PITFALLS IN ARBITRATION PROCESS AND REMEDIES THEREOF - A STUDY

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This paper is an attempt to evaluate the functioning of the Arbitration and Conciliation Act, 1996, particularly with respect to the deficiencies and the pitfalls, which have bogged its proper implementation over the last more than 16 years since its enactment on 25.01.1996 with a view to make specific recommendations for its modification to make it effective to facilitate the smooth conduct of commercial activities which, in turn, would lead to the development of the nation.

Backlog in Courts and need for ADR mechanism

As at present there is a huge backlog of cases pending in the Courts at various levels in the country. To reduce this backlog, there is a need to take effective steps, which would take out a huge percentage of cases from the judicial system and in this regard, various Committees, Law Commissions and Inter-ministerial bodies of the Government have all suggested an effective ADR system in the country.

Presently, there are more than 3,17,06,369 cases pending in various Courts in India. Over the last 3 years, in the Supreme Court, 2,32,521 fresh cases were filed but only 2,23,821 could be disposed off by the said Court thereby increasing the backlog by 8,700. Similarly, in various High Courts in the Country, fresh filing had been to the tune of 55,02,271, whereas disposal had only been 49,78,925, thereby increasing the backlog by 5,23,346 in the last three years. The situation is more precarious in the subordinate Courts where as against fresh filing of 5,28,38,039, it had been possible for the said Courts to dispose off 5,19,12,645 matters. It would thus be seen that the

pendency rather than decreasing, in fact, increased by 9,25,394 cases over the last 3 years.

Delay in appointment of arbitrators

The issue of appointment of arbitrators by the Court has undergone a number of changes over the last 16 years. Whereas the earlier view of a 3-judge bench of the Supreme Court in *Konkan Railway Corp Ltd. v. Mehul Const. Co.,*[1] was that the order of the Chief Justice in case of appointment of arbitrator for domestic arbitrations and that of the Chief Justice of India in case of international commercial arbitrations shall be deemed to have been made in his administrative capacity and the aggrieved party could approach the arbitrator under Section 16 of the Act for challenging the jurisdiction of the tribunal. This view was confirmed by a Constitution Bench of the Supreme in *Konkan Railway Corp. Ltd. v. Rani Const. Co.*[2] These judgments were followed all over the Country for a period of about five years. However, subsequently, by a majority judgment, a 7-judge bench of the Supreme Court in *SBP and Co.* v. *Patel Engg. Ltd.*,[3] held that the order under section 11 is not administrative but judicial in character. It has also been laid down that henceforth, all cases under section 11 would be dealt with at the level of the Chief Justice of India or any other judge of the Supreme Court (for international arbitrations) and Chief Justice or any other judge of the High Court (for domestic arbitrations). It would not be permissible for the Chief Justice to delegate his authority to any judge below the rank of a High Court Judge. Thus, for all intents and purposes, proceedings under section 11, which were earlier more or less summary in nature, are now being dealt with in the same manner as any other case, with all the rigours of Code of Civil Procedure applicable to these.

The delay in Court procedure, which was the bane of the 1940 Act, has now showed up once again, thereby setting at naught the avowed purpose of the New Act,

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1. (2000)7 SCC 201.
2. (2002)2 SCC 388.
3. (2005)8 SCC 618.

i.e. speedy and expeditious disposal of cases. Chief Justices of various High Courts, burdened as they already are with various judicial and administrative duties, are taking longer time to dispose of the section 11 applications. Since the appointment is judicial in nature and once the arbitrator is appointed there can be no challenge under section 16 of the Act, the matter has to be dealt with in detail at the High Court level itself, which obviously entails a lot of time.

Need to vest power of appointment of arbitrators with arbitral institutions

The Act provided for appointment of arbitrator by the Chief Justice or his designate or an institution nominated by the Chief Justice. With the judgment in *SBP's* case, the arbitral institutions have effectively been divested of the power to appoint an arbitrator. It is suggested that the Courts being already overloaded with very heavy arrears, it would be desirable on the part of the Chief Justice to vest authority in the arbitral institutions to make appointments of arbitrators. It is also submitted that all arbitral institutions have, on their panel, highly experienced persons who would be able to deliver justice between the parties in a very fair and impartial manner. Further, it is recommended that a time limit should be fixed within which the arbitral institution should appoint an arbitrator after receipt of request from either party or the Court, as the case may be. Preferably the said time limit should be two months.

Order of arbitral tribunal granting interim measures – A toothless tiger

Under section 17, no power is conferred upon the arbitrator to enforce its order nor does it provide for judicial enforcement thereof.[4] The arbitral tribunal does not possess any coercive authority to secure implementation of its interim measures and in a sense is a toothless tiger. This is indeed a flaw that weakens the entire arbitration mechanism and at times makes it appear spineless.

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4. *M.D. Army Welfare Housing Organisation v. Sumangal Services Pvt. Ltd.,* (2004) 9 SCC 619: AIR 2004 SC 1344.

Litigation and arbitration each have certain advantages and disadvantages vis-à-vis the other. The resolution of disputes through arbitration would suffer a severe blow if it is found to be substantially deficient by being handicapped to impart interim and conservatory measures.

Order under section 17 – Need to make it enforceable

An order passed by the arbitral tribunal under section 17 is appealable to the Court under section 37(2). An application under section 9 can always be made for seeking an interim measure from the Court. The entire proceedings under section 17 are rendered infructuous when a party against whom an order is passed totally ignores the order.

It is noteworthy that the 1996 Act has not made any provision for mechanism for execution of order made by the arbitral tribunal under section 17 of the Act. This is a serious lacuna, which seems to have escaped attention of the legislature. However, certain countries like Canada and Scotland have specifically provided in their Arbitration law that any order of the arbitral tribunal with regard to interim measures shall have the same status as that of an arbitral award and also enforceable just like an arbitral award.

Whether disobedience of order under section 17 amounts to contempt of court

The decision of the Supreme Court in *Sumangalam Services*'[5] case has effectively rendered the provisions of Section 17 otiose. In the said judgment, the Supreme Court held that an order of an arbitral tribunal under Section 17 is not enforceable before any Court of law. Thereafter, the Delhi High Court in *Sri Krishan v. Anand*[6] tried to provide some strength to such an order of an arbitral tribunal by stating that non-compliance thereof would amount to contempt of Court under Section 27(5) of the Arbitration and Conciliation Act, 1996. The said judgment of the Delhi High Court has, however, not been followed by any other Court or even by the Delhi High Court

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5. *M.D. Army Welfare Housing Organisation v. Sumangal Services Pvt. Ltd.,* (2004) 9 SCC 619.

6. 2009(3) Arb LR 447 (Del).

itself in any further reported judgment. Moreover, a reading of the said judgment shows that the provisions of section 27(5) were interpreted in a manner and to an extent not provided in the Act. As such, the position which exists today is that an order of an arbitral tribunal is only binding upon a party which wishes to abide by the same and not upon a party which ignores or refuses to implement the said order. It is necessary to provide for implementation of the order of the arbitral tribunal under section 17. Such implementation can be ensured by either (a) treating an order of the arbitral tribunal under section 17 as an interim award, which is then enforceable in Court; or (b) by inserting a new provision in the Act empowering the aggrieved party to approach the Court for enforcement of the order upon refusal or reluctance of the recalcitrant party to implement the same; or (c) by insertion of provisions akin to section 41, sub-sections (5), (6) and (7) and section 42 of the English Arbitration Act ,1996 in the Indian Arbitration Act.

Duty of arbitrator to avoid unnecessary delay or expense

An arbitral tribunal has the duty to adopt suitable procedures to avoid unnecessary delays or expenses. For this he has to manage the proceedings in such a way that it helps in early disposal of the matter and at the same time cutting on unnecessary expenses. The need of the hour is for fixing (a) time limit of one year with a possible extension of another six months for conclusion of arbitral proceedings; (b) conducting hearings on a day to day basis rather than holding hearings for short durations spread over a period of months or years.

An arbitral tribunal is not bound by any procedural laws of the Country, such as the Evidence Act or the Code of Civil Procedure. All that is required from an arbitral tribunal is that it should follow the principles of natural justice, which is nothing but fairplay in action. The rules of natural justice must be followed by the arbitral tribunal not only in letter but also in spirit also. In fact, the thread of natural justice should run through the entire arbitration proceeding.

Arbitral proceedings are not expedited; cost often is very high

Various lacunas in the functioning of arbitration proceedings under the Act need to be rectified to make the proceedings effective:

A. Arbitrator's inclination to follow procedural laws applicable in Courts

Practically speaking, proceedings being conducted by arbitral tribunals, particularly retired judges, has made arbitral proceedings akin to court proceedings. Invariably, oral evidence is adduced, which was not the practice a few years ago. In fact, it has been commonly been observed that arbitral tribunals comprising of retired judges insist on oral evidence.

To overcome this lacuna, it is suggested that arbitral tribunals should provide the parties adequate opportunity to present their case, according to the principles of natural justice. The arbitral tribunals should adopt a procedure, which is founded on fairplay, so that the arbitral proceedings do not become mere replicas of court proceedings by following procedural technicalities.

B. Increased number of hearings makes arbitration uneconomical

Whether a particular arbitration is a success or a failure depends on the speed with which disputes are resolved. Speed and economy are inter-linked. If the arbitral proceedings are concluded expeditiously, it would mean much less expenditure for the parties. Lesser number of sittings will mean lesser amount of fees to be paid to lawyers and the arbitrator, if he is paid on per sitting basis.

Justice B.N. Kirpal[7] pointed out the ills prevalent in the Indian arbitration system, in the following terms:

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7. Justice B.N. Kirpal "*India and Alternative Dispute Resolution*". Available at http://sarins.or/lectures/india-and-alternative-dispute-resolution-justice-bn-kirpal/.

> "Arbitration in India failed because it suffered the malady, which it was meant to cure. It was meant to be a cheap and a speedy remedy, but had become an expensive and a long drawn out affair. The advantage which you have in arbitration, namely of choosing the judge who is going to decide your case, is lost by the fact, that a matter which would normally take 15 minutes in a Court of law, takes 2-3 days of hearing before the arbitrator. The reason for this is not far to see. The reason is that like the lawyers the arbitrator's meter keeps on ticking. It is indeed unfortunate that we in India, have the talent and the expertise, to render the best arbitration possible in the whole world, yet people are shying away from India. Firstly, they are shying away from India for the reason that dispute resolution would get clogged in Courts, now they are shying away because dispute resolution has become expensive and long drawn out."

The Law Commission[8] too has observed that in India it has become increasingly common to hold arbitration proceedings at expensive venues. On several occasions, even when the proceedings last for a very short duration, the parties have to pay for a whole day. If the venue is a five-star hotel, the expenses are much heavier. Parties feel embarrassed if they have to reject request for an expensive venue. On the other hand, there are places available, which are fairly decent and not as costly as five star hotels. Several public institutions do make their conference rooms available for arbitration and all facilities are available at inexpensive rates. The Commission observed that in certain arbitrations, which have been continuing for years, the costs of meeting the expenses of the venue are running into lacs of rupees.

It is the bounden duty of any arbitral tribunal to conduct the hearings in such a manner that the matter is concluded as expeditiously as possible. The provision contained in section 18 mandating that an arbitral tribunal is bound to provide "full" opportunity to the parties to present their case is misused on a number of times and proceedings are delayed endlessly.

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8. Law Commission of India, 176th Report, p. 33.

To prevent such misuse, it is recommended that the Act should be amended to provide for “adequate” as opposed to “full” opportunity. Provision similar to section 33(1)(a) of the English Arbitration Act, 1996, which provides for “giving each party a reasonable opportunity of putting his case and dealing with that of his opponent”, must be introduced.

C. Time limit needs to be fixed to complete proceedings

It has become customary on the part of some of the arbitrators to conduct as many as three arbitration matters a day. Likewise, most of the lawyers have shown no seriousness in disposal of matters. They invariably insist on holding of arbitration hearings on holidays or after 4 p.m. They take up arbitration matters just to supplement their income. This is highly undesirable. The usual routine of holding arbitration hearings for a mere two hours a day and of giving dates spread over many months needs to be discouraged. It should be made obligatory that after completion of pleadings, arbitral hearings should be held on a daily basis till conclusion of the case and the hearings should be held for the whole day and not merely for two to three hours. Further, members of arbitral tribunals should be encouraged to allocate time schedule for oral arguments.

The time limit for deciding the case should be fixed by amendment to the law and should be, at the most, one year subject to a maximum extension of six more months, for reasons to be recorded in writing.

D. Lawyers prolong litigation before arbitrators

Arbitration has now been taken over by lawyers. They have turned into something close to ordinary civil litigation process. It is more so amount in dispute runs into crores of rupees. The advocates make arbitration an expensive and time-consuming affair. Delays take place in arbitration cases owing to the non-availability of advocates appearing in arbitration cases who are held up in Courts. This has given

arbitration cases a back seat; they fall in the category of "also ran" with advocates practicing in Courts demanding that the hearing be fixed after Court hours and on non-working Court days. Development of an independent Bar of those exclusively practicing in the field of arbitration will eliminate these difficulties and will hopefully help the wheels of arbitration to move faster.[9]

E. <u>There is no cap on number of arbitrations allowed per arbitrator</u>

It is stated that arbitration proceedings in India tend to be a long drawn out process and sometimes it takes years to conclude. A major reason for this is the busy schedule of the arbitrators. It is suggested that a provision needs to be incorporated in the Act to the effect that when an arbitrator is approached for appointment, he should declare that he is not currently handling more than six arbitration matters. ICC Rules of Arbitration[10] provide that while confirming the appointment of an arbitrator, the Court shall have due regard to "…the prospective arbitrator's availability and ability to conduct the arbitration…." A similar provision should be made in the Indian Arbitration Act and the Rules of various arbitral institutions.

F. <u>Frequent adjournments</u>

It is a matter of common experience that hearings are adjourned on one pretext or the other, whether tenable or not.[11] Time has come when grant of adjournments should be an exception rather than the rule. It should be stipulated in the Act that no party shall be allowed more than one adjournment, and that too for not more than one week. However, an exception needs to be carved out for unforeseeable situations, which are beyond the control of any party and/or the arbitral tribunal.

G. <u>Delay in submission of pleadings</u>

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9. Justice A.M. Ahmadi, *"Foreword to Arbitration Step by Step"* by P.C. Markanda.

10. Rule 13(1) of Rules of Arbitration of the International Chamber of Commerce – In force as from 1st January 2012.

11. P.C. Markanda, *"Avoidance of Delays in Arbitrations"*, ICA Arbitration Quarterly, vol. XL, No. 4, January-March 2006, p. 10.

When an arbitral tribunal meets the parties for the first time in a preliminary meeting, it draws a schedule within which the parties shall complete the pleadings. However, it is very rare that parties stick to the time limits imposed upon them. The Law Commission[12] has also noted that because of ground realities in India and the mindset of parties and counsel in thinking that the arbitral tribunal is like any other Court, an amendment of section 24 is necessary omitting the words relating to agreement of parties in fixing the time schedule. The Commission recommended that section 24 be amended to provide that the parties will be bound by the time schedule fixed by the arbitral tribunal, unless the delay can be satisfactorily explained.

It is stated that when a party invokes the arbitration clause, it is aware of its case; it knows the nature of claims, amount of claims and is possessed of all such documents which would be required to be produced in the arbitration. Between the time when the arbitration clause is invoked to the stage of appointment of arbitrator by the adversary, if it is a 3-member tribunal, and thereafter time taken for appointment of the Presiding arbitrator, a period of not less than three months expires, though in a large number of cases, it is close to six months. Now the question is that when the claimant knows the claims more than six months before the arbitral tribunal is constituted, there can be no justification whatsoever for allowing claimants to take 4 to 6 weeks to submit claim statement. Likewise, the respondent when it prefers counter-claims is also aware about its case and, therefore, there is no reason why it should not submit the counter claim statement at the time of the preliminary hearing itself. In view of the foregoing, it is stated that the Act needs to be amended to the extent that claim statement in respect of claims by the claimant and in respect of counter claims by the respondent shall be submitted to the arbitral tribunal at the very first meeting convened by the arbitral tribunal.

It is a matter of common experience that the respondent, even after knowing well in advance the nature and amount of claims months before the arbitral tribunal

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12. 176th Report of the Law Commission of India, p. 110.

convenes the preliminary meeting, seeks 8 to 12 weeks for submission of defence statement. Such a request on the part of the respondent cannot be justified by any cannon of justice. It is suggested that the legislature should amend section 24 to the extent that it the respondent would be obliged to submit defence statement within 15 days of the receipt of the claim statement. Such a step would go a long way in reducing time factor in arbitration matters.

Submission of rejoinder is not envisaged in the provisions of the Act, and, therefore, is not a matter of right. However, if the party invoking the arbitration clause wishes to submit rejoinder, which according to it is inevitable, then it may be permitted to do so within one week of receipt of defence statement.

There may be cases when one party or the other or both may have absolutely genuine problem of not sticking to the agreed time schedule. In such an event, arbitral tribunals should be vested with the power to extend the time up to a maximum of 15 days and not thereafter subject to the condition that the defaulting party shows sufficient cause, within the meaning of section 5 of the Limitation Act, for not being in a position to stick to time schedule.

H. Liberal grant of prayer for amendment of pleadings

Yet another cause of delay caused in final disposal of arbitration matters is permission granted by the arbitral tribunals to the parties to amend their pleadings. The tribunals do not mind granting the request liberally despite a clear stipulation in section 23(3) that “Unless otherwise agreed by the parties, either party may amend or supplement his claim or defence during the course of the arbitration proceedings, unless the arbitral tribunal considers it inappropriate to allow the amendment or supplement having regard to the delay in making it.”

The expression “having regard to the delay in making it” has not been given its proper meaning. Retired judges, constituting the arbitral tribunal, permit the request of amendment or supplementing, as the case may be, saying that if Courts can permit it at

any stage of the proceedings then why it should not be equally applicable in arbitrations. It is stated that there is a difference between the two cases. In the former, cases drag on for years together whereas in the latter situation, time has to be the consideration for giving legitimacy to the arbitral matters.

I. Oral evidence delays proceedings

It has been observed that usually 15-20 hearings, spread over a year or two, are taken to record the cross-examination of witnesses. It is proposed that if the law is amended to provide a time limit within which arbitral awards have to be declared and if arbitrator's fee is paid on conclusion of hearings, the proceedings, including oral examination of witnesses would be greatly expedited.

Further, in commercial contracts, oral evidence is not usually necessary since the cases mostly relate to interpretation of contractual clauses and the facts can be discerned from the documentary evidence. As such, it is proposed that recording of oral evidence should be the exception rather than the norm in arbitration matters arising out of commercial contracts. The law should mandate that oral evidence would be conducted only on a determination by an arbitral tribunal that the same is necessary on account of facts and circumstances to be recorded in writing.

J. Cap on fee of arbitral tribunal

Another issue that has been a subject-matter of intense debate relates to charging of fees by members of the arbitral tribunal. The Supreme Court in *Union of India v. Singh Builders Syndicate*,[13] observed as under:

> "When a retired Judge is appointed as arbitrator in place of serving officers, the Government is forced to bear the high cost of arbitration by way of private arbitrator's fee even though it had not consented for the appointment of such non-technical non-serving persons as arbitrator(s). There is no doubt a prevalent

13. (2009)4 SCC 523, at p. 527.

opinion that the cost of arbitration becomes very high in many cases where retired Judge(s) are arbitrators. The large number of sittings and charging of very high fees per sitting, with several add-ons, without any ceiling, have many a time resulted in the cost of arbitration approaching or even exceeding the amount involved in the dispute or the amount of the award.

"23. It is necessary to find an urgent solution for this problem to save arbitration from the arbitration cost. Institutional arbitration has provided a solution as the arbitrators' fees is not fixed by the arbitrators themselves on case-to-case basis, but is governed by a uniform rate prescribed by the institution under whose aegis the arbitration is held. Another solution is for the Court to fix the fees at the time of appointing the arbitrator, with the consent of parties, if necessary in consultation with the arbitrator concerned. Third is for the retired Judges offering to serve as arbitrators, to indicate their fee structure to the Registry of the respective High Court so that the parties will have the choice of selecting an arbitrator whose fees are in their "range" having regard to the stakes involved."

Again in *Sanjeev Kumar Jain v. Raghubir Saran Charitable Trust*,[14] the Supreme Court observed:

"41. There is a general feeling among consumers of arbitration (parties settling disputes by arbitration) that *ad-hoc* arbitrations in India – either international or domestic, are time consuming and disproportionately expensive. Frequent complaints are made about two sessions in a day being treated as two hearings for purpose of charging fee; or about a session of two hours being treated as full sessions for purposes of fee; or about non-productive sittings being treated as fully chargeable hearings. It is pointed out that if there is an arbitral tribunal with three arbitrators and if the arbitrators are from different cities and the arbitrations are to be held and the Arbitrators are accommodated in five star hotels, the cost per hearing, (Arbitrator's fee, lawyer's fee, cost of travel, cost of accommodation

14. (2012)1 SCC 455, at p. 474.

> etc.) may easily run into Rupees One Million to One and half Million per sitting. Where the stakes are very high, that kind of expenditure is not commented upon. But if the number of hearings become too many, the cost factor and efficiency/effectiveness factor is commented."

The hard-hitting observations of the Supreme Court need deep introspection. Of particular discomfort is the fact that international arbitrations are being shifted to Singapore, Kuala Lumpur etc. This is not a healthy trend and needs to be arrested before it is too late. By way of a suggestion, the fee structure prescribed by the Indian Council of Arbitration should be adopted universally. Even the fee structure of National Highways Authority of India can be adopted as a suitable guideline. Payment of fees on daily basis to the members of the arbitral tribunals is commonly perceived as a cause for delay in arbitration proceedings. It is suggested that the law should be amended to the extent that arbitrators should be entitled to payment of arbitral fee only on conclusion of the case and just before declaration of award. However, daily expenses required for administrative assistance and travelling etc. should be paid on per day basis.

The 1996 Act does not put any restriction on the fees which arbitrators should charge. Section 38 does not even speak of 'reasonable' fees. Further, proviso to section 38 of the Act states "provided that where, apart from the claim, a counter-claim has been submitted to the arbitral tribunal, it may fix separate amount of deposit for the claim and counter-claim". It means that arbitrators can fix separate daily fees for claim and counter-claims. The genesis behind such a stipulation is beyond comprehension because any tribunal will first hear the claims and thereafter the counter-claims. Moreover, counter-claims certainly arise under the same agreement under which the claims arise. Therefore, proviso to Section 38 permitting charging of additional deposit for counter-claims is nothing but a financial burden on the parties and needs to be deleted.

Conclusion

In conclusion, it is suggested that:

(a) A reasonable time limit should be fixed for making an award. In the amendment bill of 2003 (based on the 177th Report of the Law Commission), a time limit of one year (with a possible extension of another six months by the parties) had been provided. For further extension beyond the said period, provision had been made for approaching the Court.

(b) A cap should be fixed on the number of cases that an arbitrator can take up at any given time. In any case, it should not exceed 6 cases at a time.

(c) To ensure that the arbitrators finish the matter within a fixed time limit, it should be provided that fees would be payable only upon conclusion of the case. This, incidentally, would also save the parties incurring unnecessary expenditure upon an arbitrator who resigns/otherwise vacates his office, without making the award.

(d) Periodical reports should be ensured from the arbitrators, either to the High Court or the Institution which appoints them, detailing the progress of cases entrusted to them.