

## *LITIGATION Versus ARBITRATION and the way forward post COVID-19 pandemic*

### INTRODUCTION

There are two main streams for adjudication of disputes in India namely (i) litigation and (ii) Alternate Dispute Resolution (“ADR”). Whilst litigation has been a part of the conservative judicial system for a long time since courts in India have been functioning, ADR has gained impetus pursuant to the enactment of the Arbitration and Conciliation Act, 1996 (the “Act”). Both these streams have their advantages and disadvantages. Due to the on-going COVID-19 pandemic both the institutions have experienced substantial amount of change in respect of their functioning which is likely to continue into the near future.

#### **A) Litigation in India**

The judiciary system consists of hierarchy of courts, which is divided into the foremost level consisting of Hon’ble District and Magistrate Courts, thereafter the Hon’ble High Courts which exercise appellate as well as original jurisdiction which is superseded by the Hon’ble Supreme Court, the highest appellate authority in India exercising appellate and supervisory jurisdiction over all the courts in India. Apart from the aforesaid conservative structure of the judiciary, various statutes have made provisions for specialized tribunals such as Telecom Regulatory Authority of India (“TRAI”), Competition Commission of India (“CCI”), Maharashtra Electricity Regulatory Commission (“MERC”),

Appellate Tribunal for Electricity (“APTEL”), Motor Accident Tribunal (“MAT”), National Company Law (“NCLT”) etc. which adjudicate on highly specific matters. It is difficult to predict the time frame within which a matter would be adjudicated owing to numerous factors, but suffice to say that the same will not be disposed off within a short period of time save and except for matters in fast track courts or summary suits. Due to the aforesaid factor of time, litigation also involves expenditure of copious amounts of money. Apart from the counsel/advocates fees there are expenditures to be incurred towards court fees and miscellaneous expenditures which include travelling to court if in different state or city, engaging local attorney, etc. Having said that, litigation does come with its own advantage, that of being highly meticulous in its conducting of trials and appreciation of evidence, which is lost at times in the expeditious manner in which arbitration is conducted.

## **B) Arbitration in India**

The provisions of the Act mainly govern both Arbitration and Conciliation in India, whilst mediation and negotiation are not yet codified. Nevertheless, parties can opt for resolving disputes vide the means of mediation and negotiation before opting for arbitration. Pursuant to the enactment of the Act, ADR has become an alternate forum for resolving disputes. Due to the many lacunas faced by the litigants in litigation, parties mainly corporate in nature tend to choose ADR as their option for redressal of disputes. The advantages of arbitration are that the arbitration clause is binding on the parties executing the agreement. Compared to litigation the process of arbitration is speedier and less time consuming and as a result cost friendly to some extent. The process of arbitration is also highly malleable and can be conducted as per rules and procedures agreed between parties.

Though there are costs involved with respect to the fees of the arbitrator, advocate, administrative and miscellaneous costs, the same may be relatively less compared to the overall expense incurred in litigation if it is made time bound. Furthermore, the hearings conducted are confidential and thus ensure the privacy of the parties. In addition to the aforesaid, there is flexibility in terms of nominating an arbitrator for example, an expert can be chosen to help adjudicate technical matters more efficiently. It is pertinent to note that despite the aforesaid advantages of arbitration, arbitration also suffers from many inherent shortcomings due to which it has not been successful in taking over litigation. Arbitration may have helped decrease a certain amount of litigation but the same is marginal. However, with the recent amendments on time frame and fees of arbitrator, it seems arbitration will turn out to be an effective alternate resolution mechanism.

### **C) Impact of COVID-19 pandemic on litigation and arbitration in India.**

Due to the ongoing pandemic of COVID-19 and the global lockdowns implemented with a view to curb the spread of the virus, there have been major disruptions in all facets of life and the same has been extended to the workings of the judiciary including arbitral tribunals. The Hon'ble Supreme Court vide Order dated March 23, 2020 in a suo motu hearing **[Suo Motu Writ Petition (Civil) No(s).3/2020]** took cognizance of the challenges faced by the lawyers and the litigants in carrying out the necessary legal procedures and filings in matters whose limitation period (as stipulated in the general or special laws) would exhaust in this tumultuous period and extended the limitation period in all proceedings before any Court or Tribunal w.e.f. March 15, 2020, until any further orders<sup>1</sup>.

<sup>1</sup> in re, Cognizance for Extension of Limitation, 2020 SCC OnLine SC 343

Section 29A of the Act lays down the time-period for passing an arbitral award, being twelve (12) months from the date of reference to the arbitral tribunal. The aforesaid timeline can be extended by a period of six (6) months pursuant to the consent of the parties. Thereafter, any further extensions have to be sought before the concerned court, failing which the mandate of the arbitral tribunal shall terminate. This section was amended in 2019, wherein Section 29B was introduced which provided for conducting an arbitration under 'fast-track procedure'. Due to the ongoing lockdown, it would be difficult to adhere to the timelines as envisaged in Section 29A due to the disruption of normal routines, however, in normal times it assists in speedy disposal of arbitral disputes. The aforesaid Order passed by the Hon'ble Supreme Court according extension is restricted to only filing of pleadings before the tribunals and does not cover the timelines specified under Section 29A of the Act.

Section 19 of the Act states that an arbitral tribunal is not bound by the Code of Civil Procedure 1908 and hence keeping in mind the aforesaid flexibility accorded by the section and the subsisting extra-ordinary times, parties to the arbitral proceedings can adopt alternative procedures to conduct the arbitral proceedings such as e-platforms. In arbitration owing to the advantage of flexibility the parties can adapt to the current situation of COVID-19 and choose to follow rules and procedures which are in tandem with the present lockdown guidelines like exchange and file pleading via email and hold hearings via video conferencing. Whilst Arbitration seems to have an advantage of flexibility in the conducting of its proceedings, the same is not in the case of conservative litigation (which is not upto date on the usage of technology in lower courts), which unfortunately has suffered the most due to the ongoing lockdown.

But to overcome such extraordinary situation the Hon'ble Supreme Court has resorted to adopting technology to conduct hearings. The Hon'ble Supreme Court vide its circular dated March 23, 2020 listed a number of guidelines to have a matter listed for hearing via video conferencing. Furthermore, the Hon'ble Supreme Court suo motu issued "*Guidelines For Court Functioning Through Video Conferencing During Covid-19 Pandemic*" vide order dated April 06, 2020. The said Order stated that every individual and institution is expected to follow the implementation of measures designed to reduce the transmission of virus and in view thereof the scaling down of conventional operations within the precincts of court was a measure adopted in that direction. The Order further went on to record that whilst addressing the pandemic of COVID-19, the constitutional commitment of delivery and access to justice has to be maintained which can be achieved by the use of modern technology enabled courts.

The aforesaid Order issued a plethora of directives and also authorized Hon'ble High Courts to adopt necessary measures consistent with the judicial system in every state and developing public health situation<sup>2</sup>. The Order further observed the credit given to technology in the field of judiciary in the case of ***State of Maharashtra Vs Praful Desai***<sup>3</sup> which observed that technological developments made it possible to operate virtual courts similar to that of the physical courts. The relevant extract of the Order is stated herein below:

*"Advances in science and technology have now, so to say, shrunk the world. They now enable one to see and hear events, taking place far away, as they are actually taking place.... Video conferencing is an advancement in science and technology which permits one to see, hear and talk with someone far away, with the same facility and ease as if he is*

<sup>2</sup> Suo Motu Writ (Civil) No. 5 of 2020

<sup>3</sup> (2003) 4 SCC 601

*present before you i.e. in your presence... In fact he / she is present before you on a screen. Except for touching one can see, hear and observe as if the party is in the same room. In video conferencing both parties are in presence of each other... **Recording of such evidence would be as per 'procedure established by law'**."*

In its endeavour to promote the use to technology in dispensing justice in these unprecedented times, Hon'ble Justice Mr. DY Chandrachud inaugurated two virtual courts in Tamil Nadu and Delhi for traffic violations and petty offences.

It is pertinent to note that whilst the Hon'ble Supreme Court and Hon'ble High Courts may have the infrastructure and IT support to conduct virtual hearings, this may not be the case with the district courts, which would

be crippled until the requisite technology upgrade is carried out and the staff is adequately trained to conduct the same.

Considering that social distancing will be the new norm for an extensive period of time now and that the courts will not be able to function in their conservative sense as before, the courts will have to resort to and adopt the use of technology for accepting pleadings as well as hearings. In order for the courts to effectively implement the use of technology to conduct hearings during the ongoing COVID-19 and thereafter, it is imperative that the courts issue unambiguous guidelines and notifications to deal with the process of e-filing with a view to aid parties in filing pleadings. Issue guidelines in case of criminal matters, especially those wherein, production of the accused is mandatory and set up appropriate infrastructure to enable e-hearing.

Issue guidelines for filing and remote functioning of the courts coupled with effective training of the staff to enable them to function remotely. Issue guidelines for the upgrading of technology at the district and magistrate level and provide requisite training to the staff. In addition to the above measures to be adopted by the courts around India, it is imperative that lawyers who are the other side of the judiciary also become well versed with the functioning of technology. In order to achieve this goal, it will be most helpful if lawyers are also trained to use technology to enable them to carry out various legal procedures and attend hearings without a glitch, as was observed by Hon'ble Justice Mr. D Y Chandrachud in his speech at the inauguration of the virtual courts in Delhi and Tamil Nadu:

*"I believe there is a vital role to be played by the Bar Associations and the judiciary acting together as one institution in propagating*

*training for young lawyers. Of course, many young lawyers are far more proficient in technology than we are, but there are many lawyers who are not. Educational levels differ... "*

Keeping aside the changes that have to be implemented to ensure the smooth functioning of the judiciary in order to help with the dispensation of justice, it is also imperative to note that the technology used will take time to be fine-tuned to suit the needs of the stakeholders i.e. judges, lawyers and the litigants. Also the stakeholders will take some amount of time to adapt to and become comfortable with using technology in the dispensation of justice and hence the process of acclimatization should be given its due course of time and not be rushed. The technology will have to be molded in a manner such that the existing skill sets of the judiciary and the lawyers will be able to adapt to the same without having to completely re-vamp their skill sets.

It would be prudent to implement uniform technology throughout the judicial system to ensure that not too much inconvenience is caused to all stakeholders to learn different applications for different courts. Via the medium of e-hearing a plethora of matters could be heard but there are a few matters that due to their innate sensitive nature would need to be heard in person in the traditional conservative judicial set up such as matrimonial, adoption, mediation etc. cases which require physical presence and a humane touch which would otherwise be lost over an e-hearing. Having said that, certain matters such as the ones before the registrar and prothonotary could continue to be heard over e-hearing as the same are concerned with only procedural formalities. Though e-hearings may become a part of the judicial system they will by no means take over the traditional conservative judicial set up but will be supplemental to the physical form of hearing.

Due to the conscious steps taken by the Hon'ble High Courts and the Hon'ble Supreme Court to gravitate towards and imbibe the various facets of technology to conduct virtual hearings, the perennial problem of over-crowded court rooms will be solved. Furthermore, with the use of technology, courts will be able to reach the furthestmost parts of the country thus ensuring the accessibility and connectivity, to help in the dispensation of justice without compromising the core legal principals of adjudication. In addition to the same, the physical hustling of the lawyers and the counsels between multiple courts will be replaced by a mere switch of a browser, which will also prove highly convenient but will certainly take time to get used to.



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