argus partners
SOLICITORS AND ADVOCATES

August 18, 2023

The Exclusive Jurisdiction of Courts regarding Wills - Scope for arbitration/mediation of disputes arising out of a Will

argus partners
SOLICITORS AND ADVOCATES

Table of Contents

I. Introduction 1
III. Requirement of probate under the Indian Succession Act, 1925 1
IV. The Calcutta High Court's decisions interpreting an arbitration clause in a 'will' 2
V. Possibility of mediation/ arbitration in disputes arising out of a 'will': 2
VI. Conclusion 3

I. Introduction

A probate[1], as per the Indian Succession Act, 1925 ("**Succession Act**"), means a copy of a will[2] certified under the seal of a court of competent jurisdiction with a grant of administration to the estate of the testator. In some cities in India[3], a probate is required to be obtained by the executor before distributing the estate. This is because it is relevant to note that no right as executor/legatee can be established in any court unless a court of competent jurisdiction has granted probate of the Will[4]. Typically, the process of obtaining a probate can be time consuming. Hence, the question that arises is whether the disputes regarding a 'will' can be referred to arbitration?

II. Bombay High Court's recent decision overriding the arbitration clause in a 'will'

Recently, the Bombay High Court in *Ashvin Maganlal Savani* v. *Himadri Davda*[5] considered whether a 'will' is capable of being construed as an 'arbitration agreement'. After relying on the decision of the Hon'ble Supreme Court in *Vijay Kumar Sharma alias Manju* vs. *Raghunandan Sharma Alais Baburam*[6], the Bombay High Court in Ashvin Maganlal Savani (*supra*) held that:

a. By virtue of a 'will' being a testamentary document, it does not contain the signatures of the heirs. The *sine qua non* of such an agreement is "*consensus ad idem*", but the parties are not signatories to the 'will' and cannot be bound by its terms.

b. A will cannot be construed as a 'contract' under the Indian Contract Act, 1872 ("**Contract Act**") but it is a document to provide distribution of the property owned by the testator. However, the directions in the 'will' cannot be construed as an 'arbitration clause'.

Upon considering the relevant clause[7] in the 'will' in Ashvin Maganlal Savani (*supra*), the Bombay High Court held that it is the wish of the testator about the manner in which his heirs would resolve their grievances arising out of the estate, but it is not the heirs *inter-se* who agreed to refer their disputes to a third party. Although the testator directed that the decision of a third party shall be binding on his heirs, but this could not constitute the attributes of an 'arbitrator' and the process cannot be construed as an 'arbitration'.

III. Requirement of probate under the Indian Succession Act, 1925

The Succession Act is a self-contained code insofar as the question of making an application for probate, grant or refusal of probate or an appeal carried against the decision of the probate court. The probate proceedings shall be conducted by the probate court in the manner prescribed in the Act and in no other ways[8]. The grant of a probate by court of competent jurisdiction is in the nature of a proceeding in *rem*; it binds not only all parties before the court but also the entire world[9].

---

[1] Section 2 (f) of the Succession Act.
[2] Section 2 (h) of the Succession Act.
[3] Mumbai, Kolkata & Chennai.
[4] Section 213 of the Succession Act.
[5] Order dated June 27, 2023 in Commercial Arbitration Petition (L) No. 9910 of 2021.
[6] (2010) 2 SCC 486.
[7] "*19. If any of my legal heirs have any complaints for the administration of my estate as set out under this Will, in that event, he/she should approach Senior Advocate Mr. *** and in his absence Mr. ***, Advocate and Solicitor for solving or settlement of such grievousness. The decision of Mr. *** or Mr. *** (as may be the case) will be binding on them and they shall not be entitled to challenge their decision in any manner.*"
[8] *Ishwardeo Narain Singh* v. *Smt Kamta Devi* (AIR 1954 SC 280).
[9] *Chiranjilal Shrilal Goenka* v. *Jasjit Singh* ((1993) 2 SCC 507).

IV. The Calcutta High Court's decisions interpreting an arbitration clause in a 'will'

While considering if construction of an unprobated 'will' is an arbitrable dispute, the Calcutta High Court held[10] that a reference for construction of an unprobated 'will' for establishing the rights of legatees is illegal under section 23 of the Contract Act being forbidden by law, i.e., section 213 of the Succession Act. Consequently, the reference to arbitration was bad and the alleged dispute was not arbitrable.

In a similar matter, the Calcutta High Court held[11] that parties cannot be permitted to enter into an agreement the result of which may be an award that could nullify the intention of the testator. The object sought to be attained by such an agreement, i.e., to allow the parties to acquire title to a portion of the estate in contravention of the terms of a 'will', is not permitted by the applicable law. Executors cannot be permitted to have a 'will' construed by a tribunal of their own choice without proving the 'will' and the duty fixed by law, i.e., proving the 'will' before a competent court. An award adjudicating the disputes between heirs arising out of a 'will' can be treated as invalid.

V. Possibility of mediation/ arbitration in disputes arising out of a 'will':

Considering the lengthy process of a trial before a court for a 'will', it is possible that permitting a reference to mediation/ arbitration may alleviate the time spent in succession disputes before courts in India. For this, perhaps the disputes of 'wills' may need to be split into two groups, one category shall comprise of the challenge to validity of the 'will' and this may exclusively be retained in the domain of courts. However, the second category shall comprise of disputes regarding the proper implementation or application of the terms of the 'will' and these could be referred to mediation/arbitration.

Some benefits of referring disputes between executors and/ or heirs to mediation/ arbitration are:

a. Privacy and avoiding reputational damage may be vital in such disputes, particularly for families. Some members of a family may not be opposed to the existence of a 'will' but the implementation of its terms may lead to a contest. They may not be comfortable with details of their disputes being available in the public domain, but mediation/ arbitration may provide a safe environment. This may also provide families the freedom to freely express their intentions/ grievances without the details being available to the public at large.

b. For complex structures spread across jurisdictions, the bequest in the 'will' may not contain the necessary nuances for implementation. Expert evidence may be important for proper implementation of the testator's intention without rupturing the pre-existing complex structures. Sensitive details of such structures may be shared in a confined room as against proceedings in an open court.

c. Scale of costs and a timeline for completion of proceedings. While court proceedings may entail a lengthy and expensive contest, but mediation/ arbitration may provide a shorter runway for completing and resolving the dispute with a foreseeable timeline. Although high-net worth individuals may not be cost conscious, but the benefit of time saved may outweigh the ability to incur high costs on lengthy court proceedings.

---

[10] *Vishanji Dungarmal Futnani* v. *Mohanlal Dungarmal Futnani* (1987 SCC OnLine Cal 239).
[11] *Jnanendra Nath Mukherjee* v. *Jitendra Nath Mukherjee* (1927 SCC OnLine Cal 117).

VI. Conclusion

Considering the above, it is evident that in India an agreement to refer disputes of a ‘will’ is not an arbitrable dispute. Having said that, although matrimonial disputes are not arbitrable disputes in India but Section 9 of the Family Courts Act, 1984 in India requires that where it is possible to do so the court shall assist and persuade the parties in arriving at a settlement in the proceedings. By virtue of this, the parties are required to go through mediation/ counselling prior to the commencement of the trial. Therefore, it is possible that a similar provision could be introduced to permit mediation/arbitration in ‘will’ disputes by appropriately amending the Succession Act and the Arbitration and Conciliation Act, 1996.

Contributed by:

Ranjit Shetty
Senior Partner

Yuvraj Choksy
Principal Associate

DISCLAIMER

This document is merely intended as an update and is merely for informational purposes. This document should not be construed as a legal opinion. No person should rely on the contents of this document without first obtaining advice from a qualified professional person. This document is contributed on the understanding that the Firm, its employees and consultants are not responsible for the results of any actions taken on the basis of information in this document, or for any error in or omission from this document. Further, the Firm, its employees and consultants, expressly disclaim all and any liability and responsibility to any person who reads this document in respect of anything, and of the consequences of anything, done or omitted to be done by such person in reliance, whether wholly or partially, upon the whole or any part of the content of this document. Without limiting the generality of the above, no author, consultant or the Firm shall have any responsibility for any act or omission of any other author, consultant or the Firm. This document does not and is not intended to constitute solicitation, invitation, advertisement or inducement of any sort whatsoever from us or any of our members to solicit any work, in any manner, whether directly or indirectly.

You can send us your comments at:

knowledgecentre@argus-p.com

Mumbai I Delhi I Bengaluru I Kolkata

www.argus-p.com

Recent Papers/ Articles

July 2023

Green Hydrogen (Series 1) : Framework And Developments In India

Energy and Infrastructure

May 2023

Regulating AI

Technology and Data Privacy

May 2023

Navigating Crossroads Of IBC And RERA

Corporate Restructuring & Insolvency

May 2023

Is Online Rummy Chancier Than An Offline Round?

Technology and Data Privacy

April 2023

The Digital Personal Data Protection Bill, 2022 – An Analysis

Technology and Data Privacy

April 2023

Rera Regime - The Exemption Conundrum

Real Estate

For more Papers/ Articles click here.

argus partners
SOLICITORS AND ADVOCATES

MUMBAI
11, Free Press House
215, Nariman Point
Mumbai 400021
T: +91 22 6736 2222

DELHI
Express Building
9-10, Bahadurshah Zafar Marg
New Delhi 110002
T: +91 11 2370 1284/5/7

DELHI
155, ESC House, 2nd floor,
Okhla Industrial Estate, Phase 3,
New Delhi – 110020
T: +91 11 45062522

KOLKATA
Binoy Bhavan
3rd Floor, 27B Camac Street
Kolkata 700016
T: +91 33 40650155/56

BENGALURU
68 Nandidurga Road
Jayamahal Extension
Bengaluru 560046
T: +91 80 46462300

www.argus-p.com I communications@argus-p.com