MINIMIZING ROLE OF COURTS IN ARBITRATIONS

BY

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Introduction

The Arbitration and Conciliation Act, 1996 was enacted as it was felt that the old Act, i.e. the Arbitration Act, 1940 had outlived its utility and had become outdated. It was felt that the new Act should be in tune with the changing times. It was also felt that our " economic reforms may not become fully effective if the law dealing with settlement of both domestic and international commercial disputes remains out of tune with such reforms". It was with the above in view that the Legislature provided that one of the main objects of the Act was "to minimise the supervisory role of courts in the arbitral process". However, with the passage of time, this object is being diluted and it is the duty of the Courts and litigants to see that the intention of the Legislature is followed. The following are some key areas, which deserve special attention:

Appointment of Arbitrators

Under the Arbitration Act, 1940, on failure of the *persona designata* to make the appointment, the aggrieved party used to approach the Courts under Section 20 to refer the matter to arbitration. The Courts after hearing the matter used to invariably ask the recalcitrant *persona designata* to make the appointment of the arbitrator within a particular period of time. This whole process used to take 2-3 years. Under the old Act, it was the duty of the Court to determine whether the application had been filed within the period of limitation and whether the claims of the contractor were arbitrable or not. Section 11(6) of the Arbitration and Conciliation Act, 1996, which provides for appointment of arbitrator when the *persona designata* does not act, does not specify a period within which the Chief Justice or his nominee is required to make the appointment. Keeping in view the objectives of the Act, the Bombay High Court in ***Naginbhai C. Patel vs Union of India,*** *1999(2) Arb LR 343 (Bom)* held that in the absence of any specific period within which the appointment needs to be made, a reasonable period of time should be allowed to the *persona designata*. The Court considered a period of 30 days to be a reasonable period. This judgment when cited before various High Courts found favour with most but some High Courts did not agree. The matter was set at rest by the Hon'ble Supreme Court in ***Datar Switchgears Ltd. Vs Tata Finance Ltd.***, *(2000)8 SCC 151* wherein it was held as under:

> "So far as the cases falling under section 11(6) are concerned - such as the one before us - no time limit has been prescribed under the Act, whereas a period of 30 days has been prescribed under section 11(4) and 11(5) of the Act. In our view, therefore, so far as section 11(6) is concerned, if one party demands the opposite party to appoint an arbitrator and the opposite party does not make an appointment within 30 days of the demand, the right to appoint does not get automatically forfeited after expiry of 30 days. If the opposite party makes an appointment even after 30 days of the demand, but before the first party has moved the Court under Section 11 that would be sufficient. In other words, in cases arising under Section 11(6), if the opposite party has not made an appointment within 30 days of the demand, the right to make appointment is not forfeited but continues but an appointment has to be made before the former files application under Section 11 seeking appointment of an arbitrator. Only then, the right of the opposite party ceases".

Thereafter, all High Courts started making appointment of Arbitrators when the aggrieved party approached the Chief Justice or his nominee after the lapse of thirty days from the date of sending notice to the *persona designata*.

The Hon'ble Supreme Court felt that the objective of the Act would not be achieved if delay is allowed to occur in appointment of the Arbitrators and, therefore, a 3-Judge Bench in ***Konkan Railway Corporation Ltd.*** *Vs* ***M/s Mehul Construction Co.***, *2000(7) SCC 201* held as under:

> "… When the matter is placed before the Chief Justice or his nominee, under Section 11 of the Act, it is imperative for the said Chief Justice or his nominee to bear in mind the legislative intent that the arbitral process should be set in mind without any delay whatsoever and all contentious issues are left to be raised before the arbitral tribunal itself. At this stage, it would not be appropriate for the Chief Justice or his nominee to entertain any contentious issue between the parties and decide the same."

Further, on **pages 207-208** of the judgment, it has been held as under:

> "….. but, as has been explained earlier in the earlier part of this judgment, the duty of the Chief Justice or his nominee being to set arbitral process in motion, it is expected that invariably the Chief Justice or his nominee would make appointment of arbitrator so that the arbitral proceedings would start as expeditiously as possible and the dispute itself could be resolved and the objective of the Act can be achieved."

It was also held in the said judgment that where the Chief Justice or his nominee does not make the appointment, a Writ Petition would lie against the order and the Writ Court could direct the Chief Justice or his nominee to make the appointment. However, no appeal, revision or SLP would lie against an order of the Chief Justice appointing an arbitrator.

The Arbitration and Conciliation Act, 1996 is modeled after the Draft Model Law framed by UNCITRAL. This Draft Model Law has been adopted by about 50 countries upto this time. Each nation has adopted it according to its local needs. While the Indian Legislature made a departure from the UNCITRAL Model by vesting the authority to appoint an arbitrator in the Chief Justice or his nominee, the [English] Arbitration Act, 1996 provides for appointment of arbitrator through the Court. The Indian Legislature, obviously therefore, wanted a quicker resolution of disputes in arbitration and hence vested authority in the Chief Justice to make the appointment in an administrative capacity and not in his judicial capacity. Since the Chief Justice or his nominee acts in his administrative capacity, procedural formalities of conducting cases in Courts need not be adhered to.

In ***M/s Konkan Railway Corpn. Ltd****. Vs* ***M/s Rani Construction Pvt. Ltd***. *2002(2) SCC 388* the Hon'ble Supreme Court in order to further expedite the procedure for appointment of arbitrators stated that it was not necessary for the Chief Justice or his nominee to even issue notice to the respondents. This judgment, inter alia held as under:

> "There is nothing in Section 11 that requires the party other than the party making the request to be noticed. It does not contemplate a response from the other party. It does not contemplate a decision by the Chief Justice or his designate on any controversy that the other party may raise, even in regard to its failure to appoint an arbitrator within the period of thirty days. That the Chief Justice or his designate has to make the nomination of an arbitrator only if the period of 30 days is over, does not lead to the conclusion that the decision to nominate is adjudicatory. In its request to the Chief Justice to make the appointment, the party would aver that this period has passed and, ordinarily, correspondence between the parties would be annexed to bear this out. This is all that the Chief Justice or his designate has to see. That the Chief Justice or his designate has to take into account the qualifications required of the arbitrator by the agreement between the parties (which, ordinarily, would also be annexed to the request) and other considerations likely to secure the nomination of an independent and impartial arbitrator also cannot lead to the conclusion that the Chief Justice or his designate is required to perform an adjudicatory function. That the word as 'decision' is used in the matter of the request by a party to nominate an arbitrator does not itself mean that an adjudicatory decision is contemplated."

> "As we see it, the only function of the Chief Justice or his designate under Section 11 is to fill the gap left by a party to the arbitration agreement or by the two arbitrators appointed by the parties and nominate an arbitrator. This is to enable the Arbitral Tribunal to be expeditiously constituted and the arbitration proceedings to commence. The function has been left to the Chief Justice or his designate advisedly, with a view to ensure that the nomination of the arbitrator is made by a person occupying high judicial office or his designate, who would take due care to see that a competent, independent and impartial arbitrator is nominated."

The Hon'ble Supreme Court also stated that even if notice has to be given to the respondents, it has to be for a limited purpose of ascertaining the qualifications of the arbitrator to be appointed.

It is a matter of great concern that the above judgments of the Hon'ble Supreme Court are not being followed in spirit insofar as appointment of arbitrators is concerned. As against the dictum of the Hon'ble Supreme Court that the respondents need not be noticed, the prevailing practice in all High Courts is to give notice to the respondents. In Punjab and Haryana, till very recently the power to appoint an arbitrator had been vested in the Civil Judge (Senior Division). Now for cases where claims are over Rs. 25,000/- the power to make the appointment of arbitrator vests with the District Judge. Unfortunately, however, in most districts, the procedure followed for appointment of arbitrators is the same as that followed for ordinary civil suits. Notices are issued to the respondents, a written statement is invited, issues are framed, evidence is led on the application and then arguments are heard. This procedure delays appointment of arbitrators and as against one or two months that ought to be taken, it actually takes more than 2-3 years to secure appointment of arbitrators.

Stay of Proceedings

Under the old Act, the litigant would file an application under Section 20 together with an application under Section 41(b) seeking injunction against the *persona designata* from making the appointment of an arbitrator during the pendency of the Section 20 application. Under the new Act, the power to appoint an arbitrator has been given to the Chief Justice or his nominee, whereas the power to grant injunction has been vested in the "court" as defined in Section 2(1)(e) of the Act, i.e. the High Court where it has original jurisdiction and in other cases before the principal civil court of original jurisdiction in a district, i.e. the District Judge. In Punjab, Haryana and Chandigarh, a party files an application under Section 11(6) for appointment of arbitrator before the Civil Judge (Senior Division), but if during the pendency of the said application, the *persona designata* makes the appointment, it has to seek injunction under Section 9 of the Act, for which an application lies before the District Judge. Thus, the litigant has to take recourse to two separate forums, which certainly could not have been the intention of the Legislature.

Challenging Jurisdiction of Arbitral Tribunal

A party can challenge the arbitrator on the grounds mentioned in Sections 12, 13 and 16 of the Act, irrespective of the fact whether the appointment has been made by the Chief Justice or directly by the *persona designata*. The challenge can be made on the grounds of bias, or that the arbitrator does not possess requisite qualifications, or that the arbitral tribunal was illegal constituted. The Draft Model Law framed by UNCITRAL provides for remedy to the Court against decision by the arbitral tribunal on any application filed under Sections 12, 13 and 16 of the Act. Obviously, therefore, time taken for settlement of the issue as per the UNCITRAL Model Law is much more. The Indian Parliament deliberately did not adopt this procedure prescribed by the UNCITRAL Model law. The New Act, does not make any provision for challenging the order under the aforesaid sections in a Court of law at any time before the publication of the award. It is thus apparent that the intent of the Indian Parliament was to minimize the supervisory role of Courts.

The recalcitrant parties, however, to overcome the bar placed on them by Sections 13(5) and 16(6) of the Act, used to treat the order of the arbitral tribunal as an interim award and challenge the same under Section 34 of the Act. However, in ***Anuptech Equipments (P) Ltd vs Ganpati Co. Group Housing Society Ltd****., AIR 1999 Bom 219*, ***Union of India vs East Coast Boat Builders and Engineers Ltd.,*** *1998(2) Arb LR 702* and ***United India Assurance Co. Ltd. vs Kumar Texturisers*****,** 1999(2) RAJ 255 (Bom) it was held that the decision of the arbitral tribunal on Sections 12, 13 and 16 does not amount to an interim award.

Failing in their endeavour to label the interim orders under Sections 12, 13 and 16 as interim awards, the recalcitrant parties started challenging the same through writ proceedings. But the same was not successful as would be evident from a reading of ***Harike Rice Mills vs State of Punjab,*** *1997(Suppl) Arb LR 342 (P&H),* ***Satish Chander Gupta and Sons vs Union of India,*** *2003(1) Arb LR 589 (P&H),* ***Assam Urban Water Supply and Sewerage Board vs Subhas Projects and Marketing Ltd.,*** *2003(2) Arb LR 301 (Gau) and* ***National Building Construction Co. Vs Antia Electricals Pvt. Ltd.,*** *2003(2) RAJ 258 (Del)* wherein the Courts have held that interim orders of the arbitral tribunals are not amenable to correction in writ proceedings and the aggrieved party has to wait till the passing of the arbitral award to challenge the jurisdiction of the arbitral tribunals.

A new ground to circumvent the provisions of Sections 12 and 13 has now been devised by parties wishing to see the back of the Arbitral Tribunals by filing an application in the Court under Section 14 of the Act seeking termination of the mandate of the arbitrator. Section 14(1)(a) of the Act provides that the mandate of an arbitrator terminates if he becomes *de jure* or *de facto* unable to perform his

functions or for other reasons fails to act without undue delay. Section 14(2) of the Act provides that unless otherwise agreed by the parties, a party may apply to the Court to decide on the termination of the mandate of the arbitrator. The recalcitrant parties have now started filing applications under Section 14 before the Courts on the ground that the term "*de jure* or *de facto* unable to perform" includes inability to perform due to alleged bias or lack of independence of the arbitrator. The recourse available to a party against an allegedly biased arbitrator is provided under Sections 12 and 13 of the Act and a party cannot bypass these provisions and directly approach the Court under Section 14 for termination of the mandate of the arbitrator. It is hoped that the Courts would not entertain such applications which have the potential of derailing arbitration proceedings endlessly.

Post-Award

The power of the Courts to set aside an arbitral award is available under Section 34 of the Act. In ***Olympus Superstructure Pvt. Ltd. vs Meena Vijay Khetan,*** *(1999)3 SCC* 651, it had been held that the award could be set aside only on the grounds mentioned in Section 34 of the Act. It was also stated that the power to set aside an award under Section 34 of the Act was far less than that enjoyed by the Courts under Sections 30 or 33 of the Arbitration Act, 1940. Under the old Act, the award could be set aside on the ground of "misconduct" and even though various High Courts and the Hon'ble Supreme Court had laid down that there should be a desire to support the award but the Courts usually ended up scanning the award with a critical angle. Recently, in ***Oil and Natural Gas Corporation Ltd. vs SAW Pipes Ltd.,*** *(2003)5 SCC 705,* the Hon'ble Supreme Court added new grounds for setting aside arbitral awards by increasing the scope of the term Public Policy of India. Fortunately, for lawyers defending awards, in another judgment delivered very recently by the Hon'ble Supreme Court in ***M. Anasuya Devi and another vs M. Manik Reddy and another,*** *2003(3) Arb LR 404 (SC)* the earlier decisions have been reiterated and it has been clearly stated that the award can be challenged only on the limited grounds mentioned in Section 34 of the Act.

After a party files objections against an award, the same are decided by the Courts. In the High Courts having original jurisdiction, arguments are heard immediately after completion of pleadings. However, where the lower judiciary hears the matter, evidence is also recorded in favour of and against the award. It is submitted that such recording of evidence should be done away with. The evidence in the matter has already been led once before the arbitral tribunal and hence, re-recording of the same evidence before the courts serves no useful purpose and only delays the implementation of the arbitral award.

Appeals and Execution proceedings

The intention of the Legislature as evidenced by the Act had been to put an end to the disputes between the parties in as short a span of time as possible. When after toiling hard before the arbitrator and before the court, a litigant finally succeeds in getting the challenge rejected, he feels that this is the end of his miseries, while, in fact, his miseries start from the time when he takes steps to enforce the award. The respondent still has a right to appeal against the decision of the lower court and along with the appeal an application is always filed for staying enforcement of the arbitral award. Surprisingly, such stays are often granted. It is submitted that Courts should be reluctant to grant stay of such money decrees unless very strong reasons exist for doing so. The High Courts at Himachal Pradesh, Allahabad and Rajasthan while admitting the appeal require the appellant to deposit the decreetal amount in the court. These High Courts also invariably allow the decree-holder to withdraw 50% of the said money against personal surety and the balance 50% against adequate security. It is submitted that the same procedure should be followed throughout the country.

Conclusion

In the end, it is stated that the endeavour of the Courts should be to fulfill the avowed objective of the Act. The Courts should actively discourage recalcitrant parties who want to use the court procedures to delay arbitration proceedings. After the awards are made, the approach of the Courts should be to uphold the same and minimize the time within which judgment should be passed. Such an approach is all the more necessary in these times of economic liberalization wherein companies, and more especially multi-national companies, cannot afford to waste years in pursuing litigations. If the Courts are not vigilant to their role, the deep sense of anguish expressed by D.A. Desai J. in ***Guru Nanak Foundation* Vs *Rattan Singh & Sons***, *AIR 1981 SC 2075* with regard to arbitrations conducted under the Arbitration Act, 1940 would be repeated under the Arbitration and Conciliation Act, 1996. In the said judgment, it was stated as under:

> "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 claptrap and this led them to Arbitration Act, 1940 (Act, for short). However, the way in which the proceedings under the Act are conducted and without an exception challenged in Courts has made lawyers laugh and legal philosophers weep. Experience shows and law reports bear ample testimony that the 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 complexities.”

Again, in ***Ramaji Dayawala & Sons (P) Ltd.*** **Vs** ***Invest Import***, AIR 1981 SC 2085, D.A. Desai J. stated that:

> “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 courts. 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 Edmond Davis, J. in *Price* Vs *Milner*, (1966)1 W.L.R. 1235, these may be disastrous proceedings.”

In *Price* Vs *Milner*, (1966)1 W.L.R. 1235 it had been stated as under:

> “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 arbour of that old gentleman would not have been dampened somewhat had he survived long enough to learn something about the present case.”

It is hoped that such a situation would be avoided in times to come.