Invited Review Article

Arbitration is an alternative but whether it is equally efficacious or not

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Even before the law was codified there was an old tradition to settle the disputes amicably through arbitration and in order to make it easier and more systematic, the Arbitration Act, 1940 was enacted by Act No.10 of 1940 on 11.03.1940 to consolidate and amend the law relating to arbitration.

This tradition of adjudicators eventually evolved an Indian type of self rule that included arbitral techniques as part of a post colonial ideal of local governance and grass root democracy and therefore, first law on arbitration based on the English Arbitration Act, 1899 was framed as the Indian Arbitration Act, 1899 and later on, the same was substituted by the 1937 Act on Arbitration (Protocol and Convention) dealt with a Geneva Conventions Recognition and Enforcement of Foreign Awards and thereafter, the Arbitration Act 1940 being Act No.10 of 1940 was enacted on 11.03.1940 to consolidate and amend the law relating to arbitration which extended to the whole of India except the State of Jammu and Kashmir came into force with effect from 01.07.1940.

That as there were some deficiencies, therefore, the parliament deemed fit to make the Arbitration and Conciliation proceedings easier , convenient and more approachable to the normal litigant in order to get prompt justice by saving the litigants from long drawn process of conventional Courts of justice and therefore, on 16.08.1996, Arbitration Act, 1940 was substituted by the Arbitration and Conciliation Act, 1996 being Act No.26 of 1996, which was enacted to consolidate and amend the law relating to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards and also to define the law relating to conciliation and for matter connected therewith or incidental thereto.

That in the said Act, the power to appoint an arbitrator is given u/s 11 either to the High Court or to the Supreme Court and even if there is an arbitration agreement and the same is brought to the knowledge of any judicial authority, it is incumbent upon the judicial authority to refer the parties to arbitration by further giving rights to the court to pass interim measures either before the commencement of arbitration proceedings or subsequent thereto as per section 9 of the Arbitration and Conciliation Act. The provision was also given to challenge the mandate of the arbitrator or to terminate its mandate or to substitute the arbitrator, but the legislature further deemed proper to make the Act more convenient and easier and approachable to the common litigant by bringing a drastic amendment in the year 2015 w.e.f. 23.10.2015 vide Act No.3 of 2016, where, in order to get the appointment of an impartial arbitrator, clause-5 was added in section 12, where it is provided that notwithstanding any prior agreement to the contrary, any person whose relationship, with the parties or counsel or the subject matter of the dispute, falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as an arbitrator and therefore, seventh schedule r/w section 12(5) envisage that no person having fallen in any of the categories specified in the Seventh schedule can become an arbitrator.

That the Hon'ble Supreme Court in the case of **Trf Ltd v Energo Engineering Projects Ltd, [(2017) 8 SCC 377]** has held that if any person having fallen in any of the categories specified in Seventh schedule cannot act as an arbitrator, even that authority has no right to nominate or appoint somebody else as an arbitrator, so that to avoid any question being raised on the impartiality and integrity of transparent arbitrator. Relevant paragraph of judgment in the case of **Trf Ltd v Energo Engineering Projects Ltd** is being quoted herein below:-

"By our analysis, we are obligated to arrive at the conclusion that once the arbitrator has become ineligible by operation of law, he cannot nominate another as an arbitrator. The arbitrator becomes ineligible as per prescription contained in Section 12(5) of the Act. It is inconceivable in law that person who is statutorily ineligible can nominate a person. Needless to say, once the infrastructure collapses, the superstructure is bound to collapse. One cannot have a building without the plinth."

That as per section 21, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent and therefore, section 29A incorporated by the amended Act No.3 of 2016 prescribes a time limit in which the arbitral tribunal is supposed to pass an award within a period of 12

months from the date of completion of pleadings under sub section 4 of section 23 and if the award is made within a period of six months from the date the arbitral tribunal enters upon the reference, the arbitral tribunal shall be entitled to receive such amount of additional fees as the parties may agree by further allowing the parties to extend the period not exceeding six months by consent and if the award is not made within such period mentioned herein above, the mandate of the arbitrator shall terminate unless the court has either prior to or after the expiry of period so specified, extended the period.

The Arbitration Act further provides the forms and contents of arbitral award whereunder even what interest rate would be provided has also been mentioned in section 31 and therefore, the efforts of the parliament is to make the arbitration and conciliation proceedings more precise, convenient, approachable to the common man, but the question which goes to the root of the matter is that despite the best endeavour being made by the parliament, this Act is still an alternative forum to resolve the disputes, but can't be efficacious and the same is the subject matter of the article, particularly in view of the fees of arbitrator provided as per Schedule-IV of the Act, which is as follows :-

Sl.No	Sum in dispute	Model fee
1.	Up to Rs.5,00,000	Rs.45,000
2.	Above Rs.5,00,000 and up to Rs. 20,00,000	Rs. 45,000 plus 3.5 per cent. of the claim amount over and above Rs.5,00,000.
3.	Above Rs.20,00,000 and up to Rs. 1,00,00,000	Rs.97,500 plus 3 per cent. of the claim amount over and above Rs.20,00,000.
4.	Above Rs.1,00,00,000 and up to Rs. 10,00,00,000	Rs.3,37,500 plus 1 per cent. of the claim amount over and above Rs.1,00,00,000.
5.	Above Rs.10,00,00,000 and up to Rs. 20,00,00,000	Rs.12,37,500 plus 0.75 per cent. of the claim amount over and above Rs.10,00,00,000.
6.	Above Rs. 20,00,00,000	Rs.19,87,500 plus 0.5 per cent. of the claim amount over and above Rs.20,00,00,000 with a ceiling of Rs.30,00,000.

The Schedule-IV provided hereinabove shows that if any person seeks to get the matter resolved by the arbitrator, he has to pay handsome fees in lacs and sometime in crores as per the valuation, which normally he is not required to pay either before the civil court or before the commercial court in the conventional justice dispensation system.

That further if the award is passed, certainly the award is in favour of one party and against the other party and in case, the looser side wants to challenge the award as per section 34, the same has a very-very limited scope of interference even after the insertion of sub section 2-A in section 34 and if any party who has lost the arbitration case, fails to file the same within a period of three months extendable for a further period of 30 days, no application for condonation of delay is maintainable as held by the Hon'ble Supreme Court in various judgments, therefore, the law of arbitration sometimes is very convenient but on the other hand is also very harsh and contrary to the provisions of getting justice.

That the purpose of bringing the Arbitration and Conciliation Act is to give prompt justice but the same is not being fulfilled in view of the lengthy process of challenging the award u/s 34 on a very limited ground, then its appeal u/s 37 and the award having settled by the appellate forum u/s 37 of the Act, has to be executed as a decree of civil court as per section 36 of the Act, where all the provisions of Order 21 of The Code of Civil Procedure, 1908 are made applicable, which makes no difference between the decree and the award passed under the Arbitration and Conciliation Act.

That the first round of litigation begins when a party approaches the Hon'ble High Court or the Hon'ble Supreme Court for appointment of arbitrator, although, in the amended act, it has been provided that an application u/s 11 has to be decided within a period of 30 days from the date of service of notice to the opposite side but on account of our over burdened courts, the said period is not achievable and it takes months and sometimes years to get it decided and thereafter, the aggrieved party may approach the Hon'ble Supreme Court and only after the matter is settled from the Supreme Court, the arbitral proceedings commence u/s 21 of the Arbitration and Conciliation Act.

That as an illustration I am giving herewith the detail of one case where after having an arbitration clause in the agreement, writ petition was filed before the Hon'ble Allahabad High Court (author is not intentionally giving the details of the writ petition), but the Hon'ble High Court was pleased to dismiss the petition on the ground of alternative remedy of having an arbitration clause by relegating the parties for arbitration and therefore, the party in order to invoke the arbitration clause, first exhausted the departmental remedy and after exhaustion of departmental remedy, the party approached the High Court u/s 11 for appointment of an

independent sole arbitrator as per the terms of the agreement, upon which after running from pillar to post the Hon'ble Allahabad High Court was pleased to appoint an arbitrator particularly the same Hon'ble Judge who was the part of Division bench which dismissed the petition was appointed as sole arbitrator and thereafter, after running from pillar to post and going through a very lengthy process, finally the arbitration award has been passed in favour of that particular party who had approached the Hon'ble Allahabad High Court and still he is waiting for enforcement of arbitral award. The said party had paid almost Rs.10 lacs as a fees and expenses in getting the justice, which is not affordable to a common litigant. Secondly, if a common litigant approaches the Civil Court or the High Court, the availability of lawyers are much easier than the availability of lawyer for conducting the arbitration case and the lawyers charge heavy fees may be on per day basis to appear before the arbitral tribunal, which is making the arbitration more harsh and unapproachable for the common litigant.

I in order to sum up this article I hope that the parliament would make some more changes or amendments in the arbitration and conciliation act in order to make the same more approachable, convenient and to serve the purpose of " **सस्ता, सुलभ तथा त्वरित न्याय**"of our Constitution of India.

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