Key Note Address

Delivered by:

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In ancient times in India, there existed a system of arbitration. This was in the form of *Panchayats* presided over by a *Sarpanch*. The *Panches* were ordinarily elected according to their wealth, social standing and influence in the community. They could decide matters which were referred as also matters which were not referred. The binding authority behind their decisions was the fear of excommunication from the community and also from religious services, as *Panchayats* were not complete without religious preachers.

It is so well known that the father of the nation, Mahatma Gandhi favoured arbitration and mediation as a means of resolution of disputes. Mr. Pyarelal, in his biography on the life of Mahatma Gandhi, has written about a case taken up by him in the following words:

> "He had never any doubt as to Dada Abdulla's success. The facts were on Dada's side. So also was the law bound to be on his side. But he clearly saw that if the case dragged on, no matter who won, both parties would ultimately be financially ruined. The lawyer's fees were steadily mounting up. Under the law, the winner could never fully recover the costs. He felt disgusted with his profession. Why could not the parties be brought together to settle the suit out of

court by arbitration? After all Tyebji Seth and Dada Abdulla both came from the same town and were kin. He succeeded in persuading the parties concerned to agree to arbitration.

‘The arbitrator gave a verdict in Dada Abdulla’s favour. Now if Dada Abdulla had insisted on immediate execution of the arbitrator’s award, Tyebji Seth could have gone bankrupt, as he could not have paid all at once the entire amount, about 37000 pounds and costs. And this would have been a tragedy. For among the Indian merchants death was deemed preferable to the ignominy of bankruptcy. There was only one way. Dada Abdulla should be generous and agree to payment being made in easy instalments spread over a long period. To get him to do this proved even harder than getting him to agree to arbitration. But Gandhiji’s persistence won the day, and both the parties were happy over the result.

“Throughout his legal career of some twenty years, thereafter, the future Mahatma declined to use his legal knowledge to score victories, rather to bring parties together on the grounds of equity and justice. He was able to say with satisfaction in the end that he had helped settle more cases out of court than through the suit-route. He was being both frank and wise when he went on to say `I lost nothing thereby, not even money, certainly not my soul.

“The method of arbitration creates understanding between disputants as it resolves the disputes through compromise and cooperation, without leaving an

> intolerable trail of bitterness behind. Actual arbitration was in the tradition of Indian life. As a British bench presided over by SIR AMBERSON MARTEN observed, 'arbitration indeed is a striking feature of ordinary Indian life. And I would go further and say that it prevails in all ranks of life to much greater extent than in the case of England. To refer a matter to the *Panch* is the natural way of deciding many a dispute in India.'

Arbitration and Conciliation as modes for settlement of disputes between the parties have a long and time honoured tradition in this country. They have a social purpose to fulfill. Today it has all the more relevance when there has been an explosion of litigation in the courts of law. The judicial system prevalent in courts is governed by procedure prescribed under various enactments. Many provisions are very technical and have become synonymous with technicalities and obstructions, leading to delays. The procedure is so cumbersome that sometimes it takes decades together for final resolution of disputes. The litigation becomes highly expensive, time consuming and once a person gets in it, he finds it difficult to extricate himself and gets frustrated and exhausted – mentally, physically and financially. Therefore, an alternate mechanism for resolution of disputes has been evolved by reference of disputes to domestic tribunals, i.e. arbitral proceedings. It is intended to ensure fair, efficient and speedy trial, giving finality to the decision.

On account of the growth in the international trade and commerce and also on account of long delays being caused in the disposal of suits and appeals in courts, there has been tremendous pressure for resolution of disputes through arbitration. The alternative

method of settlement of disputes through arbitration is a speedy and convenient process, which is being followed throughout the world.

The Arbitration and Conciliation Act, 1996 came into effect from 25th January 1996 and the earlier Arbitration Act, 1940 was repealed. The need and necessity for enacting the 1996 Act was to instill confidence amongst international business houses that in the event of disputes arising out of commercial dealings, they shall not be left high and dry and that resolution of disputes through alternative dispute resolution mechanism shall be available on the basis of UNCITRAL Model Laws. The 1996 Act is largely based on recommendations of the United Nations General Assembly and as on date more than 65 nations have adopted it with minor changes here and there to suit local needs.

Arbitration is an alternate dispute resolution mechanism and the Act lays stress on a more congenial procedure for resolution of disputes than the acrimonious system of litigation in courts. The underlying scheme of the Act lays emphasis on the parties to the arbitration agreement choosing a person, in whom both of them repose faith and trust, to amicably resolve the disputes between them and it is only when they are not *ad idem* does the Act provide another mechanism for appointment of arbitral tribunal.

In *Dharma Prathishthanam v. Madhok Const. (P) Ltd.,* (2005)9 SCC 686, it was held that the law does not make arbitration an adjudication by a statutory body but it only aids in implementation of the arbitration contract between the parties which remains a private adjudication by a forum consensually chosen by the parties and made on a consensual reference.

The Hon'ble Supreme Court in *NBCC Ltd. vs J.G. Engineering (P) Ltd.,* (2010)2 SCC 385 held that arbitration is an efficacious and alternative way of resolution of disputes between the parties. The method of arbitration has evolved over a period of time to help the parties to resolve their disputes through this process and, in fact, the Act recognizes this aspect and has elaborate provisions to cater to the needs of speedy disposal of disputes. However, where there is no outcome for a considerable length of time, it would defeat the whole notion of the whole process of resolving the disputes through arbitration.

The primary duty of an arbitral tribunal is to ensure that no party succeeds in creating stumbling blocks in the smooth execution of the arbitration proceedings. The forum of arbitration cannot be permitted to be misused or abused with vexatious, imaginary or frivolous claims thereby burdening the nominated arbitrators with heaps of cases which would tend to frustrate the legislative object behind the 1996 Acts.

An arbitral tribunal is bound in law to decide disputes between the parties in accordance with the legal rights of the parties, rather than what the arbitral tribunal considers fair and reasonable, unless there is a specific agreement to the contrary between the parties. An arbitrator must hear both the parties and must not act at the back of one party otherwise it will amount to misconduct on his part. He has to act fairly, independently and impartially. He must not show that favour to one party which he cannot show to the other. He has quasi-judicial functions to perform, which enjoin upon him to decide the matter in controversy without fear or favour.

Generally the Courts in India have adopted a hands-off principle while dealing with arbitral awards. A perusal of some of the decisions of the Apex Court, both under the 1940 Act and 1996 Act, would show without even an iota of a doubt that the verdict of the arbitrator is given due respect. The courts in India have since long recognized self-imposed limitations on their power to set aside awards and have held that:

(a) Court cannot review an award of the arbitrator and correct any mistake in his adjudication unless objection to the legality of the award is apparent on the face of it.[1]

(b) Courts cannot sit in appeal over the verdict of the arbitrator by re-examining and re-appraising the evidence considered by the arbitrator and hold that the conclusions arrived at by the arbitrator are wrong.[2]

(c) The Court has no power to hear the matter on merits and the court cannot look into the decision contained in the award – good, bad or indifferent. It has no right to review it or re-consider it; to hear an appeal from the verdict of the arbitrator and delete from the award something with which it did not agree is beyond the jurisdiction of the Court.[3]

(d) The reasonableness of the reasons given by the arbitrator in making his award cannot be challenged. Reason varies in its conclusions according to

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1. *Hindustan Construction Co. Ltd. vs State of J&K*, (1992)4 SCC 217: AIR 1992 SC 2192; Khatri & Khatri vs CIDCO, 2000(3) Arb LR 397 (Bom)(DB)
2. *U.P. State Electricity Board vs Searsole Chemicals Ltd.,* (2001)3 SCC 397: AIR 2001 SC 1171
3. *BHEL vs Globe Hi-Fabs Ltd.,* 2004(3) RAJ 245 (Del)

the idiosyncrasy of the individual and the times and the circumstances in which he thinks.[4]

(e) The arbitrator is the final arbiter of disputes between the parties and the award is not open to challenge on the ground that arbitrator has drawn his own conclusions or has failed to appreciate facts. Where reasons have been given by the arbitrator, the Court cannot examine the reasonableness of the reasons.[5]

(f) Interpretation of terms and conditions of the contract is within the domain and province of the arbitrator. The view taken by the arbitrator cannot be faulted on the ground that the court would have reached some other conclusion on the same set of facts and circumstances.[6]

(g) Where the arbitrator reached the conclusion by giving the contract that "business efficacy" which the parties as reasonable men must have intended it to have, the award cannot be set aside on the ground that the court might have come to a different conclusion.[7] The court will interfere if it is apparent that the arbitrator has acted illegally in reaching his decision, that is to say, of he has decided on principles of construction that the law does not countenance.[8]

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4. *Municipal Corporation of Delhi vs Jagan Nath Ashok Kumar*, (1987)4 SCC 497: AIR 1987 SC 2316
5. *State of Rajasthan vs. Puri Construction Co. Ltd.*, (1994)6 SCC 485
6. *Hundistan Zinc Ltd. vs Friends Coal Carbonization*, (2006)4 SCC 445
7. *Heera Singh vs State of Rajaasthan*, 2008(1) RAJ 457 (Rajasthan)
8. *Delhi Jal Board vs Esskay Kohli*, 2007(3) Arb LR 314 (Del)

(h) The court will interfere only if the arbitrator arrives at an inconsistent conclusion or arrives at a decision ignoring the material documents which throw abundant light on the controversy to help a just and fair decision.[9]

(i) If the arbitrator is a technical person dealing with the kind of disputes which he was adjudicating, then the courts will not substitute its own decision for that of the arbitrator even if the courts were to come to a different conclusion, until and unless the decision of the arbitrator is manifestly perverse.[10]

(j) Arbitrators are not required to give arithmetical computations of amounts awarded by them under different heads even in a reasoned award. It is enough if they give reasons either for allowing or disallowing the objections raised to the respective claims of the parties.[11]

Conciliation

The Arbitration and Conciliation Act, 1996 also provides for settlement of disputes by means of Conciliation. Broadly speaking, there are at least three advantages if the parties are able to arrive at a reasonable settlement of their disputes through conciliation, viz.

(1) Quickness. The parties can devote their time and energy for better and useful work.

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9. *K.P. Paulose vs State of Kerala*, (1975)2 SCC 236: AIR 1975 SC 1259
10. *Delhi Development Authroity vs Bhagat Construction Co. (P) Ltd.*, 2004(3) Arb LR 548 (Del, DB)
11. *Hydel Construction Co. Ltd. vs HP State Electricity Board*, AIR 2000 HP 19 (DB)

(2) Economic. Instead of spending hard earned money on litigation, one can invest it for better dividends.

(3) Social. The parties go happily to their respective places and stand relieved from bickerings, enmity which in certain cases might have lingered on for generations.

The role of a conciliator, which is distinct and separate from that of an arbitral tribunal, is to make efforts which may lead the parties to arrive at an amicable settlement. He is in no way guided by the principles of law or precedents and thus, has a free hand in adopting a procedure which meets the approval of the parties, which, as the nature of the assignment demands, has to be objective, fair and just. The conciliator must give due weightage, among other things, to the rights and obligations of the parties. The conciliator has also to take into consideration the trade practice as prevalent in the market and the facts and circumstances surrounding the dispute, without in any way losing sight of the previous business practices prevailing between the same parties. Once the conciliator is possessed of all the details regarding rights and obligations of the parties, trade practice, previous practice regulating business between the parties etc., it would become easier for him to persuade the parties to be logical in their approach and arrive at a fair and reasonable settlement in the larger interest of their business relationship.

Conclusions and recommendations

Now that arbitration as a means of settlement of disputes has come to be recognized by Section 89 of the CPC, it is imperative that recourse to arbitration be taken by the

contesting parties, not only with a view to reduce the work load of the courts but also for settlement of disputes through an informal forum chosen by the parties or appointed by the court with the consent of the parties.

It would obviously be the best course of action for the parties to resort to arbitration as a last resort and endeavour should be to resolve the disputes through mediation or conciliation. In all conferences relating to Alternate Dispute Resolution mechanism, esteemed jurists have been propagating settlement of disputes outside the purview of courts and have repeatedly emphasized on the parties to avoid the rigmarole of procedural claptrap. If we do not heed to the words of the esteemed jurists, the day is not far off when people would start losing faith in arbitration, mediation and conciliation. The need of the hour is to reduce adversarial adjudicatory litigation and at the same time give speedy, satisfactory and cost-effective justice. That is where ADR processes with the active participation of all concerned become relevant and urgent.

Time has come when all of us have to strive hard to make the system of alternative dispute resolution better. One contribution which uplift the institution of arbitration is if the undue delays and expenditures involved therein are eliminated. The Supreme Court in *Sanjeev Kumar Jain v. Raghubir Saran Charitable Trust,(2012) 1 SCC 455 has highlighted the seriousness of the said issue as follows:*

> "41. There is a general feeling among the 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 the purpose of charging fee; or about a session of two hours being treated as full session 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, 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. That is why this Court in *Singh Builders Syndicate* observed that the arbitration will have to be saved from the arbitration cost.

"42. Though what is stated above about arbitrations in India, may appear rather harsh, or as a universalisation of stray aberrations, we have ventured to refer to these aspects in the interest of ensuring that arbitration survives in India as an effective alternative forum for disputes resolution in India. Examples are not wanting where arbitrations are being shifted to neighbouring Singapore, Kuala Lumpur, etc. on the ground that more professionalised or institutionalised arbitrations, which get concluded expeditiously at a lesser cost, are available there. The remedy for healthy development of arbitration in India is to disclose the fees structure *before* the appointment of arbitrators so that any party who is unwilling to bear such expenses can express his unwillingness. Another remedy

> is institutional arbitration where the arbitrator's fee is prefixed. The third is for each High Court to have a scale of arbitrator's fee suitably calibrated with reference to the amount involved in the dispute. This will also avoid different designates prescribing different fee structures. By these methods, there may be a reasonable check on the fees and the cost of arbitration, thereby making arbitration, both national and international, attractive to the litigant public. *Reasonableness and certainty* about total costs are the key to the development of arbitration."

Time has come when all of us need to give fillip to ADR mechanism and make it a better success than what we are experiencing today. We have to take the institution of arbitration to greater heights so that litigants involved in domestic arbitrations get quick relief and those involved in International disputes opt to settle their disputes in India rather than choosing a venue outside India. This is very much possible because we have not only better infrastructure but better talent available in India.