Daksha Legal

The Death of Trial Litigation and its revival from 2015

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In 2007 just before joining the profession, I was interning with a law firm and discussing with the Partner on career prospects. I told him I wanted to work in the area of arbitration. I will never forget his answer. He said, “ultimately arbitration is just procedural law just like CPC. If you focus on procedural and forget about the trial, how

are you going to win matters. Better you focus on trial court where you will actually learn trial advocacy."

Arbitration in 2007 was essentially a weekend activity carried out in five-star hotels at a leisurely pace. Hearings would be spaced out several months apart. It was not much different from trial courts in conduct of cases. Arbitrations would gone on for as many years as cases in trial courts.

If one reads the memoirs of Kailash Nath Katju, it would appear in that in the pre-Independence days lawyers would be engaged to travel to places where trial would be conducted. They would stay at the place for 3 or 4 months to complete the trial. They would be singularly dedicated to the matter. The trial would take place almost on a day-to-day basis. Constitutional advocacy and Appellate advocacy were very restricted. The prominent lawyers were the Trial lawyers who would travel to cities, towns and villages wherever they were engaged to conduct

trials. This would appear to be the situation in the present-day USA as well.

After independence, Appellate lawyers gained more prominence with challenges to constitutional amendments and various laws. If one were to ask who were the prominent lawyers of those times, one would say Mr. H. Seervai, Mr. N. Palkhivala, Mr. Gupte etc. They were not trial lawyers but constitutional lawyers. Similarly, the next generation being Mr. KK Venugopal, Mr. Fali Nariman, Mr. Andhyarujina, Mr. Soli Sorabjee. They are also famous as constitutional lawyers. The next generation thereafter being Mr. Mukul Rohatgi, Mr. Harish Salve, Mr. Gopal Subramaniam are also famous as constitutional lawyers although the last two are now gaining prominence as arbitration experts. But we cannot forget that these persons practiced prominently in the Supreme Court.

Most High Courts do not have original jurisdiction and trials happen in District

Courts. However, the more successful lawyers practice in the High Courts. Trial Advocacy as a practice has lost prominence and attraction amongst young lawyers. This has had an impact on practice in Trial Courts becoming second fiddle. The focus mostly being on High Court and Saturdays being reserved for Trial Courts. There is also a notion of adjournments and delays associated with Trial Courts. There are very few practitioners in capital cities who focus exclusively on the Trial Courts.

This has started changing since 2015 due to two significant changes in the law. The advent of the Commercial Courts Act, 2015 and the amendments to the Arbitration and Conciliation Act, 1996 ('**A&C Act**').

The Commercial Courts Act established specialized commercial courts bringing in the best practices from England and Singapore in the aspect of trial procedure, promising reduced interference from courts etc. New concepts like case management,

admission and denial of documents, stricter timelines have been incorporated into trial practice. Further, there is a bar on revisions and limited appeals permissible against interlocutory matters. This coupled with the appointment of trained specialist judges to these Courts has resulted in a laser sharp focus on speedy disposal of commercial matters. This would mean lesser adjournments and regular trials being conducted. Hence, it would not be possible in the near future for counsel to divide their time between High Court and Commercial Court.

Similarly, the amendments to the Arbitration and Conciliation Act and various judgments of the Supreme Court have resulted in a situation wherein there is reduced interference by the Courts while challenging an arbitral award and lesser time being taken for appointment of arbitrators. Docket Explosion has resulted in a situation wherein people are preferring arbitration over litigation.

Complex and heavy disputes involving extensive documentation, potentially multiple witnesses, and complicated facts are being resolved by arbitration. Given the near zero possibility of interference by courts as against an arbitral award, the preparation for trial in arbitration becomes more important and the need for experienced trial advocacy. Although it is disheartening to note that the entire academic literature on arbitration is entirely focused on procedural aspects and not on the importance of trial advocacy in arbitration.

With every new judgment of the Supreme Court on Section 34 of the A & C Act, the chance of getting an arbitral award set aside is becoming more and more impossible. The trial will gain immense importance in arbitration matters because we do not get a second chance to (1) lead any additional evidence; (2) convince the court on any aspect of law; (3) correct any mistakes we may have committed in trial.

Before 2015, trials were a dying art form. In the coming years, we will see a revival of trial advocacy. Hopefully the next generation of lawyers will include lawyers known for their trial skills.

(Views are personal)

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