INDIAN EXPERIENCES ON CLAIMS AND DISPUTE RESOLUTION

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In any contract, whether for supply or for construction, disputes and differences are bound to arise no matter how meticulously drafted a contract may be. There are many terms in a contract which are subject to more than one interpretation and it is thus obvious that both parties to the contract would stretch the clause in their favour. Obviously, therefore, disputes have to be resolved either by mutual discussion on a give and take basis or through arbitration if so provided by the terms of the contract failing which parties may have to approach the Court.

The arbitrator or the court, as the case may be, when called upon to interpret the conditions of the contract have to apply the golden rule of construction, i.e. ascertaining the intention of the parties to the instrument after considering all the words in their ordinary and natural sense. To ascertain this intention, consideration has to be given to relevant portions of the document as a whole and also to take into account the circumstances under

which the particular words were used. Very often the status and training of the parties using the words have to be taken into consideration. One cannot lose sight of the fact that very many words are used in more than one sense and that sense differs in different circumstances.

If a contract is clear and unambiguous, its true effect cannot be changed merely by the course of conduct adopted by the parties in acting under it. When a party to the contract is called upon to answer a claim arising out of a breach of contract, the terms of the contract have to be strictly construed and there can be no question of beneficent construction.

Loosely worded contracts are a source of sowing seeds of discord between the parties. Each word in the contract should be one which is capable of being given that meaning which is understood in the trade in only one sense. However, if certain new terms have got to be introduced then the author of the document must add explanation which makes the intention abundantly clear.

While drafting a contract, the owner must ensure that each and every word used in the document is clearly and accurately spelt otherwise it may create

problems subsequently. For example, in a works contract the excavation referred to was of murram including hard murram. There was no specific mention of excavation in rock or cutting of rock under the contract. The relevant term only spoke of “excavation for tank in any soil, murram, sock etc.” The only dispute was whether the word “sock” was intended to mean “rock”. The trial court as well as the High Court held that the word “sock” could not refer to “rock”. The Supreme Court agreed with the reasoning of the courts below that the charge for rock cutting would be much higher than the charge for excavation of soil or murram as rock cutting would more labour and heavier cost and no contractor would agree to the same rate for excavation of soil and for rock cutting. (1)

If in the course of carrying out a contract, a fundamentally different situation – different, i.e. from anything which the parties had in contemplation – is brought about by the conduct of one of them, then, even though his conduct may not be a breach of contract, he will not be allowed to take advantage of the new situation to the detriment of the other party when it would be unjust to allow him to do so. (2) ATKIN L.J. illustrated the principle in these words:

> "If I order a wine merchant 12 bottles of whisky at so much a bottle and he sends me 10 bottles of whisky and 2 bottles of brandy, and I accept them, I must pay a reasonable price for the brandy." (3)

Claims arising out of commercial contracts had been adjudicated upon by the arbitral tribunals culminating into an award. When objections were raised against such an award, courts gave due respect to the instrument and made the award rule of the court except when there was an error apparent on the face of the award. Till mid-seventies of the last century awards rendered by the arbitrators were in the form of non-speaking awards – lump sum or itemwise. No reasons were required to be assigned. This was the amount of confidence that an arbitrator commanded and very rarely the parties grudged against the award. A stage came when parties started looking at the awards with suspicion. This gave rise to arbitration agreement providing for a reasoned award.

In case of engineering contracts particularly, the arbitration is generally conducted by a technical person who does not have the skill, competence and training that judges have in writing the judgments. The courts recognized this drawback of technically qualified arbitrators and started dismissing objections raised against the awards by saying that all that was required from arbitrators was that they should reveal their thought process

and not the mental meanderings leading to the award. To the objection that the award was not well reasoned or was not adequate, the courts ruled that reasonableness of reasons could not be gone into. Merits of the controversy, except in the rarest of the rare cases, are not gone into by the courts. The courts also do not re-appraise and re-appreciate the evidence led before the arbitrators, nor sit in appeal over the verdict of the arbitrator. Interpretation of the conditions of the contract has been left to the arbitrators. Questions of law referred by the parties to the arbitrators even if decided most erroneously had never been interfered with by the Indian courts. With all these parameters in mind, it is not unusual that a litigant raises his level of expectancy for early disposal to reap the fruit of the award. However, this had always been a wishful thinking, which has so succinctly been summarized by the Supreme Court in *Guru Nanak Foundation Vs Rattan Singh & Sons* (4) wherein it is stated:

> "Interminable, time consuming, complex and expensive court procedures impelled jurists to search for an alternative forum, less formal more effective and speedy for resolution of disputes avoiding procedural clap trap and this led them to Arbitration Act, 1940. However, the way in which the proceedings under the Act are conducted and without an excepting challenged in courts, has made lawyers laugh and legal philosophers weep. Experience shows and law reports bear ample testimony that proceedings under the Act have become highly technical accompanied by unending prolixity, at every stage providing a legal trap to the unwary. Informal forum chosen by the parties

> for expeditious disposal of their disputes has by the decisions of the courts been clothed with 'legalese' of unforeseeable complexity."

Again, in *Ramji Dayawala & Sons (P) Ltd. Vs Invest Import* (5) the Supreme Court held:

> "Protracted, time consuming, exasperating and atrociously expensive court trials impelled an alternative mode of resolution of disputes between the parties: arbitrate – don't litigate. Arbitration being a mode of resolution of disputes by a judge of the choice of the parties was considered preferable to adjudication of disputes by court. If expeditious, less expensive resolution of disputes by a Judge of the choice of the parties was the consummation devoutly to be wished through arbitration, experience shows and this case illustrates that the hope is wholly belied because in the words of EDMUND DAVIES, J. in Price Vs Milner, these may be disastrous proceedings."

Under the 1940 Act the respondent could drag on with the litigation right from the time of invocation of arbitration to the stage of award being made rule of the court. On receiving request for appointment of arbitrator to settle the disputes arising between the parties, the persona designata – usually an officer of the employer – would sit tight over the matter. First round of litigation would start with the claimant filing a petition under section 20 seeking intervention of the court. After more than 2 years the claimant would succeed in getting an order from the court directing the persona designata to appoint the arbitrator. On the arbitrator being appointed, the

respondents would first cause delay in the arbitral proceedings by seeking adjournments on one pretext or the other and on finding that the wind was not flowing in their favour, the employer used to file application under sections 5 and 11 seeking removal of the arbitrator on grounds of bias or on other grounds. This was second round of litigation which involved another 2-3 years. Miseries of the claimant did not end even here. Third round of litigation would start with the employer filing a petition under section 33 praying for determining the effect of the agreement alleging inter alia excess of jurisdiction on the part of the arbitrator. Another period of 2-3 years would pass by and the claimants' miseries would continue to be what it had been 7 to 9 years back. Ultimately when the claimant succeeded in having the arbitral award he was required to face the fourth round of litigation in the form of objections to the arbitral award. Another period of 3 to 4 years would be consumed in the process. The fifth round of litigation started with the filing of appeal against the award having been made a rule of the court followed by the sixth round of litigation in the form of Special Leave Petition in the Supreme Court. In addition, the claimant would be facing multifarious problems in getting the decree executed even after the verdict of the Apex court.

The position was no different in other countries of the world, except that the degree of miseries of the claimants varied. This is reflected in *Price Vs Milner* (6) where EDMUND DAVIES, J. stated:

> "Many years ago a top-hatted old gentleman used to parade outside these law courts carrying a placard which bore the stirring injunction 'Arbitrate – don't litigate'. I wonder whether the ardour of that old gentleman would not have been dampened somewhat had he survived long enough to learn something about the present case"

With the enactment of the Arbitration and Conciliation Act, 1996, which is, by and large, based on the UNCITRAL Model Law as approved by the United Nations General Assembly, it can be said with certainty that the frustration element of the claimant would be much less. None of the parties, under the New Act has a right to approach the court to stall the arbitral proceedings except in the rarest of the rare cases. If either party to the contract chooses to challenge the authority of the arbitral tribunal, then it has to do so before the arbitral tribunal itself and not the court. If the challenge does not succeed, the aggrieved party is not left high and dry. As and when the award is made it can challenge the award under section 34 of the Act, which, broadly speaking, provides for limited grounds on which awards can be assailed. The party objecting to the award must furnish proof that:

"i. a party was under some incapacity; or

ii. the arbitration agreement is not valid under the law to which the parties have subjected it, or failing any indication thereon, under the law for the time being in force; or

iii the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

iv. the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:

Provided that, if the decision on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

v. the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part"

The award can also be set aside if the Court finds that -

"i. the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

ii. the arbitral award is in conflict with the public policy of India.

Explanation.- Without prejudice to the generality of sub-clause (ii) of clause (b), it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81."

Compared to the grounds on which award under the 1940 Act could be challenged, the grounds available under the 1996 Act are very few. In order to get an award set aside, the party challenging the award has to prove to the hilt one or more of the grounds mentioned hereinbefore. The Supreme in *Olympus Superstructures (Pvt.) Ltd. Vs Meena Vijay Khaitan* (7) has held that section 34 of the Act is based on Article 34 of the UNCITRAL Model Law and it would be noticed that under the 1996 Act the scope of provisions for setting aside the award is far less the same under section 30 or section 33 of the 1940 Act.

Even to get appointment of arbitrator made at an early date would not be a wishful thinking now. The earlier view taken by the courts was that since no time limit had been stipulated in section 11(6) of the Act the courts could not compel the persona designata to make the appointment of the arbitrator within 30 days of the receipt of notice invoking arbitration clause. The Bombay High Court was the first to take a pragmatic when in *Naginbhai C. Patel Vs Union of India* (8) it held that even though it was not specifically stated in the Act that the appointment should be made within 30 days of the receipt of notice but the said period being reasonable it was imperative that

the appointment should be made within that period and failure to do so resulted in abdication of the right to make the appointment. The Supreme Court in *Datar Switchgears Ltd. Vs Tata Finance Ltd.* (9) has helped the cause of arbitration to a very great extent by laying the law as follows:

> "As far as section 11(6) of the Arbitration and Conciliation Act, 1996 is concerned, if one party demands the opposite party to appoint an arbitrator and the opposite party does not make the appointment within 30 days of the demand, the right to make appointment does not get automatically forfeited after expiry of 30 days. If the opposite party makes the appointment even after 30 days of the demand, but before the first party has moved the court under section 11, that would be sufficient. Only then the right of the opposite party ceases."

Under the Old Act of 1940 the arbitrator used to become functus officio after making and publishing the award but under the 1996 Act the position is not so. The parties can approach the arbitrator with an application under section 33 of the Act for any clarification or any matter left undetermined which certainly saves a lot of time. Instead of taking recourse of remission of award under the Old Act, the parties can now have the matter settled without any hassles at the level of the arbitral tribunal.

While under the Old Act the court would pass a decree in terms of the award, but under the New Act the award by itself is a decree which can be

executed if none of the parties raises any objection within 30 days of the receipt of the signed copy of the award from the arbitrator.

Under the Old law the period of limitation for filing the objections against the award was counted from the date of service of notice to the effect that the award had been filed in the court. Even this delayed the matters from 4-6 months. Now the period is counted right from the day when a signed copy of the award is delivered to the parties.

In brief, the New Act has come as a big reprieve to the party invoking arbitration since the period of delay shall reduce substantially and it is expected that right from the stage of the arbitral tribunal entering upon reference to the stage of the award being upheld after rejection of the objections it should not take more than a couple of years as against earlier period of 5 to 6 years. It may be that in days to come the observation that: "Honest men dread arbitration more than they dread law suits" may no longer hold well.