Resolving Business Disputes in India by Arbitration: Problems Due to the Definition of 'Court'

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Abstract

The definition of "Court" in the Arbitration and Conciliation Act, 1996, is substantially different from that in the earlier law of 1940. Due to this new definition, there is tremendous load of work on the District Judge, which was earlier shared by other judges in the Civil Court. The experience of the last ten years testifies it amply that the District Judge is not able to devote as much time as is expected to arbitration matters and the cases are simply poling up. It adds to the delay and makes matters worse for the litigants. The District Judge is the senior-most judge in the district taking care of civil matters and as a matter of practice, she is also the senior-most judge taking care of criminal matters as the Sessions Judge. The designation of the head of the District Judiciary is, therefore, "District and Sessions Judge". As the routine criminal matters of bail, interim applications, etc. are much more urgent than the civil matters like arbitration, most of the time of the District and Sessions Judge is devoted to criminal matters. Even with the best of intentions, the District and Sessions Judge is generally not able to earmark sufficient time for arbitration matters which require in-depth study.

The approach followed in this paper is primarily interpretive and historical. Part II begins by discussing business dispute resolution in India; and Part III examines the role of courts in arbitration and difficulties experienced due to narrow definition of court. Finally, Part IV questions legislative wisdom by analysing the causes of legislative indifference and failure of legislature to do its duty; and suggests that may be the only plausible solution lies with the judiciary in the shape of judicial legislation.

I. INTRODUCTION

Business disputes need speedy resolution. Litigation is the least favoured method of resolution for a variety of reasons – delay being the foremost. The Indian judicial system is marred by delays. Businesses suffer because disputes are not resolved in a reasonable time. It is fashionable to talk about 'Alternative Dispute Resolution' (ADR) methods like negotiation, mediation, conciliation, arbitration, etc. but out of these only arbitration is used frequently as a method of choice for business dispute resolution. All over the world, commercial arbitration has been hailed as the most efficient form of dispute settlement available to participants in international trade as Arbitral Tribunal is viewed by businesses as a neutral and cost-effective alternative to the expensive and time-consuming courts. As a result, arbitration clause is now receiving much greater consideration in the contracts than it did in the past. It is true about businesses in India as well. However, arbitration in India has a long way to go to become an efficacious and efficient method of dispute resolution.

For India, arbitration is not new. It has a long history and tradition of arbitration, deep rooted in the age-old institution of *panchayat* (group of elders in villages). Presently, it is governed by the 'Arbitration and Conciliation Act, 1996' (hereinafter the 1996 Act) which was enforced after repealing the 'Arbitration Act, 1940' (hereinafter the 1940 Act). The 1996 Act has adopted the United Nations Commission on International Trade Law (hereinafter UNCITRAL) Model Law on International Commercial Arbitration 1985. Party autonomy is the basis of every arbitration agreement, however, court intervention is essential to have certain measure of control over the arbitral process and ensure its efficacy. For instance, arbitrators have no power, by themselves, to enforce awards. One of the most important areas of court intervention is that of setting aside or refusing to enforce an award. Thus, court intervention is a necessary evil and it can not be eliminated completely. Having said that, too much of court intervention defeats the very purpose of opting for arbitration. India's experience with the earlier law – the 1940 Act – was not very pleasant. Courts intervened at the drop of the hat and matters kept pending in the courts for years and sometimes decades forcing the Supreme Court to comment, "…the way law of arbitration is being administered has made lawyers laugh and legal

philosophers weep".[1] Along with a host of other issues, the new law – the 1996 Act – tried to tackle this issue also. One of the important objectives of the new law is to minimize the supervisory role of Courts in arbitral process. The best of intentions do not succeed in the absence of strong will to implement them and at times due to lack of foresight. The matters are still pending in the courts for unreasonable periods of time. One of the reasons for delay is the way court has been defined in the new Act.

According to Article 2 (c) of the UNCITRAL Model Law, "Court" means a body or organ of the judicial system of a State.

The equivalent provision in the 1996 Act is section 2(1)(e), which is as follows:

> "Court" means the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, but does not include any civil court of a grade inferior to such principal Civil Court, or any Court of Small Causes.

Barring a few cities where the High Courts exercise ordinary original civil jurisdiction, all matters pertaining to arbitration have to be filed in the *principal Civil Court of original jurisdiction in a district.* By definition this is the Court of the "District Judge". Any civil court of a grade inferior to such principal Civil Court or any Court of Small Causes has been intentionally kept out by the legislature. This leaves the Court of the District Judge and only this court to have jurisdiction over arbitration matters.

The equivalent definition in the 1940 Act was as contained in Section 2(c), which is as follows:

> "Court" means a Civil Court having jurisdiction to decide the questions forming the subject-matter of a suit, but does not, except for the purpose of arbitration proceedings under section 21 include a Small Cause Court.

[1] Guru Nanak Foundation v. Rattan Singh & Sons, All India Reporter 1981 Supreme Court 2075 at 2076

Due to this new definition of "Court", there is tremendous load of work on the District Judge, which was earlier shared by other judges in the Civil Court. The experience of the last ten years testifies it amply that the District Judge is not able to devote as much time as is expected to arbitration matters and the cases are simply piling up. It adds to the delay and makes matters worse for the litigants. The District Judge is the senior-most judge in the district taking care of civil matters and as a matter of practice, she is also the senior-most judge taking care of criminal matters as the Sessions Judge. The designation of the head of the District Judiciary is, therefore, "District and Sessions Judge". As the routine criminal matters of bail, interim applications, etc. are much more urgent than the civil matters like arbitration, most of the time of the District and Sessions Judge is devoted to criminal matters. Arbitration matters, with detailed contracts, long claims, counter-claims, award, application challenging the award, reply to this application and several other interim applications, are put on the back burner. Even with the best of intentions, the District and Sessions Judge is generally not able to earmark sufficient time for arbitration matters which require in-depth study. To make the matter worse, each District and Sessions Judge has to complete a target of number of cases in a calendar year. Her performance is evaluated as per the number of matters decided. She finds it convenient to decide small matters which do not require such in-depth study as the arbitration matters do. Thus, the arbitration matters keep pending and litigants have no option but to wait patiently. At times, litigants do opt for extra-legal methods to settle the dispute which is not a good practice for the economy and the society. It brings a bad name to the judicial system and erosion in faith starts taking place. It also forces foreign investors and business partners to perceive India as a place with slow-moving judiciary. Therefore, there is an adverse effect on the business in particular and economy in general.

The approach followed in this paper is primarily interpretive and historical. Part II begins by discussing business dispute resolution in India; and Part III examines the role of courts in arbitration and difficulties experienced due to narrow definition of court. Finally, Part IV questions legislative wisdom by analysing the causes of legislative indifference and failure of legislature to do its duty; and suggests that may be the only plausible solution lies with the judiciary in the shape of judicial legislation.

II. BUSINESS DISPUTE RESOLUTION IN INDIA

The business in India is booming and is expected to grow at a fast pace in the future also. Over the last one and a half decades, after the liberalisation of Indian economy in 1991, business has grown exponentially. As business grew so did the disputes. Most of the business communities have their own very old, time-tested methods of dispute resolution which have nothing to do with the formal legal system. For instance, jewellers, commodity traders, farmers, artisans, craftsmen, money lenders, etc. have a well established method of resolution of disputes and it is mostly by negotiation or mediation by a well-known, highly reputed third party. The major problem is for the businesses where stakes are very high and formal documents – contracts, arbitration clause, bank guarantee, indemnity, etc. – have been prepared. The only recourse available is the regular legal system, which India inherited from the British. Since independence in 1947, a lot of changes have been made, still the core remains as the laws enacted – for instance the Penal Code, the Civil Procedure Code, the Evidence Act, the Contract Act, etc. – during the nineteenth century by the British. The Government – Federal and States – had a major role in development since independence and ironically has turned out to be the biggest litigant in India. This Part focuses on delay in dispensation of justice and experience of arbitration in business dispute resolution in India in recent times.

A. Delay is the Norm

Dispute resolution in India is a tiring process, not because of the legal rigmarole but more due to inordinate and inexplicable delay. In 1952 Mr. Motilal C. Setalvad, the first Attorney General of Free India, wrote,

> "A burning problem which the citizens, lawyers and judges face alike is that of the congestion of Courts of law and the consequent inordinate delays in the administration of justice…" [2]

[2] Setalvad, Motilal C., 1952 "Problems before Legal Profession", All India Reporter (Journal Section), Volume 39, AIR 1952 Journal 2

Three and a half decades later, on November 26, 1985, in his Law Day (the day Indian Constitution was adopted by the Constituent Assembly in 1949) speech, the then Chief Justice of India painted a very dismal picture. He said,

> "I am pained to observe that the judicial system in the country is almost on the verge of collapse. These are strong words I am using but it is with considerable anguish that I say so. Our judicial system is creeking under the weight of arrears."

It was quoted by Mr. Ashok Desai, Attorney General in 1996, when the situation was no different from 1985.[3] More than half a century later, the situation has gone from bad to worse. The Economist wrote two years back,

> "……the number of civil and criminal cases pending before India's courts has exceeded 30m, up from 20m in 1997. Among the reasons are a shortage of judges—just 11 for every 1m people, compared with 51 in Britain and 107 in America."[4]

Nick Archer, a lawyer with a British firm, Slaughter and May, contributed to the article by calling the existence of a "frightening lack of case management". The Economist further wrote,

> "Cases are not assigned to a particular judge for their duration, and are often adjourned. Advocates may take several briefs on the same day, not turning up for some, causing yet more adjournments. …"[5]

Not only foreigners but Indians also know it. And, people at the top know it well. The Prime Minister, Dr. Manmohan Singh, expressed his concern about delay in dispensation

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[3] Desai Ashok H., November 26, 1996 "Law Day Speech", 1997 Supreme Court Cases (Journal Section), Volume 2, pp. 10-12

[4] The Economist, "India and its Courts", June 29, 2006, available at http://www.economist.com/world/asia/displaystory.cfm?story_id=E1_STNGTJT (last visited May 19, 2008)

[5] *Id.*

of justice at a Conference of Chief Justices of the High Courts and Chief Ministers in the following words,

> "In spite of efforts having been made and being made, and support provided by the Government, it is a matter of concern that there are huge arrears of more than 2½ crores (25 million) of cases in courts…… we take pride in being governed by the Rule of Law. If the Rule of Law has to become a living reality these delays and these arrears have to be effectively curbed."[6]

Litigation in India is almost a never ending saga. Like soap-operas it goes on and on. Each episode may have a new twist, new characters, new surroundings, new story, new dialogues, and like this it moves with a stately gait. The phrase 'justice delayed is justice denied' has lost its meaning and has simply become a cliché to be used in academic writings. India badly needs more judges. In a recent editorial, The Times of India, the leading English language newspaper, wrote,

> "Unless something is done quickly, our dysfunctional legal system will prove to be the biggest impediment to the country's growth…… a legal system that is drowning in cases and takes years to deliver verdicts cannot effectively deliver contracts. Better salaries and more judges, therefore, would be the first steps towards revamping the judiciary to ensure prompt delivery of justice."[7]

The courts are seen to be so preoccupied with procedural matters that trials only commence after long delays and, once begun, are conducted at a snail's pace. Monetary claims and commercial litigation that does not involve interim relief can take many years to decide, and judges are reportedly reluctant to award costs or realistic interest. In short, delay has become synonymous with dispute resolution in India.

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[6] Prime Minister's address on April 8, 2007, available at http://pmindia.nic.in/lspeech.asp?id=520 (last visited May 19, 2008)

[7] The Times of India, Editorial, "Stem the Rot", April 22, 2008, available at http://timesofindia.indiatimes.com/Opinion/Editorial/TODAYS_EDITORIAL_Stem_The_Rot/articleshow/2969165.cms (last visited May 19, 2008)

B. Arbitration Experience

Fed up with the regular litigation in courts, businesspersons very smartly resorted to arbitration, as a large number of companies in the world do, only to discover shockingly that on most of the occasions it is even worse than litigation. A system is as good as the people who work it. Because of a number of reasons – vested interests of different professional groups being one of the most important – arbitration has not been as efficacious as it should have been. The 1996 Act was brought on the statute book as the earlier law, the 1940 Act, did not live up to the aspirations of the people of India in general, and the business community in particular. The primary purpose of enacting the 1996 Act was to conform to the UNCITRAL Model Law and thus fulfil the international obligation and also to placate the business community by sending a signal that, 'hey, look! As desired by you, a new law has been enacted; now don't complain'. Unfortunately, at that time there was no thorough scrutiny of the Model Law. While the U.K. did not adopt the Model Law completely and several other countries, including the U.S., never went to adopt the Model Law, India adopted it fully. As a matter of fact, India simply did 'ctrl A', 'ctrl C', and 'ctrl V' i.e., 'select all', 'copy', and 'paste'. No attention was paid to the special needs of business community in India, the legal environment, social conditions, lack of judges and infrastructure in the courts, etc.

The result was predictable – there would be chaos. Whenever there is chaos and confusion, certain groups of people prosper. They make the most of the chaotic situation. The same happened in India. During all this confusion with the enforcement of new law, the lawyers, as always, emerged as the group benefiting most from the situation. As the situation was unclear as to what would happen with the new sections in the new law, how the courts would interpret different words and phrases, the business community's anxiety grew with each passing day. Besides the lawyers, the retired judges also made a lot of hay. And, as the sun is still shining bright, they are continuously making more and more hay. We will do well to remember that judges and lawyers, somewhere in the heart of hearts, are not two different sections. They are the same. Most of the judges, at some point of time in their career, have been lawyers. Thus, it is a simple case of 'you scratch my back and I will scratch yours'. Barring a few, with their spine intact, others give arbitration reforms only a lip service.

While the businesses are burdened with disputes for a very long time, almost eternity, to add insult to injury, they are also incurring astronomical legal expenses. The Government is a party to it. Most of the public sector undertakings (PSUs) are directly or indirectly controlled by the Government and arbitration clause has been made mandatory for all the contracts as the method of dispute resolution by choice. This is done, ironically, in the name of speedy resolution. The PSUs control enormous natural and man-made resources – oil, power, telecom, etc. The contracts with domestic and foreign companies are numerous and of very large value. The arbitration claims also run in millions of dollars and so run the counsel fee and arbitration expenses. These are the legal and justified expenses. Take in account the under the table dealings and so-called gifts to arbitrators and Government counsel, the expenses run into obscene amounts. By any yardstick these numbers are not justified.

The new Act has, more than once, proved to be a legislative failure. A number of loopholes have made this legislation a good example of 'bad legislative effort'. Everyone knows about it but people in power do not seem to bother. The situation is slightly different from the story of the Emperor with new clothes, where everyone sees the Emperor naked, but no one is willing to say so. In the present scenario, there are people telling the truth that the Emperor is naked, but the Emperor himself, or through this trusted courtiers, threatens them on the sly to keep silent and tells the world at large that the Emperor's suit is the best in the world. We will discuss this more in Part IV.

As of now the resolving disputes through arbitration has become so murky that some companies are known to start preparing for arbitration the day the contract is signed between the parties. The early bird catches the worm. This is unfortunately the culture today. It is the result of inordinate delay in judicial redressal, corruption in government which compels the contractor to file a lower unrealistic bid and later claim for escalation in an arbitration proceeding. It is generally the perception, and not totally false, that it is easier to sway an arbitrator than a judge. More often than not, arbitration matters end up in a court of law and the basic purpose of opting for arbitration vis-à-vis litigation is defeated.

III. ARBITRATION AND ROLE OF COURTS

The primary purpose of Alternative Dispute Resolution (ADR) methods, of which arbitration is the most popular, is to avoid going to the court. However, intervention by courts is inevitable. Some call it interference. I have used them interchangeably. At times the interference is desirable so as to prevent the arbitration process from going astray. Interference by courts is universal and is observed throughout the world. After all, the buck stops at the courts. In most of the jurisdictions, the subordinate judiciary is empowered to look into arbitration matters, however, a number of matters reach the highest court. India follows the same system and a large number of arbitration matters are filed in the lower courts. This Part deals with the issue of interference of courts in arbitration matters. Thereafter, it examines the definition of 'Court' in the 1996 Act and the interpretation given by the Allahabad High Court.

A. Interference by Courts

Arbitration is a creation of contract between the parties. Hence, party autonomy is the heart and soul of each and every arbitration contract. However, this autonomy is not unbridled. The applicable law and public policy provide the boundaries to this autonomy. Rules of arbitral institutions also curtail the autonomy of parties. Moreover, intervention of courts becomes necessary in cases of bias of arbitrators, misconduct of proceedings, etc. Courts also intervene in setting aside or enforcing an award.

Complete freedom to parties to do what they like in an arbitration is not acceptable and the natural corollary is that complete non-interference by courts in undesirable. For instance, in the *Hooters* case,[8] the court refused to uphold the arbitration clause and said,

> "The parties agreed to submit their claims to arbitration-- a system whereby disputes are fairly resolved by an impartial third party. Hooters by contract took on the obligation of establishing such a system. By creating a sham system

[8] Hooters of America v. Phillips, U.S. 4th Circuit Court of Appeals, CA-96-3360-4-22, Decided: April 8, 1999

> unworthy even of the name of arbitration, Hooters completely failed in performing its contractual duty."

Giving due respect to the Supreme Court's observations and the federal law and policy of promoting ADR, the Court concluded that,

> "By promulgating this system of warped rules, Hooters so skewed the process in its favor that Phillips has been denied arbitration in any meaningful sense of the word. To uphold the promulgation of this aberrational scheme under the heading of arbitration would under- mine, not advance, the federal policy favoring alternative dispute resolution. This we refuse to do."

Interference by courts in such cases is essential, desirable and should never be done away with, howsoever strong the business lobby is.

In the 1996 Act, the term court is used for various reasons. The sections which use the word `Court' are sec.9 (interim measures), sec. 14(2) (impossibility on the part of the arbitrators to act), sec. 34(3) (filing of objection to the award), sec.36 (enforcement of award), sec.37 (appeals), sec.39 (2) and (4) (lien and deposit), sec.42 (jurisdiction) and sec. 43 (limitation). However, `Judicial authority' is used in sections 5 and 8, which can also mean a District Court or a Court subordinate to the District Court or the High Court on the original side. It may also refer to a quasi-judicial authority.

B. Higher and Subordinate Judiciary in India

1. Higher Judiciary. – The highest court in India is the 'Supreme Court', and at the state level the highest court is the 'High Court'. The High Courts are known by the name of the city in which they are located, eg., Allahabad High Court, Delhi High Court, Bombay High Court, Calcutta High Court, Madras High Court, etc. Despite the city adorning a new name, the name of the High Court does not change. For instance Calcutta is now Kolkata, but the High Court remains Calcutta High Court. Similarly, Bombay is now Mumbai, but the High Court remains Bombay High Court. Some of the states name the High Court on the name of the state, eg., Gujarat High Court. Some states have a common High Court, eg., Punjab & Haryana High Court. The higher judiciary in India is known

for its illustrious judges and path-breaking judgments. Despite occasional scathing attacks, the integrity of judges, more or less, is intact. People have faith in the system. The procedure is usually painfully slow, still it is better than the subordinate judiciary.

2. Subordinate Judiciary. – At the head of the subordinate judiciary is the District and Sessions Judge. Relevant provisions of the Constitution related to the District Judges Additional District Judges are as follows:

> "Article 233. Appointment of district judges-
>
> > (1) Appointments of persons to be, and the posting and promotion of, district judges in any State shall be made by the Governor of the State in consultation with the High Court exercising jurisdiction in relation to such State.
> >
> > (2) A person not already in the service of the Union or of the State shall only be eligible to be appointed a District Judge if he has been for not less than seven years an advocate or a pleader and is recommended by the High Court for appointment".
>
> "Article 235. Control over subordinate courts-
>
> > The control over district courts and courts subordinate thereto including the posting and promotion of, and the grant of leave to, persons belonging to the judicial service of a State and holding any post inferior to the post of district judge shall be vested in the High Court, but nothing in this article shall be construed as taking away from any such person any right of appeal which he may have under the law regulating the conditions of his service or as authorizing the High Court to deal with him otherwise than in accordance with conditions of his service prescribed under such law".

Article 236 provides that in Chapter VI of Part VI of the Constitution the expression 'District Judge' includes a judge of a city civil court, additional district judge, joint district judge, assistant district judge, chief judge of a small cause court, chief presidency

magistrate, additional chief presidency magistrate, sessions judge, additional sessions judge and assistant sessions judge. The expression 'Judicial Service' in the chapter means a service consisting exclusively of persons intended to fill the post of district judge and other civil judicial posts inferior to the post of district judge.

The position of the District Judge has been dealt with adequate importance in the Constitution. Article 233 confers power on the Governor of the State to appoint persons either by direct recruitment or by promotion from amongst those in the judicial service as District Judges but this power is hedged in with the condition that it can be exercised by the Governor in consultation with the High Court. In order to make this consultation meaningful and purposive the Governor has to consult High Court in respect of appointment of each person as District Judge which includes an Additional District Judge and the opinion expressed by the High Court must be given full weight.

Article 235 invests control over subordinate courts including the officers manning subordinate courts as well as the ministerial staff attached to such courts in the High Court. Therefore, when promotion is to be given to the post of District Judge from amongst those belonging to subordinate judicial service, the High Court unquestionably will be competent to decide whether a person is fit for promotion and consistent with its decision to recommend or not to recommend such person. The Governor who would be acting on the advice of the Minister would hardly be in a position to have intimate knowledge about the quality and qualification of such person for promotion. Similarly when a person is to be directly recruited as District Judge from the Bar the reasons for attaching full weight to the opinion of the High Court for its recommendation in case of subordinate judicial service would *mutatis mutandis* apply because the performance of a member of the Bar is better known to the High Court than the Minister or the Governor.

As the position of a District Judge is immensely important in a district, there is strong rivalry among the suitable candidates for this position. This can be appreciated well by understanding the large number of people under the jurisdiction of the District Judge’s court. A district like Lucknow, the capital of the state of ‘Uttar Pradesh’ has a population of about four million. Being the head of the judiciary of such a large district gives a feeling of immense satisfaction. Thus, the position of District Judge in large districts is a coveted one for the members of subordinate judiciary. A number of cases have been

decided by the High Courts and the Supreme Court regarding the appointment of District Judge, including the Additional District Judge. One such case is that of Saikia in Assam in 1970. The matter went up to the Supreme Court, where it was held,

> "……appointment as well as promotion of persons to be District Judges is a matter to be decided by the Governor in consultation with the High Court and the expression 'District Judge' includes an additional District Judge and an additional Sessions Judge…….Further promotion of District Judges is a matter of control of the High Court. What is said of District Judges here applies equally to additional District Judges and Additional Sessions Judges."[9]

The promotion to the District Judge position is critical because some of the DJs are elevated to the position of the High Court judge and it is unheard of that any ADJ has been elevated. Thus, becoming a DJ keeps the opportunity alive to be elevated to the High Court. And, that is why fierce legal battles may take place to get such a position.

3. Hierarchy in Subordinate Judiciary. – The District Judge's Court is headed by the District Judge (DJ). There are 'Additional District Judges' (ADJs) who are not subordinate to the District Judge. The number of the ADJs is determined as per the work load in that particular district. In smaller districts, where there is not much work, there may be no ADJ and in larger districts, where there is a lot of work, as many as ten to fifteen ADJs may be appointed to share the burden of the DJ. Practically, the ADJs are appointed as per their seniority and merit. Thus, the senior-most judge would be the DJ; the next in the order of seniority would be the 'First ADJ', the next 'Second ADJ' and so on. The orders passed by any ADJ are not appealable in the court of the DJ. Hence, the DJ and ADJs are equal as far as their judicial powers are concerned.

Subordinate to the DJ are the Civil Judges (CJ). The district is territorially divided in smaller parts and the CJ has territorial jurisdiction. Their number is determined as per the size of territory and the number of cases emanating from that particular territory. Interestingly, the CJ has unlimited pecuniary jurisdiction. Additional Civil Judges (ACJs) are appointed in a manner similar to the appointment of the ADJs.

[9] 1970 AIR(SC) 1616, 1969 (3) SCC 505; State of Assam v. Kuseswar Saikia

Subordinate to the CJs are the Civil Judges (Junior Division), formerly known as *Munsif*. Additional Civil Judges (Junior Division) are appointed in a manner similar to the appointment the ACJs. The pecuniary jurisdiction of the Civil Judges (Junior Division) is quite low.

Thus, the important matters, with substantial stakes, are filed in the court of the Civil Judge. She may transfer the matter to ACJ as per administrative requirements.

C. Definition of 'Court' in the 1996 Act and its Interpretation

The definition of Court has created an avoidable problem for the business community and the legal fraternity. The matter has gone up to the Allahabad High Court and other courts for interpretation and the decision has not been flattering for the legislative wing of the Government.

1. New Act, New Definition. – The 1996 Act deviated from the 1940 Act in defining the 'court', as mentioned in Part I of this paper, by bringing in the concept of the 'principal civil court of original jurisdiction'. The definition has been restricted and thus the number of courts where the arbitration matters could have been filed has been curtailed drastically. The number of arbitration-related matters is going up everyday resulting in greater number of cases being filed in these courts. With the number of hours for working being the same, the judges manning these courts are burdened with much more work than they can handle. It is simply resulting in increasing backlog. Remember, even the Prime Minister of India[10] is worried about backlog and here is a piece of legislation which directly contributes to it.

2. The ITI Case. – The ITI case has been a watershed in the history of Indian arbitration. Just a year had passed since the new Act came into force in 1996, the issue of the definition of the term 'Court' came up in a landmark case[11] before the Allahabad High

[10] *Supra*, note 6

[11] M/s I.T.I. Ltd., Allahabad v. District Judge, Allahabad and Others; All India Reporter 1998 Allahabad 313

Court. The High Court faced the challenging task of answering the basic question as to whether the term 'Court' as defined in the new Act includes the Court of Additional District Judge (ADJ) alongwith the Court of District Judge (DJ) or not. Further, if it did not include the Court of ADJ, whether the DJ could transfer an application filed in her Court with reference to arbitration matters under the 1996 Act to the Court of any of the ADJs as is done in usual course or not.

Prima facie, the questions appeared to be simple and as per the normal routine practise in the courts and lawyers' chambers, most of the lawyers answered both the questions in affirmative, i.e., the term 'Court' includes the Court of the ADJ alongwith the Court of DJ and the DJ can, of course, transfer applications filed in her Court to the Courts of any of the ADJs. There seemed to be nothing which could stop the DJ from doing so. The argument of most of the lawyers was that if the answer to the second question was in negative, it would have stopped the wheel of justice from inching forward, the judicial system would have come to a standstill, DJ would have been loaded with arbitration-related matters, ADJs would not have got any arbitration-related matters and, moreover, it could never have been the intention of the legislature. Just like an intelligent game of chess, which may apparently look simple but at times, is immensely complex, this issue was not so simple. Most of the legal experts overlooked the restriction placed by the use of word 'principal' in the definition of Court and a very interesting section number 42 defining jurisdiction of a court and restricting filing of any application whatsoever in any other court, other than the court in which the first application had been filed. Section 42 of the 1996 Act reads as follows:

42. Jurisdiction.- Notwithstanding anything contained elsewhere in this Part or in any other law for the time being in force, where with respect to an arbitration agreement any application under this Part has been made in a Court, that Court alone shall have jurisdiction over the arbitral proceedings and all subsequent applications arising out of that agreement and the arbitral proceedings shall be made in that Court and in no other Court.

(a) Facts of the Case. – The Indian Telephone Industries (ITI), a Government of India Undertaking and company engaged in the business of manufacture, sale and supply of telephones and transmission equipments, apparatus and other allied components entered

into a contract with K. V. Electronics (KVE), a company engaged in supplying various components and assemblies of telephones and transmission equipments, to supply equipment and other material as per indents – purchase and supply orders – issued from time to time by ITI.

A dispute arose between them in the year 1995 regarding over-payment of a certain sum of money by ITI to KVE as a consequence of few purchase orders of the years 1991, 1992 and 1993. The dispute was referred to the arbitration for adjudication in pursuance of the Arbitration Clause encapsulated in the covenant on the respective purchase orders. The sole Arbitrator was appointed on February 9, 1996 and gave his award on March 3, 1997 to the effect that the ITI had made over-payment and KVE must pay back that sum. Dissatisfied by the award, KVE filed an application on May 19, 1997 under Section 34 read with Section 16 (6) of the New Act in the Court of District Judge, Allahabad for setting aside the said award.

Section 34 of the 1996 Act talks about filing of an application for setting aside an arbitral award and section 16 (6) is about the competence of arbitral tribunal to rule on its jurisdiction.

(b) Journey to the High Court. – As the 1996 Act had been in force only for a year, this might have been the first matter filed in the Court of the DJ. By that time, the Court Assistant, known as *Munsarim*, looking after the filing of applications, was not well-versed with the new law, which stated that the application should have been filed in the 'principal civil court of original jurisdiction', i.e., the Court of the District Judge only. Routinely working as per the provisions of the 1940 Act, which stated that any application for setting aside the award and otherwise also should have been filed in the Court of the Civil Judge, the *Munsarim* scribed a report on the said application that it should have been filed before the Civil Judge. The DJ, however, differed with the report and overruled the objection of the *Munsarim* and on May 25, 1997 held that the application was rightly presented in the Court of DJ. The DJ also directed the application/petition to be registered and transferred to the Court of Third ADJ, Allahabad for disposal.

On August 28, 1997, a preliminary objection was raised by ITI before the Third ADJ, Allahabad that the said Court had no jurisdiction to entertain the application. The objection was overruled by the Third ADJ the same day. It was held that the expression "but does not include any civil Court of a grade inferior to such principal Civil Court, or any Court of Small Causes" used in Section 2 (e) of the 1996 Act, implied that in addition to the DJ there may be other principal Civil Courts of original jurisdiction in a district and ADJ not being inferior in grade to the DJ, came within the purview of the term "Court" as defined in Section 2 (e) of the 1996 Act.

Dissatisfied with the Third ADJ's order, ITI then moved an application under section 42 on September 16, 1997 in the same court praying therein that the case be remitted to the DJ for disposal on the hypothesis that since the application for setting aside the award was moved under part I of the 1996 Act in the Court of DJ and hence that Court alone should have jurisdiction over the arbitral proceedings and "the arbitral proceedings shall be made in that Court and in no other Court" as envisaged by Section 42 of the New Act. In substance, the plea raised was that since KVE had moved the application under Section 34 of the 1996 Act for setting aside the award in question in the Court of DJ, which was the principal Civil Court of original jurisdiction, all subsequent arbitral proceedings would be held in that Court and in no other court. The Third ADJ, Allahabad clung to and expressed itself in concurring with the view in his order dated of August 28, 1997 and rejected the application on October 8, 1997.

Aggrieved by the order of October 8, 1997, ITI filed a Writ Petition in the High Court of Judicature at Allahabad challenging the legality of the said order.

(c) Interpretation by the High Court. – After a detailed discussion on different aspects of the case, the High Court held that the language of section 2(e), defining the Court, left no option for interpreting that the Court would also include the court of ADJ alongwith the Court of the DJ. By no imagination the word "Court" could include the Court of the ADJ. Legislature made it plain and simple by using words and phrases like, "means", "includes" and "does not include". The parliament had exhaustively explained the meaning of the term "Court" in that the word "means" is a term of restriction, while the word "includes" is a term of enlargement and when both the words "means" and "includes" are used together to define a thing, the intendment of the legislature is to

supply restricted meaning to the term. The use of phrase "but does not include" further restricted the meaning of the term Court. Hence, it was not possible to impart any other meaning to the term "Court" besides the obvious meaning of the Court of the DJ.

On the issue of the power of the DJ to transfer the matter to the Court of any of the ADJs, the Allahabad High Court held that the scheme of the 1996 Act prevented such a transfer on two counts. First, the Court of ADJ was not the principal Civil Court of Original Jurisdiction and secondly, section 42 prohibited such a transfer in the instant case.

(d) Implications for Judges, Lawyers and Business Community. – The decision case as a shock and eye-opener to the entire legal fraternity and also to the business community. No one had expected that the jurisdiction of ADJ would be barred and only the DJ exclusively would have jurisdiction over arbitration matters. The most obvious consequence would have been clogging the Court of the DJ and making all the courts of the ADJ 'arbitration-dry'. Legal experts saw no point in taking the matter to the Supreme Court as the interpretation of the terms as per the 1996 Act was crystal clear. There could have been no other interpretation and Justice S. R. Singh of the Allahabad High Court, presiding in the ITI case, wrote such a judgment that it left no scope for appeal. Perhaps, no one even tried it for academic interest.

This judgment has implications for the judges also. Arbitration matters, particularly of heavy stakes, are quite prestigious. One of the parties is generally the Government or some organisation controlled by the Government. These matters generate a number of opportunities to play the power-game. Issues like promotion and transfer of judges from one district to another can be bargained for a slight twist in the high-powered arbitration matters. As corruption is rampant in lower judiciary, with the new interpretation all the so-called power in the hands of ADJs has been snatched. The legislature has earlier snatched all the power from the hands of Civil Judges. There is tremendous heart burn in the middle levels of subordinate judiciary due to this development. It would be easy to appreciate that the salaries and other perquisites of subordinate judges are bare minimum and hence, extra-legal earnings are always welcome. A District Judge does not get more than US Dollars 10,000 per annum and her subordinates are paid even lesser.

2. Other Cases. – Ten years have passed since the ITI judgment was delivered. It has not been overruled by the Supreme Court and no other High Court has given a different opinion. This judgment has been followed in a catena of judgments by different High Courts. Some of them are as follows: (a) State of Tamil Nadu, Rep. by Superintending Engineer, and Another vs. R. Sundaram and Another[12], (b)Globsyn Technologies Limited vs. Eskaaycee Infosys[13], (c) Valliappa Software Technological Park Private Limited, Bangalore vs. C. Sundaram and Others[14], (d) National Thermal Power Corporation vs. R. S. Avtar Singh and Company and Another[15], and (e) Managing Director, Sundaram Finance Limited, Madras and Another vs. G. S. Nandakumar[16].

The Gujarat High Court held that the ADJ cannot deal with an application under sec.8 of the 1996 Act but that the word 'District Judge' included a 'Joint District Judge'. Some of the States have the position of Joint DJ, which is not very common.[17]

IV. LEGISLATIVE INDIFFERENCE

India follows the doctrine of separation of powers. The three organs – Legislature, Executive and Judiciary – work independently, however, there is definite overlap between the first two. The President is the Chief Executive and also an integral part of the Union Legislature. All the members of the Council of Minister, which is headed by the Prime Minister, must be a member of parliament, and if not, must become a member within six months. Thus, the Government has a definitive say in the legislative work. Due to coalition governments coming to power for a number of years, the main ruling party's agenda must be acceptable to other coalition partners and it surely dents the definitive say of the Government. In the last couple of years it has become increasingly difficult for the Government to be sure of getting even the bills introduced by the Government itself,

[12] 2006 (1) CTC 178, 2005 INDLAW MAD 579

[13] 2004 (57) ARBLR 560, 2003 INDLAW AP 162

[14] 2002 (46) ARBLR 530, 2002 (1) KarLJ 358, 2001 INDLAW KAR 231

[15] 2002 (3) ARBLR 8, 2002 (63) DRJ 211, 2001 INDLAW DEL 744

[16] 2001 (3) ARBLR 37, 2001 INDLAW AP 66

[17] 1997 Indlaw Guj 6, Gujarat High Court, Ahmedabad, Western Shipbreaking Corporation v. Clare Haven Limited, U.K, 21 Apr 1997

passed in the Parliament. One such example is the Arbitration and Conciliation (Amendment) Bill, 2003 which was introduced by the Government of the day on the recommendation of the Law Commission. This Part deals with the procedure for making a new law and complexities which have crept into it making the entire exercise a labyrinth. It becomes even more difficult with clash of personalities and egos resulting in hijacking of law making system by a couple of self-proclaimed Messiah of masses.

A. Constitutional Process

India follows a federal structure, with a Union (federal) Legislature and different State Legislature in provinces. The Union Legislature, known as Parliament, comprises the President, the *Lok Sabha* (the House of the People - the lower house consisting mostly of members elected directly through universal adult franchise) and the *Rajya Sabha* (the Council of States – the Upper house consisting mostly of members elected by the members of legislative assembly in each State). Schedule VII of the Indian Constitution provides for three lists, viz., the Union List, the State List and the Concurrent List. On the topics listed in the Union List, only the Union Legislature can make the law. On the topics listed in the State List, only the State Legislature can make the law. On the topics listed in the Concurrent List, both the Union and States can legislate, however, in case of conflict or contradiction between the two laws, the Union law prevails.

Article 107 of the Indian Constitution provides that all Bills, except financial or money Bills, may be introduced in either House of the Parliament. Financial or money bills can be introduced only in the *Lok Sabha*. Barring a few exceptions, every Bill needs the agreement of both Houses. After a Bill has been passed through all its stages in the two Houses of Parliament, it is sent to the President for her assent. The Presidential powers in this respect are limited and willy-nilly, she has to give assent. After the Presidential assent, the Bill becomes a law.

B. The Law Commission Report

After India achieved independence from the British rule in 1947, the Constitution of India with its Fundamental Rights and Directive Principles of State Policy gave a new direction to law reform geared to the needs of a democratic legal order in a plural society. Though

Article 372 of the Constitution stipulated the continuation of pre-Constitution Laws till they are amended or repealed, there had been demands in Parliament and outside for establishing a Central Law Commission[18] to recommend revision and updating of the inherited laws to serve the changing needs of the country.

1. Working of the Law Commission. – The Government of India reacted favourably and established the First Law Commission of Independent India in 1955 with the then Attorney-General for India, Mr. M. C. Setalvad, as its Chairman. Since then seventeen more Law Commissions have been appointed, each with a three-year term and with different terms of reference. The Eighteenth Law Commission was constituted with effect from September 1, 2006 for a three-year term ending August 31, 2009. Members of Law Commission are eminent legal experts.[19]

The Terms of Reference of the Eighteenth Law Commission include *inter alia* to keep under review the system of judicial administration to ensure that it is responsive to the reasonable demands of the times and in particular to secure elimination of delays, speedy clearance of arrears and reduction in costs so as to secure quick and economical disposal of cases without affecting the cardinal principle that decisions should be just and fair. It also aims to simplify the procedure to reduce and eliminate technicalities and devices for delay.

The projects undertaken by the Commission are initiated in the Commission's meetings. A working paper outlining the problem and suggesting matters deserving reform usually emerges out of these meetings. The paper is then sent out for circulation in the public and concerned interest groups with a view to eliciting reactions and suggestions. The Law Commission tries its best to ensure that the widest sections of people are consulted in formulating proposals for law reforms. In this process, partnerships are established with professional bodies and academic institutions. Seminars and workshops are organised in different parts of the country to elicit critical opinion on proposed strategies for reform. The data and informed views are arranged in the form of a report. The Commission may

[18] http://lawcommissionofindia.nic.in/ (last visited May 19, 2008)

[19] *Id.*

decide also to prepare a draft amendment or a new bill which may be appended to its report. Thereafter, the final report is forwarded to the Government for necessary action.

2. Recommendation for a New Definition. – In 2001, the Sixteenth Law Commission, under the chairmanship of Justice B. P. Jeevan Reddy, forwarded a report, number 176, to the Union Government suggesting necessary amendments to the 1996 Act after five years of its coming into force. The then Union Law Minister, Mr. Arun Jaitely, had expressed his desire to get the new law on arbitration reviewed as various shortcomings were observed by the legal and business fraternity in its provisions and certain representations received by the Law Minister. The Commission initially prepared a Consultation Paper and held two seminars, one at Mumbai and another at Delhi in the months of February and March, 2001 and gave wide publicity to the paper by putting it on the website. Retired judges and leading lawyers were invited for the seminars. Many luminaries also participated in the seminars and gave their written notes putting forth their suggestions. Proposals not contained in the Consultation Paper were also made and were exhaustively discussed. After making an in-depth study of the law relating to subject, looking into the position of the law in foreign jurisdictions, the Commission made various recommendations for bringing amendments in the 1996 Act. A Bill entitled 'The Arbitration and Conciliation (Amendment) Bill, 2001' had also been prepared by the Commission bringing out various provisions through which the 1996 Act was proposed to be amended.

The problems of congestion in the court of the DJ were brought before the Law Commission and after deliberating at length, the Commission came up with the idea of amending the law to include the power of transferring matters from the court of DJ to the court of ADJ. Paragraph 2.1.2 A of the Report suggested the following inclusion:

> "The principal Civil Court of original jurisdiction in a district or the Court of the principal judge, City Civil Court exercising original jurisdiction in a city, as the case may be, may transfer any matter relating to any proceedings under the Act pending before it to any court of coordinate jurisdiction, in the district or the city, as the case may be, for decision from time to time."

Paragraph 2.1.2 of the Report also suggested including the Principal Judge of the City Civil Court in the definition of court. Thus, the amended section 2(1)(e) would have read as follows:

> "'Court' means the principal Civil Court of original jurisdiction in a district, the Court of principal judge of the City Civil court of original jurisdiction in a city and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject matter of an arbitration if the same had been the subject matter of a suit, but does not include any civil court of a grade inferior to such principal Civil Court or to such Court of the principal judge City Civil Court, or any Court of Small Causes."

The Law Commission had forwarded its report to the Government on September 12, 2001. The ball was then in the Government's court.

C. Legislative Rigmarole

The Government was supposed to act with alacrity so that the necessary amendments could be made timely. With such an innocuous thing as the definition of 'court', which should not have been juggled in the first place, and for which there was agreement between all the concerned parties and there was the recommendation of the Law Commission, the Government did not act speedily resulting in further delay.

1. Action Taken by the Government. – The Government took time in going through the Law Commission's report forwarded in September 2001. It took two years to propose an amendment. On December 22, 2003, Mr. Arun Jaitley, the then Law Minister, introduced the 'Arbitration and Conciliation (Amendment) Bill, 2003' (hereinafter the 2003 Bill) in the *Rajya Sabha*.[20] The Bill proposed several amendments. The amendment regarding the definition of 'Court' was proposed in Clause 4(a)(ii) of the Bill. It read as follows:

> '(e) "Court", in relation to—

[20] Bill No. LXXV of 2003, Introduced in *Rajya Sabha* on December 22, 2003; available at http://rajyasabha.nic.in/bills-ls-rs/arch2003.htm (last visited May 19, 2008)

(i) sections other than sections specified in sub-clause (ii), means—

(a) the principal Civil Court of original jurisdiction in a district; or

(b) the Court of principal judge of the City Civil Court of original jurisdiction in a city; or

(c) any Court of coordinate jurisdiction to which the Court referred to in sub-clause (a) or sub-clause (b) transfers a matter brought before it,

and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject matter of a suit, but does not include any Civil Court of a grade inferior to such principal Civil Court or Court of principal judge of the City Civil Court, or any Court of Small Causes; and

(ii) sections 34, 34A and 36, means the Arbitration Division;

Clause 5 of the Bill proposed transfer of cases from the principal civil court of original jurisdiction to any court of coordinate jurisdiction. It read as follows:

5. After section 2 of the principal Act, the following section shall be inserted, namely:—

"2A. The principal Civil Court of original jurisdiction in a district or the Court of principal judge of the City Civil Court of original jurisdiction in a city, as the case may be, may, from time to time, transfer any matter relating to any proceedings under this Act which is pending before it, to any Court of coordinate jurisdiction in the district or the city, as the case may be, for decision.".

Clause 5 sought to enable the principal Civil Court of original jurisdiction in a district or the Court of principal judge of the City Civil Court to transfer cases to other Courts of

coordinate jurisdiction in the district or the city, so that all cases do not stagnate in the principal Courts.[21]

2. Mired in the Review Morass. – Instead of making a decision on the Bill, the *Rajya Sabha* referred the matter to the Department related Parliamentary Standing Committee on Home Affairs in January 2004.[22] The Committee could not present its report before the dissolution of the 13th *Lok Sabha* and due to formation of six additional Department-related Standing Committees, subjects were re-allocated and the Bill was referred to Department related Parliamentary Standing Committee on Personnel, Public Grievances, Law and Justice on August 17, 2004. The Committee took about a year to go through the Bill and presented its report on August 4, 2005 to the *Rajya Sabha*. The same day it was also laid on the table in the *Lok Sabha.*[23] The Committee had gone into the recommendations of the Law Commission and the Bill introduced in the *Rajya Sabha* and concluded,

> "……the Committee is of the considered view that the present Bill may not suffice in achieving the desired objectives. It recommends that Government may consider bringing in a fresh comprehensive legislation on the subject before Parliament, as expeditiously as possible."[24]

Interestingly in 2004, there was a change in guards and the 'National Democratic Alliance' (NDA) was voted out of power. 'United Progressive Alliance' (UPA) came to power. Mr. Jaitley handed over the charge of the Law Minister to Mr. Hansraj Bhardwaj. The 2003 Bill was introduced by the NDA government. The new UPA Government was in no mood to push NDA government's agenda of amending the 1996 Act.

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[21] Bill is available at http://rajyasabha.nic.in/bills-ls-rs/2003/LXXV_2003.pdf (last visited May 19, 2008)

[22] Item 3 under the head "Bills Originating in *Rajya Sabha* and Pending Before Standing Committees", available at http://rajyasabha.gov.in/legislative/bil/billexpected203.htm (last visited May 19, 2008)

[23] Reports presented by Committee on Personnel, Public Grievances, Law and Justice, Item 12.8, serial no. 7, report no. 9, Available at http://rajyasabha.nic.in/admreport/anu_repo_2005/comm_plj.htm (last visited May 19, 2008)

[24] Department Related Parliamentary Standing Committee On Personnel, Public Grievances, Law And Justice; Ninth Report On The Arbitration And Conciliation (Amendment) Bill, 2003; Presented to the *Rajya Sabha* on 4th august, 2005 and laid on the table of the *Lok Sabha* on 4th august, 2005, available at http://rajyasabha.nic.in/book2/reports/personnel/9threport.htm

In December 2004, Mr. Bhardwaj had made it amply clear to everyone that he was not ready to push for all the changes mentioned in the 2003 Bill. Inaugurating the 39th Annual General Meeting of the Indian Council of Arbitration, he had said,

> "It would not be possible to make so many changes to the 1996 Act as envisaged in the 2003 Bill. This is because you will be again reverting back to the courts. The 1996 Act was a model law and that it has worked effectively. We will make only those changes that are very necessary. You can give me suggestions and I will decide about the changes to be made in the Budget session."[25]

The tone and tenor of this statement indicates his aversion to the changes or 'so many changes' as envisaged in the 2003 Bill. This Bill was, in fact, a burden for Mr. Bhardwaj and he would have been the last person to act as a beast of burden, carrying the filth of the earlier government. He wanted to act as a scavenger and clean the system, but in his own special way. Thus, he constituted another Committee, popularly known as "Justice Saraf Committee on Arbitration", to study in depth the implications of the recommendations of the Law Commission of India contained in its 176th Report and the Arbitration and Conciliation (Amendment) Bill, 2003. The Committee was headed by Justice Dr. B.P. Saraf, Retired Chief Justice of the High Court of Jammu & Kashmir. The final Report of the Committee was presented in January 2005.[26] The Report made a detailed evaluation of the recommendations of the Law Commission apart from suggesting suitable lines on which the 1996 Act could be amended for improving the system of arbitration in India.

It was simply a red herring. No real issues regarding the business disputes have been addressed. As expected, with Mr. Bhardwaj as the Law Minister, the 2003 Bill came to a logical conclusion when in April 2006 the Government made a decision to 'withdraw' the

[25] 'Law Ministry seeks suggestions on changes in Arbitration Act', The Hindu Business Line; December 27, 2004, available at http://www.thehindubusinessline.com/2004/12/27/stories/2004122701780300.htm (last visited May 19, 2008)

[26] http://www.parinda.com/news_archives/jan2005/justice-b.p.-saraf-submits-report-on-arbitration.shtml (last visited May 19, 2008)

Bill from *Rajya Sabha*, where it was introduced.[27] As of now, the Government is mulling over the idea of introducing a new Bill. The current thinking is to divide in two the Arbitration and Conciliation (Amendment) Bill, one relating to the international arbitration disputes and the other to domestic disputes.[28] Time is running out and the Government is unable to bring the much needed amendments. One committee after another is reviewing the working of the 1996 Act. Much cry and little wool. Or, rather, no wool, only committees.

D. Legislative Depravation

Is it simply lethargy on the part of the Government or apathy or something else? In 1986 James Buchanan won the Nobel Prize for economics for devising a mathematical method to help social scientists think about politics in terms of self-interested behaviour. The obvious motive explaining the behaviour was the desire to be re-elected. Another economist, Max Corden, proposed the 'conservative social welfare function'. As per this formulation, politicians strive above all to avoid being blamed for any significant, absolute reductions in the real incomes of any significant section of the community they represent. Shell discusses this behaviour and the relationship with business in his book, "Make the Rules or Your Rivals Will".[29] Drawing implications from Buchanan's and Corden's theses, Shell writes that when both sides in a political debate are well funded and organised – and each stands to lose if the other side wins – politicians caught between these factions have a big problem. They would like to delay legislative actions as long as possible. This is one of the main reasons for the 2003 Bill to remain pending so long in the Parliament and later to be withdrawn. There are other reasons also.

1. Lethargy and Procrastination. – It is unfortunate but true that of late, the Parliament in India does not have time to legislate. In the last couple of decades there has been

[27] As reported by the Press Information Bureau of the Government of India on April 5, 2006, http://pib.nic.in/release/release.asp?relid=17020 and in the Post-budget 2006 press release by the Ministry of Parliamentary Affairs http://mpa.nic.in/Postb06.htm (last visited on May 19, 2008)

[28] The Tribune, Chandigarh, September 11, 2007, available at http://www.tribuneindia.com/2007/20070911/cth2.htm (last visited May 19, 2008)

[29] Shell, G. Richard; 2004, Crown Business, New York, First Edition, p.36-37

continuous erosion in values of parliamentarians. They are either too busy in their constituencies or busy planning to get re-elected in the next elections.

Instances of legislative incompetence, inefficiency, lethargy and corruption are too many. The incumbent Speaker of *Lok Sabha*, Mr. Somnath Chatterjee, is a worried man. He has tried his best to put the House in order but has made many foes in the process. Members of *Lok Sabha* are cross with frequent sermons for good behaviour by Mr. Chatterjee and have made it amply clear to him and the nation. In an article published in The Times of India, Mehra has lamented over sheer wastage of time in parliament.[30] There have been serious public concerns expressed for over a decade about the wastage of parliamentary time due to disruptions, sloganeering, walkouts and other methods of 'street politics' within Parliament. Some say that political parties and MPs are using agitational politics to appeal to their constituencies, redefining accountability in the era of virtual politics. It helps them in a way to cut costs, time and efforts to organise protests. Mehra writes that on an average 20 to 25 per cent of parliamentary time has been lost in the past few years. In 2006, over 40 per cent of the Bills were passed in the *Lok Sabha* with less than one hour of debate. Almost 65 per cent of MPs said nothing in the *Lok Sabha* on a legislative issue.

Piqued by the declining institutional standards of parliament, Chatterjee proposed in August 2007 'no work no pay' for legislators for wasting parliamentary time by disrupting proceedings. Unfortunately, there has been no positive impact on the members. The most troubling aspect is the apathy of the legislators. They are simply not bothered about the problems of their countrymen. Re-election, as Buchanan concluded, is perhaps the only issue in their minds.

Ironically, in his concluding speech at the penultimate session of the Constituent Assembly on November 25, 1949, B R Ambedkar, Chairman of the Drafting Committee[31] warned,

[30] Mehra, Ajay K.; "Don't Waste Time", The Times of India, May 16, 2008; available at http://timesofindia.indiatimes.com/Editorial/Dont_waste_time/articleshow/3044346.cms

[31] First Day in the Constituent Assembly, http://www.parliamentofindia.nic.in/ls/debates/facts.htm (last visited may 19, 2008)

> "If we wish to maintain democracy not merely in form, but also in fact, there are first things in my judgment we must do to hold fast to constitutional methods of achieving our social and economic objectives. It means that we must abandon the methods of disobedience, non-cooperation and *satyagraha* (insistence for truth, a very potent Gandhian method) — where constitutional methods are open, there can be no justification for these unconstitutional methods. These methods are nothing but the grammar of anarchy and the sooner they are abandoned, the better for us".

After more than half a century of giving ourselves the Constitution, the representatives of the people of India have made it next to impossible to have any significant discussion in Parliament without sloganeering, sit-ins and walkouts. Some of them even take pride in this behaviour and label themselves as true followers of Mahatma Gandhi, the Father of the Nation. Nothing can be more unfortunate.

2. Criminalisation and Corruption. – Not only apathy but corruption at the highest level is bothering the people of India. BBC reported that in December 2005, a secretly made videotape by news website Cobrapost[32] and TV news channel *Aaj Tak* (meaning 'Till Date') exposed Parliamentarians, ten from the lower house and one from the upper house, allegedly accepting money in return for asking questions in parliament.[33]

In August 2007, CNN-IBN[34] reported that actor-turned-politician, the dream girl Hema Malini, in her capacity as a Member of Parliament suggested an excise cut on the water purifiers that use the reverse osmosis technology. Indubitably it was an innocuous suggestion and surely in public interest. The only problem was that she had direct commercial link with one such equipment manufacturer, Kent RO water purifiers. She endorsed the products of that company. Without battling an eyelid, she said that she did not know that MPs were not supposed to raise the issues about products which they

[32] http://www.cobrapost.com/documents/one.htm (last visited May 19, 2008)

[33] http://news.bbc.co.uk/2/hi/south_asia/4544502.stm and http://news.bbc.co.uk/2/hi/south_asia/4520296.stm (last visited May 19, 2008)

[34] http://www.ibnlive.com/news/mp-hema-malini-in-soup-over-water-purifier-ad/46838-3.html?xml (last visited May 19, 2008)

endorse or vice-versa. She appeared so naïve that she could not understand that there was a direct conflict of interest.

Criminalisation of politics is rampant in India and finding several loop-holes a number of persons with criminal record have entered parliament as members. It has become so common that the people and also the media have lost interest in the issue. It is a way of life now. People have accepted it as a fact they have to live with. It may sound pessimistic and submissive, but the general perception is that nothing can be done. Instead of being furious with the system and revolting against the legislative bodies and their tainted members, people of India now find it a matter of fun and ridicule. Taking a dig at 'tainted ministers/legislators', in June 2004, D. Murali wrote in the Hindu Business Line[35] an entire article about using the word 'tainted'. He wrote,

> "CORRUPT, corrupt, and tainted in desire! About him, fairies; sing a scornful rhyme; and, as you trip, still pinch him to your time." That is a quote from Shakespeare's Merry Wives of Windsor, where Falstaff gets pinched even as a song is on: "Pinch him, fairies, mutually; Pinch him for his villainy; Pinch him, and burn him, and turn him about, Till candles and starlight and moonshine be out." Now, as parliamentarians pinch more time from the House on the `tainted' issue, we can as well do some research about it.
>
> He wrote further,
>
> "Nobody expects a normal politician to be an embodiment of virtue, which is why an average viewer is not too startled at what he or she sees on the TV as live telecast from Parliament. Often, what the countess said in All's Well That Ends Well may be true: "A very tainted fellow, and full of wickedness." But they look clean, don't they? "Bear a fair presence, though your heart be tainted," Luciana would say in The Comedy of Errors: "Teach sin the carriage of a holy saint." So, shouldn't we be coming to terms with tainted ministers, sooner than later?

[35] http://www.thehindubusinessline.com/2004/06/10/stories/2004061000121000.htm (last visited May 19, 2008)

Such is the sorry state of affairs with the highest legislative body, the Parliament, in India. State legislative bodies follow suit. Matters have gone from bad to worse and there is hardly any sign of improvement. The Speaker of the Lok Sabha is helpless and the Chairperson of the Rajya Sabha – the Vice President of India – is in no better position.

E. Crossing Swords Politically

Political rivalry has resulted in the withdrawal of the 2003 Bill. Even when the amendments suggested by the Law Commission and later introduced in the *Rajya Sabha* as the 2003 Bill are apparently in the interest of the people at large, clash of two giants is holding the nation to ransom.

Mr. Jaitley[36] is a well-know lawyer and belongs to the Bharatiya Janata Party (BJP), the main party in the then ruling alliance National Democratic Alliance (NDA) at the centre. The NDA had thirteen constituent parties at the time of its formation in 1998. It came to power at the centre in 1998 but collapsed within a year due to the pulling out by one of its constituent parties. In came back to power in 1999 and completed the full five-year term with Mr. Atal Behari Vajpayee as the Prime Minister and Mr. Jaitley as the Law Minister.

In 2004, the Congress led United Progressive Alliance (UPA) came to power with Dr. Manmohan Singh as the Prime Minister and Mr. Hansraj Bhardwaj[37] as the Law Minister. Like Mr. Jaitley, Mr. Bhardwaj is also a lawyer of repute and has served in the Law Ministry several times during Congress regime, including 1992 to 1996, when the new law of arbitration came into force. The 1996 Act is known as the brain child of Mr. Bhardwaj and he would be surely disturbed if anyone even tries to tinker with it. The 2003 Bill was seen by him as a blow to his wisdom, prestige and position.

[36] Profile of Arun Jaitley, http://india.gov.in/hindi/govt/rajyasabhampdetail.php?mpcode=27 (last visited May 19, 2008)

[37] Profile of Hansraj Bhardwaj, http://india.gov.in/govt/rajyasabhampdetail.php?mpcode=132 (last visited May 19, 2008)

F. Questioning the Legislative Wisdom

The question which needs to be raised at this time is the wisdom of simply copying a legislation without modifying it to our needs. Also, it is high time to question the wisdom of constituting so many committees to look into the recommendations of the Law Commission. It is a well-known fact that Law Commission has very eminent legal experts as members. Law Commission reports are a work of collective wisdom. How can it be questioned? Not once, but so many times. How many times do we need to review the work done by the Law Commission and then the Legislative Wing of the Government? This must come to an end. Also, the persons constituting all these committees must introspect as to whatever they have been doing in the name of reviewing the reports of the Law Commission is worthwhile or not. Let us not make a fool of ourselves. Enough is enough.

V. CONCLUSION

Arbitration as a method for speedy redressal of business disputes is facing uncertainty in India. Court intervention has to be reduced to the minimum. It is true that this intervention can never be eliminated. Thus, there is an urgent need to speed up the numerous matters pending in the subordinate courts, particularly in the court of District Judges. This can easily be done if the legislation allows transfer of these matters to the courts of the Additional District Judges. It is such a simple matter, however, legislative and political considerations along with vested interests have prevented this amendment to take place for a long time. The time has come when the political masters show some will and determination, bury the hatchet and think about the business in India. Not only the present business disputes are taking a much longer time for resolution, the future investment is also being blocked. Foreign investors are diffident to invest in India as the general perception is that business disputes last till eternity. This must come to an end. The legislature needs to realize its role and be sensitive to the needs of businesses. Instead of giving rise to the extra-legal dispute resolution industry managed by mafia, the politicians must clean up the system. There has to be a holistic approach to it. A piece-meal approach of correcting only certain aspects of the arbitration law will not serve the purpose in the long run. The arbitration law, along with the procedural law, must be made business-friendly. Due to these problems, it is difficult to say with certainty that India

follows the ‘rule of law’. However, it is for sure that there is rule of lawyers. It is not a good idea for the law minister to treat the ministry as his fiefdom. The basic purpose is to serve the people of India and it can be done best if the laws are made for the benefit of masses and not only lawyers. The chaos created by the new law must end. And, it can only end with a timely amendment.

Annexure I

Meeting with Mr. G. K. Kwatra, Executive Director, Indian Council of Arbitration, New Delhi, on April 22, 2008

In the meeting, we discussed about the problem due to the definition of the 'principal civil court of original jurisdiction'. He was of the opinion that there is a huge backlog due to this definition and the legislature must act with haste on the recommendations of the Law Commission. The earlier law was very clear on this aspect and there were no such problems as are being faced due to the new law.

Also, he was of the opinion that there should be more effort to bring awareness about institutional arbitration as distinguished with the ad hoc arbitration. He also said that there are groups of persons who have made a caucus where no one is allowed to enter and certain groups were acting as mafia in domestic as well as international arbitration. The answer to provide speedy justice is only through institutional arbitration and institutions like Indian Council of Arbitration can do a wonderful job in this field. There was, however, the problem of another institution, ICADR (Indian Council for Alternative Dispute Resolution) set up in Delhi as a competition to ICA. It is unfortunate that some persons were patronizing different institutions for their own selfish interests and the litigants are suffering. Luckily, there is new hope from the young and talented law graduates coming out of different law schools in India and many of them are opting for arbitration as a course of choice. Arbitration practice is lucrative as well as gratifying.