Arbitrate – Don't litigate

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EDMOND DAVIES, J. in *Price vs Milner* (1) had stated:

> "Many years ago, a top hatted old gentleman used to parade outside these Law Courts with a 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 of the present use."

A bare reading of aforementioned excerpt of *Price vs Milner* would certainly dissuade those who propagate arbitration to take recourse to law Courts. What happens in law Courts, how expensive the litigation is, how unending the woes of the litigants are, how much unpleasentness it creates between the warring parties when judgment is pronounced in one Court and the losing party initiates steps for appeal etc., are such experiences which are not unknown.

Taking recourse to conciliation, or mediation, certainly helps the parties settle the matter without any ill-will whatsoever. There are three distinct advantages if the parties are able to arrive at

reasonable settlement of their disputes, viz:

(1) **Quickness**: The parties can devote their time and energy for productive output;
(2) **Economic**: Instead of spending hard earned money on litigation, one can invest it for better dividends; and
(3) **Social**: The parties go happily to their respective places and stand relieved from bickering and enmity, which in certain cases might have lingered on for generations.

The best legal advice was given in the Serman on the Mont – "If someone sues you, come in terms with him promptly when you are both on way to Court." The famous judge Learned Hand was the wisest of the judges in confessing that "he would as litigant dread a law suit beyond almost anything else, shortness of sickness and death". DICKENS said of the Court of Chancery that there is not an honourable man amongst its petitioners who would not give, who does not often give the warning – 'suffer any wrong that can be done to you rather than come here.' These opinions of learned men accurately reflect the mood of a common man towards the present judicial system. (2)

Doors are still not closed if the parties cannot arrive at an honourable settlement in conciliation proceedings. They can still avoid recourse to Courts. They can choose an informal forum of arbitration. They do

not have to run after the advocates nor would they be required to go to Courts for settlement of their disputes. They can be their own advocates before the informal and domestic forum.

To overcome the ordeals involved, the best course available to the parties is to look to reason, appreciate the view point of the opposite party, not to stand on false prestige and resolve the controversy in an amicable manner. It does not help either party to pursue litigation. Both parties are losers, at least in terms of time, at the time of final outcome of litigation.

The Arbitration and Conciliation Act, 1996 (Act, for short), lays down in Sections 23 to 25 as to how to proceed with the matter in dispute. Section 23 of the Act provides for submission of claim statement to the arbitrator within the time agreed upon between the parties, failing which, within the time allowed by the arbitrator. The claimant shall submit with the claim statement all documents which he considers to be relevant or may add a reference to the documents or other evidence that he would submit subsequently. The respondent shall, thereafter, state his defence in respect of these particulars.

Section 24 of the Act deals with hearings before the arbitrator. If the parties cannot agree, the arbitrator shall decide whether to hold oral

hearings for the presentation of evidence or for oral arguments, or whether the proceedings shall be conducted on the basis of documents and other materials. However, all statements and documents or other information supplied to the arbitrator by one party shall be communicated to the other party.

In case there is a default in adhering to the provisions of Sections 23 and 24 of the Act by the claimant, the arbitrator shall terminate the proceedings; but if the respondent fails to submit defence statement, the arbitrator shall continue the proceedings without treating that failure in itself as an admission of the allegation by the claimant. This is what Section 25 of the Act provides.

Nothing could be simpler than what has been stipulated in Sections 23 to 25 of the Act for completion of pleadings and action to follow thereafter. In Arbitration Act, 1940 (since repealed), the Legislature had not provided any guidelines to the parties for filing of pleadings. The 1996 Act, however, by stipulating in the Act in a lucid manner as to what constitutes the claim statement and the defence statement, has made the task of the litigants very simple.

The new Act, by virtue of Section 18, provides for equal treatment of parties and ensures that each party shall be given full opportunity to

present his case. It is noteworthy that the Act of 1996 provides for “full opportunity”, which means nothing less than 100%, whereas under the English Arbitration Act, 1996, the parties have to be provided “substantial opportunity”. What is “substantial” would be a matter of debate but the Indian Act leaves nothing for guess work.

The parties would be handicapped if the law requires them to follow Civil Procedure Code or the Evidence Act in its entire rigour in conduct of arbitral proceedings. In that event, they would have no option but to engage a lawyer and once lawyers enter the fray, it is but obvious that disposal of matter would take an eternity, such are the in-built delays and laches prevalent in our statutes. But Section 18 of the 1996 Act stipulates that the arbitrator shall not be bound by the Code of Civil Procedure or the Indian Evidence Act. The parties have been given the option to agree on the procedure to be followed by the arbitrator. However, this cannot be interpreted to mean that elementary principles of the said statutes would also not be applicable.

The 1996 Act is a party-dominated Act, whereas the 1940 Act (since repealed) was not. In the repealed Act, the arbitrator was the master of the show. Under the new Act, parties are free to choose the place

of arbitration as would be seen from a reading of Section 20 of the Act. There are many more instances in the Act, where primacy has been accorded to the consent of the parties in the manner of conducting the arbitral proceedings.

It would thus, be observed that the Legislature has enacted a very simple law insofar as arbitration is concerned. However, the only point of concern is that the new Act does not provide for the time limit within which the arbitrator would be required to conclude the proceedings and make the award. The earlier stipulation in 1940 Act that the arbitrator shall make the award in four months time was neither workable nor practicable. Solution to this problem lies in the hands of the parties. The parties can provide in the arbitration agreement itself that the arbitrator shall be bound to make and publish the award within a period of one/two years, depending on the magnitude of the disputes.

The language to be adopted in arbitration is again a matter of choice of the parties, as per Section 23 of the Act. Therefore, parties can present their respective cases in the local language. Language is not a barrier. Parties to arbitration are not handicapped insofar as language in arbitration matter is concerned.

While in arbitration, parties' convenience is taken into account by the arbitral tribunal for fixing the dates of hearing, but in case the matter is before Courts, Courts would look to its own convenience when fixing a date. In arbitrations, parties take a decision whether to have hearings in quick succession and for longer hours. This is not so when the matter is tried by the Court. In view of heavy work load, Courts give longer dates with limitation of time, as and when the matter is taken up by the Court.

Even the arbitrator is not required to be a technical hand nor has any qualification been prescribed in the Act. He is chosen by the parties as the man of their confidence. He can make the award in the language known to the parties. For early settlement and for giving finality to the award, Section 34 of the Act provides for a time limit of 3 calendar months for challenging the award by the aggrieved party which is extendable by 30 days on sufficient cause being shown for the delay, but not thereafter. The award, if not challenged, attains the status of the decree but if it is challenged then it attains the status of the decree after the objections have been dismissed by the Court.

All said and done, it would leave no manner of doubt that no technicalities have been stipulated in the Act for the parties to follow

during the course of arbitral proceedings. They can fight their own cause. They do not have to spend money. They have to adopt simple language to put forth their views to the arbitrator. They do not need help of a legal person. All they have to do is to narrate facts to the arbitrator.

If instead of taking recourse to arbitration, parties decide to go to the Courts they do not have to be reminded that they are heading towards interminable, time consuming and exasperating Court procedures. More often than not, parties later on regret as to why they did not opt for arbitration.

It is no doubt true that the parties are responsible for delay to a very large extent. Those who have deep pockets engage top lawyers to take up their matters. Given a choice, they settle for nothing short of judges as their arbitrators, even when the matter in dispute is technical in nature. It is submitted that in highly technical matters, if the arbitrators chosen are non-technical, the parties should be mentally prepared to accept a verdict which the facts of the matter do not warrant.

It is a matter of concern that arbitrators have started charging hefty fees. This trend needs to be curbed before it is too late. Parties do not

want to annoy the arbitrators when they fix their fees, for fear of incurring wrath of the arbitrators. Some institutions have fixed fees of arbitrators keeping in view the amount in dispute. Very few judges, in particular, accept cases from such arbitral institutions. In a very recent judgment reported as Union of India versus Singh Builders Syndicate, the Hon'ble Supreme Court has expressed its anguish regarding the exorbitant fees being charged by the arbitrators, particularly retired judges in the following terms:

> "10. …. There is no doubt a prevalent 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 award. When an arbitrator is appointed by a court without indicating fees, either both parties or at least one party is at a disadvantage. Firstly, the parties feel constrained to agree to whatever fees is suggested by the arbitrator, even if it is high or beyond their capacity. Secondly, if a high fee is claimed by the arbitrator and one party agrees to pay such fee, the other party, who is unable to afford such fee or reluctant to pay such high fee, is put to an embarrassing position. He will not be in a position to express his reservation or objection to the high fee, owing to an apprehension that refusal by him to agree to the fee suggested by the arbitrator, may prejudice his case or create a bias in favour of the other party who readily agreed to pay the high fee. It is necessary to find an urgent solution for this problem to save arbitration from arbitration cost……." (Emphasis supplied)

Venue of arbitration is yet another factor which contributes towards

the high expenses in arbitration. In quite a large number of cases, choice falls on Conference Rooms of five-star luxury hotels. It needs no emphasis to say that these are expensive venues and charges are astronomical. This amount gets swelled further when everybody present in the arbitration meeting is to be treated to snacks and/or lunch.

While selecting arbitrators, it is very rare that the parties keep in consideration the places wherefrom they choose the arbitrator. For example, it is not rare to see that for meetings held in Delhi, arbitrators chosen by the parties come from far-flung places. Invariably they travel by air. They travel by business class. They stay in posh hotels. At the end of the hearing, the party choosing the nominee-arbitrator is lighter by lacs of rupees. Business houses do not probably mind the expense. For them, it appears, recession is on paper only.

In recent times, it has become customary for the arbitrators to also charge reading fees and fees for making award. It is again fixed at a very high rate. True, that labour put in by the arbitrator has to be paid but it should not be disproportionate to the time spent, more so when the parties during the course of arguments, succinctly state their

case. Thus, it does not seem reasonable to charge reading fees.

In earlier times, as per reported decisions, arbitration had been conducted by a sole arbitrator. Now the trend is to have multi-member arbitral tribunal. When there are three members of the tribunal, each one of them has his diary full of engagements. At the time of deciding dates of hearing, it is often seen that it is a Herculean task to match the dates of all concerned. Resultantly, dates are fixed at an interval of 4-5 months, which naturally delays the adjudication process. Furthermore, when the parties meet on the said dates, a lot of time is wasted in recapitulating the events of the previous hearings. Human memory being what it is, it cannot be expected that despite lapse of few months, everything would be fresh in the mind.

Solution to the aforesaid problem lies in fixing a schedule for at least 4 to 5 sets of dates in advance. As and when, one date is consumed/utilized, one more set of dates could be added to the already fixed schedule. If the date fixed has to be cancelled for whatever reasons, the presiding arbitrator would be spared the need to contact all concerned for fixing an alternative date.

Despite all that has been stated hereinabove, it is still desirable to go in for arbitration than litigation. If still one wants to take recourse to

Courts then as to what are the effects of going in for litigation, the following passage amply demonstrates the same:

> "Laws' delays have become proverbial right from the time of Shakespeare who ranked the law's 'delays' amongst the whips and scorns of time.'
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> "Being involved in a law suit is like being ground to bits, in a slow mill it is being roasted at a low fire, it is being stung to death by single bees, it is being drowned by drops; it is going mad by grains."

BIBLIOGRAPHY

1. (1966)1 WLR 1235
2. "Law and Common Man", Article by Justice D.H. Dharmadhikari, Judge, M.P. High Court, Journal, AIR 1990, p.41
3. 2009(2) Arb LR 1 (SC),