

LET'S GO BACK TO LITIGATION

This topic has been chosen for today because it is felt that there is a substantial level of dissatisfaction for Arbitration seated in India due to various road blocks like lack of uniformity in the treatment of procedure of Arbitral Award, time - consuming and expenses.

Therefore – “Let's Go Back to Litigation”. Now according to me, whether Arbitration has failed in India is a point of view, which may be based on good reasoning. But for anything to succeed or fail there is one and only one reason and that is the people or persons who are responsible for its implementation. So if Arbitration is not succeeding in India, it is a human problem.

Lets now examine has litigation or the State run Courts been successful in India. Far from it. Let us not go too far behind, i.e. prior to our independence. After independence, the progress made by the judicial system in India will only make a dismal reading. Taking stock of the dismal picture in 2010, we ventured upon the National Mission for Delivery of Justice and legal reference. The 13th Finance Commission had approved Rs.5,000/- Crores for States to improve justice delivery system. Not all of this money was released, also the money which was released was not properly utilized. But one can say that under the banner of "*Timely Justice for all*" a very rosy picture / blue print was presented. Some part of this was even implemented. But consider this -

We at present have a pendency of 29.1 million cases in India - 47,000/- in the Supreme Court, 3.7 million in the High Courts and 25.4 million in the Lower Courts. More than 5,30,000/- cases are more than 10 years' old cases pending in the High Courts. A very large number of their cases are criminal cases.

Now consider the cost of improving the legal infrastructure. Different methods may be applied for calculating number of Courts/Judges, Judge case ratio etc. but take it whichever way we may. We need about 20,000/- more courts and 40,000/- to 60,000/- more Judges. What will be its cost, somewhere I read it will be about Rs.1,60,000/- Crores annual ruining cost.

Now by all means give up the ADR or the Alternate Dispute Resolution System, over which Crores of Rupees have already been spent and go on to pack the Courts with more and more work. If you are dissatisfied with the Arbitration or their approach or methods.

Giving up Arbitration and going back to litigation in my opinion will be like throwing out the baby with the bathwater.

Let me now refer to what the Supreme Court of India's opinion is about Arbitration in India. In a landmark judgment delivered in the case of "*Sanjeev Kumar Jain Versus Raghbir Saran Charitable Trust and others*" (2012) 1 SCC 455, Supreme Court of India while dealing with a limited Question of awarding costs in an Appeal arising out of a grant of temporary Injunction in an Injunction Suit

found it necessary to comment upon the costs involved in Arbitration matters in India. the supreme court found itself concerned with regard to the manner in which Arbitrations in India were being conducted. It referred to an earlier Judgment "*Union of India Versus Singh Builders Syndicate*" (2009) 4 SCC 523 which dealt with complaints about the Arbitration Costs in India. The Court highlighted several paragraphs of the said Judgment and then finally in paragraphs 27 & 28 before concluding its Judgment observed as follows :-

"...27. 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 sessions for 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 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.

28. Though what is stated above about arbitrations in India, may appear rather harsh, or as an 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 professionalized or institutionalized 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. Be that as it may..."

Mr. F.S. Nariman, Senior Advocate on 12th February, 2011 in his first LCIA Annual Arbitration Lecture held in New Delhi said, if Arbitration has to succeed in India, the following should happen, and I quote:-

"Salvaging arbitration in India is just not possible until three decisions of the Supreme Court are consigned to the dustbin of history – either by requesting the Court to constitute larger Benches to review them (which appears to me to be unlikely); or approach the Law Minister to introduce legislation for this purpose. This is also a task which LCIA India could undertake in a detailed paper objectively setting out the problems arising from these three decisions: they are: Bhatia International (2002); Saw Pipes (2003); and Venture Global (2008); they have totally messed up our law of Arbitration."

All these decisions have now been overruled by the Supreme Court in the case of Bharat Aluminium Co. Vs. Kaiser Aluminium Technical Service, Inc., (2012) 9 SCC 552 which is a Five Judges decision. Friends, now I come back to when I started. Should we

give up Arbitration and go back to litigation. My suggestion is No. But surely, we will have to work together and remove the problem which are inherent in our system.

1. We must develop an Arbitration Bar.
2. More and more young Senior Advocates should start accepting to become Arbitrators.
3. Arbitration in Commercial matters should be held under the aegis of an Institution and not by ad-hoc method.

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