



INDIA ADR WEEKDAY 2: MUMBAI

SESSION 2

**Guest of Honour - Hon'ble Mr. Justice Manish Pitale, Judge, High Court of
Bombay**

08:30:00 AM To 09:30 AM IST



1 **HOST:** A very good morning to one and all present here and welcome to the India ADR Week
2 2024, in Mumbai. I would now like to invite Mr. Vikram Nankani, MCIA, Council Member and
3 Senior Advocate to introduce the judge.

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5 **VIKRAM NANKANI:** Good morning, everybody it's such a pleasant surprise to see a full
6 room in Mumbai on morning Tuesday morning, and very rarely do you get to see such a full
7 room. So thank you very much for coming and I have been given the difficult task of
8 introducing Justice Pitale. The reason why I say it's difficult is because when we reached out
9 to his office for his profile, we were told to look up the Bombay High Court's website. I mean,
10 that doesn't make me wiser, because all of you can go to the website and make me redundant.
11 So really speaking that's his modesty and that's the judge that we see every day in the court.
12 And he's a living example of that modesty. He started his career with a very eminent Senior
13 Counsel, Srihari Aney, who is the former Advocate General of Bombay or Maharashtra, if I
14 may call that correctly. Then he went on to join the Chambers of Mr. AK Sanghi in the Delhi
15 Supreme Court and practiced there for a number of years until he was elevated in 2017. All
16 that I can wish is that looking at his date of birth it should not be just 2032, it should be 2035
17 that he should remain with us as a judge. And in the short span that he has been on the bench,
18 like someone was saying this morning, practically every subject he has touched upon whether
19 it is civil, corporate, commercial, IP, arbitration, criminal. Currently, he is doing criminal
20 assignment. That shows the versatility of the man. And without much ado, may I just invite
21 justice Manish Pitale to deliver the morning address.

22
23 **JUSTICE MANISH PITALE:** Good morning, everyone, I think Mr. Nankani has been very
24 generous in introducing me and I should be humble, I think, because every day I sit in the
25 court I hear counsel arguing, and not just senior counsels or those who have made a name for
26 themselves at the bar. Sometimes a very young lawyer also comes up with a very interesting
27 argument. And every day you learn something on the bench, I'm sure also in the bar. I have
28 been lucky. I must say that I've been assigned various assignments by successive Chief
29 Justices. I have had the chance of sitting at both the benches. Nagpur was my headquarters till
30 about two years ago and I was sent as a visiting judge, we have this concept that because we
31 have two branches and a joint High Court with the state of Goa. So judges can go for
32 assignments of three- three months, twelve weeks, et cetera. I was sent for six months to Goa.
33 And my colleagues at Nagpur said that you'll have a great time there. I said no I'm going there
34 to learn something. And believe you me in Goa if you're ready to work hard, the bar also
35 supports you. It's a misnomer to say that in Goa, people just take life easy. The members of
36 the bar go home after lunch. No. They do work hard. I sat there till 7:00 in the evening and
37 lawyers were arguing matters in my court. Portuguese Law, Environmental Law. So much to



1 learn. Mr. Nankani, has been appearing there. I remember you appeared in an IT matter, and
2 I had referred it to a larger bench. But before the Division Bench could decide, the issue, I
3 think it was decided by the Supreme Court. And so therefore, that's the end of the controversy.
4 It's been my fortune that I could work on the side of arbitration as well, and I could know from
5 close quarters what are the difficulties that are being faced. And that's the reason when Neeti
6 mentioned about this ADR Week that is organized as an annual feature, I guess this is the
7 fourth edition, and it's great it will be spreading awareness, not just amongst practitioners, but
8 I'm sure amongst other professionals as well. As to what is ailing the process of arbitration in
9 our country? And I've said this before that arbitration is not failed in India. We have failed
10 arbitration. It's because we have treated arbitration over the years as a post court work
11 phenomenon. And now I am happy that finally we have an arbitration bar with Gaurab heading
12 it, Gourab Banerji. So we are in safe hands, I guess. And the idea is to have a dedicated bar so
13 that the process of arbitration is taken up as a full time activity. It's not just post court work
14 activity, whether tired lawyer reaches the arbitrator who's worked through the day and tired
15 as well. Then you have a 1 hour proceeding and then it gets pushed off to another date. So that
16 is why I think these Arbitration Weeks are necessary, at least as an annual feature. And just
17 looking at the sessions that are lined up, for today and tomorrow at Mumbai and some are
18 very interesting topics I found were arbitration and mediation is complementary process Med
19 Arb or Arb Med, the way you look at it, but I would prefer Med Arb because I have this belief
20 that mediation must be the starting process, if the dispute is resolved through mediation, then
21 it's a win-win situation for all the parties. But even if it's partly successful, it brings into focus
22 the points of dispute resolutions. And therefore the arbitration gets limited to only those points
23 in focus. The arbitration can therefore proceed quickly and hopefully in an inexpensive
24 manner, if you don't engage counsel like Mr. Nankani, then it's... but it becomes simpler, is the
25 idea.

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27 But there's one issue that always comes to my mind because there are two points of view on
28 this, that whether a mediator, once he's gone, through the process, and it's only partly
29 successful and the dispute resolution requires the process of arbitration, should the mediator
30 act as an arbitrator? Now, my personal view is that it would be fraught with risks because the
31 mediator, the process of mediation is different. It's unique in the sense that the mediator, more
32 often than not, interacts with parties individually and parties by the very process of the
33 mediation, they divulge certain, their trade secrets and certain information that is very close
34 to their business. And I'm not saying for a moment that the mediator would share it with the
35 other side. But when the same mediator proceeds as an arbitrator, there could be a chance of
36 an unconscious bias, there could be a chance of the mediator not being aware of the kind of
37 bias that might develop in his thinking because he's privy to so much more than the



1 information that would be available in a contestant arbitration. So, for me, I think unless I'm
2 convinced otherwise, the mediator should stop if it is only partly successful. Identify the points
3 of dispute resolution by arbitration and then hand it over to the others. If I'm not wrong in the
4 MSME Act in the Facilitation Council, if a member has acted as a mediator that member
5 cannot act as an arbitrator. So that's a ground for challenging an arbitral award. So that session
6 should be very interesting. I think these are one of the issues that should come up. And, of
7 course, the question that always troubles the courts as well as Counsel about whether the court
8 should have a power to modify an award. We have *NHAI versus Hakeem*, Justice Rohinton
9 Nariman's famous statement that there's a *Lakshman Rekha* that can't be crossed. And it
10 started from McDermott onwards. I found sometimes as a judge, as a court, I feel helpless
11 because I see that a little bit of tweaking will do justice but because there's limitation on the
12 power of the court as for the law laid down, you can only set aside an award or partly set aside
13 an award. Should there be an amendment to bring about power of modification because the
14 UK Act does have it. In Section 67, they say you can vary an award.

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16 Now that power is not there with the Indian Courts. But I remember a matter I was dealing
17 with in Nagpur, where the National Highway Authority of India had acquired certain pieces of
18 land. The landowners had very small pieces, one and a half acres, two acres, et cetera. They
19 were up against this behemoth of National Highway Authority. They have a number of lawyers
20 assisting them and the arbitration process went on and came to my court, where I realized that
21 the arbitrator had gone wrong. Even under these narrow scope under Section 34, the award
22 could be set aside but I thought that a little bit of tweaking would help the landowners. For
23 instance, at that time the Land Acquisition Act, the Early Land Acquisition Act was to be
24 considered. And there you have statutory relief. You have 12.5% of interest. You have solatium,
25 et cetera. On one of those factors which are statutory, available to the landowner, the arbitrator
26 had missed out, perhaps erroneously, and they had raised that as a ground that please give
27 this relief to us. And the National Highway Authority Counsel just stood up and said, all right,
28 not set aside the award on that ground so that we go back for arbitration. Now, this becomes
29 a little unfair. So I thought over it. I mulled over it. I reserved the matter and after two weeks,
30 I gave a judgment where I gave them that relief. The landowner. I knew this is going to be
31 challenged in the Supreme Court.

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33 It was, and it's now referred as one of the matters which is referred to a larger bench by Justice
34 Datta's Bench whether there is a power. The whole point is that if you are so strict about it,
35 then the only way the thing can be resolved is another round of arbitration. And in this country,
36 how many people can afford rounds and rounds of arbitration that's something which you will
37 have to discuss. And such ADR Weeks, I'm sure you come out with your papers or whatever



1 the speeches that have been delivered. Looking for a solution these ADR Weeks can act as
2 material for the government to think over, the legislature to think over what changes are to be
3 brought. Because this is something very crucial. If you restrict the power as it has been
4 restricted today, then the High Court feels that it is restricted. Although it's a Court of Record,
5 we know the kind of power that the High Court wheels, or even the Supreme Court. But if you
6 can't tweak the award for the ends of justice, then is it being too strict as a statute. But the
7 other side is that if you open it up, then it becomes an appeal. Then you go back to Saw Pipes
8 regime. And we've seen it was Saw Pipes judgment created havoc which brought about the
9 2015 amendment and so on and so forth. So it's a fine line. If you provide for power to vary, as
10 in the UK Act, what is the limitation of the power of the court to vary or modify this far and
11 not further? Who will decide that? Because once you give it into the hands of the judge then
12 what for me, reached the end of justice? May be different for another judge. So then it becomes
13 very subjective, and we don't want that in an arbitrary process. So that's one big challenge you
14 are looking at. I think this should be a very, very interesting session.

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16 Then there's one on experts as arbitrator and arbitrator appointed experts. Now, experts as
17 arbitrators obviously required, where the subject matter is highly technical. A generalist may
18 not be able to even comprehend the technical terms. It's necessary to have expert arbitrators.
19 But I have seen this because when awards come for challenge, you realize that experts are
20 experts in their field, but sometimes they don't or they're not aware of the basic principles of
21 natural justice, procedural law. And their technical knowledge is sound but the award is set
22 aside because they didn't have knowledge of the basic rudimentary principles, legal principles
23 like natural justice, et cetera. So I always feel that where experts are involved or highly
24 technical subject is involved you can have two nominee arbitrators who are experts, and they
25 can choose an umpire or a third arbitrator who's necessarily person with a legal background,
26 maybe a counsel or a judge, retired judge, so that there's some balance which is maintained.

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28 And it's true about experts in any field, even in our field, I feel there is lack of humility amongst
29 experts because they think they know a lot. I'm sure they know a lot, but that brings about a
30 bit of lack of humility, or perhaps sometimes even arrogance. When matters are argued and
31 they are shown the other side of what their thought process is, they are blockheaded. They
32 don't just accept what's happening. So I'm always reminded of what an Australian judge told
33 me. I had gone for a WIPO masterclass to Delhi, in the Delhi High Court. I was nominated by
34 the Chief Justice. You had the judge..., I'm sorry, I'm forgetting her name. She's the very judge
35 who decided the matter of Indian wrestler, recently in the Olympics. She gave us a lecture on
36 hot tubbing. So that's, of course, an Australian concept, which has now become a global
37 concept. So we can think of discussion while you discuss experts on what is hot tubbing and



1 how it can assist the process of arbitration. I also saw reference to India as it's unprecedented
2 rise in recent times and how the process of arbitration can adversely affect or positively affect
3 the superpower that India intends to become.

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5 There's no doubt that India is rising technologically and as an economic superpower. But
6 unless you have dispute resolution mechanisms which are quick, the extent of investment will
7 not be as much as it is expected. And India may not be able to realize its potential, if investors
8 feel that they will be caught in the quicksand of court proceedings or worse, the quicksand of
9 arbitral proceedings, because if the arbitral proceedings are mirroring the difficulties that
10 courts are facing, then the whole idea of arbitration fails. The court system as we all know is
11 tweaking under the burden of pendency. In benches like Nagpur perhaps a judge is more
12 satisfied because your days, matters that are listed, all of them reach you pass at least in half
13 of them effective orders. And then there are days when you take up final hearing matters. In
14 the principal seats, it's not happening at all. With the result I am today holding the anticipatory
15 bail. Bail assignment matters are necessarily urgent. They concern the liberty of individuals.
16 They're far more important than commercial matters. But the position is such that my regular
17 board won't reach now because my supplementary board is swollen to 30 matters or 35
18 matters, all of which are urgent. So there are days when out of those 35 I will have finished
19 about 32 matters, in which about 28 or 30 matters, I'll have passed effective orders but those
20 three or four remain, which are pushed off to the next date which is the same week. But the
21 judge at the principal seat goes back home a lot more dissatisfied because you have lawyers
22 mentioning matters the next day morning that even my supplementary list didn't reach. You're
23 falling short because of the assignment that I am holding for instance. It will need at least five
24 judges to do justice to that assignment.

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26 Likewise, arbitration matters, IPR matters. There was once I heard a complaint at the bar that
27 a lot of IPR matters are going to Delhi High Court. Not necessarily because the judges are
28 better. They're very good. They're competent. But because they have a commercial division
29 there. So the High Courts have to really think about these policies. In Mumbai, can we spare
30 judges for an exclusive commercial division? We can't because then who looks after bail,
31 anticipatory bail, et cetera. PMLA matters. Very tough.

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33 Now, of course the drift of the law is changing a little bit. The stringent test. Statutory tests are
34 being diluted in a way because trials go on for years. You can't have under trials languishing
35 in jail. When we think purely of a commercial, arbitral matters, we have to look at it from a
36 holistic point of view that for the parties involved in commercial dispute, it may be very
37 important. But look at it from the point of view of the court. The court is to consider all disputes



1 that reach the court and absolute priority has to be given to matters which involve the personal
2 liberty of individuals. You have 94 sanctions strength who judges for Bombay High Court,
3 today we are 66 by Thursday we will be 64 because two senior most judges are moving out as
4 Chief Justices of Madras and Kerala High Court. These are all issues that we face day in and
5 day out and when you look at these issues, these problems and if you look at it only from the
6 point of view of the bar or the lawyers, or the litigants, then you miss the whole picture. The
7 WIPO master class I'm talking about, there was a professor from UK. I am very poor at
8 remembering names, but he was a great expert who it was on Artificial Intelligence part of the
9 session. So he said, the moment you talk about Artificial Intelligence let's be clear, we are not
10 replacing judges. Artificial Intelligence cannot replace judges. But it can assist the process.
11 You have documents running into thousands and millions of pages. You will have Artificial
12 Intelligence identify where an issue has been discussed, where is the relevant portion, et
13 cetera. So it can be used as a system which can enhance the efficiency of the process. And he
14 said, we are all asking wrong questions.

15

16 One of the questions which is asked in the context of Artificial Intelligence is what happens to
17 the lawyers, will they lose work et cetera. So he said that's the wrong way of looking at it
18 because the whole purpose of this process is to resolve disputes. So, the litigant is the central
19 focus. It doesn't matter what process you use. The process that you use must be the most
20 efficient, available. So if you look at it from that point of view, then some of the debates fail
21 into insignificance, but you have to really focus on what will make arbitration successful in
22 India. And as I said, the culture has to change. You have to have arbitrators who are
23 professionals.

24

25 That brings me to a concern that was flagged by our Chief Justice in the recently concluded
26 arbitration conference in Delhi. It was, I think, the Permanent Court of Arbitration opening
27 an office in Delhi. 125 years of the Permanent Court of Arbitration, 75 years of the Supreme
28 Court, sort of joint conference. There, our Chief Justice touched upon a topic that, 'what about
29 the conduct of arbitrators'. Is it professional enough, especially in our country, who will
30 regulate their conduct? Because the misconduct of an arbitrator is a good ground for
31 substitution of the arbitrator or sitting aside of the award. But is it good enough? The party is
32 the disputants, the litigants are not bothered. They want quick resolution. So setting aside an
33 arbitral award sets the clock back. You start from zero. Substitution of an arbitrator even if we
34 say that the new arbitrator will continue from the stage where the earlier arbitrator was
35 removed again, makes it a slower process. So, is there a way to regulate the conduct? How do
36 you do it? Can you regulate it? One of the ways of looking at it could be, it could be self-
37 regulation, but self-regulation requires character, which is, I believe, not commonly found in



1 any system, frankly. And so long as that problem is there, then how do you regulate? Do you
2 have bodies like akin to the bar councils, the medical councils, which have some powers, at
3 least of regulating? How far do you regulate? And the regulation, will it affect the
4 independence of the arbitrator? Will it affect the choice of the parties? Because now there's a
5 thrust towards encouraging institutional arbitration. I think one of the reasons is this, that the
6 institution would be able to perhaps take care of this difficulty of misconduct of an arbitrator.
7 We have seen very often. And it's an elephant in the room, nobody wants to address it. That
8 there are arbitrators who are very able, no doubt, but who are more concerned with billing
9 hours, who are the, say, delaying matters. They're looking at the fees rather than the effort that
10 has to be put in. What is to be done of that? Because it's a very sensitive kind of a topic.
11 Because, for instance there's one issue that came up about six months ago that one of the
12 counsel practicing in Bombay High Court was working as an arbitrator, he passed an award.
13 The aggrieved party went to a section of lawyers, you know, all of them in the bar here. I call
14 them mischief mongers. They advised the litigant, the aggrieved party, to file a police
15 complaint against the arbitrator. And the grounds taken in the police complaint, which ran
16 into about 110 pages with judgments, precedents being quoted left, right and centre alleging
17 misconduct, alleging breach of trust, criminal liability, et cetera. And the policeperson saw that
18 110 page document and issued a notice to the arbitrator. And he came running.

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20 So, of course, nothing happened of that because the Commissioner took over the matter and
21 said this is all a civil matter. It can't be criminal liability. But this is the problem. If it's left
22 unregulated, then these kinds of mischief mongers can do damage to the system. Regulating
23 the conduct of an arbitrator is something really which we need to do. We need regulation . And
24 how do we go about it? This is something you must discuss, although I don't see it as one of
25 the topics here, but it would help the process of better understanding how the process can be
26 made quick and therefore less expensive.

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28 In commercial matters you can't say inexpensive. Inexpensive would be matrimonial disputes,
29 and those are real concerns, their custody matters and so on. Family disputes. But when you
30 come to commercial disputes, at least make it less expensive, more efficient, if that can be
31 done. So these are some concerns which I believe the ADR Week should address. The whole
32 culture of arbitration in India will change, not by amendments in the statutes. If you see the
33 amendments that were brought about in 2015 you had the Shri Krishna Committee in 2017.
34 You now have an expert committee which gave its report in February of this year. Further
35 modifications, further amendments are suggested. Howsoever much you change or amend a
36 statute, nothing will happen unless our approach changes. Our culture changes. And that will
37 take a lot of effort. I have a lot of hope from young members of the bar, because now, as I



1 remember, I came out of the Faculty of Law in Delhi University in 1994, where I was one of
2 the very few people who used to attend classes, take part in moot court competitions, represent
3 our faculty, et cetera. Most of the students used to get medical certificates for ensuring their
4 attendance was complete. Used to come for the exams and go away because it was treated as
5 an additional qualification, you couldn't do much. So we still had an entrance in those days.
6 I've cleared an entrance to get admission there. But the idea was to retain the university hostel
7 to appear for civil services exams. So the focus was never on law. Now, fortunately, you have
8 National Law Schools with the vision of the National Law School being established first in
9 Bangalore and now all over. So, the young members of the bar will be more professional I
10 believe. The culture will start changing, but we can't wait for them to ten years hence become
11 respected professionals to bring about a change. It has to be here and now.

12

13 And just see how faith in the arbitral process in a way is reduced even from the point of view
14 of the government. If you've seen the notification they issued in June recently. It says that any
15 dispute, which involves liability of more than ten crores, arbitration clause will not be there in
16 the government contracts. Now, if this country is now zooming towards becoming a
17 powerhouse. Infrastructure is being developed. Necessarily the government will be involved
18 in such contracts. Ten crores is nothing. Any contract which involves more than ten crores,
19 you will go for mediation, but not for arbitration.

20

21 Now, the Mediation Act 2023 is another big change. It's a welcome change. But on the one
22 hand, as the government is saying, we are trying to encourage arbitration as an alternative
23 dispute resolution mechanism. Then what is this notification? That's another point of debate
24 issue you should have. But you read the contents of that notification. It says, in terms that
25 arbitration has become expensive, arbitration is inefficient which indicates that the legislature
26 and the executive, they've tried their best through amendments, et cetera. The culture isn't
27 changing. They are saying that we don't have faith now because awards of 800 crores, 900
28 crores are passed against us. We have to make an effort to show grounds of challenge. We
29 succeed eventually, but we have to deposit these many crores in the court. In the meanwhile,
30 our funds are getting blocked. Arbitrators are not efficient. The process is expensive. So
31 therefore necessarily mediation. And after mediation, you go back to the traditional courts.

32

33 The other day I was addressing a conference. When I looked up the statistics and I found that
34 only the construction industry, more than 80,000 crores are blocked in the courts. Therefore,
35 let's go for arbitration. But if arbitration is now failing, you go for mediation. And if we don't
36 change our approach, mediation will also fail. Then where do we go? Go back to traditional
37 courts. And changes in the court system will take their own time. What is the judge population



1 ratio in this country? All of these are fundamental questions, but I won't burden you with them
2 in this ADR Week, but the topics are interesting. But you must please also think about these
3 issues of lack of faith in arbitrators. What is to be done with that? That's a very serious matter.
4 Most of the time we have...in big arbitral matters, we have retired judges who are doing that.
5 And I had once before my elevation, I was briefed in a matter, an arbitration matter, obviously.
6 In the weekend, I went there and it was a very well respected retired Chief Justice of a High
7 Court, and I was disturbed he was taking phone calls during arbitral proceedings. He took a
8 video call from his granddaughter. What's happening? And this is not the way arbitrary
9 proceedings are to be conducted. With great respect, I walked out of there. I told him, sir, I
10 can't conduct matters like this. I walked out, I returned the brief. That's not a solution. The
11 solution has to be holistic. We have to think about change of the culture, and I'm sure ADR
12 Weeks like these will go a long way. Thank you.

13

14 **HOST:** Thank you, sir. I would now like to invite Mr. Raj Panchmatia, partner at Khaitan &
15 Co, to give the vote of thanks..

16

17 **RAJ PANCHMATIA:** Thank you Justice Pitale for taking time out and coming this morning
18 and addressing the gathering with your views and suggestions. Many of you may not know,
19 but when we went to invite Justice Pitale, he said that 24th morning. It's a little tough. I am
20 part of the committee which is organizing the new groundbreaking ceremony for the Bombay
21 High Court. But it's arbitration. I'll definitely come. And he always supports us whenever you
22 go to him. He has always been so kind and always agreed to support the cause and to be there
23 for our conferences always. Thank you, Justice Pitale.

24

25 Some of the issues which Your Lordship raised, which you raised regarding the conduct of
26 arbitrations were very well discussed during the arbitration Bar of India event on Saturday.
27 And a lot of deliberation did take place on what should be the way forward and how it can be
28 changed. So some of those were actually discussing. Maybe these are the kind of platforms
29 where we need to discuss these more. And your observation about the AI and whether the AI
30 will take over the work of a lawyer. I've read it somewhere and I believe that I think the AI will
31 not take away the work of a lawyer but if you don't know how to use AI your work will come
32 down as a lawyer. So you need to upskill and upgrade yourself to be able to use AI. If you say
33 that I don't know how to use AI as a lawyer now, you will find yourself in some difficulty. But
34 with all of that, thank you so much once again for coming today and gracing the occasion.
35 Thank you.

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~~~END OF SESSION ~~~