the word "court" as has been used in Art. 8, and secondly, it omits the words "unless it finds that the agreement is null and void, inoperative and incapable of being performed," which appear at the end of Art. 8(1), which words qualify the power of the courts to refer the matter to arbitration. These conspicuous departures are not merely innocuous linguistic changes; they have substantive implications, which are indicative of the legislative intendments in respect of the ambit of the Act. The usage of the specific word "judicial authority" as opposed to the word "courts," in S8 is to extend its applicability to all authorities, of judicial character. S8 therefore, is applicable, not only to courts of civil adjudicature, but also to the multifarious parallel adjudicatory mechanisms and systems, like tribunals, consumer forums etc.[17] Likewise, the omission of the aforementioned

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15 Mohta, *Arbitration, Conciliation and Mediation* (2nd Edition, Manupatra 2008) pp 152.

16 Article 8 of the UNCITRAL Model Law on International Commercial Arbitration reads:

Article 8. Arbitration agreement and substantive claim before court.

1. A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.
2. Where an action referred to in paragraph (1) of this article has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court.

17 The use of the word 'judicial authority' instead of 'court' evidences the legislative intent as to the semantic sweep of the provision. Under S2(1)(E), the term 'court' has a very narrow connotation, referring to courts of civil judicature.

party, desirous of having the matter determined by an arbitral tribunal, makes an application to the judicial authority, seeking that it refer the parties to arbitration, provided that such an application is made before the party submits its first statement on the substance of the dispute.[22]

Therefore, in cases where there is an arbitration clause in the agreement, provided that the requisite conditions have been satisfied, it is obligatory for the judicial authority to refer the parties to arbitration in terms of their arbitration agreement and nothing remains to be decided in the original action after such an application is made except to refer the dispute to an arbitrator.[23]

In *Hindustan Petroleum Corp Ltd v. Pinkcity Midway Petroleums*,[24] Hindustan Petroleum (HPCL) entered into a contract with a dealer for the supply of petroleum products, which contract had an arbitration clause. HPCL suspended sales and supply of petroleum products to a dealer for 30 days and levied penalties for alleged short delivery and tampering of measurement seals by the dealer. The dealer filed a suit in a Civil Court for a declaration that the said order of HPCL was illegal and arbitrary. In response, HPCL made an application to the court under S8 of the 1996 Act, seeking a reference to arbitration, pursuant to the arbitration clause in the agreement entered into, as between the parties. The Civil Court dismissed the application, holding that the dispute was not the subject matter of the arbitration clause. HPCL appealed to the Supreme Court, by special leave.

The Supreme Court held that the language of S8 of the 1996 Act was peremptory, as had been held by the Court previously, in *Raju v. Raju*,[25] and that it was not open to the Civil Court to determine jurisdictional questions, such as whether the arbitration agreement was valid, or whether it covered

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22 Id.

23 Id. ; *Hindustan Petroleum Corp Ltd v Pinkcity Midway Petroleums* (2003) 6 SCC 503; See *Agri Gold Exims Ltd v Sri Lakshmi Knits & Woven* 2007 (1) Arb LR 235 (SC), *Nicholas Piramal India Ltd v Zenith Drugs & Allied Agencies* 2007 (3) Arb LR 372; *Regent Automobiles v. Indian Oil Corporation Ltd* 2009 (2) RAJ 179 (P&H) (DB).

24 (2003) 6 SCC 503.

25 (2000) 4 SCC 539.

qualifying words, is to minimize judicial involvement and intervention in arbitral proceedings, as envisaged under S5 of the 1996 Act,[18] and thereby vest solely and completely, in arbitral tribunals, the jurisdiction in respect of matters subject to arbitration agreements.[19] This conclusion follows from the conspicuous changes entailed by S8, w.r.t. its predecessor, i.e. S34 of the repealed 1940 Act. Under S34 of the 1940 Act, the judicial authority had the discretion to grant the reference for arbitration. Furthermore, it had the power to determine jurisdictional issues, viz. the existence and validity of the arbitration agreement, the arbitrability of the subject matter of the dispute etc. Under the 1996 Act, vide S8, the judicial authorities have been stripped of these powers, which have been vested solely in the arbitral tribunal instead. This adequately evidences the legislative intent to keep the role of non-arbitral judicial authorities to a bare minimum.[20]

The Supreme Court considered the nature and scope of S8 in two decisions. In *Raju v. Raju*,[21] the Supreme Court while considering the import of S8, held that the language of S8 is peremptory in nature, and that it cast a mandatory and unexceptionable obligation, upon the judicial authority, to refer the parties to arbitration, if the action instituted before it, was the subject matter of an arbitral agreement. The Court also propounded four requisite conditions, upon the satisfaction of which the judicial authority's exercise of its power of reference is conditioned.

Firstly, there must exist an arbitration agreement, to which the parties to the dispute have subjected themselves. Secondly, one of the parties to that agreement institutes an action before the judicial authority. Thirdly, the action instituted before the judicial authority pertains to a matter, which constitutes the subject of the arbitration agreement, and fourthly, the other

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18 S5 of the 1996 Act reads, 5. Extent of judicial intervention: Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part.

19 O. P. Malhotra, The Law and Practice of Arbitration and Conciliation (1st Edition, LexisNexis 2002) pp 256.

20 *Id.* at 256, 258.

21 *P Anand Gajapathi Raju v P V G Raju* (Dead) (2000) 4 SCC 539.

the dispute, in respect of which the pending action had been instituted. These questions were to be decided solely by the arbitral tribunal under S16, subsequent to the reference made under S8. The Court reiterated the obligatory and non-discretionary nature of S8, holding that once an application was made, seeking a reference of the parties to arbitration, it was not open to the judicial authority to decide not to do so; that S8 cast a mandatory duty upon the judicial authorities in that regard. This is based on the principle that parties to an arbitration agreement, should ordinarily be held to their agreement, and therefore not permitted to initiate or take resort to any legal proceeding other than the arbitration proceeding, relating to any dispute coming within the arbitration clause.[26] The right to seek arbitration, being a contractual right, ought not to be unilaterally abrogable.[27] S8 thus constitutes the "negative aspect" of arbitration agreements; the agreement to submit a certain matter to arbitration implies that such matter shall not be heard or adjudicated by an authority other than the arbitral tribunal, irrespective of whether such exclusion is specifically expressed in the arbitral agreement.[28] This is based on the antediluvian principle in common law that the rights are remedies under a statute being *uno flatu*, cannot be dissociated from each other.[29] Therefore, where a specific remedy is given by a statute, it deprives the person of any other form of remedy, than the one given by the statute.[30] This common law principle has been accepted

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26 *Pradeep Anand v ITC Ltd* AIR 2002 SC 2779, (2002) 6 SCC 240. It is essential to note that this case was under S34 of the repealed 1940 Act, and not the present 1996 Act. However, the principle propounded therein is applicable even under S8 of the present Act, which corresponds to S34 of the 1940 Act.

27 Wadhwa, Krishnan *infra* note 20, pp 426.

28 Anirudh Wadhwa, Anirudh Krishnan (eds) *Justice R S Bachawat's Law of Arbitration and Conciliation* Volume 1, (5th Edition, LexisNexis Butterworths 2010) pp 425; The object of submitting certain disputes to arbitration is that the disputes so submitted, shall not be heard and decided by a non-arbitral judicial authority. *See*, O P Malhotra, *The Law and Practice of Arbitration and Conciliation* (1st Edition, LexisNexis 2002) pp 259.

29 *Bacrracurigh v. Brown* 1897 AC 615; Likewise, in *Doe v Bridges* (1831) 1 B&Ad 847, 859 Lord Tenterden observed, 'Where an Act creates an obligation and enforces the performance in a specified manner, we take it to be the general rule that performance cannot be enforced in any other manner.'

30 *Premier Automobiles v K. S. Wadke* 1975 AIR 2238; It is imperative to note, however that this decision was under the Industrial Disputes Act, 1947, and not the 1986 Act. The principle however can be extrapolated *in toto*.

as law even in India, in the decision of the Supreme Court, in *Premier Automobiles v. K. S. Wadke*.[31]

EFFECT OF ARBITRATION AGREEMENTS ON THE JURISDICTION OF CONSUMER FORUMS

The question as to the effect of arbitration agreements would have, on the jurisdiction of consumer has come up before Court numerous times, though cases under S8 of the 1996 Act, are scant. Till date, no case has truly considered the ambit of S8 of the 1996 Act, while determining that question. In this section, four decisions shall be analyzed, in all of which, the aforementioned question arose for adjudication.

5.1. Fair Air Engineers Ltd. v. N. K. Modi[32]

In this case, the respondent (complainant) had entered into a contract with the appellant (opposite party), for the installation of central air conditioning in his residence. The contract contained an arbitration clause which stipulated that any dispute arising as between the parties, in respect of the performance of the contract would be decided through arbitration. The appellant having breached his contract, the service rendered by it having been deficient, the respondent instituted a complaint, at the State Forum seeking compensation. The State Forum decided in favor of the respondent. On appeal, the National Forum reversed the decision of the State Forum, and decided in favor of the appellant. One of the questions before the Supreme Court, on appeal, was the effect of arbitration agreements on the jurisdiction of Consumer Forums.

This case, being under S34 of the now repealed 1940 Act, the Court held that by invocation of S34, the party to the proceedings does not get an automatic right to have the proceedings pending before the judicial

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31 *Id.*

32 (1996) 6 SCC 385, AIR 1997 SC 533; This case was decided under S34 of the 1940 Act, however, it is imperative that it be analyzed as it continues to be referred to by courts as the *locus classicus* on the issue, despite its obsolescence.

authorities stayed, and instead relegated to arbitration. S34 gives the judicial authorities the discretion to stay the proceedings, upon being satisfied that there is no sufficient reason why the matter should not be referred to arbitration pursuant to the arbitration agreement entered into by the parties, where the parties were and still remain ready and willing to do all things necessary to the proper conduct of the arbitration.

The court rejected the contention that if the proceedings under the Consumer Forum is not stayed, and the parties not relegated to arbitration, the 1986 Act would be operating in derogation to the provisions of the 1940 Act, and in contravention to S3, on grounds that the remedy available to the parties, under the 1986 Act are in addition to those available under other laws already in force; that the Parliament was aware of the provisions of the 1940 Act and the Indian Contract Act, (1872 Act)[33] and the consequential remedy available under S9 of the Code of Civil Procedure 1908 Act (1908 Act)[34] i.e. to avail of right of civil action in a competent court of civil jurisdiction, notwithstanding which it enabled the provision of an additional remedy under the 1986 Act. Consequently, the Court held that Consumer Forums being judicial authorities for the purpose of S34 of the 1940 Act notwithstanding, in view of the object of the 1986 Act and by operation of S3 thereof, they had the jurisdiction to proceed with the matters in accordance with the provisions of the 1986 Act rather than relegating the parties to arbitration proceedings pursuant to the arbitration contract entered into between the parties. The Court also stated *obiter*, that similar powers were vested in the judicial authorities, under S8 of the 1996 Act, without elaborating further on the same. This passing averment made in respect of S8, however, was incorrect, as evidenced from the decisions given on S8; unlike S34 of the 1940 Act, S8 of the 1996 Act does not confer on the judicial authority, any discretion whatsoever, in the exercise of its power to

33 Indian Contract Act, 1872.
34 Code of Civil Procedure, 1908.

refer to arbitration. A detailed study comparing the substantive differences between the two has been done in an earlier section of the present essay.[35]

5.2. Saipriya Estates v. Sujatha[36]

In this case, the petitioner and the respondent had entered into a contract in respect of a plot of land, for the construction of a residential complex, one of the terms of which stipulated that the area of construction would be divided in the ratio of 55:45. The contract contained an arbitration clause, which stipulated that any dispute that would arise, in respect of the contractual performance, would be resolved through a reference for arbitration. The petitioner, having failed to perform its part of the contractual obligations, the respondent instituted a complaint in the District Forum, to compel performance and provide compensation.

The petitioner made an application to the District Forum to refer the dispute to arbitration, pursuant to the arbitration clause in the contract the parties to the dispute had entered into, simultaneously contending that the District Forum could not, in light of the existence of an arbitration agreement, which had not been resorted to, adjudicate upon the dispute. The Forum dismissed his application (relying on *Fair Air Engineers*). The petitioner consequently, moved the AP High Court, under its writ jurisdiction to direct the Forum to refer the dispute to arbitration.

It was contended for the petitioner that the Forum's reliance on *Fair Air Engineers* was misplaced, since it was decided under S34 of the 1940 Act, which varied materially from S8 of the 1996 Act, which is the present Act, the 1940 Act having been repealed. Unlike S34 of the 1940 Act, which allowed the judicial officer to exercise discretion, in respect of whether the reference may be made for arbitration, S8 of the 1996 Act makes the reference of a dispute to arbitration mandatory, where a clause stipulating such reference exists, evidenced from the use of the word "shall" and

35 Refer to the section titled: Reference to Arbitration under the Arbitration & Conciliation Act, 1996 *supra.*

36 *Saipriya Estates v. Sujatha AIR 2008*, AP 166.

affirmed by the Supreme Court's decision in *Pinkcity*.[37] Consequently, the presence of an arbitration clause, which has not been resorted to, will exclude the Forum's jurisdiction.

The Court held that the ruling in *Pinkcity* is not applicable to proceedings under Consumer Forums, because it's in respect to civil courts, and Consumer Forums are not civil courts. Therefore, the ouster under S8 of the 1996 Act does not apply in respect of proceedings under the District Forum. The Court further held that *Fair Air Engineers* continued to remain relevant, and was applicable to the present case, as the Court in *Fair Air* considered the impact of S8 of the 1996 Act in passing and held that it neither affected the applicability of the 1986 Act, nor ousted the jurisdiction of the Consumer Forums, established thereunder. It further held, emphatically that the 1986 Act provides an alternate mechanism of redressing disputes, in addition to the conventional mechanism.

5.3. Skypak Couriers v. Tata Chemicals[38]

In this case, the Supreme Court held that, even if there exists an arbitration agreement between the parties, notwithstanding which, the consumer institutes a complaint in relation to certain deficiency of service, then the existence of the arbitration clause will not be a bar to the entertainment of the complaint by the Redressal Agency, constituted under the 1986 Act, as the remedy provided under the Act is in addition to the provisions of any other law for the time being in force.

The Court further held, in this case, that unless an absolute necessity is evincible, for referring the dispute to consensual adjudication, the Consumer Forums must refrain from referring them to such consensual adjudication, and decide upon them on their own. It went to the extent of stating that a failure to do so would amount to a dereliction of duty on part of the Forums.

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37 (2003) 6 SCC 503.
38 AIR 2000, SC 2008.

5.4. M/S National Seeds Corporation v. Madhusudhan Reddy[39]

The most recent decision on this issue from the Supreme Court, it is surprisingly unremarkable as it doesn't even make a reference to some of the key decisions in regards to S8 of the 1996 Act. The dispute in this case arose from the failure of crops supplied by the appellants, to respondents, who were farmers, who had purchased seeds from the appellants. Due to the seeds being defective, the crops grown were not saleable, and consequently the farmers suffered significant losses. Therefore, they instituted a complaint in the District Forum, for compensation. The District Forum decided in favor of the respondents. The State Forum dismissed their appeals and the National Forum likewise dismissed the revision petition. On appeal, by special leave to the Supreme Court, one of the issues was whether the arbitration clause in the agreement between the appellants and the respondents in itself constituted an embargo on the maintainability of the action in front of the District Forum.

Perfunctorily following *Fair Air Engineers*, the Supreme Court held that remedies offered under the 1986 Act, being in addition to those available under the 1996 Act, the aggrieved party could choose to resort to either of the available remedies, i.e. under the 1996 Act or the 1986 Act, upon his discretion; that the presence of an arbitration agreement, nor even the making of an application seeking the reference to arbitration would necessarily oust the jurisdiction of Consumer Forums, in respect to the dispute. The Court completely ignored the language of S8 of the 1996 Act, the substantive implications of which are materially different from those of S34 of the 1940 Act, under which *Fair Air Engineers* was decided, and the judicial pronouncements in cases such as *P. V. G. Raju* and *Pinkcity*, which categorically held that S8 of the 1996 Act is peremptory in nature. It did not even so much as refer to the provisions of the 1996 Act in detail, but merely held that under S3 of the 1986 Act, the remedy under the 1986 Act was in addition to remedies otherwise available.

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39 AIR 2012 SC 1160, (2012) 2 SCC 50.

The law as it stands currently therefore is this: The presence of an arbitration clause, in a consumer contract does not in itself bar the jurisdiction of the Consumer Forums of adjudicating the claims arising in respect of such contracts, pertaining to defect of goods, or deficiency in service.[40]

CRITICAL ANALYSIS

Courts have continued to rely on the principles propounded in *Fair Air Engineers*,[41] w.r.t the effect of arbitration agreements on the jurisdiction of Consumer Forums, despite it having been decided under S34 of the 1940 Act, which has been repealed, and replaced by the 1996 Act, the substantive implications of which, in that regard, are significantly different.[42] *Fair Air Engineers* is, therefore, an obsolete decision and should not be relied upon by future Courts. Even otherwise however, the Courts have erroneously held that S8 of the 1996 Act does not place an embargo on the jurisdiction of Consumer Forums, in respect of matters covered by arbitration agreements.

In *Saipriya Estates*, the AP High Court went to the extent of holding that S8 of the 1996 Act is not applicable to Consumer Forums, as Consumer Forums are not courts, and therefore, the decision in *Pinkcity*, which held S8 of the 1996 Act to be mandatory, is not applicable. This is completely erroneous. The 1996 Act conspicuously uses the word "judicial authority" in S8, in order to extend its applicability to all authorities which have judicial trappings, and not only to civil courts.[43] Thus, any decision appertaining to S8, would be applicable not only to civil courts, as the AP High Court opined in this case, but to all judicial authorities. Consumer Forums, being judicial authorities,[44] as under the 1996 Act, would therefore be subject to S8.

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40 *M/S Fair Air Engineers Ltd v. N K Modi* (1996) 6 SCC 385, AIR 1997 SC 533; M/S *National Seeds Corporation v. Madhusudhan Reddy* AIR 2012 SC 1160, (2012) 2 SCC 50; *Skypak Couriers v. Tata Chemicals* AIR 2000 SC 2008.

41 (1996) 6 SCC 385, AIR 1997 SC 533.

42 Refer to the section titled: Reference to Arbitration under the Arbitration & Conciliation Act, 1996 *supra.*

43 (1996) 6 SCC 385.

44 *Fair Air Engineers* (1996) 6 SCC 385, AIR 1997, SC 533.

Skypak Couriers, in addition to wrongly stating the law, that unless an absolute need was evincible in respect of a reference to arbitration, Consumer Forums ought to determine the disputes on their own, went on to state, which statement has no valid basis, that an abstention on part of the Forums to do so, would amount to a dereliction of their duties.

National Seeds Corporation[45] *did not even consider the question of S8 being mandatory, or the judicial pronouncements in that regard. Perfunctorily following Fair Air Engineers*, it held that the remedies offered under the 1986 Act, being in addition to those available under the 1996 Act, the aggrieved party could choose to resort to either of the available remedies, i.e. under the 1996 Act or the 1986 Act, upon his discretion, and the mere presence of an arbitration agreement, nor even the making of an application seeking the reference of the parties to arbitration would necessarily oust the jurisdiction of Consumer Forums, in respect to the dispute. The Court completely ignored the language of S8 of the 1996 Act, the substantive implications of which are materially different from those of S34 of the 1940 Act, under which *Fair Air Engineers* was decided, and the judicial pronouncements in cases such as *P. V. G. Raju* and *Pinkcity*, which categorically held that S8 of the 1996 Act is peremptory in nature.

The Court in all these cases completely ignored the part of the operative provision, which mandates that the operation of the 1986 Act shall not be in derogation of the provisions of other laws already in force, and merely considered the part of the provision which states that the remedies shall be in addition to those available under other laws already in force.

The Court is correct to the extent that the mere presence of an arbitration agreement would not in itself oust the jurisdiction of Consumer Forums, and therefore preclude a remedy under the 1986 Act. This is because, under the 1996 Act, the judicial authority is not required to refer the parties to arbitration, unless an application seeking such a reference is made, by one of

45 AIR 2012 SC 1160, (2012) 2 SCC 50.

the parties. However, where a party desirous of having the dispute decided through arbitration, pursuant to the terms of the contract entered into by the parties, makes an application seeking such a reference, the judicial authority has no choice, but to relegate the parties to arbitration. An interpretation to the contrary, i.e. permitting Consumer Forums to adjudicate upon a dispute, notwithstanding an application to have the parties relegated to arbitration being made, would be in contravention to the requirement under S3 of the 1986 Act, which proscribes the operation of the 1986 Act in derogation to the other laws already in force. Such an interpretation has the effect of arrogating to the Consumer Forums, powers, which are expressly denied to them, vide S8 of the 1996 Act.[46]

Such an interpretation is flawed on other grounds as well, as it ignores the presumption in statutory interpretation that the Parliament is cognizant of all laws previously enacted, and currently in force. Incidentally, the Court in *Fair Air Engineers* used this presumption to support its conclusion that the 1986 Act, having been enacted subsequent to the 1940 Arbitration Act, the Parliament intended to provide an alternate remedy to the aggrieved party. The same presumption ought to operate while construing the 1996 Act in respect to the 1986 Act. It follows therefore, that the Parliament, while enacting the 1996 Act, was aware of the provisions of 1986 Act, and potential conflicts, S3 thereof would have w.r.t. S8 of the 1996 Act, notwithstanding which the 1996 Act made no exception for Consumer Forums, within its framework. In the absence of such exception therefore, the Consumer Forums ought to be subjected to the mandates of S8 with the same rigor other judicial authorities are subjected to. The National Consumer Dispute Resolution Commission held:

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46 This view finds support from authors of multiple authorities in the subjects of both Consumer Law and the Law of Arbitration and Conciliation. The learned editors of commentaries on the subject, such as Justice D P Wadhwa, who was himself previously, the president of the NCDRC, has in the commentary he has authored held the interpretation given in decisions subsequent to *Fair Air Engineers* as being in derogation of the provisions of S8 of the 1996 Act. In this regard, *see*, D P Wadhwa, *The Law of Consumer Protection*, (Volume 1, 2nd Edition, LexisNexis 2010).

> "The new forums created by the 1986 Act cannot ignore the substantive laws provided in other statutes. Rather, the legal relation between those parties is to be governed, by those laws.... [W]here any Act not only provides substantive law but also creates the machinery for adjudicating the disputes arising thereunder, the [Consumer Protection] Act must give way to that Special Act, no matter whether the said Act is earlier or posterior to the [1986] Act."[47]

Moreover, to allow a party to unilaterally repudiate his obligations under the contract, and instead resort to an "alternate remedy" would be nothing short of permitting a party to a contract to freely and without consequence flout contractual obligations, thereby undermining the agreement and its sanctity, and therefore defeating the whole purpose of the arbitration clause.

The conferment of unqualified parallel jurisdiction to consumer forums would have the effect of usurping the powers and jurisdiction of the various other statutory tribunals, which would upset the clear cut demarcation of jurisdiction and powers among various tribunals, thereby rendering otiose the tribunals whose powers and jurisdiction are so usurped, and in turn defeating the very purpose of their constitution. Moreover, it would encourage brazen and unabashed forum shopping as the orders passed by various statutory tribunals, even with respect to the same controversy might vary, owing to the purposive considerations guiding their orders, which considerations occasioned their establishment.[48]

Decisions such as these, are evidence of the Supreme Court's use of abstract policy reasons as a sort of stop gap device to fill up a void, where there is a lack of legal principles corroborating the conclusion reached by the court, in consonance with its agenda in respect of furthering consumer rights at the expense of that of the producers. It is one thing to protect Consumers

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47 *United Commercial Bank* v. *Mahendra Popatlal Vora* (1995) 1 CPJ 83 (NC).
48 For instance, consumer forums have a string of precedents.

from exploitative practices, but it's a whole different thing to confer upon consumers an undeserved advantage.

It is in apprehension of these sort of policy oriented, but legally unsound interpretations, that the Court in *Lucknow Development Authority v. M. K. Gupta*,[49] implicitly recognizing the principle that purposive considerations cannot be used to justify violations of the statutory language sounded the following cautionary words to future courts against the unbridled use of their powers,

> "The provisions of the Act thus have to be construed in favor of the consumer to achieve the purpose of enactment as it is a social benefit oriented legislation. The primary duty of the court while construing the provisions of such an Act is to adopt a constructive approach subject to [the qualification that] it *should not do violence to the language of the provisions* and is not contrary to attempted objective of the enactment. [Emphasis supplied]."[50]

The Court thus sounded a caution, urging the Court to resist the temptation to, under the pretext of protecting consumer interests, wield authority it does not have under the scheme of the separation of powers between the three wings of the government. Conveniently enough, later Court decisions have emphatically stated the paragraph preceding the aforementioned paragraph, which elaborates on the purpose behind the 1986 Act having been enacted, in an attempt to justify their conclusions, while utterly and despondently ignoring the cautionary words that the Court had sounded, having foreseen the potential for the exploitative usage of the 1986 Act. For a Court to wield authority it is not explicitly vested with, or otherwise, which is expressly denied to it, would be nothing short of usurping legislative powers, and undermining the doctrine of separation of powers, and legislative supremacy. The doctrine of legislative supremacy in statutory interpretation stipulates that except while exercising their

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49 *Lucknow Development Authority* v. *M. K. Gupta* AIR 1994 SC 787, (1994) 1 SCC 243.
50 *Id.*

powers of judicial review, the Courts are subordinate to the legislature as law-making bodies and are consequently barred from promulgating laws and policies in contravention to legislative directives.[51]

One of the essential prerequisites of any legal system is consistency. Lon Fuller, in his book "The Morality of Law" referred to consistency as an attribute, which among others constituted the "Inner Morality of law". The lack of consistency can irreparably cripple any legal system in that it results in manifestly different results, even in similar or analogous circumstances, which in addition to being patently unjust, shakes the public's faith in the judicial system and its ability to administer justice. The Court seems to have, perhaps without a conscious realization of the same, adopted a double standard in respect to actions under the 1986 Act, and other actions. In its overflowing zeal to be the guardian of consumer rights, it has taken power into its hands, which is reserved for the legislature, viz. the promulgation of laws.

Had the legislature intended to extend the jurisdiction in respect of matters covered under arbitral agreements to Consumer Forums, notwithstanding the embargo placed upon their jurisdiction vide S8 of the 1996 Act, the legislature would have effected, through amendment, a *non-obstante* clause to that effect, in the 1986 Act.[52] The fact that the legislature has not done so thus far, can be treated as a tacit indicator of the overriding

51 One of the quintessential statements on the doctrine of legislative supremacy is, "Judges must be honest agents of the political branches. They carry out decisions, but they do not make." EASTERBROOK, *Foreword, The Court and the Economic System*, 98 HARVARD LAW REVIEW; *as cited in* DANIEL A. FARBER, *Statutory Interpretation and Legislative Supremacy*, 78 GEORGIA LAW JOURNAL 281 (1989). Farber has argued rightly, that such an assertion however, is a gross over-simplification of the relationship between the legislature and the judiciary. Such a relationship has evolved partly as a consequence of the atrophy of judicial common law functions occasioned by the emergence of codified statutory law.

52 For example, 3A. Jurisdiction of Consumer Forums in respect to matters which are the subject of arbitration agreements.— Notwithstanding anything contained in S8 of the Arbitration and Conciliation Act, 1996, the Consumer Forums, constituted under the present Act shall have jurisdiction to entertain complaints, in respect of matters covered by arbitration agreements, as defined under S7 of the Arbitration and Conciliation Act, 1996, unless it be the opinion of the Forum, where the complaint is instituted that the dispute is of such nature, as to necessitate an arbitral reference.

effect of the 1996 Act, in respect of the 1986 Act.[53] Admittedly however, this cannot be treated as either unequivocal or conclusive, as far as indicia in this regard go, as is evidenced from a plethora of decisions on other disciplines throughout India's history.

CONCLUSION

It can however be concluded, with reasonable certainty, that the Supreme Court's interpretation of S3 of the 1986 Act, read with S8 of the 1996 Act, for the determination of the effect of arbitration agreements, on the jurisdiction of Consumer Forums is, if not blatantly wrong, questionable at the very least. Its conclusion might be progressive, but it lacks basis. The Court seems to grasp with a strenuous anxiety, at policies and other non-legal and extraneous considerations, in a feeble though ostensibly heavy handed attempt, to justify its conclusions. The absence of firm footing, has caused it to use passages of obiter, the most famous of which is that of *Lucknow Development Authority*,[54] to arrive at what it purports to be legally sound decisions.

It is not the Court's place, even in a professedly welfare state such as India, which encourages a modicum of judicial activism, to flagrantly violate the language of law. A law, if bad, on any ground, can be repealed by the legislature, and replaced with a superior piece of legislation, and the Court has at best, the power to make a recommendation to that effect.

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53 *Arguendo*, the lack of promulgation of an Amendment reversing the decisions in *Fair Air Engineers*, *Skypak* and *National Seed Corporation* can be treated, and with equal persuasiveness, as tacit approval of those decisions by the legislature. However, the legislature's inactivity in respect of promulgating amendments often isn't a conclusive test for determining the conformity of judicial interpretation with the original legislative intent. This is clearly the case in respect of *Bhatia International*, which was decided in 2002, and which remained the law of the land till 2012, where the Supreme Court overruled it, through its decision in *Bharat Aluminum Company v. Kaiser*, without any legislative intervention in the form of amendments. Therefore, the tacit approval argument would fail, and is not as convincing.

54 AIR 1994 SC 787, (1994) 1 SCC 243.

In order to resolve the present lacuna, it is imperative that the legislature add to the 1986 Act, with the view of clarifying its intent, a provision explaining the relationship between S3 of the 1986 Act and S8 of the 1996 Act. A plausible explanatory provision has already been provided above, in the footnote – number 52. Where however, it is not the legislative intent that a consumer may choose, which choice cannot be digressed from, by the opposite party to that complaint, by applying to the Forum, to refer the parties to arbitration, pursuant to the arbitral clause of the agreement that they had entered into, then, the legislature must add an explanation, expressly stating so.