AVOIDANCE OF DELAYS IN ARBITRATIONS

By

P.C. Markanda, Senior Advocate,
Member, Governing Body, ICA
&
Naresh Markanda and Rajesh Markanda, Advocates,
H. No. 111, Sector 16-A, Chandigarh - 160015

In any sphere or vocation or profession, disputes are bound to arise. And when they arise, the endeavour should be made to resolve the same at the earliest. But the question is: Have those involved in resolution of disputes made any worthwhile efforts to avoid delays? Regretfully stating, steps taken towards this end, if any, are quite minimal. Resultantly, dispute resolution, which should have been done, say, in one year's time, is not achieved even in 5 years. Delay at every stage of the proceedings, whether before the arbitrators or the Courts, has a cumulative effect. The ultimate sufferer, needless to say, is only the employer.

Reasons which contribute towards delay in resolution of disputes are innumerable. However, some of these are:

(1) Non-fixation of time for filing claims;
(2) Failure to appoint arbitrator early;
(3) Appointing arbitrator from non-related field;
(4) Late completion of pleadings;
(5) Holding arbitration hearings for short durations;
(6) Liberal grant of adjournments;
(7) Payment of fees to arbitrators on daily basis;

(8) Lack of training to arbitrators;

(9) Ignoring stipulations of agreement; and

(10) Challenging award in routine

(1) Non-fixation of time for filing claims

Generally, agreements entered into between the parties do not specify the time limit within which a contractor could raise his claims. In quite a large number of cases, the contractors initiate their claims when the work is nearing completion or sometimes even after the settlement of the final bill. The employer is taken by surprise. This practice has got to be curbed. Frivolous claims need to be avoided. The only way in which it can be done is to provide a time limit in the agreement within which the contractor can be permitted to raise its claims from the time when these arose.

In *Vishwanath Sood* *vs* *Union of India* (1), the Supreme Court held that if a claim falls within the category of excepted matters, it cannot be adjudicated upon by the arbitral tribunal. Likewise, if it is stipulated in the agreement that claims not preferred within a definite period of time from the accrual of cause of action would be beyond the purview of arbitration, it is quite possible that frivolous claims preferred at the fag end of the contract are avoided.

In CPWD and PWD contracts, it is provided in the agreement that analysis on account of non-schedule/extra/deviated items shall be submitted within seven days from the date when these are ordered by the Engineer-in-charge. Obviously, failure to submit the analysis within the

stated period would deprive the contractor from raising such claim subsequently, and any award made in violation of such a stipulation would render it liable to be set aside. [See *Suresh Chander* vs *Delhi Development Authority* (2) and *Delhi Development Authority* vs *Jagan Nath Ashok Kumar* (3)]

(2) Failure to appoint arbitrator early

In most of the works contracts, it is stipulated that the right to appoint the arbitrator would vest in a particular authority. While invoking the arbitration clause, the claimant invariably makes a request to the designated authority for appointment of an arbitrator at an early date. Instead of appointing an arbitrator straightaway, the *persona designata* seeks comments from various officers. There is hardly any justification in marking the request of the claimant to the officers, but this is what generally happens. The officials push the file from one desk to another. No urgency is attached at any stage to take any time-bound decision. Finding that the *persona designata* has not acted with the expediency the matter requires, the claimant takes recourse to the Chief Justice or his designate under Section 11(6) of the Arbitration and Conciliation Act, 1996 ('Act', for short).

Though no time limit is provided in Section 11(6) of the Act for approaching the Chief Justice to make the appointment of a sole arbitrator, the courts have interpreted that the Legislature must have intended it to limit it to 30 days. In *Datar Switchgear* vs *Tata Finance Ltd.* (4), it had been held that if one party demanded appointment of an

arbitrator and the other party did not make the appointment, the right to appoint was not automatically forfeited on the expiry of 30 days, however, the right would be forfeited if the opposite party fails to make the appointment and the claimant approaches the Chief Justice or his designate for the needful.

In a large number of cases, it takes much more than a year for the Chief Justice or his designate to appoint an arbitrator. No time limit is provided for the Chief Justice to make the appointment either under the Act or by the Scheme framed by the Supreme Court or various High Courts.

The Act or the Schemes framed by the Supreme Court or various High Courts does not stipulate that a notice of filing of application under Section 11 has to be served on the opposite party. Nor does the situation so warrant. A Constitution Bench of the Supreme Court in *Konkan Railway Corp. Ltd.* vs *Rani Const. Pvt. Ltd.* (5) very rightly observed that there was nothing in Section 11 which mandates the Chief Justice to issue notice to the respondent. However, if the respondent has to be noticed, it has to be for the limited purpose of information and for assisting the Chief Justice or his nominee in appointing the arbitrator. However this message does not seem to have percolated to the Courts below. In fact, position in Courts subordinate to Punjab and Haryana Court is much worse. The subordinate Courts even take evidence of both the parties before appointing an arbitrator. How sad!!!!

From the foregoing, it would be noticed that the main culprit for the initial delay in setting the arbitral process in motion rests wholly and exclusively with the *persona designata* followed by lackadaisical approach on the

part of the Courts. If the laxity on the part of the *persona designata* is taken serious note of by the Government, with imposition of some penal action, it would definitely bear fruitful results. In so far as delay in the Courts is concerned, it is only because certain Courts treat Section 11 applications at par with other cases. Once the Chief Justice makes it obligatory on the part of the subordinate Courts to dispose off the matter within a period of 3-4 months, there is no reason as to why there would be any delay.

(3) Appointing arbitrator from non-related field

Section 11(8) of the Act provides that the Chief Justice or his designate, in appointing an arbitrator, shall have due regard to any qualification required of the arbitrator by the agreement of the parties. The expression 'agreement of the parties' in the context in which it has been mentioned seems to refer to the qualification as stipulated in the contract by the parties. Had it been even applicable to the situation obtaining after filing of the Section 11 application, the Supreme Court in the aforesaid case would not have said that the respondent need not be noticed.

In the absence of any prescribed qualification of an arbitrator in the arbitration agreement between the parties, it is understood that only that person should be appointed who understands the nuances of the trade forming the subject-matter of the arbitration agreement. It is difficult for a man not conversant with the trade to understand the terminology or intricacies of the matter in respect of which disputes have arisen. It is not that an arbitrator from a non-related field would not understand the terminology, but the implications involved in the dispute would certainly

be beyond his comprehension, since he has no theoretical background of the field to which the disputes relate to. For example, a dispute relating to extensive damage caused to a building due to settlement of foundation would require adjudication by an expert in Soil Mechanics, rather than person of any other discipline of engineering or a non-engineer.

In practice what happens is that when an application is filed by a party under Section 11 of the Act, it is in rarest of the rare cases that man from the trade is picked up for appointment as arbitrator. The Chief Justice or his nominee has only a retired Judge of the Supreme Court or High Court in mind. It cannot be expected of Judges to comprehend the intricacies of the cases relating purely to engineering matters. There are various disciplines of engineering in relation to which disputes arise. For example, in case of disputes arising out of Dam construction, or other civil or mechanical or metallurgical engineering matters, terminology in each case and its relevance and application may be completely beyond the comprehension of a person not related to that field.

(4) Late completion of pleadings

The very first step which the arbitrator is required to take consequent to his appointment is to call upon the parties to submit their respective claim statement, reply and rejoinder. This is what Section 23 of the Act stipulates. In the absence of agreement between the parties regarding time schedule, it is the duty of the arbitrator to allow a reasonable period of time to them for submission of their respective pleadings.

There is hardly any case in which the parties submit the pleadings within the allocated time. Both the parties seek adjournment after adjournment for the said purpose. The arbitrators more often than not accept the prayer. This is certainly not in consonance with the scheme of the 1996 Act. Adherence to time schedule should be the watch word.

Of late, a practice has emerged of leading oral evidence on the part of both the parties, even though the deposition of the witnesses would not, in any manner, be different from what is available on the record. In some cases, witnesses are cross-examined for *years together*. Time is wasted; money is wasted. And that too for no useful result.

Once the arbitrator makes it clear to the parties that he would be compelled to take recourse to the stipulations of Section 25 of the Act, it can be said with certainty that both the parties would take extra pains to see that time schedule is faithfully adhered to.

(5) Holding arbitration hearings for short durations

When the arbitral tribunal holds its first meeting for chalking out the procedure in accordance with which the matter shall proceed as stipulated in Section 24(1) of the Act and for fixing hearing, the advocates of the parties invariably insist that the same should be held only on holidays or week ends. During week days, the advocates are not willing to get the hearing fixed because of Court work.

Such an approach on the part of the advocates to appear only on holidays or week ends immediately gives rise to three questions, viz.: (1) Are the arbitration cases only a part-time work? (2) Is the matter before the Arbitral Tribunal in any way inferior to the nature of matters before the Courts; & (3) Why does the legal fraternity not keep the interest of the litigating parties at par with those for whom they appear in the Courts?

Supposing the arbitration hearings have to be held only in late evenings or on holidays or on week ends, it can only be for a couple of hours or so. Reason? If hearings are to be conducted after the advocate is free from the Court, then it will be held at around 5 p.m. After two hours the advocate would pack up because: (i) he is tired after the whole day's work; and (ii) he has to prepare for the matters fixed in the Court the following day. Resultantly, effective hearing time is anywhere between 1 to 1½ hours. This is too insufficient. Obviously, therefore, it will take years together before the arbitrator would be in a position to make the award.

If the hearings are fixed on holidays or on week ends, the endeavour of the advocates is to have 2 to 3 cases fixed every day. In such a case also, the effective hearing is nearly 1½ hours in a day. We cannot lose sight of the fact that in arbitration it is customary to have tea break which consumes 15 to 20 minutes. Another 10 to 15 minutes are lost in fixing dates for the next hearing to accommodate for the prior engagements of the arbitrator(s) or the advocates of the parties.

Delay after delay, on one or the other count, frustrates the claimant. Not only time but a substantial amount of money goes down the drain. Greed on the part of the arbitrators and the advocates has brought the institution

of arbitration in disrepute. In *State of Kerala vs C. Abraham* (6), a Full Bench of Kerala High Court observed:

> "The engineering profession enjoyed a unique reputation by the acceptance of their status as decision makers, even while in the employment of the one party or the other. An objectivity and impartiality could rightly be attributed to them. Things have now changed much, regrettably indeed. The pattern of function of some of the arbitrators (who could pass non-speaking awards) tended to forfeit the credibility of the very system itself".

Knowing well that the administration of justice is not that neat and clean as it used to be, still there are some who have pinned their hopes on the institution of arbitration. However, what one experiences in actuality would shake the very confidence in arbitration. In *Price* vs *Milner* (7), EDMUND DAVIES, J. observed:

> '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 about the present case.'

(6) Liberal grant of adjournments

It is a matter of common experience that hearings fixed after long heckling, are adjourned on one pretext or the other, whether tenable or not. It is quite surprising as to why adjournments should at all be granted, particularly when the date for the meeting had been fixed with the consent of the parties, unless, of course, reasons for seeking

adjournment are such which could not have been in the contemplation of the parties or are beyond their control.

Some arbitrators do not allow adjournment when prayed for on telephone or through a formal written request. They insist that adjournment shall be granted only when sought in the arbitration meeting only. Reason for this is not far to seek. There are others who very willingly grant adjournment even on telephonic request but subject to payment of his fees by the party seeking adjournment. The end result is the same, i.e. money is paid and the adjournment is granted as a matter of routine. Furthermore, there is also another major problem due to the adjournment, i.e. fixation of the next date of hearing. Invariably the parties and/or the arbitrators cannot agree upon a common short date, which also results in inordinate delays.

No doubt, at times, seeking adjournment, under highly compelling circumstances, may be inevitable, but certainly it must not be granted on flimsy grounds and that too at short notice.

(7) Payment of fees to arbitrators on daily basis

In earlier times, charging of fees by the arbitrators on per-day basis was completely unknown. Now it is a routine rather than an exception. Same is the case with the advocates. Neither the advocate nor the arbitrator shows any urgency to hasten up the process of arbitration. In fact, the endeavour is to drag on as much as is possible. However, in some cases where the arbitrators or the advocates have sufficient arbitration matters

in hand, some urgency is shown in having the proceedings completed early. But these are few and far between and are an exception to the rule.

To start with, when the system of charging fees on per-day basis commenced a few years back, the arbitrators fixed only a nominal daily fees. Now even sky is not the limit. A whooping sum of Rs. 25,000 - 30,000 per session of hearing of about 2 hours is charged by retired Supreme Court and High Court Judges, while Engineers charge anything between Rs. 10,000 - 15,000 per session. This is too much. With this much amount of fees per day, anybody would pray that proceedings do not come to an end at all.

(8) Lack of training to arbitrators

With the passage of time, some arbitrators have acquired practical experience as to how to conduct arbitration hearings. But in an overwhelming majority of cases, it is not so. Such arbitrators openly show bias in favour of one party for reasons which are not necessary to pen down. Irked by such open display of bias, the aggrieved party, compelled by the stipulation of the 1996 Act, prefers a challenge before the arbitrator under Section 16, unlike pre-1996 Act when such party could seek verdict from the Court. The arbitrator, when challenged, gives his verdict on expected lines. He is a judge in his own cause. It is highly doubtful, if any arbitrator has so far accepted the challenge since 25th January, 1996, when the Act came into force. Quite a few hearings are held by the arbitrator before deciding the application filed under Section 16. After the verdict is given by the arbitrator, the aggrieved party knowing well that the

award is going to be against it, files one application after another. Extensive and heated arguments are led on these applications by both the parties. Both parties fully know the result. What the aggrieved party does is only aimed at deferring the doomsday. There is thus, a dire necessity to train those who have to shoulder the responsibility of doing justice between the parties. By making this suggestion, it is not expected that dishonest arbitrators would change heart but at least time wasted in deciding the challenge or filing of subsequent applications would be saved. The least that one learns in a training programme would be as to how not to show unmitigated and open bias in favour or against a party.

Request for oral hearing made by a party must not be rejected by an arbitrator because no party can be denied the right to prove his case. In *Rakesh Kumar* vs *State of H.P.* (8), the arbitrator rejected the request of the petitioner for oral hearing on the ground that it cannot be allowed unless the other party consents to the said request. The award was made without permitting the petitioner to advance oral arguments. The High Court set aside the award on account of denial by the arbitrator to one party to prove his case.

(9) Ignoring stipulations of agreement

Unlike earlier agreements, when on arising of disputes, a party could straightaway take recourse to arbitration, now in most of the agreements there is provision for sitting across the table for conciliation or for referring the matter to a Disputes Resolution Board (DRB, for short) or a Referee. In the event of the verdict not going in favour of the party claiming the amount in dispute, that party invokes the arbitration clause. In some

cases, the arbitration agreement provides that before the contractor could seek arbitration, he must submit the claims to the Executive Engineer and if the said Engineer does not agree then the contractor would make an appeal to the Superintending Engineer, who shall decide the appeal within the stated time.

In the first category of cases, a period of anything between 6 months to a year would normally be taken to complete the pleadings and arguments before the DRB announces its verdict. In an overwhelming majority of cases the verdict given by DRB is usually not acceptable to either of the parties. This is more so in case of Government departments. If the Government departments do not accept the award of an arbitrator which is of a binding nature, it is naïve to think of DRB verdict being honoured. May be, with the passage of time DRB verdict is given that respect which it deserves, but as of now, results are far from encouraging.

In the second category of cases, sometimes the contractors bypass the procedure given in the agreement to approach the Executive Engineer and/or Superintending Engineer and/or Consultant for decision before invoking the arbitration clause. They do so because they know for certain that it is going to be an exercise in futility. Even though the Courts know that no Government department has ever settled any claim when the contractor approached the aforesaid Engineers, but still the Courts insist on exhausting the procedure before a party takes recourse to arbitration. In some cases, when the contractor gave a go-by to the agreed procedure, the Courts set aside the award. The result was that years

spent in arbitration and before the Courts for defending the award went awaste [See *Hotel Corporation of India vs Motwani (P) Ltd.* (9)]

(10) Challenging award in routine

After spending a number of years in pursuing arbitration, the claimant heaves a sigh of relief when the award is finally made. But that happiness is short-lived and evaporates in thin air when the claimant receives summons from the Court to the effect that the award has been challenged. It was probably with such a situation in mind that the Apex Court in *Guru Nanak Foundation vs Rattan Singh & Co.* (10), observed: "The way in which the proceedings under the Act are conducted and without an exception challenged in Courts, have made lawyers laugh and legal philosophers weep". In another case reported as *Ramji Dayawala & Sons (P) Ltd. vs Invest Import* (11) it was stated that: "If expeditious, less expensive resolution of disputes by a Judge of the choice of the parties was the consumation devoutly to be wished through arbitration, experience shows and this case illustrates that the hope is wholly belied."

In Government departments, awards are challenged as a matter of routine. No officer wants to own responsibility. Sanction sought from higher authorities for challenging the award in the Courts is liberally granted; sometimes, even without application of mind and on other occasions even without reading what the objections are. It is not only extra financial burden on the State Exchequer by way of interest that continues to mount with the efflux of time but also sheer wastage of time of both the parties. Interest amount from date of award onwards which

could legitimately be saved is not saved. In most of the cases, the amount of interest exceeds the principal amount.

It is suggested that responsibility for causing loss to the State Exchequer must be fixed by the Government where the litigation is nothing short of luxurious litigation. It is not understood as to why repeatedly the stereo-typed claims since decided by various Courts are challenged. Once the Government takes steps in realizing the extra expense incurred on account of payment of future interest on such claims which have been repeatedly settled by various Courts from the concerned official(s), it is quite probable that most of the awards would not be challenged as a matter of routine.

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