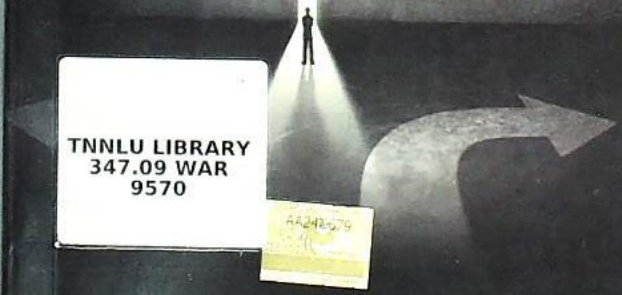
Arbitration, Conciliation *and* Mediation

Vishnu S Warrier



LexisNexis

Contents

Preface *v*

SECTION I

1. History of Arbitration Law in India **3**
Early Legislations 4
The UNCITRAL Model Law 8

2. Arbitration and Conciliation Act, 1996 **9**
Introduction 9
Preliminary 10
General Provisions 11
Sample Arbitration Clauses 19
Arbitral Award 21
Arbitral Tribunal 24
Court 25
International Commercial Arbitration 27
Sample Arbitration Clauses 31
Legal Representative 31
Party 32
Section 2(2) – Scope 33
Section 2(3) 34
Section 2(4) 35
Section 2(5) 36
Section 2(6) – Construction of References 36
Section 2(7) 37
Section 2(8) 38
Section 2(9) 38
Receipt of Written Communications 38
Waiver of Right to Object 42
Extent of Judicial Intervention 49
Administrative Assistance 55

Arbitration Agreement 56
Power to Refer Parties to Arbitration where there is an Arbitration Agreement 63
Interim Measures by Courts 68

3. Arbitration Tribunal 73
Composition of Tribunal and Appointment of Arbitrators 73
Appointment of Arbitrators 75
Grounds for Challenge 80
Challenge Procedure 84
Termination of Mandate of Arbitrator 91
Jurisdiction of Arbitration Tribunal 94
Conduct of Arbitral Proceedings 97

4. Making of Arbitral Award and Termination of Proceedings 106
Rules Applicable to Substance of Dispute 106
Decision Making by Panel of Arbitrators 110
Settlement 111
Form and Contents of Arbitral Award 114
Termination of Proceedings 116
Correction and Interpretation of Award; Additional Award 118

5. Recourse Against Arbitral Award 122
Application for Setting Aside Arbitral Award 122
Grounds for Setting Aside an Arbitral Award 133

6. Finality and Enforcement of Award 138
Finality of an Award 138
Enforcement of Arbitral Award 140

7. Appeals 145

8. Miscellaneous Provisions 152
Deposits 152
Lien on Arbitral Award and Deposits as to Costs 153
Arbitration Agreement not to be Dischargedby Death of Party Thereto 155
Provisions in Case of Insolvency 156
Jurisdiction 156
Limitations 157

9. Enforcement of Foreign Awards 158
The New York Convention Awards 158
The Geneva Convention Awards 161

SECTION II

1. Conciliation and Mediation 167
Conciliation as an Alternative Dispute Resolution 167
Advantages of Conciliation 168
Differences between Arbitration and Conciliation 169
Differences between Conciliation and Mediation 170
Conciliation Proceedings 170

2. Supplementary Provisions 176
Power of High Court to make Rules 176
Removal of Difficulties 177
Power to make Rules 177
Repeal and Saving 178

Annexure I: Summary 183
Annexure II: Sample Questions and Answers 203
Annexure III: Suggested Readings 210
Annexure IV: The Arbitration and Conciliation Act, 1996 216

1

History of Arbitration Law in India

Alternative Dispute Resolution (ADR) refers to any means of settling disputes outside of the courtroom. In other words, it refers to any method sought for resolving disputes, other than by way of litigation. ADR is a collective term by which the parties to any dispute can settle the issues, with or without the help of a third party.

A dispute is essentially a *lis inter partes*, and the justice dispensation system in India has found an alternative to such forms of adversarial litigation in the form of Alternative Dispute Resolution mechanism. ADR has an advantage of providing parties with the opportunity to reduce hostility, to resolve conflict in a peaceful manner, and achieve a greater sense of justice in each individual case.

Further, party autonomy safeguards the rights of parties to choose the law and rules governing the arbitration, language, venue and number of arbitrators in relation to the arbitration proceedings. ADR mechanisms have proven to be one of the most effective mechanisms to resolve disputes relating to domestic and international commercial issues.

Most common forms of ADR are negotiation, conciliation, mediation, and arbitration. Negotiation is always attempted at the very first stage to resolve any dispute. It is the paramount mode of dispute resolution. Negotiation allows the parties to meet in order to settle a dispute. The main advantage of these forms of dispute resolution is that it allows the parties themselves to control the process and the solution.

Arbitration is a method of resolving disputes through an arbitrator appointed by the parties in a dispute. It is an alternative method to the regular court proceedings to settle any dispute. Arbitration has a very ancient heritage in India. The earliest known mode of Alternative Dispute Resolution was the Panchayat system created during the ancient *Vedic ages*, where the head of a family or the chief of the community acted as the Panchayat, and whose commands were believed to be the voice of God and was obeyed unquestionably. It was always considered as a representative body and whatever was its real number, it always bore the name which helped in

recalling its constitution of five persons or *'Panchayat'*.[1] To refer matters to Panchayat is one of the natural ways of deciding disputes in India.[2]

Arbitration is a simplified version of a trial involving limited discovery and simplified rules of evidence. Each arbitration proceeding is headed and decided by a panel. In order to comprise a panel, either both sides agree on one arbitrator, or each side selects one arbitrator and the two arbitrators elect the third arbitrator. The panel then deliberates and issues a written decision, or arbitral award. Opinions are not for public record.

The ancient Indian jurisprudence recognised two methods by which disputes between citizens could be settled, viz. judicial process in the Court established by the King and the other by various categories of Arbitration Institutions.[3] Indian civilisation expressly encouraged the settlement of disputes by the tribunals chosen by the parties themselves. Arbitration is a striking factor of ordinary Indian life, and it prevails in all ranks of life to a greater extent. The law of arbitration is based on the principle of withdrawing the disputes from ordinary courts by mutual understanding, and enabling the parties to substitute it with a domestic tribunal consisting of persons of their own choice known as 'arbitrators'.

EARLY LEGISLATIONS

- Initial steps were taken place during British period for institutionalising the arbitration mechanism by way of enacting **the Bengal Regulation Act** in the year 1772 and 1780. Said Acts directed all parties in cases of disputed accounts to submit their cases to arbitrators and whose decision shall be deemed to be a decree and be treated as final.[4]
- Further, **the Regulation Act, 1781** recommended judges to direct parties to approach a mutually agreed person to settle the disputes among them. However in such cases, an award of the arbitrator could not be set aside unless there were two witnesses that the arbitrator had committed gross errors or was partial to a party.[5]

[1] Maine, "Ancient Village Communities", quoted in the 76th Report of the Law Commission of India on Arbitration Act, 1940, November, 1978.
[2] *Chanbasappa Gurushantappa v. Basalingayya Gokurnaya Hiremath*, AIR 1927 Bom 565 : 1927 (29) Bom LR 1254.
[3] Dr. Kane, *History of Dharmasastra*, Vol. 3, 1946, p. 230
[4] *Nripendra Nath Sircar, Law of Arbitration in British India*, 1942, p. 6 cited in the 76th Report of the Law Commission of India on Arbitration Act, 1940, 1978, p. 6, para 1.14.
[5] Rishab Sinha, Sarabjeet Singh, "Taking Alternative Dispute Resolution To The Common Man", Available at: http://www.adrcentre.in/images/pdfs/Taking%20Alternative%20Dispute%20Resolution%20To%20The%20Common%20Man.pdf

- **Sir Elijah Impey's Regulation, 1781**, provided that, 'judges do recommend and so far as they can, without compulsion, prevail upon the parties to submit to the arbitration of one person, to be mutually agreed upon by the parties.' It also provided that:

  > *"no award of any arbitrator, or arbitrators be set aside except upon full proof, made by oath of two credible witness, that the arbitrators had been guilty of gross corruption or partiality in the cause in which they had made their award."*[6]

- **Regulation of 1787** laid down rules for referring suits to arbitration with the consent of the parties. However, there was no detailed provision to regulate the arbitration proceedings, nor any provisions for the consequences of the award not being made in time or for the situation when the arbitrators differed in their opinion[7].
- **Regulation XVI of 1793** came up with provisions referring suits to arbitration and submitting them to the decision of the *Nizam*. Further, Regulations XXI of 1793 and XV of 1795 made provisions to promote references of disputes of certain description to arbitration. They even laid down procedure for reference, award and setting aside. They further recommended criteria for appointment of arbitrators.
- **Regulation VI of 1813** allowed arbitration in suits, with respect to rights in land and disputes regarding forcible disposition of land.
- **Regulation XXVII of 1814** allowed *Vakils* to act as arbitrators, removing an age-old bar on their acting as such.
- **Madras Presidency Regulation of 1816** authorised the District *Munsifs* to assemble District *Panchayats* for administration of civil suits for real or personal property.
- **Bengal Regulation VII of 1822** allowed Revenue Officers to refer rent and revenue disputes to arbitrators and called upon Collectors to do the same. This dichotomy regarding arbitration in civil and revenue courts is still recognised.
- **The Bombay Presidency Regulation of 1827** facilitated amicable adjustments of disputes of civil nature by means of arbitration. It allowed reference of present, as well as future disputes to arbitration by means of an agreement.
- **Bengal Regulation IX of 1883** empowered Settlement Officers to refer disputes to arbitration.

[6] 76th Report of the Law Commission of India on Arbitration Act, 1940, November, 1978.
[7] Nripendra Nath Sircar, *Law of Arbitration in British India*, 1942, p. 6 cited in the 76th Report of the Law Commission of India on Arbitration Act, 1940, November, 1978, p. 6.

These regulations introduced compulsory arbitration which prescribed the limits of judicial intervention, and provided safeguards to ensure fairness and laid down the procedure for attendance and examination of witnesses. Subsequently, the then British government introduced the following statutes to regulate the conduct of arbitrations in India:

- Legislative Council of India established under the Charter Act, 1834 passed the Act of 1840, which amended the law with reference to Arbitration, Damages and Interested Witnesses.
- Sections 312 to 327 of the Code of Civil Procedure Code, 1859 permitted references to arbitration in pending suits, and the procedure for arbitration was explained under Sections 313 to 325. This Act allowed arbitration without the intervention of courts. Though the Act was further revised in the years 1877 and 1882, no changes in the law of arbitration were made. In *Pestonjee Nussurwanjee v. Manockjee*,[8] the court was of the opinion that, a proper construction of the Code provided that, when persons agree to submit the matters in difference between them to arbitration of one or more of the specified persons, no party to such an agreement could revoke the submission unless, the same was for a good cause.
- Besides, the Indian Contract Act, 1872 recognises arbitration as an exception to Section 28, where it says that, an agreement in restraint of legal proceedings is void. This Act recognises an agreement made to refer to arbitration, present as well as future disputes. Though, future disputes could not be referred to arbitration as per the provisions of the Code of Civil Procedure, it could be possible if a person entered into a contract to refer future disputes and later tried to wriggle out of it, by going to the courts on the same matter. Under such circumstances he would not be allowed to do so.[9]
- Later, the Indian Arbitration Act was enacted on arbitration law in the year 1899. It was enacted based upon the English Arbitration Law, 1889. However, the said Act was applicable only to the Presidency Towns. It recognised the concept of arbitration agreements and it allowed reference of present and future disputes to arbitration.[10]
- The Act of 1899 was repealed in the year 1940 and laws relating to arbitration were redrafted and consolidated as the Arbitration Act, 1940. The same was based upon the English Arbitration Act, 1934.[11]

[8] (1868) 12 MIA 112.

[9] Section 21, The Specific Relief Act, 1878.

[10] Dr. PC Markanda, *Law Relating to Arbitration and Conciliation*, 8th Edn., LexisNexis Butterworths Wadhwa, 2013, p. 5.

[11] 76th Report of the Law Commission of India on the Arbitration Act, 1940.

- After independence, the word "arbitration" was incorporated under Entry 13 of the Concurrent List of the Indian Constitution. Upon being a signatory to the Geneva Convention, the Parliament enacted the **Arbitration (Protocol and Convention) Act** in the year 1937 to give effect to the protocol on arbitration under the Geneva Convention. Later in the year 1961, in terms with the **New York Convention**, the Parliament enacted the **Foreign Awards (Recognition and Enforcement) Act, 1961**. It was further followed by **the Legal Services Authorities Act, 1987**.
- In quest of increasing the efficiency of the nation's economy, the government of India accepted the idea of Liberalisation, Privatisation and globalisation, which resulted in new challenges in settling large number of commercial disputes. It was observed that, the existing Act of 1940 was not sufficient to address the new challenges. Hence, the Law Commission of India and several other statutory bodies recommended for amendment of the existing Act of 1940, to address the issues of contemporary requirements. Accordingly, the government of India adopted the UNCITRAL[12] Model Law,[13] and enacted the Arbitration and Conciliation Act, 1996.[14]
- The Act of 1996 was enacted to consolidate and to amend the law relating to arbitration, international commercial arbitration and enforcement of foreign arbitration awards, as also to define the law relating to conciliation, and for matters connected therewith or incidental thereto.[15]
- The Act of 1996 superseded the previous Act of 1940 and brought radical changes in the field of arbitration by introducing new concepts like Conciliation to ensure speedy settlement of commercial disputes. The constitutionality of the Act of 1996 was challenged in *Babar Ali v. Union of India and Others*.[16] However, the court was of the opinion that, the Act was not unconstitutional and in no way did it offend the basic structure of the Indian Constitution. As long as the arbitration clause exists, a party cannot take recourse to the civil courts for appointment of a Receiver without evincing an intention to start the arbitration proceedings.[17]

[12] United Nations Commissions on International Trade Law (UNCITRAL).

[13] Designed to address the need for harmonising and improving domestic laws of arbitration as per different systems of the world and thus, contain certain provisions, which are designed for universal application.

[14] Came into force with effect from January 25, 1996.

[15] The introduction to the Arbitration and Conciliation Act, 1996.

[16] (2000) 2 SCC 178 : JT 1999 (10) SC 508.

[17] *Kalpana Kothari v. Sudha Yadav and Ors.*, (2002) 1 SCC 203 : AIR 2002 SC 404.

- In addition to the above-mentioned legislations, Section 89, Section 104(1) clauses (a) to (f), and the Second Schedule of the Code of Civil Procedure, 1908 was also regulating the arbitration procedure till it got repealed in the year 1940.

THE UNCITRAL MODEL LAW

The United Nations' General Assembly approved the UNCITRAL Model Law described as, "the core legal body within the United Nations system in the field of international trade law with a mandate to co-ordinate legal activities in this field in order to avoid duplication of effort and to promote efficiency, consistency and coherence in the unification and harmonization of international trade law."[18]

UNCITRAL is a major legal body of the United Nations system in the field of international trade law. It has got universal membership, specialising in commercial law reform worldwide, for over 40 years. Briefly, the UNCITRAL's business is the modernisation and harmonisation of rules on international business.[19]

On June 21, 1985, after years of analysis and discussion, the United Nations Commission on International Trade Law adopted a final trade model on International Commercial Arbitration, called the Model Law.[20] The Model Law was adopted keeping in mind the manifold problems encountered by parties contemplating an international arbitral remedy, and the desirability of uniformity in the law of arbitral procedures, and the specific needs of international commercial arbitration practice.[21]

Further, the UNCITRAL also adopted a set of Conciliation Rules, way back in 1980. The said Model Law and the Rules are intended to deal with the international commercial arbitration and conciliation. It was recommended by the General Assembly of the United Nations, that all member countries should give due consideration to the Model Law and the Rules for bringing up a uniform procedure in arbitration and conciliation proceedings.

Though, the Model Law and Rules are intended to deal with International Commercial Arbitration and Conciliation, the same also served as a model for respective legislations on domestic arbitration and conciliation, with appropriate modifications.

[18] *Supra note 10* at p. 10.
[19] Risha Sharma, "Article 17 of the UNCITRAL Model", The Lex-Warrier: Online Law Journal, LW (2013) October 14, Available at: http://lex-warrier.in/2013/10/article-17-uncitral-model/ Accessed on 6 August, 2015.
[20] Lucio E. Saturnino, The UNCITRAL Model Law on International Commercial Arbitration, Vol. 17, No. 2, 1986, The University of Miami Inter-American Law Review.
[21] As adopted by the Commission at its eighteenth session, in 1985.

2

Arbitration and Conciliation Act, 1996

INTRODUCTION

As a measure of fulfilling the obligations under international treaties and conventions, the Indian Parliament enacted the Arbitration and Conciliation Act in the year 1996 in conformity with the Model Law adopted by the United Nations Commission on International Trade Law.

The Act of 1996 is a leap in the direction of an Alternate Dispute Resolution system. It is based upon the UNCITRAL Model Law. However, cases decided under the preceding Act of 1940 have to be applied with calculation for determining the issues arising for decision under the New Act.[1]

The Act of 1996 is divided into four parts. Part - I (Sections 2 to 43) deals with domestic arbitration including international arbitration conducted in India. Part - II (Sections 44 to 60) deals with enforcement of foreign awards governed by the New York Convention and the Geneva Convention. Part - III containing Sections 61 to 81, sets out the legal framework for conciliation proceedings in India. Part - IV (Sections 82 to 86) deals with supplementary provisions.

It may be noted that, the Preamble of the Act makes it very clear that, the Parliament had enacted the Act with utmost care and almost on the same line with that of Model Law. The provisions of the Act should be interpreted keeping in mind the Model Law as the concept, under the present Act has undergone major change. It will therefore, be useful to take note of the corresponding provisions of the UNCITRAL Model Law. The whole object of the scheme of the Act is to secure an expeditious resolution of disputes.[2]

Legislative intention underlying the Arbitration and Conciliation Act, 1996 is to minimise the supervisory role of courts in the arbitral process,[3] and the object of Arbitration and Conciliation Act, 1996 intended to provide speedy and alternative solution to the disputes and avoid protection of litigation.[4]

[1] *Firm Ashok Traders v. Gurumukh Das Saluja*, (2004) 3 SCC 155 : AIR 2004 SC 1433.
[2] *Gas Authority of India Ltd. (GAIL) v. Keti Construction (I) Ltd.*, (2007) 5 SCC 38 : (2007) 6 SCR 439.
[3] *Food Corporation of India v. Indian Council of Arbitration*, (2003) 6 SCC 564 : AIR 2003 SC 3011.
[4] *Fuerst Day Lawson Ltd. v. Jindal Exports Ltd.*, (2001) 6 SCC 356 : AIR 2001 SC 2293.

Major objectives of the Act, 1996 are the following:

(a) To encourage arbitration, mediation, and conciliation as an alternative dispute mechanism.

(b) To minimise the supervisory role of courts in the arbitration procedure.

(c) To make provisions for effective, fair and efficient procedure for arbitration.

(d) To ensure that, arbitral tribunal gives proper justification for its awards and such awards are enforced in the same manner as if it were a decree of the Court.

(e) To cover international commercial arbitration.

(f) To provide that, settlement agreement reached through conciliation proceedings will have the same status as that of an arbitration award and the same shall be enforced in the same manner as if it were a decree of the Court.

(g) To ensure that, the Arbitration Tribunal remains within the limits of its jurisdiction.

However, it is to be noted that, the Act of 1996 is applicable only if the place of arbitration is in India.[5] Further, it may be noted that, when an international commercial arbitration is held in India the provisions of Part-I would compulsorily apply and parties are free to deviate only to the extent permitted by the provisions of Part-I.[6]

PRELIMINARY

The Arbitration and Conciliation Act, 1996 is an Act to consolidate and amend the law relating to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards, as also to define the law relating to conciliation and for matters connected therewith or incidental thereto. It extends to the whole of India:[7] Provided that Parts I, III and IV shall extend to the State of Jammu and Kashmir only in so far as they relate to international commercial arbitration or, as the case may be, international commercial conciliation.

However, the expression "international commercial conciliation" provided under sub-section 2 of Section 1, shall have the same meaning as the expression "international commercial arbitration" in clause (f) of sub-section

[5] *Shreejee Traco (I) Pvt. Ltd. v. Paperline International Inc*, (2003) 9 SCC 79.

[6] *National Agricultural Co-op. Marketing Federation India Ltd. v. Gains Trading Ltd.* (2007) 5 SCC 692 : AIR 2007 SC 2327.

[7] Section 1(2), Arbitration and Conciliation Act, 1996.

(1) of Section 2, subject to the modification that for the word "arbitration" occurring therein, the word "conciliation" shall be substituted.[8]

The Supreme Court in *Venture Global Engineering v. Satyam Computer Services Ltd. and Others*[9] observed that, Section 1(2) expressly extends Part-I to the State of Jammu and Kashmir so far as it relates to international commercial arbitration giving rise to an anomaly so far as the rest of India is concerned, unless Part-I applies to international commercial arbitrations in the other States as well.

Section 1(2) of the Act makes it clear that it extends to the whole of India. Jammu and Kashmir being a part of India, the Act will also apply to the State of Jammu and Kashmir. However, in terms of the proviso to sub-section 2 of Section 1 of the Act, Parts I, III and IV shall extend to the State of Jammu and Kashmir only insofar as they relate to international commercial arbitration.[10] The Delhi High Court further opined that,

> *"there is nothing in Section 1(2) of the Act which may compel us to depart from the plain meaning of Section 2(2) of the Act so as to make Part-I applicable to an international commercial arbitration being held outside India."*[11]

An international commercial arbitration, can take place in India or outside India. In case, an international commercial arbitration takes place in India, there is no difficulty in applying the provisions of Part-I of the Act to such arbitration. It is only an international commercial arbitration being held outside India that the provisions of Part-I of the Act will not be applicable. The applicability of Parts I, III and IV to the State of Jammu and Kashmir, only in relation to an international commercial arbitration means that an arbitration which is not an international commercial arbitration will not be governed by the provisions of Parts I, III and IV. It shows that the domestic arbitration in the State of Jammu and Kashmir will be governed by the laws which may be exclusively applicable to that State.[12]

GENERAL PROVISIONS

Part - I of the Arbitration and Conciliation Act, 1996 covering Sections 2 to 43 disclose that, the principles contained in the said provisions are aimed to achieve the following results:[13]

[8] Explanation to Section 1(2), Arbitration and Conciliation Act, 1996.

[9] (2008) 4 SCC 190 : AIR 2008 SC 1061, also see *Bhatia International v. Bulk Trading S. A. & Anr*, (2002) 4 SCC 105 : AIR 2002 SC 1432 : (2002) 2 SCR 411.

[10] *Marriott International Inc. & Anr v. Ansal Hotels Limited & Anr*, AIR 2000 Del 337 : 2000 (3) Arb LR 369 (Delhi).

[11] *Id.*

[12] *Id.*

[13] *Supra note 10* at p. 33-34.

(a) Quickness in achieving resolution of disputes by a domestic tribunal without any unnecessary and wasteful expenditure;
(b) The parties have been given a choice in accordance with which they wish the arbitral tribunal to proceed with the adjudication of the controversy between the parties, subject only to certain restrictions concerning public interest;
(c) The will of the parties shall prevail without intervention of the court, except as provided under Sections 8 and 9;
(d) The parties shall be treated equally and procedural laws will have no applicability before the arbitral tribunal;
(e) If the challenge to the jurisdiction of the arbitration tribunal does not succeed, the arbitral proceedings shall continue till arbitral award is made;
(f) If the parties cannot choose a venue, the arbitral tribunal shall determine the place of venue having regard to the circumstances of the case;
(g) Review of the award by the arbitral tribunal within the time stated in the Act rather than remittance of the award and to the arbitral tribunal by the court for reconsideration; and
(h) The award itself is a decree unless set aside by the courts on limited grounds available under Section 34.

Arbitration

Arbitration is a voluntary process, where parties to the dispute on mutual consent shall refer their dispute to a third party for his decision. "Arbitration" means any arbitration whether or not administered by a permanent arbitral institution.[14] However, the definition of arbitration given under the Act, 1996 does not provide a clear meaning to the term "arbitration". Hence, following definitions given by various authorities on the subject are noteworthy in ascertaining the meaning of the term "arbitration".

Arbitration is a process of settling an argument or disagreement in which the people or groups on both sides present their opinions and ideas to a third person or group. In other words, it is a process of resolving a dispute or a grievance outside a court system by presenting it for decision to an impartial third party.[15]

In English Law, arbitration is a process of resolution of disputes, which takes place in pursuant to an arbitration agreement among two or more parties, through which parties agrees to bound by the decision of the arbitrator in accordance with the law mutually agreed upon.[16] *It is a private dispute resolution system agreed upon by the parties, contained in the arbitration agreement, such arbitration agreement is contained in a commercial document, and the same must be interpreted having regard to the language used in it.*[17]

Arbitration is the process of solving an argument between people by helping them to agree to an acceptable solution. However, both sides in the dispute have agreed to go to arbitration.[18] *It is a reference to the decision of one or more persons, either with or without an umpire, of some matters, which has arisen because of difference of opinion between the parties.*[19]

The term "arbitration" is used in several senses. It may refer either to a judicial process or to a non-judicial process. A judicial process is concerned with the ascertainment, declaration and enforcement of rights and liabilities as they exist, in accordance with some recognised system of law. An industrial arbitration may well have for its function to ascertain and declare, but not to enforce, what in the arbitrator's opinion ought to be the respective rights and liabilities of the parties and such a function is non-judicial.[20]

In light of above mentioned definitions we can say that, following are the essentials of arbitration:

(a) There should be some disputes among two or more parties.
(b) Parties to the dispute shall refer their dispute to a third party for his decision by an agreement.
(c) Third party to whom the dispute referred is called the arbitrator.
(d) The agreement by which the parties refer the dispute to an arbitrator is called arbitration agreement.
(e) Arbitrator should determine the dispute in a judicial manner after giving due consideration to the evidence produced by the parties and hearing both the sides.

Scope of Arbitration

Arbitration is usually no more and no less than litigation in the private sector. The arbitrator is called upon to find the facts, apply the law and

[14] Section 2(1)(a) of The Arbitration and Conciliation Act, 1996.
[15] Merriam-Webster Dictionary (Online Edition), Available at: www.merriam-webster.com Accessed on 30 July, 2015.
[16] Ronald Bernstein, *Handbook of Arbitration Practice*, 3rd Edn.,1997, Para 2.03, p. 13.
[17] *P Manohar Reddy & Bros v. Maharashtra Krishna Valley Development Corporation*, AIR 2009 SC 1776: (2009) 2 SCC 494.
[18] Cambridge Dictionaries (Online Edition), Available at: http://dictionary.cambridge.org/dictionary/american-english/ Accessed on 30 July, 2015.
[19] *Collins v. Collins*, (1858) 26 Beav 306 : 28 LJ Ch 186.
[20] *Halsbury's Laws of England*, 4th Edn., Vol. 2, para 502.

grant relief to one or other or both of the parties.[21] It is considered to be the civilised way of resolving issues, while avoiding court proceedings. This approach manifests the faith of the parties in the capacity of the tribunal of their choice to decide even a pure question of law.[22]

Where the arbitration process had lingered on for as many as nine years, it was appropriate to fix the time for the arbitration to be concluded within a particular period of time to be determined by the Courts.[23]

However, the arbitration agreement itself provides the procedure for the enlargement of time and if the parties have taken recourse to it and consented to enlargement of time by the arbitrator, the court cannot exercise its inherent power in extending the time limit fixed by the parties in the absence of consent of either of them.[24]

Kinds of Arbitration

Ad-hoc Arbitration

It is an arbitration agreed and arranged by the parties themselves without the recourse to an arbitral institution. It may be either domestic or international.

Domestic Arbitration

It refers to an arbitration which takes place in India, wherein the parties to the arbitration are Indians and the dispute is decided in accordance with the substantive laws of India.

Institutional Arbitration

When a dispute is referred to any particular arbitral institutions through the commercial agreement, then such arbitration proceeding is called 'Institutional Arbitration'. Such arbitration is conducted in accordance with the prescribed rules of the institution and the arbitrator(s) are generally assisted by the secretariat of such institutions.

International Arbitration

These kinds of arbitration may take place either in India or outside India, wherein there are foreign origin ingredients in relation to the parties to the dispute. The applicable law may be either Indian or foreign.

Statutory Arbitration

There are certain statutes which refer any dispute under the said statute to an arbitrator for his decision. In such circumstances, arbitration is

[21] *Northern Regional Health Authority v. Derek Crouch*, [1984] QB 644 CA.
[22] *Tarapore and Co v. Cochin Shipyard Ltd.*, AIR 1984 SC 1072 : (1984) 2 SCC 680.
[23] *NBCC Ltd. v. JG Engineers (P) Ltd*, AIR 2010 SC 640 : (2010) 2 SCC 385.
[24] *Id.*

obligatory, and the arbitration which arises under a statute is called 'Statutory Arbitration'. Provisions of Part - I of the Act, 1996 shall apply to Statutory Arbitration.[25]

Arbitration Agreement

In order to constitute arbitration there shall be an arbitration agreement between the parties to the dispute. Section 2(1)(b) and Section 7 of the Act of 1996 deals with arbitration agreement.

It means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.[26]

(a) An arbitration agreement may be in the form of a separate agreement, or of an arbitration clause in a contract.

(b) An arbitration agreement shall be in writing. An arbitration agreement is treated as in writing if,

  (i) The arbitration agreement is contained in a document and the parties sign the same.

  (ii) The arbitration agreement is contained in an exchange of letters, telex, telegrams or other means of communication, which provide a record of the agreement.[27]

  (iii) The arbitration agreement is contained in an exchange of statements of claim and defence in which the existence of agreement is alleged by one party and not denied by the other party.

Section 2(1)(b) defines "Arbitration Agreement" to mean an agreement referred to in Section 7. Section 2(1)(h) defines "party" to mean a party to an Arbitration Agreement. Section 7(1) clearly indicates that to constitute an Arbitration Agreement, there has to be an agreement i.e., a valid contract. The parties have to be *ad-idem* on referring disputes to arbitration under a written, signed agreement. Section 7(4)(a) of the Act provides that an Arbitration Agreement is in writing if it is contained, inter alia, in a document signed by the parties. Ex-facie the UIBT is not an agreement, but a merely unilateral undertaking of the Plaintiff which is not signed by the Defendant and thus it is not signed by the "parties" as mandated by Section 7(4)(a) of the Act.[28]

A reference in a contract, to a document containing an arbitration clause also constitutes an arbitration agreement. However, the contract should be in

[25] Section 2(4) of the Act, 1996.
[26] *Lucent Technologies Inc. v. ICICI Bank Ltd.*, 2010 (5) RAJ 574 (Del); see also *Jindal Exports Ltd. v. Fuerst Day Lawson Ltd.*, AIR 2010 Del 135 : (2010) ILR 5 Delhi 219.
[27] *Taipack Ltd. v. Ram Kishore Nagar Mal*, 2007 (3) Arb LR 402 (Del).
[28] *Nasir Husain Films (P) Ltd. v. Saregama India Ltd.*, 2007 (5) Bom CR 192 : (2010) 2 CompLJ 412 (Bom).

writing and the reference should be such as to make that arbitration clause part of the contract.[29]

An arbitration agreement could be in different forms. It may be by way of an arbitration clause in a contract or in the form of separate agreement. However, the condition is that, it shall be in writing.[30] Further, it may be noted that, under the scheme of Act, 1996 the arbitration clause is separable from other clauses of the deed. An arbitration clause itself constitutes an agreement.[31]

The scope of Act, 1996 is very wide not just limited to the arbitration agreement in writing but also other agreements as specified under Section 7(4) of the Act. If there is any arbitration agreement in any other enactment for the time being in force, provisions of Act of 1996 will apply, except Sections 40(1), 41 and 43.[32]

An arbitration agreement is a collateral term of a contract, as distinguished from its substantive terms; but nonetheless, it is an integral part of it. However comprehensive, the term of an arbitration clause may be the existence of the contract, and is a necessary condition for its operation and it perishes with the contract. The contract may be *non-est* in the sense that, it never came legally into existence or it was *void ab initio*.[33]

The essential ingredients[34] of an arbitration agreement are as follows:

(a) There should be valid and binding agreements between the parties.

(b) Such an agreement may be contained as a clause in a contract or as a separate agreement.

(c) Such an agreement deemed to be in writing, if it is contained in a document signed by the parties or in an exchange of letters, telegrams, telex, etc. or any other mode of communication which, provide a record of the agreement or an exchange of statements of claim and defence in which, the existence of the agreement is alleged by one party and not denied by other.

(d) 'Parties' intention to refer present and future disputes to arbitration.

(e) The dispute to be referred to an arbitrator is in respect of a defined legal relationship, whether contractual or not.

An arbitration agreement is nothing but a contract. It comes into existence only if both the parties to the contract agree to the terms and conditions of

[29] Section 7(5), the Arbitration and Conciliation Act, 1996.
[30] *Nimet Resources Incorporated v. Essar Steels Ltd.*, AIR 2000 SC 3107 : (2000) 7 SCC 497.
[31] *Firm Ashok Traders v. Gurumukh Das Saluja*, (2004) 3 SCC 155 : AIR 2004 SC 1433.
[32] *Grid Corporation of Orissa v. Indian Change Chrome Ltd.*, AIR 1998 *Ori* 101 : 1998 2 RAJ 416.
[33] *Vinod Shantilal Gosalia v. Anil Vassudev Salgaocar*, 1996 (Suppl.) Arb LR 380 (Bom) **see also** *Union of India v. Kishorilal Gupta*, AIR 1959 SC 1362 : (1960) 1 SCR 493.
[34] *Jayant N Sheth v. Gyaneshwar Apartment co-operative Housing society Ltd., (1999) 1 Bom CR 774.*

the contract. Hence, an arbitration clause cannot be amended unilaterally by either one of the parties to the contract.[35] Further, it may be noted that, so long as the provisions of the contract do not violate the provisions of the Act, nothing prevents parties from giving full effect to it.[36]

In *National Insurance Co. Ltd. v. Boghara Polyfab (Pvt.) Ltd.*,[37] it was held by the Hon'ble Supreme Court that, an arbitration agreement cannot be invoked under the following circumstances:

(a) Where, the obligations under a contract are fully performed and discharged, the performance is acknowledged by full and final discharge voucher / receipt, nothing survives in regard to such discharged contracts;

(b) Where the parties to the contract by mutual agreement accept the performance of altered, modified and substituted obligations and confirm in writing the discharge of contract by performance of the altered, modified or substituted obligations;

(c) Where the parties to an agreement by mutual consent absolve each other from performance of their respective obligation and consequently cancel the agreement and confirm that there are no outstanding claims or disputes.

(d) A contract may be *non-est* in the sense that, it never came legally into existence or it was valid *ab initio*. In that event as the original contract has no legal existence, arbitration clause also cannot operate, for along with the original contract, it is also void. This principle is now to be read subject to Section 16(1)(b).

(e) Though the contract was legally executed the parties may put an end to it as if it had never existed and substituted a new contract for it, solely governing their rights and liabilities. In such an event as the original contract is extinguished by the substituted one and the arbitration clause of the original contract perishes with it.

The words "all disputes" in the arbitration clause were interpreted by the Supreme Court to mean "all disputes" that might be in existence when the arbitration clause is invoked and one of the parties to the agreement gives the arbitration notice to the other. On interpretation of the arbitration clause, it was held that it cannot said to be a one-time measure and it cannot be held that once the arbitration clause is invoked the remedy of arbitration is no longer available in regard to other disputes that might arise in future.

The Supreme Court, however, suggested that if the parties want it to be an one time measure, the arbitration clause can be recast making it clear that the

[35] *NHAI v. Bumihiway DDB Limited*, (2006) 10 SCC 763 : (2006) Supp (6) SCR 586.
[36] *CMC Limited v. Unit Trust of India*, AIR 2007 SC 1557 : (2007) 10 SCC 751.
[37] AIR 2009 SC 170 : (2009) 1 SCC 267.

remedy of arbitration can be taken recourse to only once, at the conclusion of the work under the agreement or at the termination / cancellation of the agreement and at the same time expressly saving in disputes / claims from becoming stale or time barred, etc. and for that reason alone being rendered non arbitrable.[38]

Atlantic shipping clause

Generally, parties provide for a "time-bar clause" in an arbitration agreement providing that, claims to which the agreement applies shall be barred unless some steps to commence arbitration are taken within a stated time. In other words, there may be a clause to the effect that, a party to the agreement cannot claim any right or a party will be discharged from his liability, under the contract on the expiration of a specified time unless some steps to commence arbitral proceeding is taken within the specified period.

This clause is also known as "Atlantic Shipping clause". It takes its name from a decision in *Atlantic Shipping and Trading Co. v. Louis Dreyfus and Co.*[39] In this case, validity of a time-bar clause in an arbitration agreement was challenged and the court held that, it was lawful to have a clause that, the arbitration must be commenced within a certain time and that, if it was not so commenced, then the claim would be barred.

An agreement which prescribes time limit different from those under the Limitation Act, 1963 for enforcing the rights under the contract is void.[40] However, an agreement could provide for extinction of a right or liability under the contract on expiration of stipulated period. Prior to the amendment of Section 28 for the Indian Contract Act, 1872, such a clause did not fall within the mischief of that section as it did not shorten the period of limitation to enforce a right, but brought to an end the right itself.

However, with the enactment of Indian Contract (Amendment) Act 1996, clause of the type known as "Atlantic Shipping Clause" would now become void under amended clause (b) of Section 28 of the Indian Contract Act, 1872.

It is very clear that, every agreement which extinguishes the rights of any party thereto, or discharges any party thereto from any liability, under or in respect of any contract on expiration of a specified period so as to restrict any party from enforcing his rights is void to that extent.[41]

Time-bar clauses are to be strictly construed against the party relying on them. However, in a case where the time-bar clause applies and if the court

[38] *Dolphin Drilling Ltd v. Oil and Natural Gas Corporation Ltd.*, AIR 2010 SC 1296 : (2010) 3 SCC 267.
[39] (1922) 2 AC 250.
[40] Section 28, The Indian Contract Act, 1872.
[41] Section 28(b), The Indian Contract Act, 1872.

is of the opinion that, in the circumstances of the case, undue hardship would be caused, it may on such terms, if any, as the justice of the case may require, extend the time for such period as it thinks proper.[42]

Hence, an arbitration clause indicating that, if the contractor (s) does / do not prefer his / their specific and final claims in writing within a period of 90 days of receiving the intimation from the railways that the final bill is ready for payment, he / they will be deemed to have waived his / their claim(s) and the railway shall be discharged and released of all liabilities under the contract in respect of these claims may not meet the legal challenge whenever the above clause is given effect.[43]

Scott-Avery clause

While parties cannot by contract oust the jurisdiction of the courts, they can always agree that no right of action shall accrue in respect of any differences which may arise between them until such differences have been adjudicated upon by an arbitrator. Such a provision is often termed a *Scott v. Avery* clause.

In other words, neither party shall bring any action or other legal proceedings against the other in respect of any such dispute until such dispute shall first have been heard and determined by the arbitrator(s), in accordance with the Arbitration Rules and an award from the arbitrator(s) shall be a condition precedent to any action or other legal proceedings.

Scott v. Avery[44] was a case where, a policy of insurance on a ship provided that, in the event of loss the amount of loss would be determined by the arbitration and that; the award of arbitrator would be a condition president to the maintainability of any suit. Accordingly, the House of Lords held that, no action was maintainable unless the award was obtained.[45]

SAMPLE ARBITRATION CLAUSES

(a) Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration under the Arbitration and Conciliation Act, 1996, which Rules are deemed to be incorporated by reference into this clause. The number of arbitrators shall be one.

[42] Section 43(3). The Indian Contract Act, 1872.
[43] *Dolphin Drilling Ltd v. ONGC Ltd.* 2010 (1) Arb. LR 370 (SC); See also *Jay Chand Bhasin v. Union of India*, AIR 1983 Del 508 : (1983) ILR 2 Delhi 599.
[44] 10 ER 1121 (1856) : [1856] 5 HLC 811.
[45] *Scott v. Avery*, (1856) 5 HLC 811.

The seat, of arbitration shall be at New Delhi. The language to be used in the arbitration shall be English.

(b) Every dispute, difference or question which may at any time arise between the parties hereto or any person claiming under them, touching or arising out of or in respect of this agreement or the subject matter thereof shall be referred to the arbitration or, if he is unable or unwilling to act, to another arbitrator to be agreed upon between the parties or failing agreement to be nominated by the parties or, failing agreement to two arbitrators, one to be appointed by each party to the difference and in case of difference of opinion between them to an umpire appointed by the said two arbitrators before entering on the reference and the decision of the arbitrator (or such arbitrators, or umpire as the case may be) shall be final and binding on the parties in all respects and the arbitration shall commence accordingly.

(c) In the event of any dispute, difference or question arising out of or in respect of this agreement or the commission of any breach of any terms thereof or of compensation payable therefore, or in any manner whatsoever in connection with it, the same shall be referred to the ..... for arbitration. The decision or award so given shall be binding on the parties hereto.

(d) All disputes arising between the partners as to the interpretation, operation, or effect or any clause in this deed or any other difference arising between the partners which cannot be mutually resolved, shall be referred to the arbitration ..... who shall decide the matter and failing him to any other arbitrator chosen by the partners in writing. The decision of such an arbitrator shall be binding on the partners.

(e) The parties hereto agree that any dispute between them arising from or under the agreement, or as to the interpretation of its meaning or effect, or concerned with the transaction of ..... entered into by this agreement shall be referred to the arbitration who shall pass a detailed award in the matter. The said Shri ..... in whose impartiality the parties have implicit faith and confidence, and decision thereon shall be final and binding on the parties.

(f) All disputes or difference between the parties to this agreement touching or concerning the construction, meaning or effect of these presents, or any matter herein contained, or the transaction hereby completed, or the respective rights and liabilities of the parties, or their enforcement, shall be referred to ..... who shall either decide the dispute or differences himself or appoint an arbitrator or a board of arbitrators, to decide the dispute or difference and refer it to such arbitrator or board for his or their award, which shall be final and binding on the parties.

(g) All disputes or differences between the partners during the continuance of this partnership touching or concerning the construction, operation or effect of any clause in this deed, or the transaction hereby contemplated, or the respective rights and liabilities of the partners, or their enforcement, or if any difference of opinion arises which cannot be resolved and is not provided under this deed as to the advisability of carrying on the business of the partnership or as to the act or omission or neglect of a partner which is calculated to cause loss to the partnership business, or as to the correctness or ascertainment of the accounts and profit and loss of the partnership business, or the appropriation of any funds of the partnership, or the custody of documents, books or other things belonging to the partnership, or the winding-up of the business of partnership, shall be referred to arbitration of Mr. ..... (name and full address) who shall decide the dispute or differences himself or refer it to such other arbitrator or board of arbitrators nominated by him with the consent of the parties to this deed for award which shall be final and binding on the parties.

ARBITRAL AWARD

The term "arbitral award" has not been defined in the Act with any preciseness or exactness. The definition of arbitral award as contained in Section 2(1)(c) of the Act is of inclusive nature. Under Section 2(1) (c), of the Arbitration and Conciliation Act, 1996 an "arbitral award" includes an interim award. 'Award', as defined in the Black's Law Dictionary, is 'the decision or determination rendered by arbitrators or commissioners, or other private or extra judicial deciders, upon a controversy submitted to them'. An award may be contrasted with orders and directions which address the procedural mechanisms to be adopted in the reference. Occasionally the arbitral tribunal may be called upon to give a partial award, particularly where certain items of a claim are admitted by the opposite party.[46]

In view of the definition given under Section 2(1)(c) of the Act, an interim arbitral award is also an award and has, therefore, to be made in the same way as an award after hearing the parties, and on consideration of the evidence adduced.[47] An interim award is a final award at the interim stage, viz. a stage earlier than the stage of final argument.[48] Although an interim

[46] *NTPC Limited v. Simens Atkeingesellschaft*, 2005 (2) RAJ 367 (Del) : 2005 (2) Arb LR 172 (Delhi).
[47] *Deepak Mitra v. District Judge*, 1999 (Suppl.) Arb LR 329 (All).
[48] *M/s Shyam Telecom Ltd. v. Icomm Ltd.*, 2010 (3) Arb LR 53 (Del) : 2010 117 DRJ 642.

award is included in the definition of "arbitral award" contained in Section 2(1)(c) of the Act, in order to treat the order as an interim award it should fulfil the requisites of an award.[49]

All orders or decisions of an arbitral tribunal are not an award. It is only a decision or award which satisfies the requirements of Section 31, are said to be an award. All others are orders or decisions in the course of the proceedings deciding procedural issues or terminating the arbitral proceedings themselves on the ground that, the submissions does not fall within the arrangement or that, there is no agreement or that there is no dispute for adjudication.[50]

Further, an award may be 'interim' or 'partial'. An 'interim award' is the determination of primary issues, such as jurisdiction of the Arbitral Tribunal or the liability of the party, whereas partial award has an immediate monetary impact. The effect of an interim award is that it can be enforced even only some of the issues are decided, while others remain pending determination before the Tribunal. An interim award or a partial award is final with respect to the issues which it decides.

In *Anand Prakash v. Assistant Registrar, Co-operative Societies*,[51] it was made clear that by an interim award, the arbitrator has to decide some of the issues or some of the claims. He may determine the issue of liability by leaving the question of the amount or damages to be dealt with later. In order for it to be an interim award, the arbitral tribunal must determine some part of the disputes referred to it. The court further observed that:

> *By an interim award the arbitrator has to decide a part of the dispute referred to him. He may decide some of the issues or some of the claims referred. He may determine the issue of liability by leaving the question of the amount of damages to be dealt with later. An interim award must determine some part of the dispute referred to the arbitrator. It cannot deal with any other matter. The question of passing an order of stay or an injunction pending the determination of the referred dispute is foreign to the concept of an interim award. The interim order of injunction cannot be held to be an interim award.*[52]

The division bench's decision in the case of *Uttam Singh Duggal and Co. Pvt. Ltd., New Delhi v. Hindustan Steel Ltd.*,[53] held that:

[49] *Asian Electronics Ltd. v. M.P. State Electricity Board*, 2007 (3) Arb LR 22 MP : 2007 (2) MPLJ 144.
[50] *Harinarayan G Bajaj v. Sharedeal Financial Consultants Pvt. Ltd.*, AIR 2003 Bom 296 : 2003 (2) Arb LR 359 (Bom)
[51] AIR 1968 ALL, ER 22, at P. 28.
[52] *Id.*
[53] AIR 1982 MP 206 : ILR (1983) MP 269.

> *before an order of the arbitrators may be held to be an interim award, it must decide a part of the claim or an issue of liability. What the arbitrators did in this case was to decide a preliminary issue relating to their jurisdiction. As the order of the arbitrators does not decide the claim or even any part of the claim of any issue of liability, it cannot be held to be an interim award.*

However, an order of the arbitrator on a preliminary issue relating to jurisdiction is not to be construed as an interim award and no appeal in such a case shall be maintainable.[54]

If an order on the point of jurisdiction of the arbitral tribunal was to be an interim award under the Act, Section 37 of the Act would not have provided for appeal against an order whereby, the arbitral tribunal holds that it has no jurisdiction. While enacting Section 16 of the Act, the legislature was conscious that the arbitral tribunal could hold in its favour or against itself on the point of jurisdiction. If the legislature had to treat an order under Section 16 to be an interim award, it would not have provided for an appeal under Section 37 where the arbitral tribunal allows the plea that the arbitral tribunal does not have jurisdiction and the legislature would have left challenge to such order as well under Section 34 of the Act. It cannot be accepted that the order under Section 16 would change its nature upon two different contingencies, that is to say, where the order rejects the plea of no jurisdiction it becomes an interim award and where the arbitral tribunal allows the plea of no jurisdiction it is not an interim award and only appealable. Therefore, it can easily be interpreted that in either case it is only an interim order and not an interim award.[55]

The Supreme Court held that an award made by the arbitrator disregarding the terms of the reference or the arbitration agreement or the terms of the contract would suffer from a jurisdictional error; that an arbitrator cannot award an amount which is ruled out or prohibited by the terms of the agreement; because of a specific bar stipulated by the parties in the agreement that claim could not be raised, even if it is raised and referred to arbitration because of a wider arbitration clause, such claim amount cannot be awarded as the agreement is binding on the arbitrator, and the arbitrator has to adjudicate as per the agreement.[56]

The challenger or the objector has to await an arbitral award to be rendered before carrying the challenge or objection to court; or, if the challenger or objector is fortuitous in the arbitral tribunal rendering an interim award,

[54] *Id.*
[55] *Union Of India & Another v. M/S. East Coast Boat Builders & Engineers Ltd.*, ILR 1998 Delhi 797 : 1998 (47) DRJ 333.
[56] *Rajasthan State Mines and Minerals Ltd. v. Eastern Engineering Enterprises*, (1999) 9 SCC 283 : AIR 1999 SC 3627.

the challenge or objection can be canvassed in proceedings for annulment of the interim award which, by dint of the definition in Section 2(1)(c) of the 1996 Act, is capable of being subjected to proceedings under Section 34 thereof.[57] The order of the arbitrators holding that the claim is barred under a limitation clause is also an award under Section 2(1)(c) of the Act and, therefore, it is binding on the applicant, if no step is taken to set aside the award by the applicant.[58]

An award shall be made in writing and shall be signed by the members of the arbitral tribunal.[59] In other words, an award should be in writing, which means that, the person who made the same shall sign it.[60] An award cannot be said to be made in law till it is made known to third parties or at least some step is taken with regard to it which makes it impossible for the arbitrator to make any alterations therein, whether by communicating the contents of the award to the parties or filing it in court or some other way,[61] i.e., an award is made when it is written out and signed.

The award of the arbitrators should be read as a whole and portion out of it cannot be picked up to show that the findings of the arbitrators were inconsistent with those portions.[62] If an award is made by a commercial man, then it has to be construed liberally because it cannot be forgotten that, the arbitrator has no legal training.[63] If *prima facie* the award is good, it is for the defendant to show that it is uncertain.[64] However, an award must determine all the differences which the parties by their agreement referred to arbitration, but it must not purport to determine matters which are not referred.[65]

ARBITRAL TRIBUNAL

Under Section 2(1)(d) of the Arbitration and Conciliation Act, 1996, an "arbitral tribunal" means a sole arbitrator or a panel of arbitrators. Under Section 6 of the Act, in order to facilitate the conduct of the arbitral proceedings, the parties, or the arbitral tribunal with the consent of the parties, may arrange for administrative assistance by a suitable institution or person.

[57] *Niranjan Lal Todi v. Nandlal Todi And Others*, (2014) 3 CALLT 314 (HC) : 2014 (4) CHN (CAL) 489.
[58] *Dr. E. Muralidharan v. Venkataraman And Company And Anr.*, (2006) 3 MLJ 354 : 2006 (3) Arb LR 477 (Madras).
[59] Section 31(1), the Arbitration & Conciliation Act, 1996.
[60] *Fateh Muhammad v. Amar Nath*, AIR 1933 Lah 777.
[61] *Nalini Ranjan Guha v. Union of India*, AIR 1958 Cal 624 (DB) : 93 Cal LJ 373.
[62] *Ganesh Singh v. Bhikham Singh*, AIR 1928 Oudh 1 (FB) : (1928) ILR 3 LUCK 1.
[63] *Selby v. Whitebread & Co.*, (1917) 1 KB 736.
[64] *Union of India v. Jai Narain Misra*, AIR 1970 SC 753 : (1969) 2 SCR 588.
[65] *Halsbury's Laws of England*, 4th Edn., Vol 2, para 610.

Interpretation of the term 'arbitrator' cannot be detached from the context in which it occurs and the same cannot be interpreted in a vacuum, and has to be made in the light of other provisions of the agreement. Where, one clause of the agreement speaks of the expression 'an arbitrator' and the other clause stipulates that, arbitration shall be conducted in accordance with the arbitration procedure of the named institution, which provided for a panel of three arbitrators, it was held that, adjudication of disputes shall be made by an arbitral tribunal of three members.[66]

> *In modern practice, despite the advantages of a sole arbitrator, particularly in arbitrations involving heavy stakes, preference is for appointment of three arbitrators, albeit not without rationale. Particularly, in the area of "international commercial arbitration involving complex problems peculiar to special types of disputes, e.g., engineering, construction, maritime and international trading disputes, a sole arbitrator, many a time may not be suitable for resolution of such disputes. In such situations, the common practice is to appoint a tribunal comprising of three arbitrators. Even though it may involve more expense and delay than sole arbitrator arbitration, it is still preferred as it is more effective. An arbitral tribunal of three arbitrators is likely to prove more satisfactory to the parties, and the ultimate award is more likely to be accepted to them.*[67]

COURT

For the purpose of the Act, 1996 '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.[68]

The dispute between the parties arises on the issue as to whether the expression 'court' for the purposes of Section 2(1)(e) is the Court which has jurisdiction over the place of arbitration or whether it is the place where the cause of action has arisen. While interpreting the provisions of Section 2(1)(e) in *Somaiya Organics (India) Ltd. v. State of U.P.*,[69] the Supreme Court made a distinction between the expression "subject matter of the arbitration" and the expression "subject matter of the suit". The Court observed[70] that:

[66] *Gayatri Projects Ltd. v. State of Orissa* 2004 (2) Arb LR 394 (Ori) : . : 97 (2004) CLT 665.
[67] Redfern and Hunter, *Law and Practice of International Commercial Arbitration*, 4th Edn., 2004, p. 185 quoted in *Sime Darby Engineering Sdn. Bhd. v. Engineers India Ltd.*, 2009 (7) SCC 545 : AIR 2009 SC 3158.
[68] Section 2(1)(e), The Arbitration and Conciliation Act, 1996.
[69] (2001) 5 SCC 519 : AIR 2001 SC 1723.
[70] *Bharat Aluminum Company v. Kaiser Aluminum Technical Services Inc. (BALCO)*, (2012) 9 SCC 552 : 2012 (8) SCALE 333.

The term "subject matter of the arbitration" cannot be confused with "subject matter of the suit". The term "subject matter" in Section 2(1)(e) is confined to Part I of the Act, 1996. It has a reference and connection with the process of dispute resolution. Its purpose is to identify the courts having supervisory control over the arbitration proceedings. Hence, it refers to a court which would essentially be a court of the seat of the arbitration process. In our opinion, the provision in Section 2(1)(e) has to be construed keeping in view the provisions in Section 20 which give recognition to party autonomy. Accepting the narrow construction as projected by the learned counsel for the appellants would, in fact, render Section 20 nugatory. In our view, the legislature has intentionally given jurisdiction to two courts i.e. the court which would have jurisdiction where the cause of action is located and the courts where the arbitration takes place. This was necessary as on many occasions the agreement may provide for a seat of arbitration at a place which would be neutral to both the parties. Therefore, the courts where the arbitration takes place would be required to exercise supervisory control over the arbitral process. For example, if the arbitration is held in Delhi, where neither of the parties are from Delhi, (Delhi having been chosen as a neutral place as between a party from Mumbai and the other from Kolkata) and the tribunal sitting in Delhi passes an interim order under Section 17 of the Arbitration Act, 1996, the appeal against such an interim order under Section 37 must lie to the courts of Delhi being the courts having supervisory jurisdiction over the arbitration proceedings and the tribunal. This would be irrespective of the fact that the obligations to be performed under the contract were to be performed either at Mumbai or at Kolkata, and only arbitration is to take place in Delhi. In such circumstances, both the courts would have jurisdiction i.e. the court within whose jurisdiction the subject matter of the suit is situated and the courts within the jurisdiction of which the dispute resolution i.e. arbitration is located.

The Supreme Court held that the provisions of Section 2(1)(e) are purely jurisdictional in nature and can have no relevance to the question whether any part of the cause of action has taken place outside India. The observations which have been extracted above, clearly establish that the Court where the arbitration takes place would be required to exercise supervisory control over the arbitral process. The Supreme Court has held that the Parliament has given jurisdiction to two courts – the Court which would have jurisdiction where the cause of action is located and the Court where the arbitration takes place.

It would not be appropriate, while applying the ratio of the judgment in BALCO to hold that the reasons which are contained in the judgment would operate with prospective effect. What the Supreme Court has essentially ordered, while moulding the reliefs is that the declaration of law to the effect that Part - I shall apply only to those arbitrations where the place of

arbitration is India, shall take prospective effect after the date of the judgment. But equally, it would be impermissible to hold that the interpretation which has been placed by the Supreme Court on the provisions of Section 2(1)(e) would apply only prospectively.[71]

While the judgment in *Bhatia International v. Bulk Trading S.A. and Anr.*[72] has been overruled with prospective effect, the decision of the Supreme Court independently considered various other aspects, including *inter alia* as to whether within the meaning of Section 2(1)(e), the Court of the place of arbitration would have jurisdiction of a supervisory nature that would comprehend proceedings under Section 9 of the Act. The decision on this aspect and the reasoning of the Supreme Court is declaratory and cannot be regarded as being prospective. Hence, the Bombay High Court opined that, the same being the Court within the meaning of Section 2(1)(e), has jurisdiction to entertain an application under Section 9, once it is held that parties by their agreement had accepted that the place of arbitration would be Mumbai.[73]

In the case of *Fountain Head Developers,*[74] the Full Bench of the Bombay High Court dealt with the question while interpreting Section 2(1)(e). There the Bombay High Court considered *Patel Engineering*[75] and ultimately came to a conclusion that the District Judge alone could be the principal Civil Court and not any other Judge subordinate to him.

Supreme Court further observed that, although not defined under the said Act, 1996 within the meaning of Section 2(1)(e), the term 'Court' would certainly include other judicial authorities like Special Tribunals like Consumer Forum, etc.[76]

INTERNATIONAL COMMERCIAL ARBITRATION

Section 2(1)(f) of the Act defines the term "International Commercial Arbitration" as an arbitration relating to disputes arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India and where at least one of the parties is-

(i) an individual who is a national of, or habitually resident in, any country other than India; or

[71] *Konkola Copper Mines Plc v. Stewarts and Lloyds of India Ltd.*, 2013 (4) Arb LR 19 (Bom) : 2013 (5) Bom CR 29.
[72] (2002) 4 SCC 105 : AIR 2002 SC 1432 : (2002) 2 SCR 411.
[73] *Konkola Copper Mines Plc v. Stewarts And Lloyds Of India*, 2013 (4) Arb LR 19 (Bom) : 2013 (5) Bom CR 29.
[74] *Fountain Head Developers v. Maria Arcangela Sequeira* 2007 (2) ALR 362 : AIR 2007 Bom 149.
[75] *S.B.P. and Company v. Patel Engineering Limited* AIR 2005 SCW 5932 : AIR 2006 SC 450.
[76] *Fair Air Engineers (P) Ltd. and another v. N.K. Modi* 1996 (6) SCC 385 : AIR 1997 SC 533.

(ii) a body corporate which is incorporated in any country other than India; or

(iii) a company or an association or a body of individuals whose central management and control is exercised in any country other than India; or

(iv) the Government of a foreign country;

Disputes arising out of commercial legal relationship where at least one of the parties is a body corporate which is incorporated in any country other than India is an International Commercial Arbitration.[77] It is for the arbitrator to determine whether an "international commercial arbitration agreement" exists or not. Disputed questions of fact cannot be agitated in a writ petition.[78]

An arbitration agreement will be considered as international arbitration agreement where one of the parties is a foreigner, notwithstanding the fact that, the arbitration is to take place in a particular country.[79]

By virtue of Section 2(2) of the Act, 1996, Part-I of the Act shall apply to all arbitration proceedings conducted in India. Hence, it is applicable to both domestic as well as international commercial arbitration. However, Act does not differentiate between "domestic arbitration" and "international commercial arbitration". When the parties have agreed by the terms of the arbitration agreement entered into between them they are bound to such an agreement.[80]

In the case of *Bharat Aluminium Co. Ltd v. Kaiser Aluminium Technical Services Ltd.*,[81] the Hon'ble Supreme Court overruled its earlier judgments rendered in *Bhatia International v. Bulk Trading SA*, [82] as well as *Venture Global case*[83] and held that, Part-I of the Act applied only to the arbitrations held in India,[84] where an International Commercial Arbitration is held in India, the provisions of Part-I will compulsorily apply, and the parties are free to deviate only to the extent permitted by the provisions of Part-I.[85]

[77] *NHAI v. Sheladia Assoc. Inc.*, 2010 (2) RAJ 527 (Del)

[78] *Van Oord ACZ India Pvt. Ltd. v. Gujarat Adani Port Pvt. Ltd.*, 2005 (2) RAJ 303 (Guj) : AIR 2005 Guj 284.

[79] *GAIL v. SPIE CAPAG SA*, AIR 1994 Del 75 : (1994) ILR 2 Delhi 131.

[80] *Progressive Construction Ltd. v. The Louis Berger Group Inc.*, AIR 2012 AP 38 : 2012 (3) Arb LR 357 (AP).

[81] (2012) 5 RAJ 1 (SC).

[82] AIR 2002 SC 1432: (2002) 4 SCC 105: (2002) 2 SCR 411.

[83] AIR 2008 SC 1061 : (2008) 4 SCC 190.

[84] Risha Sharma, "Enforcement of Foreign Arbitration Awards in India, Malaysia and Indonesia", The Lex-Warrier: Online Law Journal, LW (2013) October 7, Available at: http://lex-warrier.in/2013/10/foreign-arbitration-awards-malaysia-indonesia/ Accessed on 30 July, 2015.

[85] *National Agricultural Co-op. Marketing Federation India Ltd. v. Gains Trading Ltd*, (2007) 5 SCC 692 : AIR 2007 SC 2327.

It was held that, Section 2(2) provided that, Part-I will apply where the place of arbitration is in India. It does not provide where the place of arbitration is not in India. It also does not provide that, Part-I will "only" apply where the place of arbitration is in India. It is therefore clear that Part-I will apply to arbitrations which takes place in India but does not provide that, provisions of Part-I will not apply to arbitrations which takes place out of India. By omitting to provide that, Part-I will not apply to international commercial arbitrations which takes place outside India, the effect would be that, Part-I would also, apply to international commercial arbitrations held out of India. Thus, in respect of arbitrations which take place outside India even the non-derogable provisions of Part-I can be excluded. Such an agreement may be express or implied.[86]

If an agreement is entered between an Indian Company and a foreign company, and the agreement is governed by a foreign law and the arbitration seat is outside India, it amounts to a clear exclusion of Part-I of the Act, 1996.[87] The provisions of Part-I of the Act would equally applicable to International Commercial Arbitrations held outside India, unless any of the said provisions are excluded by agreement between the parties expressly or by implication.[88]

Further, the court opined that, an International Commercial Arbitration usually involves, five different legal systems like:

(a) The law governing the Partie's capacity to enter into an arbitration agreement;

(b) The law governing the arbitration agreement and the performance of that agreement;

(c) The law governing the existence and proceedings of the arbitral tribunal – the "curial law" of the arbitration (*lex arbitri*);

(d) The law or the relevant legal rules, governing the substantive issues in dispute – the "proper law of the contract"; and

(e) The law governing recognition and enforcement of the award.[89]

Bhatia International case laid down the principle that in cases of international commercial arbitrations held outside India, the provisions of Part-I would apply unless the parties by an agreement express or implied, exclude all or any of its provisions.[90]

[86] *Bhatia International v. Bulk Trading SA*, AIR 2002 SC 1432 : (2002) 4 SCC 105.

[87] *Dozco India Pvt. Ltd. v. Doosan Infracore Co. Ltd.*, 2010 (10) SCALE 691 : (2011) 6 SCC 179.

[88] *Venture Global Engineering v. Satyam Computers Services*, AIR 2008 SC 1061 : (2008) 4 SCC 190.

[89] *Max India Ltd. v. General Binding Corporation*, 2010 (2) RAJ 289 (Del) (DB) : 2009 (3) Arb LR 162 (Delhi).

[90] *Bhatia International v. Bulk Trading S. A. & Anr.*, (2002) 4 SCC 105 : AIR 2002 SC 1432 : (2002) 2 SCR 411.

In the subsequent judgment of the Constitution Bench in *Bharat Aluminum Company v. Kaiser Aluminum Technical Services Inc.*,[91] the Supreme Court held that:

(a) The Act of 1996 adopts the territorial principle;

(b) The seat of arbitration constitutes the centre of gravity of the arbitration though the venue of the arbitration may be at one or more convenient locations;

(c) Though Section 2(2) does not stipulate that Part-I shall apply only where the place of arbitration is in India yet, the absence of the word 'only' does not change the content of Section 2(2) as limiting the application of Part-I to arbitration where the place/seat is in India;

(d) The choice of another country as the seat of arbitration inevitably imports an acceptance that the law of that country relating to the conduct and supervision will apply to the proceedings;

(e) If the seat of arbitration is outside India, Part-I would not be applicable, nor would it enable Indian courts to exercise supervisory jurisdiction over the arbitration or the award. This necessarily follows from the fact that Part-I applies only to arbitrations having their seat/place in India;

(f) There is no existing provision in the Civil Procedure Code, 1908 or in the Act of 1996 for the Court to grant an interim measure under Section 9 in an arbitration which is to take place outside India, even though the parties by agreement may have made the Act of 1996 as the governing law of arbitration.

Having regard to these principles, the Supreme Court held that the judgment in *Bhatia International* and the subsequent judgment taking the same view in *Venture Global Engineering v. Satyam Computer Services Ltd.*,[92] did not lay down the correct principle of law. Hence, Part - I of the Act of 1996 was held to be applicable only to all arbitrations which take place within the territory of India and in a foreign seated international commercial arbitration, no application for interim measure would be maintainable under Section 9 or any other provision.

However, the Supreme Court held that since the judgment in *Bhatia International* had held the field since 13 March, 2002 and had been followed by the High Courts and in *Venture Global Engineering*, in order to render complete justice, the law declared by the Court would apply prospectively to all arbitration agreements executed thereafter.

[91] (2012) 9 SCC 552 : 2012 (8) SCALE 333.
[92] (2008) 4 SCC 190 : AIR 2008 SC 1061.

SAMPLE ARBITRATION CLAUSES

(a) "All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules."[93]

(b) **Arbitration without emergency arbitrator**: "All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules. The Emergency Arbitrator Provisions shall not apply."[94]

LEGAL REPRESENTATIVE

'Legal representative' means a person, who, in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased, and, where a party acts in a representative character, the person on whom the estate devolves on the death of the party so acting.[95]

Chhattisgarh High Court in *New India Assurance Co. Ltd. v. Smt. Jasinta Kujur and Ors.*,[96] observed that, the definition of legal representative under Section 2(1)(g) of the Arbitration and Conciliation Act, 1996, is similar to that under Section 2(11) of the Code of Civil Procedure, 1908, i.e., 'legal representative' means a person who in law represents the estate of a deceased person, and includes any person who intermeddled with the estate of the deceased and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued.

The definition contained in Section 2(11) Code of Civil Procedure, 1908 is inclusive in character and its scope is wide, it is not confined to legal heirs only. Instead it stipulates that a person who may or may not be legal heir competent to inherit the property of the deceased can represent the estate of the deceased person. It includes heirs as well as persons who represent the estate even without title either as executors or administrators in possession of the estate of the deceased. All such person would be covered by the expression 'legal representative'.[97] The apex court in the matter of *Gujarat*

[93] Rules of Arbitration, International Chamber of Commerce, Available at: http://www.icc.se/skiljedom/rules_arb_english.pdf
[94] *Id.*
[95] Section 2(1)(g), The Arbitration and Conciliation Act, 1996.
[96] AIR 2007 Chh 107 : 2008 ACJ 1946.
[97] *Custodian of Branches of BANCO National Ultramarino v. Nalini Bai Naique*, AIR 1989 SC 1589 : 1989 Supp (2) SCC 275.

State Road Transport Corporation v. Ramanbhai Prabhatbhai and Anr.,[1] observed that, a legal representative is one who suffers on account of death of a person due to a motor vehicle accident and need not necessarily be a wife, husband, parent and child. The Court further held that the provisions are in consonance with the principles of law of torts that every injury must have a remedy.

PARTY

"Party" means a party to an arbitration agreement.[2] In other words, the word 'Party' is defined in Section 2(1)(h) of the Act to mean a "party to an arbitration agreement" and therefore, ordinarily, the expression 'Party' as used in Section 34 of the Act must carry the same meaning, namely, a party to the arbitration agreement or award.[3] The expression 'party' is used in Section 34(2) in its definitional sense to mean a party to the arbitration proceedings and does not include a third person, who is not a party to the agreement.

However, the opening part of Section 2(1)(h) of the Act shows, the definitional meaning is subject to anything repugnant in the subject or context. We must, therefore, see whether there is anything in Section 34 or in the context in which it occurs which should compel us to place a broader meaning different from the one given to it in Section 2(1)(h). In our opinion, there is nothing in the subject or context of Section 34 which would suggest us to depart from the definitional meaning of the expression 'party'.[4]

Section 34 of the Act read with the definition of 'party' in Section 2(1)(h) of the Act makes it amply clear that only a party to the arbitration agreement can invoke the provisions of Section 34 of the Act. A third party has no *locus standi* to challenge the award under Section 34 of the Act.[5]

However, in view of Section 2(1)(h) of the Act, the importance of the word 'party' can be judiciously expanded, if the context so warrants. Hence, the word 'party' may include not only the signatory to the arbitration agreement, but also a party non-signatory to the agreement. According to the learned single judge, the contextual facts and circumstances warrant expansion of the definition found under Section 2(1)(h) of the Arbitration and Conciliation Act, 1996 to include the Government of India, which is a party non-signatory for the purpose of challenging the award under Section 34 of the Act.[6]

[1] AIR 1987 SC 1690 : (1987) 3 SCC 234.
[2] Section 2(1)(h), The Arbitration and Conciliation Act, 1996.
[3] *Mukesh Nanji Gala And 2 Ors v. M/S Heritage Enterprises and Anr.*, 2015 (2) Arb LR 219 (Bom) : 2015 (2) Bom CR 123.
[4] *Sohan Lal v. Lt. Governor, Delhi*, AIR 1991 SC 1592 : 1991 Supp (2) SCC 295.
[5] *ITI Ltd v. Siemens Public Communications Network Ltd.*, (2002) 3 SCR 1122 : AIR 2002 SC 2308.
[6] *Chennai Container Terminal Pvt. Ltd .etc. v. Union of India and Ors.*, AIR 2007 Mad 225 (DB).

As observed by the Supreme Court in *Sundaram Finance Limited v. NEPC Limited*,[7] the Arbitration and Conciliation Act, 1996 is based on UNCITRAL Model. Hence, the provisions of this Act must, therefore, be interpreted and construed independently. In order to get help in construing these provisions it is more relevant to refer to the UNCITRAL Model Law.

SECTION 2(2) – SCOPE

Under Section 2(2) of the Arbitration and Conciliation Act, 1996, Part-I of the Act, shall apply to all the arbitrations where the place of arbitration is in India. Section 2(2) of the Act cannot be read in isolation and it must be read along with Section 2(5) of the Act.[8] Section 2(5) of the Act reads as under:

> *"Subject to the provisions of Sub-section (4), and save insofar as is otherwise provided by any law for the time being in force or in any agreement in force between India and any other country or countries, this Part shall apply to all arbitrations and to all proceedings relating thereto."*

The provisions of Part-I are by virtue of Section 2(2) explicitly made applicable to domestic arbitration only and held that provisions of Part-I were by nature of Section 2(2) of the Act made applicable only to domestic arbitrations and consequently no order can be passed under Section 9 of the Act in a case where the place of arbitration was outside India.[9] It was observed that, there is no provision in Part-II, Chapter I or any other portion of the 1996 Act applicable to foreign arbitrations under the New York Convention, which gives the Court such a power.[10]

Though Section 2(2) does not stipulate that Part-I shall apply only where the place of arbitration is in India yet, the absence of the word 'only' does not change the content of Section 2(2) as limiting the application of Part-I to arbitration where the place / seat is in India.[11]

Hence, it is evident from the reading of sub-section 2 that, Part-I of the Act, 1996 will apply only in cases where the place of arbitration is in India and provisions of sub-sections 3, 4 and 5 shall be read accordingly, and cannot widen the scope thereof to include arbitral proceedings concluded outside

[7] 1999 (2) SCC 479 : AIR 1999 SC 565.
[8] *Marriott International Inc. & Anr v. Ansal Hotels Limited & Anr*, AIR 2000 Del 337 : 86 (2000) DLT 873.
[9] *Keventer Agro Limited v. Seagram Company Limited*, Decided on January 27, 1998 (Calcutta High Court – Unreported)
[10] *Id.*
[11] *Bharat Aluminum Company v. Kaiser Aluminum Technical Services Inc.* (BALCO), (2012) 9 SCC 552 : 2012 (8) SCALE 333.

India.[12] By virtue of the provisions of Section 2(2), Part-I of the Act, 1996 is applicable only when the place of arbitration is in India irrespective of the fact of arbitration being an International Commercial Arbitration.[13] However, it is clear from the proviso to Section 1(2) of the Act, 1996 that, Part-I shall apply to a case of International Commercial Arbitration relating to the State of Jammu and Kashmir.[14]

The language employed by the Parliament in drafting sub-section 2 of this section is clear and unambiguous. Saying that, Part-I would apply where the place of arbitration is in India, tantamounts to saying that, it would not apply where the place of arbitration is not in India.[15] Now it is fairly established that, when an arbitration agreement is silent as to the law and procedure to be followed in implementing the arbitration agreement, the law governing said agreement would ordinarily be the same as the law governing the contract itself.[16]

SECTION 2(3)

This Part shall not affect any other law for the time being in force by virtue of which certain disputes may not be submitted to arbitration.[17] This provision plainly means that Part-I of the Act shall not affect any other law for the time being in force by virtue of which certain disputes may not be submitted to arbitration. To put it differently, if any law which is for the time being in force were to provide, either expressly or by necessary implication, that the specified disputes may not be submitted to arbitration, in that case, in spite of the non-obstante provision in Section 5 of the Act, that law has been saved by virtue of Section 2(3) of the Act of 1996.

On a conjoint reading of Sections 2(3) and 5 of the Act of 1996, it is clear that any other law for the time being in force by virtue of which certain disputes may not be submitted to arbitration, such law is saved and not affected by the non-obstante clause in Section 5 of the Act of 1996.

Section 2(3) of the Act of 1996 carves out those laws, which are for the time being in force, by virtue of which specified disputes may not be submitted to arbitration. Such laws have been saved on their own by virtue of this provision. Having been saved by Section 2(3), the question of such law being repugnant to Section 5 of the Act of 1996 does not arise. To be repugnant to

[12] *East Coast Shipping Co. v. MJ Scrap Pvt. Ltd.*, 1997 (3) ICC 429 (Cal).
[13] *NHAI v. Sheladia Assoc. Inc.*, 2010 (2) RAJ 527 (Del).
[14] *Dominant Offset Pvt. Ltd. v. Adamovske Strojirny AS*, 1997 (2) Arb LR 335 (Del) : 68 (1997) DLT 157.
[15] *Shreejee Traco (I) Pvt. Ltd. v. Paperline International Inc.*, (2003) 9 SCC 79.
[16] *Indtel Technical Services Pvt. Ltd. v. WS Atkins Rail Ltd.*, (2008) 10 SCC 308 : AIR 2009 SC 1132.
[17] *Carona Limited v. Sumangal Holdings*, 2007 (4) MhLJ 551 : 2007 (4) Bom CR 265.

Section 5 of the 1996 Act, the law should be such that there is no restriction of submitting of specified disputes to arbitration.[18]

While sub-section 3 seeks to exclude certain disputes from the operation of Part-I of the Act, 1996, sub-section 4 seeks to extend its scope to certain arbitral proceedings provided by the statute.[19] Sub-section 3 specifically saves the state law in respect of specified matters to which *Madhya Pradesh Madhyastham Adhikaran Adhiniyam* of 1983 applies. Sections 3 and 7 of said Act specifically provides jurisdiction to the tribunal constituted under the Act, 1983 in respect of the disputes which falls under the said Act.[20]

SECTION 2(4)

Under this sub-section, Part-I of the Act, except sub-section (1) of Section 40, Sections 41 and 43 shall apply to every arbitration under any other enactment for the time being in force, as if the arbitration were pursuant to an arbitration agreement and as if that other enactment were an arbitration agreement, except in so far as the provisions of this Part are inconsistent with that other enactment or with any rules made there under.

This section is in *pari materia* to Section 46 of the Arbitration Act, 1940. However, both the provisions are in so far material to provide that, the provisions of the Act shall apply to arbitration under any other enactment for the time being in force except in so far as the Act is inconsistent with that other enactment or with any rules made there under.[21]

The expression "any other enactment" referred under this Section is one which merely provides for the reference of a dispute to arbitration and not to a self-contained enactment like Section 19 of the Defence of India Act, 1939 and the Rules made thereunder.[22] Hence, provisions of Arbitration Act do not apply to arbitration under Section 19 of the Defence of India Act, 1939.[23]

What this section provides is that, in the absence of any provision relating to any matter connected with an arbitration in the special Act, i.e., the Defence of India Act, the provisions of the Arbitration Act shall be followed to the extent of the omission; and for that purpose, a statutory award made under any other enactment shall be deemed to have been made under the Act.

[18] *Vijay Kumar Sharma & Ors. v. State of Karnataka & Ors.*, (1990) 2 SCC 562 : AIR 1990 SC 2072.
[19] *East Coast Shipping Co. v. MJ Scrap Pvt. Ltd.*, 1997 (3) ICC 429 (Cal).
[20] *DD Sharma v. MP Rural Road Development Authority*, AIR 2008 MP 72 : 2008 (1) Arb LR 592 (MP).
[21] *Stock Exchange, Mumbai v. Vinay Bubna*, AIR 1999 Bom 266 : 1999 (2) Bom CR 597.
[22] *Union of India v. Ramdas Oil Mills*, AIR 1968 Pat 352 (DB).
[23] *Ibid.*

While sub-section 3 seeks to exclude certain disputes from the operation of Part-I of the Act, 1996, sub-section 4 seeks to extend its scope to certain arbitral proceedings provided by the statute.[24] So far as sub-section 4 is concerned, it brings within the scope of the Act all arbitral proceedings provided for in other enactments except in cases where the provisions of Part-I are inconsistent with any other enactment or any rules made thereunder.[25]

SECTION 2(5)

Subject to the provisions of sub-section (4), and save in so far as is otherwise provided by any law for the time being in force or in any agreement in force between India and any other country or countries, Part-I of the Act, 1996 shall apply to all arbitrations and to all proceedings relating thereto. Language of this section is *pari materia* with the corresponding provisions of Arbitration Act, 1940. *Prima facie* this section governs references to arbitration by parties in a pending suit without reference to or knowledge of the court.[26]

The Act, 1996 does not apply to an award made before it came into force.[27] Under this section, all arbitrations have to be conducted according to the provisions of the Act and arbitration in violation of the Act become invalid.[28] While interpreting the statutes the courts must always presume that, the legislature in its wisdom intended that, every part of the same should have effect. To say that, sub-section 5 would lift the bar imposed under sub-section 3, irrespective of the place of arbitration would run contrary to such well-established precepts.[29]

SECTION 2(6) – CONSTRUCTION OF REFERENCES

Under Section 2(6) of the Arbitration and Conciliation Act, 1996, except as under Section 28, the parties are free to determine certain issues, and that freedom would include the right of the parties to authorise any person including an institution to determine that issue. Section 20 is the provision which sees that the parties are free to agree on the place of arbitration and failing upon any agreement, then under sub-section (2), it has to be determined depending upon the circumstances of the case and convenience of the parties.[30]

[24] *East Coast Shipping Co. v. MJ Scrap Pvt. Ltd.*, 1997 (3) ICC 429 (Cal).
[25] *Id.*
[26] *Ramayya v. Venkatachellamma*, AIR 1953 Mad 834 : (1953) I MLJ 572.
[27] *Manji Ramji v. H M Mehta & Co.*, AIR 1943 Bom 463 : 1943 (45) Bom LR 940.
[28] *Phool Narain v. Madan Gopal*, AIR 1955 Raj 162 (DB).
[29] *East Coast Shipping Co. v. MJ Scrap Pvt. Ltd.*, 1997 (3) ICC 429 (Cal).
[30] *Sanshil Chemicals Industry v. Oriental Carbons and Chemicals Ltd.*, 2001 (3) SCC 341 : AIR 2001 SC 1219.

If the parties have not by themselves reached a conclusion with regard to the manner in which the arbitral proceedings should be governed for the resolution of disputes, they may authorise any person, including an institution to determine the manner in which the issues should be resolved.

Such determination by a person or an institution duly authorised by the parties shall be final and binding on both the parties to an arbitration agreement. It may be submitted that, the provisions of this sub-section are applicable subject to the provisions contained in Section 28 of the Act.

A conjoint reading of Section 2(6) and Section 20 leads to the conclusion that in the event where the parties do not agree with regard to the place of arbitration, though they are free to determine the same, then they have the right to authorise any person, including an institution, in the case at hand, the Joint Committee, is for deciding the venue of the arbitration, and such decision (of the Committee) will not partake the character of adjudication of a dispute arising out of the agreement, so as to clothe it in the character of an award.[31]

SECTION 2(7)

An award made under Part-I of this Act shall be considered as a domestic award. Though the term 'domestic award' is nowhere defined under this Act, it is simple to note that a domestic award is the one where both the parties to the said arbitration are Indians. Since all awards made under the provisions of Part-I of this Act are considered to be a domestic award, for recourse to Sections 34 and 37 for setting aside of the award, appeals shall be applicable. Similarly such awards shall be enforced under the provisions of Section 36 of this Act.

Section 9 does suggest that once an award is made an application for interim measure can only be made if the award is a "domestic award" as defined in Section 2(7) of the said Act. Thus, where the legislature wanted to restrict the applicability of Section 9, it has done so specifically.[32]

The provisions of Part-I would apply to all arbitrations and to all proceedings relating thereto. Where such arbitration is held in India, the provisions of Part-I would compulsorily apply and parties are free to deviate only to the extent permitted by the derogable provisions of Part-I. In cases of international commercial arbitrations held out of India, provisions of Part-I would apply unless the parties by an agreement whether express or implied, exclude all or any of its provisions. In that case, the laws or rules chosen

[31] *Ibid.*
[32] *Bhatia International v. Bulk Trading S.A. & Anr.* 2002 (4) SCC 105 : AIR 2002 SC 1432 : (2002) 2 SCR 411.

by the parties would prevail. Any provision in Part-I, which is contrary to or excluded by that law or rules, will not apply.[33]

Further, provisions of Part-I would apply to all arbitrations and to all proceedings relating thereto and that in the case of international commercial arbitrations held out of India, provisions of Part-I would apply unless the parties by agreement express or implied exclude all or any of its provisions.[34]

SECTION 2(8)

Arbitration being a private procedure established by an agreement, it is possible for the parties to agree (whether by subscription to the printed code of procedure of an institution or otherwise) to lay down for themselves the procedure to be followed. It would be the duty of the arbitrator to give effect to the agreed procedure, otherwise he acts without jurisdiction. Of course such a code could include or even wholly consist of a direction that, the arbitrator should use his own judgment. No doubt, it is possible for a formal submission to arbitration to include a provision that the arbitrator shall have a general power to regulate the procedure as he thinks fit, and such a provision would receive due effect.[35] However, in the absence of such a general power, the arbitrator should follow the code, and any general words therein, must be rightly construed. A provision that, "English procedure and law shall be applicable cannot be construed as conferring on ... arbitrators, whose jurisdiction is wholly derived from contract, a general power of regulating procedure corresponding to the power of the courts derived from statutes and common law."[36]

SECTION 2(9)

Section 2(9) says that, Part-I of the Act, other than clause (a) of Section 25 or clause (a) of sub-section (2) of Section 32 refers to a claim, it shall also apply to a counter-claim, and where it refers to a defence, it shall also apply to a defence to that counter-claim.

RECEIPT OF WRITTEN COMMUNICATIONS

Under Section 3 of the Act, any written communication is deemed to have been received if it is delivered to the addressee personally or at his place of

[33] *Id.*

[34] *M/s Shin Satellite Public Company Limited v. M/s Jain Studios Limited*, 2008 (2) Arb LR 242 (Delhi) : (2009) 1 CompLJ 43 (Del).

[35] Francis Russell, *Russell on Arbitration*, 20th Edn., 1982, Sweet & Maxwell, p. 254.

[36] *Id.*

business, habitual residence or mailing address,[37] and if none of the places referred to in clause (a) can be found after making a reasonable enquiry, a written communication is deemed to have been received if it is sent to the addressee's last known place of business, habitual residence or mailing address by registered letter or by any other means which provides a record of the attempt to deliver it.[38] Such communication is deemed to have been received on the day it is so delivered.[39] However, this section does not apply to written communications in respect of proceedings of any judicial authority.[40]

Subject to any agreement as to the manner of service, a written communication is deemed to be received when it is delivered to the addressee personally or at his place of business, habitual residence or mailing address. However, there is no prescribed procedure for service of notice through the court under the Act.[41] The court should serve the notice in the manner as prescribed in the Code of Civil Procedure and the service should be to all the defendants. Service to only some of them would be of no avail.[42]

Further, the Code of Civil Procedure (Amendment) Act, 2002 has prescribed in Order 5, Rule 9 that, service of Summons can be made by registered post with acknowledgment due to the defendant or its agent, or by speed post, or by courier service approved by the court or any means of transmission of documents including fax message electronic mail service.

However, parties are free to agree how the notice of arbitration is to be served. Commercial contracts often contain specific provisions setting out how service is to be effected, for example by requiring service by registered post at a particular address and marked for the attention of a named individual. Service of a notice of arbitration will be valid if effected in accordance with such contractual provisions.[43] In such cases, the burden of showing that there has been effective service of the communication is on the person making service.[44]

Section 27 of the General Clauses Act, 1897 provides that unless a different intention appears, the service shall be deemed to be effected by properly addressing, pre-paying and posting by registered post a letter containing the document, and unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of

[37] Section 3(1)(a).

[38] Section 3(1)(b).

[39] Section 3(2).

[40] Section 3(3).

[41] *Kawalsingh Akbar v. Baldeosingh Akbar*, AIR 1957 Nag 57 (DB).

[42] *MI Shahdad v. Mohd. Abdullah Mir*, AIR 1967 J&K 120.

[43] *Surinder Kumar & Bros. v. Union of India*, 1994 (1) Arb LR 160(Del) : 52 (1993) DLT 11.

[44] *Schumacher t/a Vita Konzern v. Laurel Island Ltd.* , (1995)] 1 Llyod's Rep, 208.

post. A notice of making of award has to be served upon the 'party' to the agreement. Delivery of the award to the advocate of the party is not a valid delivery and the period of limitation to challenge the award cannot be said to run from the date of the said delivery.[45]

Section 3 requires the service of a notice by a registered letter, sent to the usual residence or place of business of the person to be served and where this is done, the provisions of law are complied with and there is no question of presumption under Section 114, Illustration (f) of the Indian Evidence Act, 1872.[46] Section 3 of the Arbitration and Conciliation Act, 1996 provides three methods of delivery of communication and if any of the three methods of delivery is followed the communication would be treated as received on the date of delivery.[47]

This section is a complete code and provides for the modes of service of notice by the arbitrator on a party before he proceeds to hear the case.[48] Hence, a notice sent by post to a person at his last known place of business or abode is a good and proper notice,[49] and if two registered letters are sent on the same subject matter, then it is held to be a sufficient notice.[50]

A copy of the award was sent to the party by the arbitrator at the place which was, in fact, the subject-matter of the dispute between the parties. The concerned postman of the area made a statement that said party was not present at the address. On the very next day, the addressee refused to receive the communication even when tendered to him. The postman endorsed the same fact on the envelope and sent it back to the sender. It was held that, by virtue of Section 3(1)(a) read with Section 3(3) of the Act, it can be presumed that the document had indeed delivered to said party.[51]

When a letter has been addressed to the respondent at the address given in the agreement between the parties, but the letter was received back with the endorsement "left", it was held that, the service was deemed to be effective and the letter would be deemed to have been received when the same was sent to the last known address of the respondent.[52]

In the matter of *M/s Madan and Co. v. Wazir Jaivir Chand*[53], Hon'ble Supreme Court has observed that if a registered letter addressed to a person at his

[45] *Benarsi Krishna Committee v. Karmayogi Shelters Pvt. Ltd.*, 2012 (9) SCALE 251 : (2012) 9 SCC 496.
[46] *Kapur & Sons v. Raj Kumar Khanna*, AIR 1955 Punj 235.
[47] *Vaibhav Bhatia & Anr. v. M/S L&T Finance Ltd. & Anr.*, decided on March 24, 2014 (Delhi High Court)
[48] *Union of India v. Bhatia Tanning Industries*, AIR 1986 Del 195 : 27 (1985) DLT 97.
[49] *Kapur & Sons v. Raj Kumar Khanna*, AIR 1955 Punj 235.
[50] *Id.*
[51] *Kailash Rani Dang v. Rakesh Bala Aneja*, AIR 2009 SC 1662 : (2009) 1 SCC 732.
[52] *Bhairab Karmakur and Construction Co. v. Sarbari Biswas*, 2009 (4) Raj 369 (Cal)
[53] AIR 1989 SC 630 : (1989) 1 SCC 264.

residential address does not get served in the normal course and is returned, it can only be attributed to the addressee's own conduct. If he is staying away for some time all that he has to do is to leave necessary instructions with the postal authorities either to detain the letters addressed to him for some time until he returns or to forward to them to the address where he has gone or to delivered them to some other person authorised by him.

The Apex Court in *State of M.P. v. Hiralal and Ors.*,[54] has again upheld that the notices returned with postal remarks "Not available in the House", "House Locked", and "Shop Closed", it must be deemed that the notices have been served on the respondents. The Hon'ble Supreme Court in the case of *Chief Commissioner of Income Tax v. V.K. Gururaj and Ors*,[55] held that the notice sent by registered post, neither unserved envelopes nor AD card received back shall be deemed as served.

Though an arbitrator has no power to order service of notice by means of publication, if the registered notices are properly served, then the publication must be treated as a superfluity. The arbitrator by publishing, does not misconduct the proceedings. He did all that; the law required him to do and something more *ex abundanti cautela*.[56]

Section 3 of the Act of 1996 therefore provides that attempt to deliver be deemed delivery on the addressee where letter / communication was sent to the registered / mailing address of the addressee and thus a genuine attempt made to notify the opposite party of matters covered by the Act. In the context of the mischief sought to be remedied by the Parliament, Section 3(1)(b) of the Act of 1996 has necessarily to be purposively interpreted and Heydon's Rules applied.

A literal interpretation of Section 3 of the Act of 1996 has of necessity of justice to be eschewed lest it become a dead letter and the intention of Parliament defeated while the mischief targeted perpetuated. In *Swantraj and Ors. v. State of Maharashtra*,[57] the Hon'ble Supreme Court has held that when two contentions as to the interpretation of a provisions in the statute claim acceptance, what must tilt the balance is the purpose of the statute, its potential frustration and judicial avoidance of the mischief by a construction which meets the ends of ensuring potent the remedies intended by the Legislature. Referring to Maxwell's work,[58] the Hon'ble Supreme Court quoted therefrom as under:

[54] (1996) 7 SCC 523 : (1996) 1 SCR 480.
[55] 1996 (7) SCC 275 : (1996) 1 SCR 841.
[56] *Union of India v. Bhatia Tanning Industries*, AIR 1986 Del 195 : 27 (1985) DLT 97.
[57] (1975) 3 SCC 322 : AIR 1974 SC 517.
[58] Maxwell, revised by P St. J Langan, *Maxwell on the Interpretation of Statutes*, 12th Edn., para 137,

"There is no doubt that 'the office of the Judge is, to make such construction as will suppress the mischief, and advance the remedy, and to suppress all evasions for the continuance of the mischief.' To carry out effectually the object of a statute, it must be so construed as to defeat all attempts to do, or avoid doing, in an indirect or circuitous manner that which it has prohibited or enjoined : quando liquid prohibit, prohibetur et omne per quod devenitur ad illud."

Any written communication is deemed to have been received, if it is delivered to the addressee personally or at his place of business, habitual residence or mailing address and if none of the places referred to in clause (a) of Section 3(1) can be found after making a reasonable enquiry, a written communication is deemed to have been received if it is sent to the addressee's last known place of business, habitual residence or mailing address by registered letter or by any other means which provides a record of the attempt to deliver it.[59]

The notice sent to the address of a party as disclosed in the agreement would amount to good service.[60] A bare perusal of Section 3 would reveal that if a written communication is delivered to the addressee personally at his place of business, it shall be deemed to have been received by him on the day it was delivered.[61]

A notice in order to be valid, effective and legal must be sent at the last known address of a party. In other words, if the process leads to the notice being delivered to the person on whom it is to be served that will suffice.[62] Deemed delivery of the written communication at the hands of the Arbitrator having been made on the appellants-non-claimants in the facts detailed above, the non-appearance of the appellants as non-claimants before the Sole Arbitrator was at their own peril and they are liable to suffer consequences.[63]

WAIVER OF RIGHT TO OBJECT

Section 4 of the Act, which corresponds to Article 4 of the UNCITRAL Model Law, was enacted to control the conduct of the parties during the arbitral proceedings. The purpose appears to be that unnecessary technical objections with regard to the continuation or otherwise of the arbitration proceedings and challenge to an award on that ground at a subsequent

[59] Section 3(1)(b).
[60] *Supra note* 52.
[61] *Kailash Rani Dang v. Rakesh Bala Aneja & Another*, AIR 2009 SC 1662 : 2008 (4) Arb LR 649 (SC).
[62] *Schumacher t/a Vita Konzern v. Laurel Island Ltd.*, [1995] 1 Llyod's Rep 208.
[63] *Mr. S.C. Gupta v. Unknown*, decided on May 21, 2014 (Rajasthan High Court)

stage should be discouraged. The object is not to unnecessarily prolong the litigation on such objection which may be waived.[64]

Under Section 4 of the Act, a party who knows that, (a) any provisions of this Part from which parties may derogate, or (b) any requirement under the arbitration agreement, has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance, without undue delay or, if a time limit is provided for stating that objection, within that period of time, shall be deemed to have waived his right to so object.

Commentary on Article 4 of the UNCITRAL Model law, which corresponds to Section 4 of the Act, 1996 is as follows:

(a) Where a procedural requirement, whether laid down in the UNCITRAL Model law or in the arbitration agreement, is not complied with, any party has a right to object with a view to getting the procedural defect cured. Article 4 implies a waiver of this right under certain conditions, based on general conditions such as 'estoppels' or *'venire contra factum proprium'*.

(b) The first condition is that the procedural requirement, which has not been complied with, is contained either in a non-mandatory provision of the model law or in the arbitration agreement. Restriction of this rule to provisions of law from which the parties may derogate was adopted on the ground that an estoppel rule which also covered fundamental procedural defects would be too rigid. It may be mentioned, however, that the model law contains specific rules concerning objections with regard to certain fundamental defects such as lack of a valid arbitration agreement or arbitral tribunal's exceeding its mandate. As regards non-compliance with a requirement under the arbitration agreement, it may be noted that the procedural stipulations by the parties must be valid and, in particular, not be in conflict with a mandatory provision of 'this Law'.

(c) The second condition is that the party knew or ought to have known of the non-compliance. It is submitted that, the expression "ought to have known" should not be construed as covering very kind of negligent ignorance but merely those instances where a party could not have been unaware of the defect. This restrictive interpretation, which might be expressed in the article, seems appropriate in view of the principle which justifies statutory impliance of wavier.[64A]

[64] *RS Jiwani v. Ircon Int'l Ltd.*, 2010 (3) RAJ 485 (Bom) (FB) : 2010 (1) Bom CR 529.
[64A] Commentary to Article 4, Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration, Available at: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V85/244/18/PDF/V8524418.pdf?OpenElement, Accessed on August 13, 2015

(d) The third condition is that the party does not state this objection without delay or, if a time limit is provided therefore, within such period of time. This later reference to time is, logically speaking, the first one to be examined since a time-limit, whether provided for in the model law or the arbitration agreement, has priority over the general formula 'without delay'.

(e) There is yet another condition which should be overlooked. A party loses his right to object only if, without stating his objection, he proceeds with the arbitration. Acts of such 'proceedings' would include, for example, appearance at a hearing or communication to the arbitral tribunal or the other party. Therefore, a party would not be deemed to have waived his right if, for instance, a postal strike or similar impediment prevented him for an extended period of time from sending any communication at all.

(f) By virtue of Article 4, a party is deemed to have waived his right to object, he is precluded from raising the objection during the subsequent phases of the arbitral proceedings and, what may be of greater practical relevance after the award is rendered. In particular, he may not be then invoke the non-compliance as a ground for setting aside the award or as a reason for refusing its recognition or enforcement. Of course, a waiver has this latter effect only in cases where Article 4 is applicable, i.e., with regard to those awards which are made 'under the Law'. It is submitted that, a court from which recognition or enforcement of any other award is sought could also disregard late objections of a party by applying any similar rule of the applicable procedural law or general idea of estoppel.

A conjoint reading of Sections 4 and 16 would jointly lead to the following results:

(a) A plea that the arbitral tribunal does not have a jurisdiction shall be raised not later than the submission of the statement of defence.

(b) A plea that the arbitral tribunal is exceeding the scope of its jurisdiction shall be raised as soon as the matter alleged to be beyond the scope of its authority raised during the arbitral proceedings.

(c) The arbitral tribunal shall decide on a plea referred to in sub-section (2) or in sub-section (3).

(d) The arbitral tribunal if it takes a decision rejecting the plea shall continue with the arbitral proceedings and make an arbitral award, in which case the aggrieved by such an arbitral award may apply for setting aside the same in accordance with Section 34 read with Section 16 (6).

(e) A party who knows that, (a) Any provisions of this Part from which parties may derogate, or (b) Any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time limit is provided for stating that objection, within that period of time, shall be deemed to have waived his right to so object.[65]

The term 'waiver' is not strictly defined in its application in arbitral proceedings. Considering the dictionary meaning, a person is said to waive an injury when he abandons the remedy which the law gives him for it, and it may be express or implied. If the appellant having a clear knowledge of the circumstances on which he might have founded an objection to the arbitrators proceeding to make their award submits to the arbitration going on and allows the arbitrators to deal with the case as it stands before them taking the chance of the decision being more or less favourable to himself, it is too late for him after the award has been made to raise objection.[66]

'Waiver' is a term which is loosely used and difficult to define where applied to irregularities in the proceedings before the arbitrator, or in the conduct of the arbitrator during those proceedings. It must be an intentional act with knowledge. If a party raises objections to the award which he had raised before the arbitrators, there is no waiver or acquiescence.[67]

Waiver is an intentional relinquishment of a known right or such conduct as warrants an interference of the relinquishment of that right. Thus, waiver is created upon the knowledge of all facts by both the parties. Mere silence will not be a waiver. A person may waive the provisions made for his individual benefit, but he cannot be deemed to have waived in law the statutory provisions which are based on public policy.[68]

Waiver is the intentional or voluntary relinquishment of a known right, or such conduct as warrants as inference of the relinquishment of such right, or one dispenses with the performance of something one is entitled to. Waiver also occurs where one in possession of any right, whether conferred by law or by contract, with full knowledge of the material facts, does or forbears to do something, the doing of which or the failure or forbearance to do which is inconsistent with the right or his intention to rely upon or surrender of some claim, right, privilege, or of the opportunity to take advantage of some

[65] *Hrinder Singh v. Nirmal Singh*, 2010 (3) Raj 546 (Del) (DB); See also, *SN Malhotra & Sons v. Airport Authority of India*, 2008 (2) Arb LR 76 : 149 (2008) DLT 757.
[66] *N Chellappan v. Secretary, Kerala State Electricity Board*, AIR 1975 SC 230 : (1975) 1 SCC 289.
[67] *Dharmu Saboto v. Krushna Saboto*, AIR 1956 Ori 24.
[68] *Chinoy Chalani & Co. v. Y Anjiah*, AIR 1958 AP 384.

defect, irregularity or wrong. 'Waiver' is a doctrine resting upon an equitable principle which courts of law will recognise.[69]

The term "waiver" has been described in Halsbury's Laws of England[70] as:

> *The abandonment of a right and is either express or implied from conduct. Where the right is a right of action, or a right of property, an express waiver depends upon the same considerations as release. If it is a mere statement of an intention not to insist upon the right, it is not effectual unless made with consideration.*

Although it has often been said that a waiver is the "intentional relinquishment of a known right", this is a misleading definition. What is involved, is not the relinquishment of a right and the termination of a reciprocal duty, but the excuse of the non-occurrence or of a delay in the occurrence of a condition of a duty.[71]

However, pursuant to the provisions of Section 4 of the Act, a party which knows that a requirement under the arbitration agreement has not been complied with, and still proceeds with the arbitration without raising an objection as soon as possible, waives his right to object.[72] In the event that a party is aware that they can derogate from any provision of Part-I or any requirement under the arbitration agreement has not been complied with and yet proceed with the arbitration without stating their objection to such non-compliance without undue delay or, if a time limit is provided for stating that objection within that period of time, is deemed to have waived the right to so object.[73]

Waiver is essentially unilateral, resulting as legal consequence from some act or conduct of party against whom it operates, and no act of party in whose favour it is made is necessary to complete it. It may be shown by acts and conduct, and sometimes by non-action[74].

The term "estoppel" and "waiver" are sometimes used interchangeably, but the two are quite distinct and different. Estoppel is a rule of evidence and is not a cause of action. On the other hand, waiver is contractual and

[69] *Black's Law Dictionary*, 5th Edn., 1979, p. 1417; *Atlas Life Insurance Co. v. Schrimsher*, 179, Okl, 643, 66 P 2D, 944, 948.

[70] *Halsbury's Laws of England*, 3rd Edn., Vol. 4, p. 432.

[71] E. Allan Farnsworth, *Contracts*, Section 5 at p. 561, Little, Brown and Company, Boston, 1982 as quoted by Dr. P C Markanda, *Law Relating to Arbitration and Conciliation*, 8th Edn., LexisNexis Butterworths Wadhwa, 2013, p. 126.

[72] *BSNL v. Motorola India (p) Ltd.*, AIR 2009 SC 357 : (2009) 2 SCC 337.

[73] *Anuptech Equipments Pvt. Ltd. v. Ganpati Co-op. Housing Society Ltd.*, AIR 1999 Bom 219 : 1999 (2) Bom CR 331.

[74] Black's Law Dictionary, 5th Edn., p. 1417.

may constitute a cause of action.[75] Waiver is distinct from estoppel in that in waiver the essential element is actual intent to abandon or surrender right while in estoppel such intent is immaterial. The necessary condition is the detriment of the other party by the conduct of the one estopped. An estoppel may result through the party estopped did not intend to lose any existing right. Thus voluntary choice is the essence of waiver for which there must have existed an opportunity for a choice between the relinquishment and the conferment of the right in question.[76]

In the agreement executed between the parties there was no arbitration clause, yet the contractor approached the court for appointment of an arbitrator. In the said proceedings, a consent order was passed whereby an arbitrator was appointed. The State thereafter participated without demur or protest and submitted to the jurisdiction of the said arbitrator as also a substitute arbitrator was appointed at a later point of time. It was held that, the State was estopped on the doctrine of acquiescence and waiver from raising objections to the competence of the arbitrator and validity of the arbitration proceedings by averring that, there was no arbitration clause in the agreement. Long participation and acquiescence in the proceedings preclude such a party from contenting that, the proceedings were without jurisdiction.[77]

The question whether a party is estopped from challenging an award on the ground that no arbitration agreement existed between the parties was referred by a two judge bench of the Supreme Court[78] to a Constitution Bench, which did not render a final verdict on the question in view of long pendency of litigation between the parties. It was stated that, the question should be decided at a later point of time in a more appropriate case.[79]

Where a party questions the very existence of the arbitration agreement on the ground of its being a nullity, the parties to the reference are not precluded from challenging the jurisdiction of the arbitrator or the award made by him in spite of the fact that, they were parties to the reference and participated before the arbitrator. When the very foundation of the reference to the arbitrator is being shaken on the ground of the alleged invalidity of the agreement containing the arbitration clause, the participation of the party in the arbitration proceedings, culminating in an award will be of no consequence and he would be entitled to move an application for a

[75] *SC Konda Reddy v. Union of India*, AIR 1982 Kant 50 : 1981 (2) KarLJ 276.

[76] *Provash Chandra Daivi v. Biswanath Banerjee*, AIR 1989 SC 1834 : 1989 Supp (1) SCC 487.

[77] *State of Rajasthan v. Nav Bharat Construction Co.*, AIR 2005 SC 2795 : (2005) 11 SCC 197.

[78] *Dodsal Pvt. Ltd. v. Delhi Electric Supply Undertaking*, AIR 1996 SC 3229 : *1996* (1) Arb LR 409.

[79] *Dodsal Pvt. Ltd. v. Delhi Electric Supply Undertaking*, (2001) 9 SCC 339.

declaration that the arbitration agreement does not exist or the same is a nullity or is void *ab initio*.[80]

In order to avoid further participation in the reference giving rise to waiver by conduct, the party complaining about the irregularities should state his objections at once and make it clear that he is not abandoning his right to insist on the objection at a later stage. This gives all concerned an opportunity to rectify the irregularity, if that is possible; and provided the objection is stated clearly and in time, there should be no danger of the court later holding that it has been waived. It is true that in cases of serious irregularity the party complaining may be able to seek the intervention of the court at once, without waiting for the tribunal to make its award. The court would be reluctant to hold that a party who has chosen not to disrupt the reference by applying for immediate intervention of the court had thereby lost the right to insist on his objection at a later stage[81].

An agreement between the corporation and the contractor provided that, in the event of disputes, the matter shall be referred to the Managing Director for adjudication. The Managing Director, on the alleged failure of the contractor, awarded the balance work to another agency and put a note on the file that the corporation had suffered huge financial losses due to the failure of the contractor to complete the work within time. It was held that in such circumstances, the Managing Director could not act as an arbitrator and that the contention that the contractor had signed the contract with his eyes wide open, was repelled on the ground that an order which lacks inherent jurisdiction would be a nullity and thus, the procedural law of waiver or estoppel would have no application in such case.[82]

In *The Chief Engineer, The Superintending Engineer, The Executive Engineer v. Chandragiri Construction Company, Government Contractor,*[83] on the request of the respondent, an arbitrator had been appointed by the department. Thereafter, department took part in the arbitration proceedings without raising any objection. Held that, the department by its conduct had waived its right to object to the jurisdiction of the arbitrator, and the department was therefore, statutorily barred from raising objections in terms of this section.

When the respondent raised objection to the arbitrator much after filing of defence statement and that too at the time of cross examination of witness,

[80] *Natinal Research Development Corporation v. Silicon Ceramics Ltd.*, AIR 1998 Del 52 : 1997 (2) Arb LR 173 (Delhi).

[81] Sir Michael J. Mustill, Steward C. Boyd, *The Law and Practice of Commercial Arbitration*, Butterworths, London, 1982, pp. 523-24.

[82] *Bihar State Mineral Development Corporation v. Encon Builders (I) (P) Ltd.*, AIR 2003 SC 3688 : (2003) 7 SCC 418.

[83] 2011 (2) CTC 669.

it was held that, challenge to jurisdiction must be made not later than the time when statement of defence is filed. If a party chooses not to object at the appropriate time it amounts to deemed waiver.[84]

In *Surendra Kapoor v. Prabir Kumar,*[85] it was held that, a party having failed to raise the point of lack of jurisdiction or absence of any agreement between the parties to refer the matter to arbitration, preceded to participate in the arbitration proceedings before the arbitral tribunal, and the arbitral tribunal declared the award on conclusion of arbitration proceedings, then such a party would be deemed to have waived his right to raise objection either to the jurisdiction or absence of an agreement to refer the matter to arbitration.

When a party chooses not to raise a plea, he must be deemed to have waived any objection to the jurisdiction of the arbitral tribunal, though he was fully aware of the terms and conditions of the agreement. Section 34(2)(a)(iv) cannot come to his rescue as the said section cannot be read in isolation and allowed to render otiose the provisions of Sections 4, 5 and 16 which, in a sense, are the high points of the Act.[86]

EXTENT OF JUDICIAL INTERVENTION

Arbitration is an alternative mode of dispute resolution mechanism. Statement of objects and reasons of the Act, 1996 states that, the main objective of the Act is "to minimize the supervisory role of courts in arbitral process". By virtue of Section 5 of the Act of 1996, either in case of domestic or international commercial arbitration, no judicial authority shall intervene unless otherwise expressly provided under Part-I of the Act.

The object of the Act is to see that the proceedings come to finality without the intervention of the court, unless intervention by the court is warranted in a given case and the same is warranted by law. It would serve no purpose, and would rather be wasteful expense of time and resource, if the arbitral proceedings which ought to be interdicted are allowed to continue and culminate into an award which would not stand scrutiny in the eye of law.[87]

Arbitration is an efficacious and alternative mode of dispute resolution mechanism. If a dispute awaits resolution for years then the court would be justified in fixing a time period while making the appointment of an

[84] *ACE Printing & Pack Pvt. Ltd., v. Modern Food Industries (India)*, 2011 (2) RAJ 261 (Del) : 2011 (121) DRJ 126.

[85] 2008 (1) RAJ 133 : 2007 (3) Arb LR 97 (Bom).

[86] *SN Malhotra v. Airport Authority of India*, 2008 (2) Arb LR 76 : 149 (2008) DLT 757.

[87] *Alcove Industries Ltd. v. Oriental Structural Engineers Ltd.*, 2008 (1) Arb LR 393.

arbitrator within which the proceedings must come to an end.[88] The extent of judicial intervention or the restriction placed on the court is confined only to the proceedings pending before the tribunal to the extent so provided under the Act.

By virtue of Section 5, all other statutes have been excluded from operation insofar as they were relating to intervention by any judicial authority in matters covered by Part-I of the Act. However, courts shall intervene, if so permitted specifically by any of the provisions contained in Part-I of the Act.

The object of the Act is to prevent parties to any arbitration from agitating questions relating to the arbitration in any manner other than as provided for by the Act. So a suit where any question may be raised with regard to the existence or validity of an award is expressly barred by this section. This section clearly indicates the intention of the legislators to minimise the supervisory role of the courts to ensure that, intervention of the court is minimal.[89]

The court's approach to natural justice and fairness, in the context of arbitrations, will no doubt be affected by the non-interventionist principle expressed in Section 1(c)[90] of the 1996 Act, and by virtue of Section 34[91] of the Act, which makes it clear that procedural and evidential matters are for the tribunal to determine in the absence of any agreement between the parties. Additionally, whilst there were a number of authorities under the old law, showing the court's willingness to intervene where it was felt the tribunal had erred in relation to evidential and procedural matters, there must be very considerable doubt as to the validity of those decisions under the new statutory regime.[92]

It would seem that, there has been a widespread movement by influential interests involved in the arbitration process against control by the courts, supported by the many modern governments who perceive a public financial advantage in diverting litigation away from the public funded judiciary into privatised sector which arbitration represents. Further, it may perhaps be added that, not only uncorrected errors of law, but elements of over-confidence, unfairness and inquisitorial and domineering attitudes

[88] *NBCC Ltd. v. JG Engg. Pvt. Ltd.*, AIR 2010 SC 640 : (2010) 2 SCC 385.
[89] *Shree Subhalakshmi Fabrics Pvt. Ltd., v. Chand Mal Baradia*, AIR 2005 SC 2161 : (2005) 10 SCC 704.
[90] Equivalent to Section 5 of the Indian Arbitration and Conciliation Act, 1996.
[91] Equivalent to Sections 19, 20, 22, 23, 24, 26 etc. of the Indian Arbitration and Conciliation Act, 1996.
[92] D. Sutton, *Russell on Arbitration*, 21st Edn., London, 1997, pp. 196 - 197.

can be expected to increase with the withdrawal of appellate powers and sheltered by the lack of publicity provided by arbitration.[93]

The question remains as to what extent a court should intervene, particularly during the arbitral proceedings? It is argued by the ones, who favour court intervention, whether without the support of the court arbitral proceedings may falter or be ineffective. Others maintain that the courts should play no part during the proceedings which the parties have chosen to solve privately. It is easier to justify some role for the courts in cases where the parties are English and the arbitration is to follow the normal English rules of procedure. It is less easy to justify in a "one-off" case conducted under the rules of an international body where the parties are foreign, the only connection with England being the parties' choice, directly or indirectly to hold their arbitration there. Be that as it may the powers of the court are deliberately wide.[94]

The policy of the legislature is to minimise the intervention of the courts in arbitration proceedings and to confine the intervention into an exceptional category of cases stipulated in the legislation. Excessive intervention in arbitral proceedings is liable to render the object and purpose of facilitating arbitration as an effective form of alternate dispute resolution in commercial disputes. The role of the court, when it enters into the arena of commercial disputes must be only to facilitate an efficacious and expeditious determination of disputes.[95]

Under the Act of 1996, the court has been denuded of the power to enlarge time for making and publishing an award. It is true that apparently, there is no provision under this Act for the court to fix time limit for the conclusion of the arbitral proceedings but the court can opt to do so in exercise of its inherent power, on the application of either party. Where however, the arbitration agreement itself provides the procedure for enlargement of time and the parties consent for it, the court cannot exercise its inherent power in extending the time fixed by the parties in the absence of the consent of either of them.[96]

This section prescribes the extent of judicial intervention possible in clear terms and the courts have no jurisdiction to overstep the stipulation.[97] As per the scheme of this Act, an arbitration matter has to proceed without any hindrance or obstruction from the courts, particularly so by writ petition.

[93] Alfred Arthur Hudson, *Hudson's Building and Engineering Contracts*, 11th Edn., Sweet & Maxwell, 1994, p.1579.
[94] D. Sutton, *Russell on Arbitration*, 21st Edn., London, 1997, pp. 323.
[95] *Tata Industries Ltd. v. Grasim Industries Ltd.*, 2011 (2) Arb LR 411 (Bom) : 2011 (3) Bom CR 326.
[96] *NBCC Ltd., v. J G Engg. Pvt. Ltd.*, AIR 2010 SC 640 : (2010) 2 SCC 385.
[97] *Union of India v. Popular Const. Co.*, AIR 2001 SC 4010 : (2001) 8 SCC 470.

In no uncertain terms, it is clearly stipulated that, for sections falling under Part-I, no judicial authority shall interfere, except where it is specifically so provided in this Part.[1] However, this Section would be attracted only if there is a written and not an oral application by the petitioner.[2]

Under Section 8 of the Act, the judicial authority can refer parties to arbitration, where there is an arbitration agreement. By virtue of Section 9 of the Act, court can pass interim measures before or during the arbitral proceedings or at any time after making of the arbitral award but before it is enforced.

By virtue of Section 11, the Chief Justice of India or his nominee or Chief Justice of High Court or his nominee can appoint an arbitrator when one party of the arbitration fails to appoint an arbitrator. By virtue of Section 27, the arbitral tribunal or a party with the approval of the arbitral tribunal may apply to the court for assistance in taking evidence. By virtue of Section 34, the court can set aside an arbitral award on some specified grounds.

By virtue of Section 36 an arbitral award can be enforced by the court in the same manner as if it were a decree of the court. By virtue of Section 37(1) of the Act, an appeal shall lie from the following orders of the court:

(a) granting or refusing to grant interim measure under Section 9,

(b) setting aside or refusing to set aside an arbitral award under Section 34.

Similarly by virtue of Section 37(2), an appeal shall lie to a court from an order of the arbitral tribunal:

(a) Accepting the plea referred to in sub-section (2) or sub-section (3) of Section 16,

(b) Granting or refusing to grant an interim measure under Section 17.

The appointment of an arbitrator under Section 11 of the Arbitration and Conciliation Act, 1996 is purely an administrative act, and the Chief Justice or his nominee performing the said function under Section 11(6) cannot decide any contentious issue between the parties.[3]

It was further held that appointment under Section 11 being an administrative act, cannot be made the subject-matter of an appeal under the provisions of the Arbitration and Conciliation Act, 1996, but any party aggrieved can file a writ petition under Articles 226 and 227 of the Constitution of India, wherein, the administrative decision can be looked into and examined within the limited parameters of the power of judicial review.[4]

It was held that while exercising power under Section 11(6), the Court is not required to examine and consider the question of existence and validity of the arbitration clause and its scope and ambit.[5]

Section 5 of the Arbitration and Conciliation Act, 1996 prohibits and restrains any judicial authority from interfering with the arbitration proceedings, except in accordance with the provisions as contained in Part-I of the Arbitration and Conciliation Act, 1996. Section 5 incorporates a limited non-obstante clause, which restrains all judicial authorities from examining and going into the questions, except as provided for and stipulated in Part-I. To this extent, exclusive jurisdiction is vested with a court as defined in Section 2(e) or judicial authority to decide all matters as stipulated in Part-I. The said provision does not specifically state that the Arbitration and Conciliation Act, 1996 shall prevail over all other existing enactments.[6]

The Supreme Court, referring to the provisions of the Companies Act held that the power to wind up a company is conferred on the Company Court. The said power cannot be the subject-matter of arbitration. By agreement, the parties cannot confer jurisdiction on an arbitrator when the statute confers and gives jurisdiction to a specific authority under an enactment, and the said authority alone has the jurisdiction to decide the subject-matter to the exclusion of other authorities.[7]

As far as Section 5 if concerned, it has been settled in *Bhatia International v. Bulk Trading S.A.*,[8] and confirmed in *Venture Global Engineering v. Satyam Computer Services Ltd.*,[9] that Part-I of the Arbitration Act is applicable to international arbitrations being held outside the territory of India subject to one rider i.e., the same must not be expressly or impliedly excluded by the arbitration agreement / clause.

Section 5 of the Act which states that notwithstanding anything contained in any other law for the time being in force, in matters governed by Part-I of the Act, no judicial authority shall intervene except so provided in that Part, makes the position clear. The purpose and intent of the Act clearly would be to promote resolution of disputes by arbitration and not to take

[1] *State of Jharkhand v. RK Const. Pvt. Ltd.*, AIR 2006 Jhar 98 (Jhar) : 2006 (3) Arb LR 307 (Jhar).
[2] *Garden Finance Ltd., v. Prakash Industries Ltd*, AIR 2002 Bom 8 : 2002 (1) Bom CR 641.
[3] *Konkan Railway Corporation Ltd. v. Rani Construction P. Ltd*, (2000) 8 SCC 159 : 2000 (7) SCALE 211.

[4] *Id.*
[5] *India Trade Promotion v. International Amusement Limited*, 142 (2007) DLT 342 : ILR (2007) Supp (3) Delhi 69.
[6] *Id.*
[7] *Haryana Telecom Ltd. v. Sterlite Industries (India) Ltd.*, AIR 1999 SC 2354 : (1999) 5 SCC 688.
[8] (2002) 4 SCC 105 : AIR 2002 SC 1432 : (2002) 2 SCR 411.
[9] (2008) 4 SCC 190 : AIR 2008 SC 1061.

any matter out of the purview of arbitration which is required to be settled by arbitration.[10]

This section makes it clear that, no judicial authority which would include courts can intervene except where so provided in Part-I of the Act. Therefore, unless there is a remedy provided under the Act, it would be impossible to accept the plea that, the court can exercise its *suo motu* powers which would mean inherent powers. Once the Act expressly excludes judicial interference, it will be impossible to exercise the powers under Section 151 of the Code of Civil Procedure, 1908.[11]

However, the Act of 1996 under three different sections confers the power on the court to intervene in the matter. In terms of Section 34(1), recourse to a court against the arbitral award can be made by an application for setting aside such an award in accordance with Sections 34(2) and 34(3). In other words, a court can intervene in setting aside the award, which also includes an interim award made under Section 31(6). Further, under Section 37(2), an appeal can be filed against an order passed by the arbitral tribunal under Section 16(2) or 16(3), or granting or refusing to grant an interim measure under Section 17. The court can also intervene on an application under Section 14(2).

In other words, a conjoint reading of Sections 5, 34, 37 and 14(2) will show that the court can intervene only in cases covered by Sections 14(2), 34 and 37.[12] Under Section 5, competence of courts is restricted in order not to make the arbitration process the beginning of litigation instead of its end.[13]

However, this section does not affect the jurisdiction of the court under Article 226 of the Constitution. But it is a well settled principle of law that, where there is an arbitration clause, the High Court will not be justified in entertaining the writ petition. Emphasis has always been laid on the remedy of arbitration normally being pursued instead of availing the extra-ordinary jurisdiction of the High Court under Article 226 of the Constitution. Thus, in a case where a commercial dispute arises between the parties and there is an arbitration agreement or clause for resolving the dispute it is not a fit case where the writ petition ought to have been entertained and decided on merits.[14]

Entertaining a writ petition is a rule of convenience and there is no absolute bar to entertain it though there is an arbitration agreement or clause

[10] *Travancore Devaswom Board v. Panchami Pack Pvt. Ltd.*, 2005 (1) KLT 690 (SC) : (2004) 13 SCC 510.
[11] *Anuptech Equipments (p) Ltd., v. Ganpati Co-op Group Housing Society Ltd*, AIR 1999 Bom 219 : 1999 (2) Bom CR 331.
[12] *United India Assurance Co. Ltd., v. Kumar Texturisers*, AIR 1999 Bom 118 : 1999 (1) Bom CR 755 .
[13] *Delhi Development Authority v. Alkaram*, AIR 1982 Del 365 : 21 (1982) DLT 44.
[14] *Mangayarkarasi Apparels Pvt. Ltd. v. Sundaram Finance Ltd.*, 2002 (3) Arb LR 210 (Mad).

between the parties. Courts can refuse to entertain writ petitions when there is an effective alternative remedy. However, this principle cannot be applied universally, and it depends upon the facts and circumstances of each case and discretion is given to the courts to entertain it or not.[15]

When there is an arbitration clause in an agreement, parties to said agreement are bound to invoke the same instead of taking recourse to civil suit or writ petition. A contract for supply of gas *inter alia* provided for an arbitration clause. A dispute arose between the parties as to whether there was any breach of obligation by either of them. Instead of resorting to arbitration, one of the parties filed a writ petition. It was held that, when there is an arbitration clause in the agreement, disputes will have to be decided in arbitration only.[16]

An alternative remedy is not an absolute bar to the invocation of the writ jurisdiction of the High Court or the Supreme Court. The constitutional power vested in the High Court or Supreme Court cannot be fettered by any alterative remedy available to the authorities. Injustice whenever and wherever it takes place has to be struck down as an anathema to the rule of law and the provisions of the Constitution.[17]

When an alternative remedy and equally efficacious remedy is open to a litigant, he should be required to pursue that remedy and not to invoke the writ jurisdiction of the High Court. The extraordinary jurisdiction of the court is not a panacea for all the maladies which a litigant may suffer from. Writ jurisdiction is not to facilitate avoidance of obligations voluntarily incurred.[18]

The Act of 1996 being a complete Code in itself, and Section 5 limiting interference by judicial authorities, any attempt to extend the scope for interference by the High Court in exercise of its extraordinary power under Article 226 of the Constitution, would defeat the object of the Act of 1996. Where there is a grouse by a party against the arbitral tribunal, the remedy is to file an application under Section 16. The mere fact that, it may cause inconvenience of having to wait till the conclusion of the arbitral proceedings is no ground to entertain a writ petition at an intermediate stage in a manner contrary to the legislative intent.[19]

[15] *HPCL v. Geetha Kasturiranga*, 2011 (1) Arb LR 568 (Mad) (DB)
[16] *Nagarjuna Cerachem Pvt. Ltd. v. GAIL (India) Ltd.*, AIR 2005 AP 151 : 2004 (6) ALT 543.
[17] *Union of India v. Tantia Construction (P) Ltd.*, (2011) 5 SCC 697 : (2011) 5 SCR 397.
[18] *Unity Service Station v. IOC Ltd.*, 2008 (1) Arb LR 74 (Kant)
[19] *Cadre Estates Pvt. Ltd., v. Salochna Goyal*, 2011 (1) RAJ 273 (Del) : 2010 (119) DRJ 457.

ADMINISTRATIVE ASSISTANCE

In order to facilitate the conduct of the arbitral proceedings, the parties or the arbitral tribunal, with the consent of the parties, may arrange for administrative assistance by a suitable institution or person.[20] An arbitrator cannot delegate their right to one of the parties or to strangers unless the parties to the agreement consent thereto.[21]

However, an arbitrator is at liberty to appoint an accountant "not objected to any of the parties." If he appoints one without communicating the same to the parties, the award may be set aside.[22]

It is open to the arbitrators to have ministerial and other works performed by a third party. Hence, where in arbitration for partition, the measurements were made and the maps are prepared by someone else, it cannot be said that partition was made by an outsider and not by the arbitrator.[23]

If an arbitrator takes some ministerial work from a third person, that does not render the conduct of the arbitrator as judicial misconduct.[24] The writing of a part of the award by a junior at the dictation of the arbitrator is an act of a ministerial character, which could be delegated to a third party.[25]

However, an arbitrator has no authority to delegate his functions except possibly what are called "ministerial acts", and if he does so he is guilty of judicial misconduct.[26]

ARBITRATION AGREEMENT

Under Section 7 of the Act;

(1) an "arbitration agreement" means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

(2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(3) An arbitration agreement shall be in writing.

(4) An arbitration agreement is in writing if it is contained in –

(a) a document signed by the parties;

[20] Section 6, The Arbitration and Conciliation Act, 1996.
[21] *Ramtran Das v. Adhar Chandra Das*, AIR 1953 Cal 646 : (1955) ILR 1 Cal 187.
[22] *Re. Tidswell*, (1863) 33 Bev. 213.
[23] *Shaikh Muhammad Khalil v. Shaikh Muhammad Rahim*, AIR 1925 Pat 810 : (1925) ILR 4 PAT 670.
[24] *Juggobundhu Sahu v. Chand Mohan Saha*, AIR 1916 Cal 806 (DB).
[25] *Nihal Chand v. Shanti Lal*, AIR 1935 Oudh 349 (DB).
[26] *Ram Chandr Brij Lal v. Maanohar Das Ram Prasad*, AIR 1931 All 751 : 133 Ind. Cas. 531.

(b) an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement; or

(c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.

(5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.

In order to constitute arbitration, there shall be an arbitration agreement between the parties to the dispute. Section 2(1)(b) defines an "Arbitration Agreement" to mean an agreement referred to in Section 7. Section 7(1) clearly indicates that to constitute an Arbitration Agreement, there has to be an agreement i.e., a valid contract. It means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.[27]

Section 2(1)(h) defines "party" to mean a party to an arbitration agreement. The parties have to be *ad-idem* on referring disputes to arbitration under a written, signed agreement. Section 7(4)(a) of the Act provides that an Arbitration Agreement is in writing if it is contained, *inter alia*, in a document signed by the parties. *Ex-facie* the UIBT is not an agreement, but a merely unilateral undertaking of the Plaintiff which is not signed by the Defendant and thus it is not signed by the "parties" as mandated by Section 7(4)(a) of the Act.[28]

In order to constitute an agreement as an arbitration agreement, it shall comply with any or all of the following criteria:

(a) An arbitration agreement may be in the form of a separate agreement, or of an arbitration clause in a contract.

(b) An arbitration agreement shall be in writing. An arbitration agreement is treated as in writing if,

(i) The arbitration agreement is contained in a document and the parties sign the same.

(ii) The arbitration agreement is contained in an exchange of letters, telex, telegrams or other means of communication, which provide a record of the agreement.[29]

[27] *Lucent Technologies Inc. v. ICICI Bank Ltd.*, 2010 (5) RAJ 574 (Del); see also *Jindal Exports Ltd. v. Fuerst Day Lawson Ltd.*, 2010 (4) Raj71 (Del).
[28] *Nasir Husain Films (P) Ltd. v. Saregama India Ltd.*, 2007 (5) Bom CR 192 : (2010) 2 CompLJ 412 (Bom).
[29] *Taipack Ltd., v. Ram Kishore Nagar Mal*, 2007 (3) Arb LR 402.

(iii) The arbitration agreement is contained in an exchange of statements of claim and defence in which the existence of agreement is alleged by one party and not denied by the other party.

A reference in a contract to a document containing an arbitration clause also constitutes an arbitration agreement. However, the contract should be in writing and the reference should be such as to make that arbitration clause part of the contract.[30]

Under the scheme of the 1996 Act, an arbitration clause is separable from other clauses of a partnership deed. An arbitration clause constitutes an agreement by itself.[31]

An arbitration agreement could be in different forms. It may be by way of an arbitration clause in a contract or in the form of a separate agreement. However, the condition is that it shall be in writing.[32] Further, it may be noted that, under the scheme of the Act of 1996, the arbitration clause is separable from other clauses of the deed. An arbitration clause itself constitutes an agreement.[33]

It may be contained *inter alia* in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of communication, which provide a record of the agreement.[34]

In the absence of the existence of a "defined legal relationship", there is no question of there being an arbitration agreement between the parties to submit their dispute to arbitration. The disputes which are referable to arbitration are those disputes which are in respect of a "defined legal relationship", whether contractual or not. However, it does not relate to all kinds of disputes.[35]

Though, an arbitration agreement is not required to be in any form, what is required to be ascertained is whether the parties have agreed that if disputes arise between them in respect of the subject-matter of the contract, such disputes shall be referred to arbitration, and then such an agreement would spell out an arbitration agreement.[36]

No particular form can be laid down as being universal for framing an arbitration agreement, however, it is certain that words used for the purpose, must be words of choice and determination to go to arbitration and not problematic words of mere possibility.[37]

[30] Section 7(5), The Arbitration and Conciliation Act, 1996.
[31] *Firm Ashok Traders v. Gurumukh Das Saluja*, (2004) 3 SCC 155 : AIR 2004 SC 1433.
[32] *Nimet Resources Incorporated v. Esser Steels Ltd.*, AIR 2000 SC 3107 : (2000) 7 SCC 497.
[33] *Firm Ashok Traders v. Gurumukh Das Saluja*, (2004) 3 SCC 155 : AIR 2004 SC 1433.
[34] *Taipack Ltd., v. Ram Kishore Nagar Mal*, 2007 (3) Arb LR 402.
[35] *Chemical Sales Agencies v. Naraini Newar*, AIR 2005 Del 76 : 2005 (1) Arb LR 193 (Delhi).
[36] *Chief Conservator of Forests v. Ratan Singh Hans*, AIR 1967 SC 166 : (1966) SuppSCR 158.
[37] *Thomson Press India Ltd. v. NCT of Delhi*, 1999 (1) Arb LR 421

An arbitration agreement is an agreement to submit present or future disputes. An arbitration agreement is therefore a contractual undertaking by two or more parties to resolve disputes by the process of arbitration, even if the disputes themselves are not based on contractual obligations.[38]

In other words, an arbitration agreement is an agreement worked out consciously by and between parties. It is a process or mechanism through which the disputes that might crop up between the parties to a contractual transaction are provided to be resolved. It is not only a common feature but also a very crucial feature of contracts in this modern era. It has to be construed as an independent contract in itself.[39]

For the purpose of construing an arbitration agreement, the term "arbitration" is not required to be specifically mentioned therein.[40] To constitute an arbitration agreement for the purposes of this section as well as Section 11, the following two requirements should be satisfied: viz.

(a) There should be an arbitration agreement between the parties to the dispute; and
(b) It should relate to or be applicable to the dispute in regard to which appointment of an arbitrator is sought.

In the absence of an arbitration agreement, an application for the appointment of an arbitrator is not maintainable.[41]

The essential ingredients[42] of an arbitration agreement are as follows:

(a) There should be valid and binding agreements between the parties.
(b) Such an agreement may be contained as a clause in a contract or as a separate agreement.
(c) Such an agreement deemed to be in writing, if it is contained in a document signed by the parties or in an exchange of letters, telegrams, telex, etc. or any other mode of communication which, provide a record of the agreement or an exchange of statements of claim and defence in which, the existence of the agreement is alleged by one party and not denied by other.
(d) Parties' intention to refer present and future disputes to arbitration.
(e) The dispute to be referred to an arbitrator is in respect of a defined legal relationship, whether contractual or not.

[38] D. Sutton, *Russell on Arbitration*, 22nd Edn., Sweet & Maxwell, 2002, Para 2.002, p. 26.
[39] *Alaknanda Hydro Power Co. Ltd., v. Shring Construction Co. Pvt. Ltd.*, 2010 (2) RAJ 132 (AP).
[40] *Bihar State Mineral Dev. Corp v. Encon Builders (I) Pvt. Ltd.*, AIR 2003 SC 3688 : (2003) 7 SCC 418.
[41] *BSNL v. Telephone Cables Ltd.*, AIR 2010 SC 2671 : (2010) 5 SCC 213.
[42] *Jayant N Seth v. Gyaneshwar Apartment Cooperative Housing Society Ltd.*, 2000 (1) Raj 117 (Bom).

The well settled principles in regard to what constitutes an arbitration agreement are as follows:[43]

1. The intention of the parties to enter into an arbitration agreement shall have to be gathered from the terms of the agreement. If the terms of the agreement clearly indicate an intention on the part of the parties to the agreement to refer their disputes to a private tribunal for adjudication and a willingness to be bound by the decision of such tribunal on such disputes, it is arbitration agreement. While there is no specific form of an arbitration agreement, the words used should disclose a determination and obligation to go to arbitration and not merely contemplate the possibility of going for arbitration. Where there is merely a possibility of the parties agreeing to arbitration in future, as contrasted from an obligation to refer disputes to arbitration, there is no valid and binding arbitration agreement.
2. Even if the words 'arbitration' and 'arbitral tribunal' (or arbitrator) are not used with reference to the process of settlement or with reference to the private tribunal which has to adjudicate upon the disputes, in a clause relating to settlement of disputes, it does not detract from the clause being an arbitration agreement if it has the attributes or elements of an arbitration agreement. They are: (a) The agreement should be in writing; (b) The parties should have agreed to refer any disputes (present or future) between them to the decision of a private tribunal; (c) The private tribunal should be empowered to adjudicate upon the disputes in an impartial manner, giving due opportunity to the parties to put forth their case before it; (d) The parties should have agreed that the decision of the private tribunal in respect of the disputes will be binding on them.
3. Where the clause provides that in the event of disputes arising between the parties, the disputes shall be referred to arbitration, it is an arbitration agreement. Where there is a specific and direct expression of intent to have the disputes settled by arbitration, it is not necessary to set out the attributes of an arbitration agreement to make it an arbitration agreement. But where the clause relating to settlement of disputes, contains words which specifically excludes any of the attributes of an arbitration agreement or contains anything that detracts from an arbitration agreement, it will not be an arbitration agreement. For example, where an agreement requires or permits an authority to decide a claim or dispute without hearing, or requires the authority to act in the interests of only one of the parties, or provides that the decision of the Authority will not be final and binding on the parties, or that if either party is not satisfied with the decision of the Authority, he may file a civil suit seeking relief, it cannot be termed as an arbitration agreement.
4. But mere use of the word 'arbitration' or 'arbitrator' in a clause will not make it an arbitration agreement, if it requires or contemplates a further or fresh consent of the parties for reference to arbitration. For example, use of words such as "parties can, if they so desire, refer their disputes to arbitration" or "in the event of any dispute, the parties may also agree to refer the same to arbitration" or "if any disputes arise between the parties, they should consider settlement by arbitration" in a clause relating to settlement of disputes, indicate that the clause is not intended to be an arbitration agreement. Similarly, a clause which states that "if the parties so decide, the disputes shall be referred to arbitration" or "any disputes between parties, if they so agree, shall be referred to arbitration" is not an arbitration agreement. Such clauses merely indicate a desire or hope to have the disputes settled by arbitration, or a tentative arrangement to explore arbitration as a mode of settlement if and when a dispute arises. Such clauses require the parties to arrive at a further agreement to go to arbitration, as and when the disputes arise. Any agreement or clause in an agreement requiring or contemplating a further consent or consensus before a reference to arbitration is not an arbitration agreement, but an agreement to enter into an arbitration agreement in future.

[43] *Jagdish Chander v. Ramesh Chander and Others*, (2007) 5 SCC 719 : (2007) 5 SCR 720.

In Commercial Arbitration,[44] the following attributes have been discussed as the ones which must be present if the process is to be considered as arbitration:

(a) The agreement pursuant to which the process is or is to be carried on must contemplate that, the tribunal which carries on the process will make a decision which is binding on the parties to the procedural agreement.
(b) The procedural agreement must contemplate that; the process will be carried on between those persons whose substantive rights are determined by the tribunal.
(c) The jurisdiction of the arbitral tribunal to carry on the process and to decide the rights of the parties must derive either from the consent of the parties or from an order of the court or from a statute the terms of which makes it clear that, the process is to be an arbitration.
(d) The tribunal must be chosen either by the parties or by a method to which they have consented.
(e) The procedural agreement must contemplate that the tribunal will determine the rights of the parties in an impartial manner, with the tribunal owing an equal obligation of fairness towards both parties.

[44] Sir Michael J. Mustill, Steward C. Boyd, *The Law and Practice of Commercial Arbitration*, Butterworths, London, 1982, pp. 43 – 44.

(f) The agreement of the parties to refer their disputes to the decision of the tribunal must be intended to be enforceable in law.

(g) The procedural agreement must contemplate a process whereby the tribunal will make a decision upon a decision which is already formulated at the time when the tribunal is appointed.

In addition, some other factors which are relevant for the purpose of the process to be considered as arbitration are:

(a) Whether, the procedural agreement contemplates that the tribunal will receive evidence and contentions or at least give the parties the opportunity to put them forward.

(b) Whether, the wording of the agreement is consistent or inconsistent with the view that, the process was intended to be arbitration.

(c) Whether, the identity of the chosen tribunal or the method prescribed for choosing the tribunal shows that the process was intended to be arbitration.

(d) Whether, the procedural agreement confers the right to invoke the process on parties or on one party alone.

(e) Whether, the procedural agreement requires the tribunal to decide the dispute according to law.

The essence of arbitration is that the arbitrator decides the case and his award is in the nature of a judgment. Where the parties intended to refer the matter to a person for his final binding decision, then that person is an arbitrator and merely because he has been referred to as a referee, would not make his award invalid.[45]

However, there is no requirement of the words "arbitrator" or "arbitration" to be mentioned in the clause to make it an arbitration clause.[46] Where, the relevant clause in the contract contemplated by the parties made no mention of the words "arbitrator" or "reference", which were essential ingredients to bring in the provision of arbitration, the clause could not be said to have not constituted an arbitration clause.[47]

It is not a requirement of law that an arbitration clause incorporated in the contract should be stamped. Therefore, if a party contends that, the arbitration clause is not stamped and thus the applicant was not entitled to the relief prayed for this plea cannot be accepted.[48] There is no requirement for registration of an arbitration agreement.[49]

[45] *Rahul Steel & Agro Industries v. Pancsar Steel & Agro Industries*, (1993) 103 PLR 188.
[46] *Joseph Vilangadan v. PN Writer & Co. Pvt. Ltd.*, 2010 (6) RAJ 83 (Ker) : 2010 (2) KHC 127.
[47] *Ujjwal Service Pvt. Ltd. v. Coal India Ltd.*, 2005 (3) RAJ 187 : 2005 (2) Arb LR 465 (Jhar).
[48] *Geo-Group Communications Inc. v. IOL Broadband Ltd.*, (2010) 1 SCC 562 : 2010 (3) Bom CR 708.
[49] *Aspire Investments Pvt. Ltd., v. Nexgen Edusolutions Pvt. Ltd.*, 2010 (3) RAJ 668 (Del).

Further, mere non-mentioning of the name of the arbitrator in the arbitration agreement does not make it vague and uncertain nor, inapplicable of being enforced by the party wishing to get the disputes resolved through arbitration. It is nowhere stipulated in the Act, 1996, that, the parties must mention the name of the arbitrator in the arbitration agreement for adjudicating the disputes that, have arisen between the parties or which may arise in future. Thus, non-mentioning of the name of the arbitrator in the arbitration agreement does not make the arbitration agreement non-existent in law.[50]

An arbitrator is a person to whom differences and disputes are submitted by the parties. His functions are quasi-judicial in nature. The person asked to act as an arbitrator in the settlement of disputes and to record the settlement agreed upon by the parties, his act is not that of an arbitrator and the record made by him is not an award, and if that record is operating itself, it was only a contract between those who signed it.

An arbitrator's task is to determine disputes referred to him, either as a sole member of an arbitral tribunal or jointly with other members of the tribunal, on the basis of the evidence and submissions according to the law chosen by the parties or other considerations agreed upon by them or determined by the tribunal and within the general obligation of a fair resolution by an impartial tribunal and within the general obligation of a fair resolution by an impartial tribunal without any unnecessary delay or expense. Despite the apparent similarities with the role of a judge, an arbitrator is not a judge in the sense of an appointee of the State who presides over law suits. The authority of an arbitral tribunal arises entirely from the agreement between the parties.[51]

POWER TO REFER PARTIES TO ARBITRATION WHERE THERE IS AN ARBITRATION AGREEMENT

Section 8 of the Act of 1996, deals with the power of the judicial authority to refer parties to arbitration, where there is an arbitration agreement. By virtue of Section 8, the judicial authority can direct the parties to arbitration and decline to exercise its own jurisdiction by refusing to proceed with the action.

An order directing the parties to arbitration can be made only if the following conditions are satisfied:[52]

[50] *ITC Classic Finance Ltd. v. Grapco Mining & Co Ltd.*, 1998 (1) Arb LR 1 : AIR 1997 Cal 397.
[51] D. Sutton, *Russell on Arbitration*, 22nd Edn., Sweet & Maxwell, 2002, pp. 97-98.
[52] (2000) 4 SCC 539 : AIR 2000 SC 1886.

(a) a party to an arbitration agreement should have brought an action or filed a suit.

(b) the matter in issue in the action should be the subject matter of the arbitration agreement.

(c) the party who applies for an order directing the parties to arbitration should not have filed his written statement on the substance of the dispute.

(d) the applicant should have produced the original arbitration agreement or a duly certified copy.

Section 8 of the Act creates a right in the person bringing the action to have the dispute adjudicated by the court. If the other party does not move the court for referring the parties to arbitration the court can adjudicate the matter. However, if the other party applies to the court before submitting his first statement on the subject of dispute, then it is obligatory on the part of the court to refer the matter to arbitration in terms of their arbitration agreement.

The scope of Section 8 was examined by the Supreme Court in *P Anand Gajapati Raju v. PVG Raju.*[53] In this case, the parties to the dispute entered into an arbitration agreement, when the matter was pending in appeal before the Supreme Court. The question before the court was whether, the court can direct the parties to arbitration?

The court observed that if the following conditions are fulfilled, the court can exercise its powers to refer parties to arbitration:

(a) if there is an arbitration agreement within the meaning of Section 7 of the Act.

(b) a party to the agreement brings an action in the court against the other party.

(c) subject matter of the action is same as the subject matter on the arbitration agreement.

(d) the other party moves to the court for referring the parties to arbitration before he submits his first statement on the substance of the dispute.

In order to direct the parties to arbitration, it is not necessary that, agreement must already be in existence before the action is brought in the court. The parties to an action can enter into an arbitration agreement while the matter is pending before the court. If a party to the arbitration agreement, which entered into after the filing of the suit, applies to the court and the other party does not object, the court can refer the matter to arbitration.

[53] *Id.*

It was held by the Supreme Court that the expression "Judicial Authority", occurring in Section 8 of the Act is to be understood as referring to the courts, as defined in Section 2(e) and other courts, including a separate tribunal like the Consumer Forum.[54] It shall also include a tribunal constituted under Section 11 of the Delhi School Education Act, 1973.[55]

Under Section 8 of the present Act, the expression used is "not later than when submitting his first statement on the substance of the dispute." The expression "substance of the dispute" could have reference only to the merits of the case.[56]

The purpose of the expression "not later than when submitting his first statement on the substance of the dispute" occurring in Section 8(1), is that a party requesting for reference to arbitration must make use of the first opportunity to have the reference and he cannot be permitted to protract the proceedings and take such a contention at a belated stage after taking his defence in the suit.[57]

In *T N Electricity Board v. Sumathi.*[58] the respondent filed a writ petition under Article 226, claiming compensation for her husband's death caused due to electrocution. It was contented that, electrocution occurred due to the improper maintenance of the electric wires by the Tamil Nadu Electricity Board.

The Supreme Court is of the opinion[59] that under Section 8 of the Act, a matter shall not be referred to arbitrator if:

(a) the parties to an arbitration agreement have not filed any application for referring any dispute to an arbitrator.

(b) in a pending suit such application is not filed before submitting first statement on the substance of dispute.

(c) such application is not accompanied by the original arbitration agreement or duly certified copy of the agreement.

(d) the subject matter of the suit includes the subject matter of the arbitration agreement and other dispute.

(e) some parties to the suit are not parties to the arbitration agreement.

In a recent decision of the Supreme Court in *Travancore Devaswom Board v. Panchami Pack Pvt. Ltd.,*[60] while considering the provisions of Section 16(2)

[54] *SPB & Co v. Patel Engg. Ltd.,* (2005) 8 SCC 618 : AIR 2006 SC 450.
[55] *Management Committee, Montfort Senior Secondary School v. Vijay Kumar,* (2005) 7 SCC 472 : AIR 2005 SC 3549.
[56] *N.I.I.T. Ltd. v. Manoharan,* 2005 (3) KLT 1025 : 2005 (3) KLJ 129.
[57] *Id.*
[58] AIR 2000 SC 1603 : (2000) 4 SCC 543.
[59] *Sukanya Holdings (P) Ltd. Jayesh H Pandya,* AIR 2003 SC 2252 : (2003) 5 SCC 531.
[60] 2005 (1) KLT 690 (SC) : (2004) 13 SCC 510.

of the Act, it was held that the participation of a party in the preliminary sitting before the arbitrator would not make any difference. It was held "the language of the Section, therefore, leaves no room for doubt that mere participation in the proceedings would not tantamount to an acceptance of the jurisdiction of the Arbitrator to arbitrate the dispute between the parties." Section 16(2) of the Act provides that a plea that the arbitral tribunal does not have jurisdiction, shall be raised not later than the submission of the statement of defence; however, a party shall not be precluded from raising such a plea since he has appointed, or participated in the appointment of an arbitrator. Though the words used in Section 16(2) are not identical with the words used in Section 8(1), a comparative study of Sections 8 and 16 of the 1996 Act and the provisions of the 1940 Act would make it clear that the law makers were in favour of a liberal approach in the matter of reference to arbitration and thought of taking away the too rigid conditions.

The Supreme Court held that the language of Section 8 is peremptory and it is obligatory for the court to refer the parties to arbitration in terms of their arbitration agreement. An application before the court under Section 8 brings to the court's notice that the subject-matter of the action before it, is the subject-matter of an arbitration agreement.[61]

It is well settled that a document of title or any other document which is required to be produced as per law, must be a document which is admissible under the Indian Evidence Act, 1872. Xerox copies of the documents are not admissible in evidence.[62]

A similar situation[63] was considered and it was held that the requirement of Section 8(2) that the original arbitration agreement or the duly certified copy thereof, should be produced alongwith the application for referring the matter to arbitrator and cannot be interpreted to mean that if the copy of the same was produced earlier, though by the other party, the application should be dismissed.

The Supreme Court has had the occasion to deal with a question of maintainability of an application under Section 8, where alongwith the application, the original or certified copy of the agreement was not produced.[64] The language of Section 8(2) suggests that there is a mandate that the application under Section 8(1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof. That the language might suggest that it is a mandatory stipulation

[61] *P. Anand Gajapathi Raju v. P. V.G. Raju (died)*, AIR 2000 SC 1886 : (2000) 4 SCC 539.
[62] *Selvin Joseph v. Vijayan*, 1999 (3) KLT 898.
[63] *Parampal Singh and Ors. v. Punjab State Ware House Corporation, Chandigarh Ors.*, (2000) 124 (1) PLR 347 : AIR 2000 P&H 53.
[64] *Refrigeration & Appliances and Ors. v. Jayaben Bharatkumar Thakkar and Ors.*, 2000 (2) Arb LR 650 (SC).

and production of the arbitration agreement later would make Section 8 inapplicable to such an application.

Considering the object and purpose of the word "accompany" in Section 8(2), it need not be read and understood to mean that the arbitration agreement or a copy thereof must be annexed to the application. If it is already available with the court or if it is not disputed or if it is produced in the event of a dispute when such dispute is raised, it can still be said that the agreement had accompanied the petition. The word 'accompany' used in Section 8(2) must be reasonably and realistically understood.[65]

The situation contemplated by Section 8 can arise only at the first instance of an opponent and defendant in a judicial proceeding, or at the highest, *suo motu* at the instance of the judicial authority, when the judicial authority comes to know of the existence of an arbitration agreement.[66]

The Act itself provides for the production of the original copy or the certified copy of the same. The original agreement or a certified copy of the same is the requirement in order to entertain an application under Section 8 of the said Act. Supreme Court lays down the ratio that the mandatory requirement under Section 8(2) of the said Act must be complied with.[67]

In case where there is an arbitration clause in the agreement, it is obligatory for the court to refer the matter in terms of the arbitration agreement, and nothing remains to be decided in the original action, namely, in the suit that has been instituted by the first respondent herein, after an application is made under Section 8(3) of the Act, except to refer the dispute to the arbitrator. It is nothing but mandatory for the civil court to refer the dispute to the arbitrator.[68]

In view of the mandatory language provided under Section 8 of the Act, the main objects of the Act itself are as under:[69]

(a) to comprehensively cover international commercial arbitration and conciliation as also domestic arbitration and conciliation;
(b) to make provision for an arbitral procedure which is fair, efficient and capable of meeting the needs of the specific arbitration.
(c) to provide that the arbitral tribunal gives reasons for its arbitral award;
(d) to ensure that the arbitral tribunal remains within the limits of its jurisdiction;

[65] *Natarajan v. General Manager, Southern Railways*, 2006 (2) KLT 390 : 2006 (4) Arb LR 149 (Kerala).
[66] *Ardy International (P) Ltd. and Anr. v. Inspiration Clothes & U and Anr.*, (2006) 1 SCC 417 : 2005 (9) SCALE 302.
[67] *N. Radhakrishnan v. Maestro Engineers*, (2010) 1 SCC 72 : (2009) 15 SCR 371.
[68] *Smt. Kalpana Kothari Appellant v. Smt. Sudha Yadav & Ors.*, (2003) 117 CompCas 660 (P&H).
[69] *General Manager, Northern Railway, New Delhi v. Metal Powder Co. Ltd.*, (2007) 1 MLJ 769 : 2007-1-LW 772.

(e) to minimise the supervisory role of the courts in the arbitral process;

(f) to permit the arbitral tribunal to use mediation, conciliation or other procedures during the arbitral proceedings to encourage settlement of disputes;

(g) to provide that every final arbitral award is enforced in the same manner as if it were a decree of the court;

(h) to provide that a settlement agreement reached by the parties as a result of conciliation proceedings will have the same status and effect as an arbitral award on agreed terms on the substance of the dispute rendered by an arbitral tribunal; and

(i) to provide that, for purposes of enforcement of foreign awards, every arbitral award made in a country to which one of the two international conventions relating to foreign arbitral awards to which India is a party applies, will be treated as a foreign award.

INTERIM MEASURES BY COURTS

Section 9 occurs in Chapter II in Part-I, which defines an arbitration agreement and provides the power of a judicial authority to refer the parties to arbitration, where there is an arbitration agreement, and provides further for interim measures by courts.[70]

For appreciating the scope of Section 9, the term 'party' has to be understood, following the definition of the said term in Section 2(1)(h), which states that unless the context otherwise requires 'party' means a party to an arbitration agreement.[71]

One important aspect to be kept in mind is that a court exercising jurisdiction under Section 9 of the Arbitration and Conciliation Act, 1996 does not cease to be a Civil Court merely because it exercises the power under Section 9. For the purposes of this section, "court" means the principal civil court of original jurisdiction in a district, and includes a High Court in exercise of its ordinary original jurisdiction, and having jurisdiction to decide the questions forming the subject-matter of the arbitration, if the same had been the subject-matter of the arbitration agreement.[72]

That the general rules that governed the court while considering the grant of an interim injunction at the threshold lare attracted even while dealing with an application under Section 9 of the Act. There is also the principle

[70] *Shoney Sanil v. Coastal Foundations (P) Ltd.*, AIR 2006 Ker 206 : 2006 (1) KLT 915.
[71] *Id.*
[72] *Arvind Construction (P) Ltd v. Kalinga Mining Corporation and others*, 2007 (6) SCC 798 : AIR 2007 SC 2144.

that when a power is conferred under a special statute and it is conferred on an ordinary court of the land, without laying down any special condition for exercise of that power, the general rules of procedure of that court would apply.[73]

The Supreme Court made it clear that the grant of an interim prohibitory injunction or interim mandatory injunction are governed by well-known rules and that it is difficult to imagine that the Legislature intended to make Section 9 of the Act, *dehors* the accepted principles governing the grant of such interim orders.[74]

Under Section 9 of the Act, a court can pass interim order before or during or after making of any arbitral award. However, such interim orders shall be before the enforcement of any award so passed. Under Section 9 of the Act, the court can pass interim orders for:

(a) the appointment of a guardian for a minor or person of unsound mind for the purpose of arbitration proceedings.

(b) the preservation, interim custody or sale of any goods which are the subject matter of the arbitration agreement.

(c) securing the amount in dispute in the arbitration.

(d) the detention, preservation or inspection of any property or thing which is the subject matter of the dispute in arbitration.

(e) interim injunction or appointment of a receiver.

The Supreme Court held that an application for interim measures under Section 9 can be made in India, even though the place of arbitration is in a foreign country.[75] The court further held that, that power of the court to pass an interim order under Section 9 is conferred on the District Court. When the power is conferred under a special statute and it is conferred on an ordinary court of the land without underlying any special condition for exercise of that power, the general rules of procedure that court would apply.[76]

It was held by the Supreme Court that the purpose of enacting Section 9 read with the Model Law of UNCITRAL rules is to provide "interim measures of protection". The order passed by the court shall fall within the meaning of the expression "an interim measure of protection" as distinguished from an all time or permanent protection.[77]

[73] *Id.*
[74] *Adhunik Steels Ltd v. Orissa Manganese and Minerals Pvt. Ltd*, AIR 2007 SC 2563 : (2007) 7 SCC 125.
[75] *Bhatia International v. Bulk Trading SA*, AIR 2002 SC 1432 : (2002) 4 SCC 105 : (2002) 2 SCR 411.
[76] *Arvind Constructions Co. (P) Ltd. v. Kalinga Mining Corporation & Others*, (2007) 6 SCC 798 : AIR 2007 SC 2144.
[77] *Firm Ashok Traders v. Gurumukh Das Saluja*, AIR 2004 SC 1433 : (2004) 3 SCC 155.

The power under Section 9 should be used sparingly and that too with conditions and that while passing an order; the court should ensure that effective steps are taken to commence the arbitral proceedings.[78] The power under Section 9 is discretionary and it cannot be used as a matter of course.[79]

An *ex parte* interim order for the seizure of the vehicle could be passed without notice. Therefore, it cannot be said that there is a total embargo upon the power of the court to appoint an Advocate Commissioner for seizing and taking possession of a hypothecated vehicle or equipment, in an application filed under Section 9 of the Arbitration and Conciliation Act, 1996.[80]

Further, it may be noted that the grant of an injunction was a discretionary relief.[81] It is also observed, that no orders of permanent nature could be passed under Section 9.[82] Besides, it is open to financiers to approach the civil court and seek interim orders *ex parte* or otherwise for the appointment of Advocate Commissioners.[83]

In *Cholamandalam DBS Finance Ltd v. Sudheesh Kumar,*[84] the court issued certain guidelines for the practice of the financial institutions approaching the Court under Section 9 of the Arbitration Act as follows:

(a) If the pleadings in the affidavit make out that it is just and convenient to grant interim orders, and if, *prima facie*, the balance of convenience is in favour of the applicant, then an *ex parte* order appointing an Advocate Commissioner may be passed, but simultaneously notice shall be ordered to go to the respondent indicating the date of hearing of the application. It is open to the learned counsel for the appellant to get permission of the court to also serve private notice on the respondents personally at the time when the vehicle is seized. But, an affidavit must be sworn to by the Advocate Commissioner that the person who received the notice was authorised to do so and that it was not given to some third party who was not responsible or who was not authorised to acknowledge any court notice on behalf of the respondents;

(b) After the advocate commissioner reports to the court that the vehicle has been seized, it shall be in the custody of the applicant. This

[78] *Sundaram Finance Ltd v. NEPC India Ltd,* AIR 1999 SC 564 : (1997) 11 SCC 201.
[79] *National Building Construction Corporation Ltd. v. IRCON International Ltd,* 1998 (44) DRJ 399.
[80] *Kogta Financial India Ltd v. Jayesh Kishorlal Dawda,* 2011 (6) CTC 182.
[81] *House Productions Pvt. Ltd v. Media Plus,* 2005 (2) MLJ 256 : 2005 (3) Arb LR 52 (Madras).
[82] *Sai Priya Construction Company v. K.Anantha Kumari Satya Raju,* 2006 (1) Arb.L.R. 569 : 2006 (3) ALD 21.
[83] *R. Omprakash Choraliya v. Deputy Inspector of Police,* 2008 (1) MLJ 616 : 2007-4-LW 834.
[84] 2010 (1) CTC 481.

custody is on behalf of the court, i.e., the applicant will be holding it in *custodia legis*.

(c) Of course, if even after the notice, the borrower does not appear or if it appears to the court that the borrower is deliberately evading notice, then it is open to the applicant to pray for such reliefs as are necessary, which may even include the sale of vehicle and the matter may be heard *ex parte* and orders passed in exercise of discretion of the court.

(d) The application shall not be closed without hearing the other side after notice is served. Before closing the application, the court shall also ascertain whether the applicant has taken steps to initiate the arbitral proceedings. If the applicant has not done so, then orders shall be passed putting the applicant on terms as laid down in the *Sundaram Finance* case[85] because Section 9 depends on a close nexus with the initiation of arbitral proceedings.

(e) As regards the expenditure incurred for keeping the vehicle in custody, the applicant shall bear it until the respondent is served and appears. After that, the court shall hear the parties and pass orders.

(f) The remuneration for Advocate Commissioners appointed by this court shall be commensurate with the work done, since the financiers will shift this burden only on the already beleaguered borrower.

Article 23 of the ICC Rules permits parties to apply to a competent judicial authority for interim and conservatory measures. Therefore, in such cases an application can be made under Section 9 of the said Act.[86]

Further, by virtue of Section 17 of the Act, during the arbitral proceedings the arbitral tribunal may at the request of a party order a party to take any interim measure of protection as the tribunal may consider necessary in respect of the subject matter of the dispute.

The powers under Section 9 as available to the court and the powers under Section 17 as available to the arbitral tribunal, to make interim measures, are independent. There may be certain degree of overlapping between the two provisions, but the powers under Section 9 are much wider inasmuch as they extend to the period, pre and post the award, as well as with regard to the subject-matter and nature of the orders. The pendency of an application under Section 17, therefore, does not denude the court of its powers to make an order for interim measures under Section 9 of the said Act.[87]

[85] *Supra* note 80.
[86] *Bhatia International v. Bulk Trading S.A. & Anr.,* 2002 (4) SCC 105 : AIR 2002 SC 1432 : (2002) 2 SCR 411.
[87] *S.B.P. & Co. v. Patel Engineering Ltd. And Another,* 2005 (3) Arb. I.R. 285 (SC) : AIR 2006 SC 450.

A bare perusal of the aforementioned provisions would clearly show that even under Section 17 of the 1996 Act the power of the arbitrator is a limited one. He cannot issue any direction which would go beyond the reference or the arbitration agreement. Furthermore, an award of the arbitrator under the 1996 Act is not required to be made a rule of court; the same is enforceable on its own force. Even under Section 17 of the 1996 Act, an interim order must relate to the protection of the subject-matter of dispute and the order may be addressed only to a party to the arbitration. It cannot be addressed to other parties. Even under Section 17 of the 1996 Act, no power is conferred upon the Arbitral Tribunal to enforce its order nor does it provide for judicial enforcement thereof. The said interim order of the learned arbitrator, therefore, being *Coram non judice* was wholly without jurisdiction and, thus, was a nullity.[88]

Under the Arbitration and Conciliation Act of 1996, unlike its predecessor, the Act of 1940, the Arbitral Tribunal is empowered by Section 17 of the Act to make orders amounting to interim measures. The need for Section 9, in spite of Section 17 having been enacted, is that Section 17 would operate only during the existence of the Arbitral Tribunal and its being functional. During that period, the power conferred on the Arbitral Tribunal under Section 17 and the power conferred on the court under Section 9 may overlap to some extent but so far as the period pre- and post- the arbitral proceedings is concerned, the party requiring an interim measure of protection shall have to approach only the court.[89]

Under Section 17, the Arbitral Tribunal can only order a party to take an interim measure of protection and to provide appropriate security in connection with such measure. Although there may be some degree of overlap between the provisions of Section 17 and 9, there is no bar to an order being made under Section 9 by a court of competent jurisdiction during the pendency of arbitration proceedings before an Arbitral Tribunal.[90]

Though Section 17 gives the arbitral tribunal the power to pass orders the same cannot be enforced as orders of a court. It is for this reason that Section 9 admittedly gives the court power to pass interim orders during the arbitration proceedings. This view correctly represents the position in law, namely, that even before the commencement of arbitral proceedings the court can grant interim relief. The said provision contains the same principle which underlies Section 9 of the 1996 Act.[91]

[88] *MD, Army Welfare Housing Organisation v. Sumangal Services (P) Ltd.*, (2004) 9 SCC 619 : AIR 2004 SC 1344.
[89] *CREF Finance Ltd. v. Puri Construction Ltd and Ors.* 2000 (55) DRJ 730 : 2000 (3) Arb LR 331 (Delhi).
[90] *National Highways Authority of India v. China Coal Construction Group Corporation*, AIR 2006 Del 134 : 2006 (1) Arb LR 265 (Delhi).
[91] *Techno Car SPA v. The Madras Aluminum Company*, 2004 (3) CTC 754 : 2004 (2) Arb LR 284 (Madras).

3

Arbitration Tribunal

An "arbitral tribunal" means a sole arbitrator or a panel of arbitrators.[1] Under Section 6 of the Act, in order to facilitate the conduct of the arbitral proceedings, the parties, or the arbitral tribunal with the consent of the parties, may arrange for administrative assistance by a suitable institution or person.

The interpretation of the term "arbitrator" cannot be detached from the context in which it occurs and the same cannot be interpreted in a vacuum, and has to be made in the light of other provisions of the agreement. Where, one clause of the agreement speaks of the expression "an arbitrator", and the other clause stipulates that arbitration shall be conducted in accordance with the arbitration procedure of the named institution, which provided for a panel of three arbitrators, it was held that, adjudication of disputes shall be made by an arbitral tribunal of three members.[2]

COMPOSITION OF TRIBUNAL AND APPOINTMENT OF ARBITRATORS

Parties to an arbitration agreement are free to determine the number of arbitrators. However, such number shall not be an even number.[3] Where the number of arbitrators is not determined, the arbitral tribunal shall consist of a sole arbitrator. Further, if parties fail to determine the number of arbitrators, the arbitral tribunal shall consist of sole arbitrator.[4]

Party autonomy in the arbitration agreement must be given due importance while construing the importance of the parties.[5] Section 10(1), gives the freedom to the parties to determine the number of arbitrators, provided that such number shall not be an even number.[6]

Section 10 deviates from Article 10 of the UNCITRAL Model Law only in the sense that Section 10(1) of the Act provides that despite the freedom given

[1] Section 2(1) (d), The Arbitration and Conciliation Act, 1996.
[2] *Gayatri Projects Ltd. v. State of Orissa*, 2004 (2) RAJ 696 (Ori) : 2004 (2) Arb LR 394 (Orissa).
[3] Section 10(1), The Arbitration and Conciliation Act, 1996.
[4] Section 10(2), The Arbitration and Conciliation Act, 1996.
[5] *Sime Derby Eng. SDN BHD v. Engineers India Ltd.*, AIR 2009 SC 3158 : (2009) 7 SCC 545.
[6] *Prakash Cotton Mills Pvt. Ltd. v. Vinod Tejraj Gowani*, 2014 (6) ABR 1.

to the parties to determine the number of arbitrators, such number shall not be an even number. But in default of the determination of the number, Section 10(2) provides that the tribunal is to consist of a sole arbitrator. Therefore, the scheme of Section 10(2) of the Act is virtually similar to Article 10.2 of the UNCITRAL Model Law[7].

Under Section 10(1) of the Arbitration and Conciliation Act, 1996, the appointment of arbitrators, in even number is prohibited, and the consequence of such appointment is contemplated in sub-section (2) thereof. The question as to whether the arbitration agreement becomes invalid only because the number of arbitrators appointed is even in number, is already considered and decided by the Supreme Court in the case of *MMTC Ltd. v. Sterlite Industries (India) Ltd.*[8]

In the aforesaid case, the question regarding the even number of arbitrators had been considered, and it was held that any arbitration agreement between the parties, even if it contemplates the appointment of arbitrators in even number, the same will not become invalid. It has been held that the arbitration agreement can still be given effect to in accordance to the provisions of Section 11 of the Arbitration and Conciliation Act, 1996 and in view of the provisions of sub-section 2 of Section 10; the matter can be proceeded with.

A similar view was taken by the Supreme Court in the case of *Narayan Prasad Lohia v. Nikunj Kumar Lohia and Others,*[9] and it was held that an arbitration agreement, merely because it contemplates for the appointment of arbitrators in even number, will not become illegal or invalid. In view of the above, it has been held that merely because the arbitration agreement contemplates the appointment of two arbitrators i.e., even number of arbitrators, the arbitration agreement will not become invalid.

In this regard the principles laid down in the case of *Sri Venkateshwara Construction Co. v. Union of India and Others,*[10] may also be taken note of where in it has been held by the Andhra Pradesh High Court that in the event, when even number of arbitrations are appointed, the arbitration in such cases would be by a sole arbitrator in view of Sub-section 2 of Section 10 and for taking further action in the matter, the procedure contemplated under Section 11 will have to be followed.

In *Dr. Deepashree v. Sultan Chand and Sons,*[11] the arbitration agreement contemplated appointment of two arbitrators, one each to be appointed

[7] *Sime Darby Engineering Sdn. Bhd. v. Engineers India Ltd.*, 2009 (7) SCC 545 : AIR 2009 SC 3158.
[8] AIR 1997 SC 605.
[9] AIR 2002 SC 1139 : (2002) 3 SCC 572.
[10] AIR 2001 AP 284 : 2001 (2) Arb LR 619 (AP).
[11] 2009 (4) Arb LR 94 (Delhi) : AIR 2009 Del 85.

by the parties. On disputes having arisen, an arbitrator was appointed by one of the parties and the other party was asked to give consent to the appointment of that arbitrator as the sole arbitrator. The opposite party had declined to concur with the appointment of the nominated arbitrator as the sole arbitrator and had nominated another arbitrator as per the terms of the agreement. Thereafter, an application under Section 11 was filed by one of the parties.

The learned Single Judge relying on a judgment of the Andhra Pradesh High Court in *Sri Venkateswara Construction Company v. Union of India,*[12] where an agreement for arbitration by two arbitrators was construed as an agreement for reference to a sole arbitrator, and relying on two judgments of this Court, *Wipro Finance Ltd. v. Sandplast India Ltd.,*[13] and *Marine Container Services (South) Pvt. Ltd. v. Atma Steels Ltd.,*[14] where sole arbitrators were appointed even though the arbitration agreements were for the appointment of two arbitrators, had held that an agreement for appointment of two arbitrators is not an agreement within the meaning of Section 10(1) of the Act and consequently Section 10(2) comes into play and the Arbitral Tribunal is to consist of a sole arbitrator.

The precedents referred to hereinabove had also held that an arbitration agreement which provides for an even number of arbitrators will not be invalid on that count only, and it was held that in those circumstances the arbitration agreement is to be deemed to be for reference to a sole arbitrator. A similar view was also taken in *North East Securities Ltd. v. Sri Nageshwara Chemicals and Drugs Pvt. Ltd.*[15] In view of the precedents discussed above, it cannot be held that the arbitration agreement is void solely for the reason that it contemplated arbitration by an even number of arbitrators. Section 10(2) of the Arbitration and Conciliation Act, 1996 shall be applicable in the circumstances and the arbitral tribunal is to consist of a sole arbitrator.

APPOINTMENT OF ARBITRATORS[16]

Section 11 of the Arbitration and Conciliation Act, 1996 lays down the procedure for the appointment of an arbitrator as follows:

1. A person of any nationality may be an arbitrator, unless otherwise agreed by the parties.
2. Subject to sub-section (6), the parties are free to agree on a procedure for appointing the arbitrator or arbitrators.

[12] AIR 2001 AP 284 : 2001 (2) Arb LR 619 (AP).
[13] 2006(3) Raj 524 (Delhi).
[14] 2001 (1) Arb LR 341 (Delhi) : (2000) ILR 2 Delhi 532.
[15] 2001 (1) Arb LR 70 (AP).
[16] Section 11, The Arbitration and Conciliation Act, 1996.

3. Failing any agreement referred to in sub-section (2), in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two appointed arbitrators shall appoint the third arbitrator who shall act as the presiding arbitrator.
4. If the appointment procedure in sub-section (3) applies and—
   (a) a party fails to appoint an arbitrator within thirty days from the receipt of a request to do so from the other party; or
   (b) the two appointed arbitrators fail to agree on the third arbitrator within thirty days from the date of their appointment, the appointment shall be made, upon request of a party, by the Chief Justice or any person or institution designated by him.
5. Failing any agreement referred to in sub-section (2), in an arbitration with a sole arbitrator, if the parties fail to agree on the arbitrator within thirty days from receipt of a request by one party from the other party to so agree the appointment shall be made, upon request of a party, by the Chief Justice or any person or institution designated by him.
6. Where, under an appointment procedure agreed upon by the parties,—
   (a) a party fails to act as required under that procedure; or
   (b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or
   (c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure, a party may request the Chief Justice or any person or institution designated by him to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.
7. A decision on a matter entrusted by sub-section (4) or sub-section (5) or sub-section (6) to the Chief Justice or the person or institution designated by him is final.
8. The Chief Justice or the person or institution designated by him, in appointing an arbitrator, shall have due regard to—
   (a) any qualifications required of the arbitrator by the agreement of the parties; and
   (b) Other considerations as are likely to secure the appointment of an independent and impartial arbitrator.
9. In the case of appointment of sole or third arbitrator in an international commercial arbitration, the Chief Justice of India or the person or institution designated by him may appoint an arbitrator of a nationality other than the nationalities of the parties where the parties belong to different nationalities.

10. The Chief Justice may make such scheme as he may deem appropriate for dealing with matters entrusted by sub-section (4) or sub-section (5) or sub-section (6) to him.
11. Where more than one request has been made under sub-section (4) or sub-section (5) or sub-section (6) to the Chief Justices of different High Courts or their designates, the Chief Justice or his designate to whom the request has been first made under the relevant sub-section shall alone be competent to decide on the request.
12. (a) Where the matters referred to in sub-sections (4), (5), (6), (7), (8) and (10) arise in an international commercial arbitration, the reference to "Chief Justice" in those sub-sections shall be construed as a reference to the "Chief Justice of India."
    (b) Where the matters referred to in sub-sections (4), (5), (6), (7), (8) and (10) arise in any other arbitration, the reference to "Chief Justice" in those sub-sections shall be construed as a reference to the Chief Justice of the High Court within whose local limits the principal Civil Court referred to in clause (e) of sub-section (1) of Section 2 is situated and where the High Court itself is the court referred to in that clause, to the Chief Justice of that High Court.

Section 11 of the Arbitration and Conciliation Act, 1996 would relate to appointment of arbitrators. The section postulated that a person of any nationality may be appointed an arbitrator unless otherwise agreed by the parties. Sub-section (2) laid down that the parties were free to agree on a procedure for appointing an arbitrator or arbitrators. Sub-sections (2) to (8) dealt with the procedure for appointment of an arbitrator.

Under sub-section (3) in absence of an agreement referred to in sub-section (2) in an arbitration with three arbitrators, each party should appoint one arbitrator and the two appointed arbitrators should appoint the third arbitrator who should act as the presiding arbitrator. An event of failure of sub-section (3) was contemplated and remedial measures for such purpose were provided for under sub-section (4).

Sub-section (4) provides that in the event of the appointment procedure in sub-section (3) is applied, and any party to the arbitration agreement fails to appoint an arbitrator within 30 days of the receipt of a request to do so from the other party, or the two appointed arbitrators fail to agree on the third arbitrator within 30 days from the date of their appointment, the Chief Justice or his designate, on a request from either party could make such an appointment.

Sub-section 11(5) of the Arbitration and Conciliation Act, 1996 specifies that failing an agreement under sub-section (2), in an arbitration by a sole arbitrator, if the parties fail to agree on the arbitrator within 30 days from

receipt of a request by one party from the other to agree, the appointment should be made upon a request made by a party by the Chief Justice or his designate.

No particular form is required to appoint the arbitrator, unless the arbitration agreement so requires. However, under Section 14, the mandate of the arbitrator shall terminate if he becomes *de facto* or *de jure* unable to perform his functions. Hence, the mandate of an arbitrator cannot be terminated if the arbitrators are able to perform his functions as an arbitrator.

An order of appointing an arbitrator or refusing to appoint an arbitrator under Section 11(6) of the Act is neither 'judicial' nor 'quasi-judicial'. The nature of the function as performed by the Chief Justice or his nominee is to aid the constitution of the Arbitral Tribunal. Section 11 does not lay down any time limit within which the Chief Justice or his nominee has to make the appointment; it is expected that these functions would be acted upon promptly.[17]

It is not mandatory for the Chief Justice or his nominee to appoint an arbitrator who does not belong to the nationality of the parties to the dispute. Section 11(9) of the Act is not mandatory. In case, the party who belongs to the nationality other than that of the proposed arbitrator has no objection, the Chief Justice of India or his nominee can appoint an arbitrator belonging to the nationality of one of the parties.[18]

Once a petition under Section 11 of the Arbitration and Conciliation Act, 1996 is taken up for consideration by the Chief Justice or his designate, or the appointing authority under the agreement would not be heard to say that the procedure for constitution of the arbitral tribunal as laid down in the arbitration agreement be strictly adhered to.[19]

The Constitutional Bench of the Supreme Court was of the opinion that,[20] the order of the Chief Justice or his nominee under Section 11, nominating an arbitrator, is not an adjudicatory order and the Chief Justice or his nominee is not a tribunal. Such an order cannot properly be made the subject of a petition for special leave to appeal under Article 136 of the Indian Constitution. Later, in *SBP and Co. v. Patel Engg. Ltd.*,[21] a seven judge bench of the Supreme Court reconsidered and over-ruled the decision and opined

[17] *Konkan Railway Corporation Ltd. v. Meyal Construction Co. Ltd.*, (2000) 7 SCC 201 : AIR 2000 SC 2821.

[18] *Malaysian Airlines Systems Bhd v. M/s. STIC Travels (P.) Ltd.*, AIR 2001 SC 358 : (2001) 1 SCC 509.

[19] *Deep Trading Company v. Indian Oil Corporation and Others*, 2013 (IV) SCC 281 : AIR 2013 SC 1479.

[20] *Konkan Railway Corporation Ltd. v. Rani Construction Pvt. Ltd.*, AIR 2002 SC 778 : (2002) 2 SCC 388.

[21] (2005) 8 SCC 618.

that the power exercised by the Chief Justice under Section 11(6) of the Act is not an administrative power; it is rather a judicial power.

An order under Section 11(6) as made by the designated Justice, is an administrative order, and hence amenable to writ jurisdiction under Article 226 of the Constitution subject to the rule of alternative remedy.[22]

It was held by the Supreme Court that Arbitration and Conciliation Act, 1996 is applicable only when the place of arbitration is in India. If the contract of an Indian company with a foreign company contains an arbitration clause, specifying New York to be the place of arbitration, a petition before the Chief Justice of India or his nominee for appointment of an arbitrator is not maintainable.[23]

Section 11 of the Arbitration and Conciliation Act, 1996 is a complete code. The extent of the right of an appointing authority under the arbitration agreement to constitute the arbitral tribunal, and specifically the terminus of such power was considered by the Supreme Court in *Datar Switchgears Ltd.*[24] and *Punj Lloyd Ltd.*[25]

Datar Switchgears Ltd. which was subsequently followed by *Punj Lloyd Ltd.*, laid down that the right of the party to constitute an arbitral tribunal did not cease after the expiry of 30 days, but such right ceased when a petition under Section 11 of the Arbitration and Conciliation Act, 1996 was filed after the expiry of the period of 30 days from the date of the receipt of the demand for arbitration.

Therefore, in terms of *Datar Switchgears Ltd.* and *Punj Lloyd Ltd.*, a party can constitute the arbitral tribunal even after the expiry of 30 days from the date of receipt of the demand, however, such appointment was required to be made prior to a petition under Section 11 of the Arbitration and Conciliation Act, 1996 was filed. Once such petition was filed after the expiry of 30 days, the right to appoint the arbitrator ceased.

Hence, it is understood that, neither *Datar Switchgears Ltd.* nor *Punj Lloyd Ltd.*, answers the question whether or not the Chief Justice or his designate should have due regard to the qualification required of an arbitrator by the arbitration agreement of the parties and other considerations as are likely to secure of an appointment of an independent and impartial arbitrator once a petition under Section 11 came up for considerations.

In other words, whether or not the Chief Justice or his designate was free to appoint any arbitrator of their choice, once the person or the institution entrusted under the arbitration agreement to constitute the arbitral tribunal

[22] *State of Orissa v. Gokulananda Jena*, (2003) 6 SCC 465 : AIR 2006 SC 450.

[23] *Shreejee Traco (I) Pvt. Ltd. v. Paperline International Inc.*, (2003) 9 SCC 79.

[24] *Datar Switchgears Ltd. v. Tata Finance Ltd. & Anr.*, 2000 (8) SCC 151 : 2000 (7) SCALE 204.

[25] *Punj Lloyd Ltd. v. Petronet MHB Ltd.*, 2006 (2) SCC 638.

failed to perform his or its function, is the question that we have to answer.

A bare reading of the scheme of Section 11 shows that the emphasis on the terms of the agreement being adhered to and/or given effect as closely as possible. In other words, the court may ask to do what has not been done. The court must ensure that the remedies provided for are exhausted.[26]

GROUNDS FOR CHALLENGE

By virtue of Section 12(1), when a person is approached in connection with his possible appointment as an arbitrator, he shall disclose in writing any circumstances likely to give rise to justifiable doubts as to his independence or impartiality. An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall, without delay, disclose to the parties in writing any circumstances referred to in sub-section (1), unless they have already been informed of them by him.[27]

An arbitrator may be challenged only if — (a) circumstances exists that give rise to justifiable doubts as to his independence or impartiality, or (b) he does not possess the qualifications agreed to by the parties.[28] A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.[29]

When an unsuccessful party cannot challenge the order of the arbitrator rejecting the challenge to his appointment, even before a civil court, before the award is made, a petition cannot also lie under Article 226 of the Indian Constitution to challenge that order.[30]

An arbitrator was challenged on the ground that, he had worked as the Head of the Law department of a sister concern of one of the parties to the arbitration agreement for more than 15 years. It was held that an allegation of bias cannot be sustained in such cases.[31]

While sub-section (1) of Section 12 provides for the disclosure in writing by a person approached in connection with his possible appointment as an arbitrator, of any circumstance likely to give rise to justifiable doubts as to his independence or impartiality, under sub-section (2) such disclosure is

[26] *Supriya Kumar Saha v. Union of India*, decided on December 24, 2013 (Calcutta High Court).
[27] Section 12(2), The Arbitration and Conciliation Act, 1996.
[28] Section 12(3), The Arbitration and Conciliation Act, 1996.
[29] Section 12(4), The Arbitration and Conciliation Act, 1996.
[30] *Harike Rice Mills v. State of Punjab*, 1998 (1) RAJ 223 : 1997 Arb LR 32.
[31] *Saurabh Kalani v. Tata Finance Ltd.*, 2004 (1) RAJ 120 Bom (DB) : 2003 (5) Bom CR 844.

required to be made by an arbitrator, from the date of his appointment and throughout the arbitral proceedings, without any delay.[32]

Section 12 casts a solemn duty on an arbitrator, who is put in a position of a judge to disclose to the parties his interest. The entire scheme of Act 26 of 1996 rests on the foundation of the arbitrator being impartial and independent. A person approached for his possible appointment as an arbitrator, is required to inform the person approaching him of circumstances which are likely to give rise to justifiable doubts as to his independence or impartiality.

The disclosure is not whether the arbitrator is, in fact, independent or impartial, but of circumstances which are likely to give rise to justifiable doubts as to his independence or impartiality. The object of Section 12(1) is that the person, appointed as an arbitrator should ever be above reproach. The very fact that Section 11(8) (b) of Act, 1996 requires the Chief Justice or his designate, in appointing an arbitrator, to have due regard to other considerations as are likely to secure the appointment of an independent and impartial arbitrator, would emphasise the importance placed by the Act on the independence and impartiality of the arbitrator.

The basis to determine whether or not there are justifiable doubts as to the independence or impartiality of the arbitrator is whether the party to the dispute would have a reasonable apprehension in his mind about the independence of the arbitrator and not whether the arbitrator thinks that he is capable of being impartial.[33]

The disqualification under Sections 12(1) and (2) does not relate only to pre-reference disputes. Otherwise, the expression 'throughout the arbitral proceedings' would be rendered otiose. 'Throughout the arbitral proceedings' must mean the existence, or arising of such circumstances even during the course of arbitral proceedings, which give rise to any doubt as to the independence of the arbitrator.[34]

Section 12 of the Act casts a duty on the arbitrator, where the obligation continues throughout the arbitral proceedings, i.e., whenever such facts come into being during the arbitral proceedings. What the law stipulates as a disqualification to become, or to remain an arbitrator in a given dispute is not the existence of actual bias, but the existence of such facts and circumstances as are 'likely to give rise to justifiable doubts as to his independence and impartiality.'[35]

[32] *National Highways Authority of India v. Bumihiway DDB Ltd. (JV)*, (2006) 10 SCC 763 : 2006 Supp (6) SCR 586.
[33] *Murlidhar Roongta v. S. Jagannath Tibrewala*, 2005 (1) Arb. LR 103 (Bom) : 2005 (1) Bom CR 228.
[34] *Hasmukhlal H. Doshi v. Justice M.L. Pendse*, 2001 (1) Arb. LR 87 (Bom.) : 2000 (3) Bom CR 672.
[35] *Alcove Industries Ltd., v. Oriental Structural Engineers Ltd.*, 2008 (1) Arb LR 393 (Del.).

If the person proposed to be appointed as the arbitrator, is called upon to disclose in writing, as required under Section 12(1) of the Act, he may well declare that there are circumstances likely to give rise to justifiable doubts as to his independence or impartiality. If it were to be held that the Chief Justice or his designate is also required to obtain a written disclosure from the person proposed to be appointed as the arbitrator, how can the person approached of his possible appointment, give such a disclosure unless he is made aware of the details regarding the parties to the dispute, the nature of the agreement, etc.[36]

There can be no manner of doubt that the requirement of a disclosure in writing, as prescribed in Section 12(1), seeks to achieve a salutary purpose. Such a written disclosure would ensure that persons, whose independence and impartiality is beyond reproach, are alone appointed as arbitrators. The quintessence of an arbitral procedure is fairness and expedition. Impartiality is an essential attribute of fairness. The pristine rule of adjudicative ethics rest on the premise that, the arbitral tribunal permitted by the law to try cases and controversies must not only be unbiased but must also avoid even the appearance of bias.[37]

An arbitrator is an arbiter of disputes and differences between the parties concurring in his appointment. His installation as the judge of their cause is not by any institutional fiat. He earns the prerogative of conducting the proceedings by the confidence he commands. Fairness, impartiality, independence and neutrality are, therefore, the indispensable qualities of an arbitrator.[38]

While an arbitrator is duty bound to disclose in writing the circumstances likely to give rise to justifiable doubts as to his independence or impartiality, in case doubts still remain after such disclosure, the appointment of an arbitrator can be challenged in the circumstances specified in Section 12(3) of the Act.[39]

Section 12(3), which provides for a challenge to the appointment of an arbitrator, does not specifically provided for a challenge to be made to his appointment solely on account of his non-disclosure. It is only if circumstances exist that give rise to justifiable doubts as to his independence or impartiality, or he does not possess the qualifications agreed to by the parties, can there be a challenge under Section 12(3) to his functioning as an arbitrator.[40]

[36] *State of Arunachal Pradesh v. Subhash Projects & Marketing Ltd.*, 2007 (1) Arb LR 564 (Gau) (DB).
[37] *Id.*
[38] *Id.*
[39] *Unipack Industries v. Subhash Chand Jain*, 2002 (1) Arb. LR 174 (Del) : 94 (2001) DLT 710.
[40] *Ahluwalia Contracts (India) Ltd., v. Housing & Urban Development Corporation*, 2007 (4) Arb LR 539 (Del) : (2008) ILR 1 Delhi 982.

While failure to disclose in writing, without anything more, may not ordinarily necessitate an inference that non-disclosure is only because circumstances exist which are likely to give rise to justifiable doubts as to the independence or impartiality of the arbitrator, if a party to the dispute has information as to the existence of such circumstances, it is always open for him to make a challenge.

It may not be understood that this court has laid down that in no case would failure to make a disclosure in writing necessitate an inference of the existence of circumstances giving rise to justifiable doubts as to independence or impartiality of the arbitrator, for it is not beyond the realm of possibility that an arbitrator, with a view to avoid informing the parties in writing of his being so circumstanced as to give rise to justifiable doubts as to his independence or impartiality, may well choose not to make such a written disclosure.

While Section 12 prescribes the grounds for challenge, Section 13 prescribes the challenge procedure, and under sub-section (1) thereof subject to sub-section (4), the parties are free to agree on a procedure for challenging an arbitrator. Under sub-section (2), the challenge to an arbitral tribunal may arise in two different situations.[41]

A person who intends to challenge an arbitrator may do so within fifteen days of his becoming aware of the constitution of the arbitral tribunal. He may also challenge an arbitrator thereafter on his becoming aware of any circumstances referred to in sub-section (3) of Section 12. Thus, even before he becomes aware of the circumstances referred to in Section 12(3), sub-section (2) of Section 13 enables a party to challenge an arbitrator within fifteen days of his becoming aware of the constitution of the arbitral tribunal.[42]

A conjoint reading of Sections 12 and 13 would show that, on any of the grounds of challenge mentioned in Section 12, the procedure prescribed under Section 13 for such a challenge must be adhered to and, if the challenge is unsuccessful, a party has necessarily to participate in the arbitral proceedings and his remedy, to question the unsuccessful challenge, is only by way of an application under Section 34 to set aside the award after the award is passed by the arbitrator.[43]

Where a statute creates different authorities to exercise their respective functions there under, each of such authorities must exercise the functions within the four corners of the statute.[44] If a statute has conferred a power

[41] *Rishi Electricals (P) Ltd. v. H.P. State Electricity Board*, 2006 (Supp) Arb LR 498 (HP).
[42] *Id.*
[43] *Bharat Heavy Electricals Ltd. v. C.N. Garg*, 2000 (3) Arb. LR 674.
[44] *Taylor v. Taylor*, (1875) Ch D 426.

to do an act, and has laid down the method in which that power has to be exercised, it necessarily prohibits the doing of the act in any other manner than that which has been prescribed. The principle behind the rule is that if this were not so, the statutory provision might as well not have been enacted.[45]

CHALLENGE PROCEDURE

Subject to sub-section (4), the parties are free to agree on a procedure for challenging an arbitrator.[46] In other words, Section 13(1) provides that party would be free to agree on a procedure for challenging an arbitrator.[47]

Failing any agreement referred to in sub-section (1), a party who intends to challenge an arbitrator shall, within fifteen days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstances referred to in sub-section (3) of Section 12, send a written statement of the reasons for the challenge to the arbitral tribunal.[48]

Section 13(2) deals primarily with the challenge to the very appointment of the arbitrator. As per the express language of Section 13(2), a challenge to an arbitrator, on the grounds specified in Section 12(3), has to be made only before the Arbitral Tribunal. However, the remedy provided under Section 13(2) does not exclude the remedy under Section 14(2). Both provisions are not mutually exclusive. The court also held that the provisions of Sections 13 and 14 are not mutually exclusive so much so that a party not raising a challenge under Section 13 would be excluded from availing a remedy under Section 14, even if the ground urged is within the parameters of the said provision.[49]

The Division Bench of the Gauhati High Court drew a very interesting proposition to the effect that "though a party unsuccessful in his challenge under Section 13 would be debarred from carrying the same to any other forum resting on some other provision of the Act, except to the extent permissible under Section 34, such an impediment does not stare at a party omitting and/or failing to question the independence and impartiality of the arbitrator under Section 13(2) within the time prescribed".[50]

[45] *Ramchandra Murarilal Bhattad & Ors. v. State of Maharashtra & Ors.*, (2007) 2 SCC 588 : AIR 2007 SC 401.

[46] Section 13 (1), The Arbitration and Conciliation Act, 1996.

[47] *Konkan Railway Corporation Ltd. and Ors., v. Mehul Construction Co.*, JT 2000 (9) 362 : AIR 2000 SC 2821.

[48] Section 13 (2), The Arbitration and Conciliation Act, 1996.

[49] *State of Arunachal Pradesh v. Subhash Projects & Marketing Ltd.*, (2006) 3 GLR 939 : 2007 (1) Arb LR 564 (Gau).

[50] *Id.*

Section 13(2) provides a right to challenge an arbitrator. It also prescribes the forum before which such a challenge is maintainable. Without stopping merely at prescribing a right and laying down the procedure, Section 13(5) also indicates the remedy available if the challenge under Section 13(2) is unsuccessful.[51]

While there is a conceivable logic to permit continuance of the arbitral proceedings following an unsuccessful challenge to the arbitrator, there is no apparent rationale to exclude the invocation of any other provision of the Act for redress to a party in default, in a fact situation, justifying the same. In other words/if circumstances envisaged in Section 12(3) of the Act exist, a party failing to raise the challenge based thereon under Section 13(2), in our considered opinion, cannot be debarred from availing a remedy otherwise available to him under the Act. To put it differently, failure of such a party to file an application under Section 13(2) on the grounds under Section 12(3) of the Act would not act as an estoppel against him[52].

Unless the arbitrator challenged under sub-section (2) withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.[53] Under Section 13(3) if there is a challenge to the continuance of the arbitrator or his appointment the arbitral tribunal must decide the challenge.[54]

If the parties have failed to adopt a procedure for challenging an arbitrator, a party who intends to challenge an arbitrator shall within fifteen days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstances likely to give rise to justifiable doubts as to his independence or impartiality, send a written statement of the reasons for the challenge to the arbitration tribunal.

An objection as to the jurisdiction of an arbitrator has to be filed within 15 days after the party raising the objection to the jurisdiction becomes aware of the constitution of the arbitral tribunal. After the said period has expired, objection cannot be entertained since; it would be of no consequence.[55]

If it was to be so construed, on such a challenge being made and, unless the arbitrator withdraws from his office or the other party agrees to the challenge, the arbitral tribunal is statutorily bound, under Section 13(3), to decide on the challenge. Section 13(3) takes note of the possibility of an arbitrator, on his being challenged, recusing himself or for the parties to the

[51] *Chennai Metro Rail Limited v. M/s. Lanco Infratech Limited*, 2014 (2) Arb LR 341 (Madras) : 2014 (2) CTC 427.

[52] *State of Arunachal Pradesh v. Subhash Projects & Marketing Ltd.*, (2006) 3 GLR 939: 2007 (1) Arb LR 564 (Gau).

[53] Section 13 (3), The Arbitration and Conciliation Act, 1996.

[54] *Sundaram Finance Ltd. v. NEPC India Ltd.*, 1999 (2) SCC 479 : AIR 1999 SC 565.

[55] *Vikesh Chugh v. BLB Ltd.*, AIR 2009 Del 80 : 2008 (4) Arb LR 196 (Delhi).

agreement to agree to the challenge and, as a result, the arbitrator would cease to continue in office.

It is only in case an arbitrator does not recuse himself, or the parties to the agreement do not agree on the challenge, does Section 13(3) require the arbitral tribunal to decide on the challenge. Once the party raises a challenge it is for the arbitrator himself to decide whether he should continue with the proceedings or not.[56]

Once a challenge is determined under Section 13(3) of the Act, it is argued that the court, cannot in the exercise of its jurisdiction under Section 14 of the Act, set aside or interfere with a decision of the arbitral tribunal taken under Section 13 of the Act. Perusal of Section 5 of the Act read with Sections 12 and 13 any ground as contained in Section 12(3) can only be a subject matter of a challenge under Section 13 and once that challenge is decided and if not accepted the only remedy for a party aggrieved is to agitate the point whilst challenging the award under Section 34 of the Act.[57]

Section 13(3) of the Act makes it very clear that unless the arbitrator challenged withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge. However, by virtue of Section 13(4) of the Act if a challenge under any procedure agreed upon by the parties or under the procedure under sub-section (2) fails, the arbitral tribunal has to continue the arbitral proceedings and make an arbitral award.[58]

Section 13(4) provides that in case the challenge made by the party to the functioning of the arbitrator tribunal fails, the arbitral tribunal has to continue the proceedings and make an award.[59] If a challenge under any procedure agreed upon by the parties or under the procedure under sub-section (2) is not successful, the arbitral tribunal shall continue the arbitral proceedings and make an arbitral award.[60]

If Section 13(4) is construed, the legislature in its wisdom has provided for a remedy whilst challenging the award. In these circumstances, the court was of the opinion that the judgment in the case of *M/s Anuptech Equipments Pvt. Ltd. v. M/s Ganpati Co-operative Housing Society Ltd. and others,*[61] would not apply,, nor would this be a case where this court should invoke its

[56] *Rishi Electricals (P) Ltd. v. H.P. State Electricity Board*, 2006 (Supp) Arb LR 498 (HP).
[57] *Mr. Hasmukhlal H. Doshi & Another v. Mr. Justice M.L. Pendse & Others*, 2000 (3) Bom CR 672 : 2000 (3) MhLJ 690.
[58] *Ahluwalia Contracts (India) Ltd. v. Housing and Urban Development Corporation*, 2008 (100) DRJ 461: 2007 (4) Arb LR 539 (Delhi).
[59] *Neeru Walia v. Inderbir Singh Uppal & Anr.*, 160 (2009) DLT 55 : (2009) 155 PLR 43.
[60] Section 13(4), The Arbitration and Conciliation Act, 1996.
[61] AIR 1999 Bom 219 : 1999 (2) Bom CR 331.

extraordinary jurisdiction under Article 226 and / or for that matter under Article 227 of the Constitution of India.

Where an arbitral award is made under sub-section (4), the party challenging the arbitrator may make an application for setting aside such an arbitral award in accordance with Section 34.[62] In other words, sub-section 5 of Section 13 gives right to the aggrieved party to challenge such an award passed by the arbitrator, under Section 34 of the Act on the ground which the party had made out in its application before the Tribunal asking the Tribunal to recuse itself.[63]

Under the provisions of Section 13(5) of the Act, the party challenging the arbitrator had a right to make an application for setting aside such an arbitral award in accordance with Section 34 of the Act. Section 13(5) of the Act specifically provides a right to the party aggrieved to challenge the final award if his initial challenge to the arbitration had not been successful.[64]

A careful look at Section 13(5) and Section 34(2) (a) (v) would show that if a party challenges an arbitrator under Section 13(2) and suffers an order of rejection by the arbitral tribunal, he can include it as one of the grounds of challenge to the final award, in terms of Section 13(5). Independent of Section 13(5), Section 34(2) (a) (v) enables a party to seek to set aside the award on the ground that the composition of the arbitral tribunal was not in accordance with the agreement of the parties. Therefore, it is not possible to hold that Sections 13 and 14 are not mutually exclusive. They are in fact, mutually exclusive, as per the scheme of the Act.[65]

In view of the above, the only remedy available to the petitioner is to challenge the arbitrator in a manner prescribed by Section 13(2) before the arbitral tribunal itself. If the petitioner's challenge is accepted, then the petitioner can nominate its own arbitrator and together with the arbitrator of the first respondent, they can nominate the third arbitrator.[66]

If the petitioner's challenge is rejected, then the only remedy open to the petitioner is to participate in the proceedings and defend itself. If an award is passed against the petitioner and the petitioner chooses to challenge the same under Section 34, it would then be open to them to include a challenge to the constitution of the Tribunal also as one of the grounds, by falling back upon Section 13(5).[67]

[62] Section 13(5), The Arbitration and Conciliation Act, 1996.
[63] *Neeru Walia v. Inderbir Singh Uppal & Anr.*, 160 (2009) DLT 55 : (2009) 155 PLR 43.
[64] *M/s Satish Chander Gupta and Sons v. Union of India and Others*, 2003 (1) Arb LR 589 P H : (2003) 133 PLR 164.
[65] *Chennai Metro Rail Limited v. M/s. Lanco Infratech Limited*, 2014 (2) Arb LR 341 (Madras) : 2014 (2) CTC 427.
[66] *Id.*
[67] *Id.*

In fact, Section 13(5) of the Act, 1996 indicates that if a challenge has been made within fifteen days of the concerned party becoming aware of the constitution of the arbitral tribunal or within fifteen days from such party becoming aware of any circumstances pointing towards impartiality or independence of the arbitral tribunal, a challenge on this score is possible in the form of objections to the final award under Section 34 of the Act, 1996.[68]

By virtue of Section 13(6) an arbitral award is set aside on an application made under sub-section (5), the Court may decide as to whether the arbitrator who is challenged is entitled to any fees.

The constitutional bench of the Supreme Court held that, though an arbitrator is appointed by the Chief Justice or his designate under Section 11 of the Act, party who has justifiable doubts about that arbitrator's independence or impartiality can challenge that, the arbitrator under Section 12 by adopting the procedure under Section 13 of the Act.[69]

In *Dharam Prakash v. Union of India and Anr.*,[70] wherein constitutionality of Section 13(3), 13(4), 13(5) as well as Section 34 of the Act were under challenge, it was held by the Division Bench of this Court:

> *We have considered the aforesaid submission of the learned Counsel for the petitioner. It is to be noted that the aforesaid Act is enacted mainly in the pattern of the Modern Law adopted by the United Nations Commission on International Trade law. The object and the reasons of the Act clearly indicate that the intention of the Act is to lay emphasis on speedy disposal of arbitration proceedings. The Act also seeks to minimise judicial intervention in the progress and completion of arbitration proceedings, which is crystal clear from a bare reading of Section 5 of the Act which provides that no judicial authority would intervene except where so provided in the Act. Consequently, the bar on court interference on challenging the arbitral tribunal during the pendency of the arbitration proceeding was meant to minimise judicial intervention at that stage as any interference at that stage would be against the spirit with which the Act was enacted. Sub-section (5) of Section 13 of the Act lays down that challenging an arbitral award is permitted even on the grounds taken by the aggrieved party on which the challenge to the arbitral tribunal was made. There is no provision in the Act which would enable the court to remove an Arbitrator during the arbitration proceedings. But, at the same time the party having grievance against an Arbitrator cannot be said to be*

[68] *Naresh Kumar Lamba v. Ashok Kumar Lamba & Ors*, Arb. P. No. 253/2012, decided on May 2, 2013 (Delhi High Court).

[69] *Konkan Railway Corporation Ltd. v. Rani Construction Pvt. Ltd.*, AIR 2002 SC 778 : (2002) 2 SCC 388.

[70] 2007 (94) DRJ 431 (DB) : AIR 2007 Delhi 155.

> *without a remedy and the said remedy becomes available as soon as the arbitral award is made by the Arbitrator or the arbitral tribunal.*

Further, in *Bharat Heavy Electricals Ltd. v. C.N. Garg and Ors.*,[71] it was observed that:

> *The legislature was more than cautious while providing in explicit term that no judicial Authority shall intervene except where so provided (Section 5). Thus clear mandate is to bar judicial interference except in the manner provided in the Act. Conversely if there is no provision to deal with a particular situation, Courts cannot assume jurisdiction and interfere. Comparing this legislation with the earlier legislation on the subject-namely the Arbitration Act, 1940, the message is loud and clear. The legislature found mischief in various provisions contained in the Arbitration Act, 1940 which would enable a party to approach the Court time and again during the pendency of arbitration proceedings resulting into delays in the proceedings. Law makers wanted to do away with such provisions. So that arbitration proceedings are not unduly hampered. The very purpose of arbitration, which is an alternate Dispute Redressal Forum, is defeated once the Courts interfere with these proceedings. The experience in the working of the old Arbitration Act showed that it was resulting in more delays than in civil suits. Therefore, not only such provisions were omitted in the new Act, provision in the form of Section 5 was inserted to convey the message. The scheme of the new Act is clear enough, i.e. during the arbitration proceedings Court's interference is done away with. The new Act deals with the situation even when there is challenge to the constitution of the Arbitral Tribunal. It is left to the Arbitrator to decide the same in the first instance. If a challenge before the Arbitrator is not successful, the Arbitral Tribunal is permitted to continue the Arbitral proceedings and make an Arbitral award. Such a challenge to the constitution of the Arbitral Tribunal before the Court is then deferred and it could be only after the arbitral award is made that the party challenging the Arbitrator may make an application for setting aside an arbitral award and it can take the ground regarding the constitution of Arbitral Tribunal while challenging such an award. Thus course of action to be chartered in such contingency is spelt out in the Act itself. Court interference on basis of petitions challenging Arbitral Tribunal during the pendency of the arbitration proceedings would be clearly against the very spirit with which the Arbitration and Conciliation Act, 1996 has been enacted. The mischief which existed in the earlier enactment and is sought to be removed by the present enactment cannot be allowed to be introduced by entertaining writ petitions in the absence of any provision in the new Act in this respect. A statute is an edict of the legislature and the conventional way of interpreting or construing a statute is to seek the 'intention' of its maker.*

[71] 2001 (57) DRJ 154 (DB).

A statute is to be construed according "to the intent of them that make it" and "the duty of judicature is to act upon the true intention of the legislature - the means or sententia legis."

It was further observed that:

A possible question in this connection may arise about there being no provision for removal of an Arbitrator during the arbitration proceedings by the Court. Admittedly the Act does not contain any provision where the Court can remove an Arbitrator during the pendency of arbitration proceedings. In this connection we have to remind ourselves of the intention behind the legislation, i.e. the Arbitration and Conciliation Act, 1996. As already observed, the Act is modelled after the UNCITRAL Model Law. This Model Law has been adopted by various countries. The need for such a Model Law arose because of increased international commercial activity. Such activity in modern times is at Government or Semi-Government level. In such circumstances it was only fair and proper that all the participating countries should have similar legal provisions when it came to Arbitration. In fact Arbitration is envisaged as a method for speedy alternate redressal of disputes between the parties to commercial transactions. If Court interference was permitted during arbitration proceedings, the very object of speedy redressal of disputes would have been frustrated. That is why keeping the peculiar conditions in India, coupled with the need for speedy resolution of disputes, the provision of Court interference was avoided. Rather Section 5 was inserted which provides that there will be no judicial intervention. We have already noted that a party having grievances against an Arbitrator on account of bias and prejudice is not without remedy. In has only to wait till the arbitral award comes and it can challenge the award on various grounds including bias and prejudice on the part of the Arbitrator. Before the stage of challenge of award under Section 34 comes, Sub-sections (1), (2) and (3) of Section 13 envisage a situation where the Arbitrator may on his own recluse himself on objection being taken qua his functioning as an Arbitrator or where both the parties agree to his removal as per procedure accepted by them. If both fail, the Arbitrator is required to decide on the challenge to his functioning as an Arbitrator levelled by a party. The Arbitrator is expected to be a fair person and if he finds that there is substance in the allegations, an Arbitrator is expected to dispassionately rule on such an objection. Failing all this the last resort for an aggrieved party is the challenge under Section 13(5) read with Section 34. Thus going on with the ethos of the new Act of speedy progress of arbitration proceedings without judicial interference coupled with the fact that an aggrieved party is not without remedy, it cannot be said that the absence of a provision regarding removal of an Arbitrator renders the relevant provisions of the statute ultra vires the Constitution. We are of the considered view that absence of a provision of removal of an Arbitrator does not render the relevant statutory provisions invalid or ultra vires the Constitution of India.

To conclude we could say that there is no provision in the Act empowering the court to terminate the mandate of the arbitrator who has entered upon the reference and/or to substitute the same with an arbitrator appointed by this court. The necessary corollary is that the challenge to the appointment of the arbitrator must be raised by the petitioner before the arbitral tribunal itself. If such challenge succeeds, the petitioner shall have no cause for grievance left. If, however, the petitioner is unable to succeed before the arbitral tribunal, it shall have no option except to participate in the arbitral proceedings and if aggrieved by the arbitral award, to challenge the same in accordance with the provisions of Section 34 of the Act.[72]

TERMINATION OF MANDATE OF ARBITRATOR

By virtue of Section 15(1), the mandate of an arbitrator shall terminate:

a. Where he withdraws from office for any reason; or

b. By or pursuant to agreement of the parties.

Section 15(1) of the Arbitration and Conciliation Act, 1996 provides that in addition to the circumstances set out in Sections 13 and 14, the mandate of an arbitrator shall terminate *inter alia* by or pursuant to agreement of the parties.[73]

That the parties are obliged to give effect to the terms of the agreement and that the contract had to be adhered to as closely as possible and that corrective measures have to be taken first, before approaching the court as the last resort. The Supreme Court held that the emphasis of Section 11 is on the terms of the agreement being adhered to, as closely as possible and that the court may be asked to do what had not been done.[74]

The Supreme Court held that if the opposite party did not make an appointment within 30 days of the demand, as stipulated in the contract, the right to make appointment would not get forfeited, but would continue. However, such appointment, though made after 30 days, should have been made at least before the first party made an application under Section 11, seeking the appointment of an arbitrator.[75]

The court further held that if no appointment has been made by the opposite party till the application under Section 11(6) has been made, the right of the opposite party to make an appointment ceases and is forfeited.

---

[72] *Ahluwalia Contracts (India) Ltd. v. Housing and Urban Development Corporation*, 2008 (100) DRJ 461 : 2007 (4) Arb LR 539 (Delhi).

[73] *Oaks Management Consultancy Pvt. Ltd. v. Worldwide Media Pvt. Ltd.*, 2012 (7) ALLMR 646 : 2012 (4) MhLJ 584.

[74] *Northern Railway Administration v. Patel Engineering Company*, 2008 (10) SCC 240 : 2008 (11) SCALE 500.

[75] *Datar Switchgears Limited v. Tata Finance Limited*, 2000 (8) SCC 151 : 2000 (7) SCALE 204.

Where the mandate of an arbitrator terminates, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.[76]

Section 15(2) uses the words "rules that may be applicable to appoint arbitrator." The interpretation of these words stands concluded in view of the judgment of the Supreme Court in *Yashwith Constructions (P) Ltd. v. Simplex Concrete Piles India Ltd. and Anr.*,[77] where the learned court observed that the word "rules" occurring in Section 15(2) refers to the provision for appointment contained in the arbitration agreement or any rules of any institution under which the disputes were referred to arbitration. The word 'rules' are not confined to an appointment under any statutory rule or rule framed under 1996 Act or under a scheme. The word 'rules' only means that appointment of a substitute arbitrator must be done according to the original agreement or provision applicable to the appointment of the arbitrator at the initial stage.

That arbitration agreement reflected the intention of the parties to refer the matter to the arbitration if there was a dispute. The court then held that there is a valid clause and the named arbitrator has declined to act as arbitrator, the vacancy can be filled in under Section 11(6) of the Act.[78]

Unless otherwise agreed by the parties, where an arbitrator is replaced under sub-section (2), any hearings previously held may be repeated at the discretion of the arbitral tribunal.[79]

Unless otherwise agreed by the parties, an order or ruling of the arbitral tribunal made prior to the replacement of an arbitrator under this Section shall not be invalid solely because there has been a change in the composition of the arbitral tribunal.[80]

The scheme of the Arbitration and Conciliation Act, 1996 would require that there be an arbitration agreement providing for appointment or arbitrator/arbitrators which will constitute the arbitral tribunal, which must be constituted by odd number of arbitrators.[81]

Therefore, if a case is covered by Section 11(6) of the Act, two principles have become well-settled viz., (i) that the right of a party to make an appointment is not forfeited but would continue, even after the deadline

[76] Section 15(2), The Arbitration and Conciliation Act, 1996.
[77] AIR 2006 SC 2798 : (2006) 6 SCC 204.
[78] *Dharampal Satyapal Ltd. v. Dinesh Enamelled Wire Industries (P) Ltd.*, Decided on November 17, 2009.
[79] Section 15(3), The Arbitration and Conciliation Act, 1996.
[80] Section 15(4), The Arbitration and Conciliation Act, 1996.
[81] *S.B.P. and Co. v. Patel Engineering Ltd. and Anr*, 2006 (1) Bom CR 585 : AIR 2006 SC 450.

stipulated in the agreement; and (ii) that the right would automatically cease and get forfeited, the moment a petition under Section 11(6) is filed.[82]

Section 11(6) of the Act has application only when a party or the concerned person had failed to act in terms of the arbitration agreement. When Section 15(2) says that a substitute arbitrator can be appointed according to the rules that were applicable for the appointment of the arbitrator originally, it is not confined to an appointment under any statutory rule or rule framed under the Act or under the Scheme. It only means that the appointment of the substitute arbitrator must be done according to the original agreement or provision applicable to the appointment of the arbitrator at the initial stage.[83]

If the sentence is read as a whole, it would be absolutely clear that the Supreme Court did not construe Section 15(2) as a mandate for appointment of the substitute arbitrator in accordance with the agreement between the parties. The Supreme Court therefore did not end the sentence with the phrase "according to the original agreement", but went on to use the words "or provision applicable to the appointment of the arbitrator at the initial stage" meaning thereby a provision other than that contained in the original agreement.[84]

The term "rules" in Section 15(2) obviously referred to the provision for appointment, contained in the arbitration agreement or any Rules of any Institution under which the disputes were referred to arbitration.[85]

Section 15 specifies additional circumstances in which the mandate of an arbitrator shall terminate and also provides for substitution of an arbitrator. Sub-section (1) of this Section lays down that in addition to the circumstances referred to in Sections 13 and 14, the mandate of an arbitrator shall terminate where he withdraws from office for any reason or pursuant to agreement of the parties. Sub-section (2) of Section 15 postulates appointment of a substitute arbitrator in accordance with the rules that were applicable to the appointment of the original arbitrator.[86]

The Supreme Court further observed that sub-sections (3) to (5) of Section 11 refer to cases where there is no agreed procedure. Sub-section (2) provides that subject to sub-section (6) the parties are free to agree on a procedure for appointing the arbitrator or arbitrators. Sub-section (6) sets out the contingencies when party may request the Chief Justice or any

[82] *Deep Trading Company v. Indian Oil Corporation*, 2013 (4) SCC 35 : AIR 2013 SC 1479.
[83] *Yashwith Constructions (P) Ltd. v. Simples Concrete Piles India Ltd. and Anr.*, AIR 2006 SC 2798 : (2006) 6 SCC 204.
[84] *Id.*
[85] *Punj Lloyd Ltd. v. Petronet MHB Ltd.*, (2006) 2 SCC 638.
[86] *Shane Duff v. Essel Sports Private Limited*, 2013 (2) Arb LR 159 (Bom) : 2013 (3) Bom CR 250.

person or institution designated by him to take necessary measures unless the agreement on the appointment procedure provides other means for securing the appointment. The contingencies contemplated in sub-section (6) statutorily are:

(i) a party fails to act as required under agreed procedure, or

(ii) the parties or the two appointed arbitrators fail to reach an agreement expected of them under that procedure, or

(iii) a person including an institution fails to perform any function entrusted to him or it under the procedure.[87]

In terms of Section 15(1)(b) of the Act, the mandate of an arbitrator can be terminated by or in pursuance of the agreement between the parties. Such termination of mandate of an arbitrator is in addition to the grounds to terminate the mandate of an arbitrator contemplated under Section 14 of the Act. Therefore, an application to terminate the mandate of an arbitrator either under Sections 14 or 15 of the Act is maintainable to the court in terms of Section 14(2) of the Act.[88]

JURISDICTION OF ARBITRATION TRIBUNAL

By virtue of Section 16(1), the arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose:

a. an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and

b. A decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause.

The scope of the arbitration agreement must be determined on its own terms and without any reference to the remaining bye-laws. The interpretation of an arbitration agreement must be done independently, flowing from the principle of severability and separability as recognised under Section 16(1) of the Act.[89]

A plea that the arbitral tribunal does not have jurisdiction, shall be raised not later than the submission of the statement of defence; however, a party shall not be precluded from raising such a plea merely because he has appointed, or participated in the appointment of an arbitrator.[90]

[87] *Union of India v. Bharat Battery Mfg. Co. (P) Ltd.*, (2007) 7 SCC 684 : (2007) 9 SCR 993.
[88] *M/s V.K. Sood Engineer & Others v. State Of Punjab And Ors*, Decided on 6 January, 2012.
[89] *World Sport Group (Mauritius) Ltd. v. M.S.M. Satellite (Singapore) Pte. Ltd.*, AIR 2014 SC 968 : 2014 (5) Bom CR 693.,
[90] Section 16 (2), The Arbitration and Conciliation Act, 1996.

A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority, is raised during the arbitral proceedings.[91]

The House of Lords held that where a case or statute had not been brought to the court's attention and the court gave the decision in ignorance or forgetfulness of the existence of the case or statute, it would be a decision rendered *per incuriam*.[92] These principles have been accepted to form part of Indian law. These principles were highlighted by the Hon'ble Apex Court, most notably in *State of U.P. v. Synthetics and Chemicals Ltd.*[93]

The arbitral tribunal may, in either of the cases referred to in sub-section (2) or sub-section (3), admit a later plea if it considers the delay justified.[94]

The arbitral tribunal shall decide on a plea referred to in sub-section (2) or sub-section (3) and, where the arbitral tribunal takes a decision rejecting the plea, continue with the arbitral proceedings and make an arbitral award.[95]

In *Unik Accurates Pvt. Ltd. v. Sumedha Fiscal Services Ltd.*,[96] a learned single judge of the Calcutta High Court held that under Article 227 of the Constitution, an arbitral tribunal was subject to the supervisory jurisdiction of the High Court and, therefore, an order passed by an arbitral tribunal under Section 16 of the Act could be challenged before the High Court by way of a writ petition.

In *M/s Archon v. Sewda Construction Co.*,[97] the Gauhati High Court held that the mere existence of an alternative remedy by way of an appeal against the impugned order of the Arbitrator would not by itself be a bar to the High Court exercising its powers under Articles 226 and 227 of the Constitution. This decision is again distinguishable on facts. The question whether the jurisdiction under Article 226 could be exercised even when Section 16(6) read with Section 16(5) Arbitration and Conciliation Act, 1996 requires the aggrieved party to await the passing of the award was not considered by the Gauhati High Court.

A party aggrieved by such an arbitral award may make an application for setting aside such an arbitral award in accordance with Section 34.[98]

If an application under Section 16 of the Arbitration and Conciliation Act is allowed by the learned arbitrator, it will have no grievance left. If not, the

[91] Section 16(3), The Arbitration and Conciliation Act, 1996.
[92] *Hudders field Police Authority v. Watson*, (1947) 2 All ER 193.
[93] (1991) 4 SCC 139 : (1991) 3 SCR 64.
[94] Section 16(4), The Arbitration and Conciliation Act, 1996.
[95] Section 16(5), The Arbitration and Conciliation Act, 1996.
[96] 2003 (4) Raj 571 (Cal).
[97] 2004 Legal Eagle 2877 (Gau).
[98] Section 16(6), The Arbitration and Conciliation Act, 1996.

petitioner has to abide by the legislative scheme outlined in Section 16(5) read with Section 16(6) Arbitration and Conciliation Act, 1996 and await the passing of the award. If the award goes against the petitioner, it can challenge the award on the grounds available to it under Section 34 of the Arbitration and Conciliation Act, 1996.[1]

That a suit for declaration that an agreement containing an arbitration clause is forged, fabricated, unenforceable and null and void and for injunction restraining the arbitration does not lie and is barred under Section 5 of the Arbitration and Conciliation Act, 1996 and under Sections 34 and 41 (h) of the Specific Relief Act, 1963 read with Section 16 of the Arbitration and Conciliation Act, 1996.[2]

Where a party does not raise a plea of lack of jurisdiction before the arbitral tribunal, he must make out a strong case why he did not do so if he chooses to move a petition for setting aside the award under Section 34(2) (v) of the Act on the ground that, composition of the tribunal was not in accordance with the agreement of the parties. If plea of jurisdiction is not taken before the arbitrator as provided in Section 16 of the Act, such a plea cannot be permitted to be raised in proceedings under Section 34 of the Act for setting aside the award, unless good reasons are shown.[3]

If the respondent did not take the jurisdictional point before the arbitrator and allowed the arbitrator to pass a final award, such plea cannot be allowed to be taken in an application for setting aside the award. In such cases, law of acquiescence will be applicable.[4]

If the Chief Justice of India or his nominee has nominated an arbitrator under Section 11 of the Act before the expiry of thirty days, the arbitral tribunal would be improperly constituted one and the be without jurisdiction. It would be then open to the aggrieved party to require the arbitral tribunal to rule on its jurisdiction under Section 16 of the Act.[5]

That, an order of the arbitral tribunal that it has jurisdiction to entertain dispute is not illegal as power is conferred on it under Section 16 of the Act is "to rule on its own jurisdiction." If the tribunal decision that, it has jurisdiction, it shall continue with the proceedings and make an arbitral award. However, a party aggrieved by such an arbitral award can only make

[1] *Raj Kumar Shivhare v. Assistant Director, Directorate of Enforcement*, (2010) 4 SCC 772 : AIR 2010 SC 2239.

[2] *Shree Krishna Vanaspati Industries (P) Ltd. v. Virgoz Oils and Fats Pte. Ltd. and Anr.*, CS(OS) No. 1038/2009.

[3] *GAIL v. Keti Construction (I) Ltd.*, 2007 (5) SCC 38 : (2007) 6 SCR 439.

[4] *Sarkar Enterprises v. Garden Reach Shipbuilders & Engineers Ltd*, AIR 2002 Cal 65.

[5] *Konkan Railway Corporation Ltd. v. Rani Construction Pvt. Ltd.*, AIR 2002 SC 778 : (2002) 2 SCC 388.

an application for setting aside such an award in accordance with Section 34 of the Act.[6]

By virtue of Section 17 (1) of the Act, an arbitral tribunal may at the request of the party, order a party to take any interim measure of protection as the tribunal may consider necessary in respect of the subject matter of the dispute. However, such power will be subject to the agreement between the parties. The arbitral tribunal may also order a party to provide appropriate security in connection with the measure ordered by it.

CONDUCT OF ARBITRAL PROCEEDINGS

Sections 18 to 27 of the Act, 1996 deals with the proceedings of arbitral tribunal. Following are main principles regarding the conduct of arbitral proceedings. By virtue of Section 18 of the Act, 1996 the parties shall be treated with equality and each party shall be given a full opportunity to present his case.

By virtue of Section 19 of the Act, 1996 the arbitral tribunal shall not be bound by the Code of Civil Procedure, 1908 (5 of 1908) or the Indian Evidence Act, 1872 (1 of 1872). The arbitral tribunal has no jurisdiction to entertain a claim in the nature of a suit for enforcement of a mortgage, since that constitutes an action for the enforcement of a right *in rem*; and the arbitral tribunal has proceeded on the basis of the admissions made by the appellants, but Order 12, Rule 6 of the Code of Civil Procedure, 1908 would have no application in an arbitral proceeding since Section 19(1) of the Act of 1996 provides that the arbitral tribunal shall not be bound by the Code of Civil Procedure, 1908 or by the Indian Evidence Act, 1872.[7]

The fact that the arbitral tribunal is not bound by the provisions of the Code of Civil Procedure, 1908 is not to indicate that the tribunal commits an error of jurisdiction in drawing guidance from the fundamental principles which are embodied in procedural law. What Section 19(1) of the Arbitration and Conciliation Act, 1996 does, is to indicate that the strict principles governing the law of civil procedure and evidence, will not bind the tribunal. But that is quite distinct from the position that the arbitral tribunal would be acting within jurisdiction in looking at those fundamental principles.[8]

The Hon'ble Supreme Court observed that the general principles of the Code of Civil Procedure, 1908 relating to discovery and inspection of documents, would not be attracted in arbitration proceedings under the Act.

[6] *BASF Styrenics Pvt. Ltd., v. Offshore Industrial Construction Pvt. Ltd.*, AIR 2002 Bom 289 : 2002 (4) Bom CR 661.

[7] *Booz Allen and Hamilton Inc. v. SBI Home Finance Ltd.*, AIR 2011 SC 2507 : (2011) 5 SCC 532.

[8] *Id.*

The court further observed that the arbitral tribunal had the power and jurisdiction, on its own, to direct the respondent to produce the documents that it found to be relevant.[9]

Subject to the provisions of Section 19, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting its proceedings. Failing any agreement referred to in sub-section (2) of Section 19, the arbitral tribunal may, subject to this Part, conduct the proceedings in the manner it considers appropriate. The power of the arbitral tribunal under sub-section (3) includes the power to determine the admissibility, relevance, materiality and weight of any evidence.

Merely because the Civil Procedure Code does not apply to the arbitration proceedings, it does not follow that the nature of jurisdiction exercised by the adjudicatory body, be it a court or an arbitral tribunal, in the matter of direction to produce documents changes. It continues to be a procedural aspect which, as noticed above, the arbitral tribunal is well within its right to prescribe, particularly when no other procedure has been agreed to between the parties.[10]

It is not a matter of inherent power, but a matter of statutory right to regulate its own procedure by the arbitral tribunal, which governs aspects such as discovery and production of documents.[11] The choice of the procedure to be adopted by the arbitral tribunal in conducting the arbitration was left to the determination of the parties under Section 19(2) of the 1996 Act.[12]

Section 19(3) of the Act enables the arbitral tribunal to conduct the proceedings in the manner it considers appropriate, in the absence of an agreement between the parties on the procedure to be followed. This provision also confers jurisdiction on the arbitrator to adopt an appropriate procedure for resolving the dispute involved in the case, which includes the power to appoint an expert.[13]

There is no specific provision in the Act, 1996 which specifically confers power on the arbitrator to direct discovery, the arbitrator has absolute power and flexibility by virtue of Section 19 of Act, 1996 to conduct the proceedings in the manner it considers appropriate without being bound by the rules of the Indian Evidence Act, 1872 and the Code of Civil Procedure, 1908. Under Section 19(4) of the Arbitration and Conciliation Act, 1996 an arbitral tribunal has power to decide admissibility of document/evidence.[14]

[9] *Managing Director, Army Welfare Organisation v. Sumangal Services (P) Ltd.*, (2004) 9 SCC 619 : AIR 2004 SC 1344.
[10] *Id.*
[11] *Thyssen Krupp Werkstoffe GmBH v. Steel Authority of India*, 168 (2010) DLT 250.
[12] *National Thermal Power Corporation v. Singer Company*, (1992) 3 SCC 551 : AIR 1993 SC 998.
[13] *Biju Xavier v. Christy Fernandez*, 2010 (4) KLT 904.
[14] *Tilak Raj Gogia v. Union Of India & Ors.* Decided on 18 February, 2013, Delhi HC

Under Section 20 of the Act of 1996, the parties are free to agree on the place of arbitration. Failing any agreement referred to in sub-section (1) of Section 20, the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties.

It had been held that the place of arbitration is wholly irrelevant for deciding the jurisdiction under Section 2(1) (e). There is a distinction in the law between the venue of arbitration and the place of arbitration. Sub-sections (1) and (2) of Section 20 deal with the place of arbitration, while sub-section (3) provides for the venue of arbitration.[15]

However, the place of arbitration is that which is agreed upon between the parties under sub-section (1) and failing such an agreement that which is determined by the tribunal under sub-section (2) of Section 20. Parties may initially agree to a particular place as a seat of arbitration, but there is nothing in sub-section (1) of Section 20 which prevents them from agreeing subsequently to another place as the seat of arbitration.[16]

Notwithstanding sub-section (1) or sub-section (2), the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of documents, goods or other property.[17]

The Supreme Court in the case of *Sanshil Chemicals Industry v. Oriental Carbons and Chemicals Ltd.*[18] has contemplated a contingency wherein an Arbitrator can determine the place of arbitration:

> *... Section 20 is the provision which sees that the parties are free to agree on the place of arbitration and failing upon any agreement, then under sub-section (2) it has to be determined depending upon the circumstances of the case and convenience of the parties. A conjoint reading of Section 2(6) and Section 20 therefore leads to the conclusion that in the event, parties do not agree with regard to the place of arbitration, though they were free to determine the same then they had the right to authorise any person including an institution and in the case in hand the Joint Committee is such an institution for deciding the venue of the arbitration and such decision of the Committee will not partake the character of adjudication of a dispute arising out of the agreement, so as to clothe it the character of an award.*

[15] *Bhatia International v. Bulk Trading S.A.*, (2002) 4 SCC 105: AIR 2002 SC 1432: (2002) 2 SCR 411.
[16] *Venture Global Engineering v. Satyam Computer Services Ltd.*, (2008) 4 SCC 190 : AIR 2008 SC 1061.
[17] Section 20(3), The Arbitration and Conciliation Act, 1996.
[18] 2001 (3) SCC 341 : AIR 2001 SC 1219.

A plain reading of Section 20 leaves no room for doubt that where the place of arbitration is in India, the parties are free to agree to any 'place' or 'seat' within India, be it Delhi, Mumbai, etc. In the absence of the parties' agreement thereto, Section 20(2) authorises the tribunal to determine the place/seat of such arbitration. Section 20(3) enables the tribunal to meet at any place for conducting hearings at a place of convenience in matters such as consultations among its members for hearing witnesses, experts or the parties.

The fixation of the most convenient 'venue' is taken care of by Section 20(3). Section 20, has to be read in the context of Section 2(2), which places a threshold limitation on the applicability of Part - I, where the place of arbitration is in India.[19]

Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent.[20]

A perusal of Section 21 of the Act would go to show that the proceedings would commence on the date on which a request for the dispute to be referred to arbitration, is received by the concerned respondent. Therefore, the commencement of arbitral proceedings is incumbent on the receipt of the notice to be sent in accordance with Section 21 of the Act, which in other words, if no notice is received by the concerned respondent, then there is no commencement of arbitral proceedings at all.[21]

The provision is very clear to the effect that it does not even say that it should be served, but it specifically says that such notice will have to be received. Section 21 will have to be read with Section 34 of the Act. Section 34 (2) (iii) provides for a ground for setting aside an award, in a case where the applicant was not given proper notice of the appointment of an Arbitrator or the arbitral proceedings.[22]

Therefore, proper notice is the notice, which has to be served and received by a person concerned. Court was of the view that Section 34(2) (iii) has to be read with Section 21 of the Act.[23]

Under the 1996 Act, the court can pass interim orders under Section 9. Arbitral proceedings, as we have seen, commence only when the request to refer the dispute is received by the respondent as per Section 21 of the

[19] *Bharat Aluminum Co. v. Kaiser Aluminum Technical Services Inc.*, (2012) 9 SCC 552 : 2012 (8) SCALE 333.

[20] Section 21, The Arbitration and Conciliation Act, 1996.

[21] *Singhal & Brothers and Anr. v. Mahanagar Telephones Nigam Ltd., and Ors.*, 2005 (5) Bom CR 261 (DB) : 2005 (3) MhLJ 951.

[22] *Harish Chand Gupta & Another v. Ashok Leyland Finance, Chennai & Another*, 2010 (1) MLJ 504.

[23] *M/s Indus Ind Bank Ltd. v. Mulchand B Jain*, Decided on 13 February, 2013, Madras High Court.

Act. The material words occurring in Section 9 are "before or during the arbitral proceedings." This clearly contemplates two stages when the court can pass interim orders, i.e., during the arbitral proceedings or before the arbitral proceedings.

There is no reason as to why Section 9 of the 1996 Act should not be literally construed. Meaning has to be given to the word 'before' occurring in the said section. The only interpretation that can be given is that that court can pass interim orders before the commencement of arbitral proceedings. Any other interpretation, like the one given by the High Court will have the effect of rendering the word 'before' in Section 9 as redundant. This is clearly not permissible. Not only does the language warrant such an interpretation but it was necessary to have such as provision in the interest of justice.

However, for such a provision, no party would have a right to apply for interim measure before notice under Section 21 is received by the respondent. It is not unknown when it becomes difficult to serve the respondents. It was, therefore, necessary that provision was made in the Act which could enable a party to get interim relief urgently in order to protect its interest.

Reading the section as a whole it appears to us that the court has jurisdiction to entertain an application under Section 9 either before arbitral proceeding of during arbitral proceedings or after the making of the arbitral award but before it is enforced in accordance with Section 36 of the Act.[24]

It is settled that a party has a right to apply for interim protection even before notice under Section 21, for referring the dispute to arbitration is received by the respondent. Thus, in the facts of the case it cannot be said that the dealer had no right to approach the competent civil court under Section 9 of the Arbitration and Conciliation Act, 1996 for grant of interim protection before making a request for the dispute being referred to arbitrator under Section 69 of the Dealership Agreement.[25]

It is now settled law that it is not competent to the parties by agreement to invest a court with jurisdiction which it does not otherwise possess but if there are more than one forums where a suit can be filed, it is open to the parties to select a particular forum and exclude the other forums in regard to claims which one party may have against the other under a contract.[26]

It is well settled that the parties cannot, by an agreement, confer jurisdiction upon the court, not possesses by it under the Code.[27] It is a settled principle that the place where the agreement has been entered into between the parties is also a place where part of the cause of action arises,

[24] *Sundaram Finance Limited v. NEPC India Ltd.*, 1999 (2) SCC 479 : AIR 1999 SC 565.

[25] *Id.*

[26] *Globe Transport v. Triveni Engineering Works and Ors.*, 1983 (4) SCC 707 : (1984) 86 PLR 259.

[27] *Kakam Singh v. Gammon (India) Ltd.*, AIR 1971 SC 740 : (1971) 1 SCC 286.

if the breach of terms and conditions of the agreement is alleged by one of the party to be agreement.[28]

By virtue of Section 22, the parties to an arbitration agreement are free to agree upon the language or languages to be used in the arbitral proceedings. Failing any agreement referred to in sub-section (1) of Section 22, the arbitral tribunal shall determine the language or languages to be used in the arbitral proceedings.

> *The object of the Act is undoubtedly laudatory but it must also provide for appropriate measures against persons responsible where it is found that sickness is caused by factors other than circumstances beyond the control of the management... The proceedings before the Board for Industrial and Financial Reconstruction take a long time to conclude and all the while the protective umbrella of Section 22 is held over the company which was reported sick... There have been cases where unfair advantage is sought to be taken of the provisions of Section 22 by certain industrial companies and the wide language employed in the section is providing them a cover. Definitely Section 22 was not meant to breed dishonesty nor can it be so operated as to encourage unfair practices. It is expected that the Government might be thinking of necessary modifications in the Act.*[29]

The agreement or determination, unless otherwise specified, shall apply to any written statement by a party, any hearing and any arbitral award, decision or other communication by the arbitral tribunal.[30]

The arbitral tribunal may order that any documentary evidence shall be accompanied by a translation into the language or languages agreed upon by the parties or determined by the arbitral tribunal.[31]

By virtue of Section 23 of the Act, 1996 within the period of time agreed upon by the parties or determined by the arbitral tribunal, the claimant shall state the facts supporting his claim, the points at issue and the relief or remedy sought, and the respondent shall state his defence in respect of these particulars, unless the parties have otherwise agreed as to the required elements of those statements.

Section 23(1) of the Act provides that the parties should state the facts supporting their claim, the points to the issue and the relief or remedies sought for, while the other party should state the defence, unless the other party agrees to certain statements.[32] The parties may submit with their

[28] *A.B.C. Laminart Pvt. Ltd. and Anr. v. A.P. Agencies, Salem* AIR 1989 SC 1239 : (1989) 2 SCC 163.
[29] *Deputy CTO v. Corromandal Pharmaceuticals*, AIR 1997 SC 2027 : (1997) 10 SCC 649.
[30] Section 22(3), The Arbitration and Conciliation Act, 1996.
[31] Section 22(4), The Arbitration and Conciliation Act, 1996.
[32] *Impex Corporation v. Elenjikal Aquamarine Exports Ltd.*, 2008 (4) R.A.J. 168 (Ker) : AIR 2008 Ker 119.

statements all documents they consider to be relevant or may add a reference to the documents or other evidence they will submit.

Apart from that, Section 19(2) of the Act provides for the parties to agree on the procedure which however is subject to Part - I which contains Sections 2 to 43. Hence, it would be quite clear that Section 23(1) of the Act was mandatory and was not subject to any contract to the contrary. The procedure to be followed could be agreed but the requirement to file a claim statement containing the claims and relief was mandatory[33].

Unless otherwise agreed by the parties, either party may amend or supplement his claim or defence during the course of the arbitral proceedings, unless the arbitral tribunal considers it as inappropriate to allow the amendment or supplement having regard to the delay in making it.

By virtue of Section 24, unless otherwise agreed by the parties, the arbitral tribunal shall decide whether to hold oral hearings for the presentation of evidence or for oral argument, or whether the proceedings shall be conducted on the basis of documents and other materials: Provided that the arbitral tribunal shall hold oral hearings, at an appropriate stage of the proceedings, on a request by a party, unless the parties have agreed that no oral hearing shall be held.

The proceeding under Section 34 of the Arbitration and Conciliation Act, 1996 is a proceeding within the meaning of Section 24(1) (a) and Section 24(1) (b) of the Code of Civil Procedure, 1908. Thus, it is a proceeding before a civil Court.[34]

However, parties shall be given sufficient advance notice of any hearing and of any meeting of the arbitral tribunal for the purposes of inspection of documents, goods or other property.

Sections 24(1) and (2) make it clear that in the absence of agreement it is for the arbitrator to decide whether oral hearings should be conducted or not. But, once it is decided to hold oral hearing, parties shall be given sufficient notice of hearing and of any meeting of the tribunal for the purpose of inspection of documents, books or other property. Section 24(3) of the Act, 1996 makes it compulsory that all statements and other information supplied to the arbitral tribunal by one party shall be communicated to the other party.[35]

[33] *Vijayakumar Raju v. Indus Ind Bank Ltd.*, (2009) 5 MLJ 1055.
[34] *Kumbha Mawji v. Union of India*, reported in AIR 1953 SC 313 : (1953) 4 SCR 878; See also *Shahab Uddin alias Munnan v. District Judge, Muzaffarnagar and Another*, 2009 (2) ALJ 275 : 2009 1 AWC 154 All.
[35] *Sulaikha Clay Mines v. M/s Alpha Clays and others*, AIR 2005 Ker 3 : ILR 2004 (3) Kerala 515.

All statements, documents or other information supplied to, or applications made to the arbitral tribunal by one party shall be communicated to the other party, and any expert report or evidentiary document on which the arbitral tribunal may rely in making its decision shall be communicated to the parties.

By virtue of Section 25, of the Act, 1996 unless otherwise agreed by the parties, where, without showing sufficient cause:

(a) the claimant fails to communicate his statement of claim in accordance with sub-section (1) of Section 23, the arbitral tribunal shall terminate the proceedings;

(b) the respondent fails to communicate his statement of defence in accordance with sub-section (1) of Section 23, the arbitral tribunal shall continue the proceedings without treating that failure in itself as an admission of the allegations by the claimant;

(c) a party fails to appear at an oral hearing or to produce documentary evidence, the arbitral tribunal may continue the proceedings and make the arbitral award on the evidence before it.

By virtue of Section 26 (1) of the Act, 1996 unless otherwise agreed by the parties, the arbitral tribunal may:

(a) appoint one or more experts to report to it on specific issues to be determined by the arbitral tribunal, and

(b) require a party to give the expert any relevant information or to produce, or to provide access to, any relevant documents, goods or other property for his inspection.

Unless otherwise agreed by the parties, if a party so requests or if the arbitral tribunal considers it necessary, the expert shall, after delivery of his written or oral report, participate in an oral hearing where the parties have the opportunity to put questions to him and to present expert witnesses in order to testify on the points at issue.[36]

Unless otherwise agreed by the parties, the expert shall, on the request of a party, make available to that party for examination all documents, goods or other property in the possession of the expert with which he was provided in order to prepare his report.[37]

By virtue of Section 27(1) of the Act, 1996 the arbitral tribunal, or a party with the approval of the arbitral tribunal, may apply to the court for assistance in taking evidence. However, such an application shall specify:

(a) the names and addresses of the parties and the arbitrators;

(b) the general nature of the claim and the relief sought;

[36] Section 26(2), The Arbitration and Conciliation Act, 1996.
[37] Section 26(3), The Arbitration and Conciliation Act, 1996.

(c) the evidence to be obtained, in particular—

(i) the name and address of any person to be heard as witness or expert witness and a statement of the subject-matter of the testimony required;

(ii) the description of any document to be produced or property to be inspected.

The court may, within its competence and according to its rules on taking evidence, execute the request by ordering that the evidence be provided directly to the arbitral tribunal,[38] and the court may, while making an order under sub-section (3), issue the same processes to witnesses as it may issue in suits tried before it.[39]

Persons failing to attend in accordance with such process, or making any other default, or refusing to give their evidence, or guilty of any contempt to the arbitral tribunal during the conduct of arbitral proceedings, shall be subject to the like disadvantages, penalties and punishments by order of the court on the representation of the arbitral tribunal as they would incur for the like offences in suits tried before the court.[40]

Notwithstanding anything contained under Section 27 of the Act, 1996 the expression "Processes" includes summonses and commissions for the examination of witnesses and summonses to produce documents.[41]

[38] Section 27(3), The Arbitration and Conciliation Act, 1996.
[39] Section 27(4), The Arbitration and Conciliation Act, 1996.
[40] Section 27(5), The Arbitration and Conciliation Act, 1996.
[41] Section 27(6), The Arbitration and Conciliation Act, 1996.

4 Making of Arbitral Award and Termination of Proceedings

RULES APPLICABLE TO SUBSTANCE OF DISPUTE

By virtue of Section 28(1) where the place of arbitration is situate in India:

a. in an arbitration other than an international commercial arbitration, the arbitral tribunal shall decide the dispute submitted to arbitration in accordance with the substantive law for the time being in force in India;

Section 28(1)(a) of the Arbitration and Conciliation Act, 1996 cast an obligation on the arbitrator to decide the disputes in accordance with the substantive law. Considering that Indian Partnership Act, 1932 being a substantive enactment, the decision to permit the petitioners to file an additional ground as per Section 23(3) of the Arbitration and Conciliation Act, 1996, cannot be faulted with. The relevancy of Section 28(1)(a) of the Arbitration and Conciliation Act, 1996 to decide the dispute in accordance with the substantive law.[1]

It must be seen that reference to arbitration arises only by reason of an agreement between the parties. It cannot be denied that the arbitrator has the authority or the discretion to decide about allowing the party to file an additional ground under Section 23(3) of the Arbitration and Conciliation Act, 1996; so too the obligation to dispose of the disputes in accordance with the substantive law needs to be considered; yet the question as to the applicability of the substantive law as required under Section 28(1)(a) of the Arbitration and Conciliation Act, 1996 arises only as a matter of resolution of the disputes that have arisen under the contract.[2]

In view of the mandate contained in Section 28(1)(a) of the Arbitration and Conciliation Act, 1996, the arbitral tribunal is obliged to decide a dispute in accordance with the substantive law of India, that includes the Indian Contract Act, 1872 the Transfer of Property Act, 1882 and other such laws in force. If the award is contrary to the substantive provisions of law or the provisions of the Act or against the terms of the contract, it would be patently illegal calling for interference under Section 34; and the phrase "Public Policy

[1] *The Andhra Pradesh Cooperative Wool Spinning Mills Limited and Another v. G. Mahanandi and Company Wool Merchants and Others*, AIR 2003 AP 418 : 2003 (3) ALD 419.
[2] *M/s. Indian Oil Corporation Limited v. M/s. Devi Constructions*, 2009 (2) SLW 849.

of India" appearing in Section 34 should be given a wide meaning, so as to include within its fold, the fundamental policy of India, the interest of India, justice or morality and patent illegality.[3]

Section 28(1)(a) of the Arbitration and Conciliation Act, 1996 requires an arbitral tribunal to decide the dispute in accordance with the substantive law for the time being in force in India.[4] However, a court can set aside an arbitral award, only if any of the grounds mentioned in Sections 34(2)(a) (i) to (v) or Sections 34(2)(b)(i) and (ii), or Section 28(1)(a) or 28(3) read with Section 34(2)(b)(ii) of the Act, are made out.[5]

(b) in international commercial arbitration;

(i) the arbitral tribunal shall decide the dispute in accordance with the rules of law designated by the parties as applicable to the substance of the dispute;

(ii) any designation by the parties of the law or legal system of a given country shall be construed, unless otherwise expressed, as directly referring to the substantive law of that country and not to its conflict of laws rules;

(iii) failing any designation of the law under clause (a) by the parties, the arbitral tribunal shall apply the rules of law it considers to be appropriate given all the circumstances surrounding the dispute.

Where there is no express choice of law governing the contract as a whole, or the arbitration agreement as such, a presumption may arise that, the law of the country where the arbitration is agreed to be held is the proper law of the arbitration.[6] For determining the system of law with which the transaction has its closest and most real connection, the court has to examine various factors such as the place where the contract was made, the form and object of the contract, the place of performance, the place of residence or business of the parties, reference to the court having jurisdiction and such other links.[7]

Where, the parties have not expressly or impliedly selected proper law, the courts imputes an intention by applying objective test to determine what the parties would have as just and reasonable persons intended as regards the applicable law had they applied their mind to the question. The judge has to apply the proper law for the parties in such circumstances by putting

[3] *Oil & Natural Gas Corporation Limited v. Saw Pipes Limited*, 2003 (5) SCC 705 : AIR 2003 SC 2629.
[4] *M/s. Chemipex v. M/s. Shlok Chemicals*, Appeal No. 397 of 2012 in Arbitration Petition No. 832 of 2011, decided on January 21, 2013, Bombay High Court.
[5] *J. G. Engineers (P) Ltd. v. Union of India*, 2011 (5) SCC 758 : AIR 2011 SC 2477.
[6] *National Thermal Power Corporation v. Singer*, AIR 1993 SC 998 : (1992) 3 SCC 551.
[7] *Id.*

himself in the place of a "reasonable man". He has to determine the intention of the parties by asking himself "how a just and reasonable person would have regarded the same problem."[8]

The Apex Court in *Bharat International v. Kaiser Aluminium Technical Services Inc.*,[9] set aside its earlier judgments rendered in the *Bhatia International*[10] and *Venture Global*[11] cases. It was held that Part – I of the Act applied only to arbitrations held in India. In this case court observed that:

> *In view of the above discussion, we are of the considered opinion that the Arbitration Act, 1996 has accepted the territoriality principle which has been adopted in the UNCITRAL Model Law. Section 2(2) makes a declaration that Part I of the Arbitration Act, 1996 shall apply to all arbitrations which take place within India. We are of the considered opinion that Part I of the Arbitration Act, 1996 would have no application to International Commercial Arbitration held outside India. Therefore, such awards would only be subject to the jurisdiction of the Indian courts when the same are sought to be enforced in India in accordance with the provisions contained in Part II of the Arbitration Act, 1996. In our opinion, the provisions contained in Arbitration Act, 1996 make it crystal clear that there can be no overlapping or intermingling of the provisions contained in Part I with the provisions contained in Part II of the Arbitration Act, 1996.*
>
> *With utmost respect, we are unable to agree with the conclusions recorded in the judgments of this Court in Bhatia International (supra) and Venture Global Engineering (supra). In our opinion, the provision contained in Section 2(2) of the Arbitration Act, 1996 is not in conflict with any of the provisions either in Part I or in Part II of the Arbitration Act, 1996. In a foreign seated international commercial arbitration, no application for interim relief would be maintainable under Section 9 or any other provision, as applicability of Part I of the Arbitration Act, 1996 is limited to all arbitrations which take place in India. Similarly, no suit for interim injunction simplicitor would be maintainable in India, on the basis of an international commercial arbitration with a seat outside India.*
>
> *We conclude that Part I of the Arbitration Act, 1996 is applicable only to all the arbitrations which take place within the territory of India.*
>
> *The judgment in Bhatia International was rendered by this Court on 13th March, 2002. Since then, the aforesaid judgment has been followed by all the High Courts as well as by this Court on numerous occasions. In fact, the judgment in Venture Global Engineering has been rendered on 10th January, 2008 in terms of the ratio of the decision in Bhatia International (supra). Thus, in order to do complete justice, we hereby order, that the law now declared by this Court shall apply prospectively, to all the arbitration agreements executed hereafter.*

[8] *Id.*

[9] 2012 (9) SCC 552 : 2012 (8) SCALE 333.

[10] *Bhatia International v. Bulk Trading S.A. & Anr.*, (2002) 4 SCC 105: AIR 2002 SC 1432: (2002) 2 SCR 411.

[11] *Venture Global Engineering v. Satyam Computer Services Ltd. & Anr.*, 2008 (1) Scale 214 : AIR 2008 SC 1061.

The arbitral tribunal shall decide *ex aequo et bono* or as *amiable compositeur*, only if the parties have expressly authorised it to do so[12]. In view of Section 28(2) of the Act, without consent of the parties, the Arbitral Tribunal cannot grant any relief in equity[13]. The arbitral tribunal under Section 28(2) can act as *amiable compositeur* and can decide *ex aequo et bono* only if parties have expressly authorised it to do so.[14]

Section 28(2) specifically provides that the arbitrator shall decide *ex aequo et bono* (according to what is just and good) only if the parties have expressly authorised him to do so. Similarly, if the award is patently against the statutory provisions of substantive law which is in force in India or is passed without giving an opportunity of hearing to the parties as provided under Section 24 or without giving any reason in a case where parties have not agreed that no reasons are to be recorded, it would be against the statutory provisions. In all such cases, the award is required to be set aside on the ground of *"patent illegality"*.[15]

The arbitrator, in finding that the deficiency was so large that the customary allowance didn't apply but that a larger allowance must be made and at the same time the buyer had no sufficient cause to reject the goods, but purported to make a new contract between the parties, which he had no power to do, and that the award should be remitted for his reconsideration.[16]

The phrase *ex aecquo et bono* means 'according to equity and conscience.'[17] In relation to the expression *amiables compositeurs* the Black's Law Dictionary refers to 'Amicable compounders' and states that 'amicable compounders are arbitrators authorized to abate something of the strictness of the law in favour of natural equity.'[18] *Amiables compositeurs* is a French expression

[12] Section 28(2), The Arbitration and Conciliation Act, 1996.

[13] *Oil & Natural Gas Corporation Limited v. Saw Pipes Limited*, 2003 (5) SCC 705 : AIR 2003 SC 2629 **Also see,** *Rajinder Krishan Khanna & Others v. Union of India & Others*, (1998) 7 SCC 129 : (1998) Supp 2 SCR 302.

[14] *Edifice Developers and Engineers Ltd. v. Essar Projects (India) Ltd.*, Decided on January 3, 2013 in Appeal No.11 of 2012.

[15] *Delhi Development Authority v. Anand And Associates*, 2008 (1) Arb LR 490 Delhi : (2008) ILR 2 Delhi 627.

[16] *Hooper & Co v. Balfour, Williamson & Co*, (1890) 62 LT 646.

[17] **See** *Black's Law Dictionary*, 6th Edn., Springer, 1994.

[18] *Food Corporation of India v. Chandu Construction & Another*, (2007) 4 SCC 697 : (2007) 4 SCR 1160.

meaning, 'a person who adopts flexible approach brimful with fairness and reality.'[19] It means, that the arbitrator must hear the parties and their respective proofs, or establish default against them and decide according to the rules of law, unless they are dispensed from doing so by the terms of the submission, or unless they have been appointed as *amiables compositeurs*. This is to say, if they are *amiables compositeurs*, they are to be exempt at all events from the strictness of obligations expressed in the previous words.[20] An arbitral tribunal can decide the dispute as *amiables compositeurs* arises only if the parties expressly authorise it to do so. The jurisdiction of the arbitral tribunal depends upon the consensus arrived at between parties. Thus, availability of such a jurisdiction is conditioned upon the agreement between the parties.[21]

In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.[22] The arbitral tribunal is, in all cases, bound to decide in accordance with the terms of the contract in view of Section 28(3) of the 1996 Act.[23] In *Hindustan Zinc Limited v. Friends Coal Carbonisation*,[24] the Supreme Court reiterated the principles laid down in *Oil and Natural Gas Corporation*. The Court held that as per the law laid down in *Saw Pipes*, it is open to the court to consider whether the award is against the specific terms of the contract or not.

It is well-settled that where the contract, in clear and unambiguous terms, bars or prohibits a particular claim, any award made in violation of the terms of the contract would violate Section 28(3) of the Act, and would be considered to be patently illegal and therefore, liable to be set aside under Section 34(2)(b) of the Act.[25]

DECISION MAKING BY PANEL OF ARBITRATORS

The Arbitration and Conciliation Act, 1996 has provided in Section 29, that unless otherwise agreed by the parties, in arbitral proceedings with more than one arbitrator, any decision of the arbitral tribunal shall be made by a majority of all its members.[26]

[19] *NHAI v. Sheladia Assoc. Inc.*, 2010 (2) Raj 527 (Del).
[20] *Rolland v. Cassidy*, 13 App Cas 770
[21] *Hindustan Life Care v. Ramesh*, 2009 (3) Raj 339 (Mad).
[22] Section 28(3), The Arbitration and Conciliation Act, 1996.
[23] *Municipal Corporation of Delhi v. Jagannath Ashok Kumar*, 1987 4 SCC 497 : (1988) 1 SCR 180
[24] 2006 (4) SCC 445 : 2007 (1) SCALE 1
[25] *Oil & Natural Gas Corporation Limited v. Saw Pipes Limited*, 2003 (5) SCC 705 : AIR 2003 SC 2629
[26] *Johara Bibi and others v. Mohammad Sadak Thambi Marakayar and others*, AIR (38) 1951 Mad 997.

Section 29(1) of the Act, 1996 says that, unless otherwise agreed by the parties, in arbitral proceedings with more than one arbitrator, any decision of the arbitral tribunal shall be made by a majority of all its members. Notwithstanding sub-section (1), if authorised by the parties or all the members of the arbitral tribunal, questions of procedure may be decided by the presiding arbitrator.[27]

Section 29 of the Arbitration and Conciliation Act, 1996 empowers the court to award interest from the date of decree only. It has, however, been held that while passing a decree in terms of the award, the court can award interest for the period during which the proceedings were pending in the court, i.e., the period from the date of institution of proceedings for the enforcement of the award in the court till the passing of the decree in cases arising after the Interest Act, 1978.[28]

SETTLEMENT

Section 30 of the Act, 1996 speaks about 'settlement'. Section 30 confers the power on the arbitral tribunal to encourage settlement, and if during the arbitral proceedings, the parties settle the dispute themselves, the arbitral tribunal shall terminate the proceedings, and if requested by the parties and not objected to by the arbitral tribunal record the settlement in the form of an arbitral award on the agreed terms. The arbitral award shall state the reasons upon which it is based unless the parties have agreed that no reasons are to be given or the award is an arbitral award on agreed terms under Section 30.[29]

It is not incompatible with an arbitration agreement for an arbitral tribunal to encourage settlement of the dispute and, with the agreement of the parties; the arbitral tribunal may use mediation, conciliation or other procedures at any time during the arbitral proceedings to encourage settlement.[30]

Sub-section (1) of Section 30 is indicative of the legislative intent that during the pendency of arbitral proceedings, it is open to an arbitral tribunal to encourage parties to resolve their disputes by recourse to mediation, conciliation or other procedures that would lead to a settlement. It is a duty of the arbitrator to encourage settlement and, therefore, the learned arbitrator would get power to hold an inquiry to find out whether the parties had

[27] Section 29(2), The Arbitration and Conciliation Act, 1996.
[28] *Gujarat Water Supply & Sewerage Board v. Unique Erectors Gujarat (P.) Ltd.*, AIR 1989 SC 973 : (1989) 1 SCC 532.
[29] *Anuptech Equipments Pvt. Ltd., v. M/s. Ganpati Co-operative Housing Society. Ltd.*, AIR 1999 Bom 219 : 1999 (2) Bom CR 331.
[30] Section 30(1), The Arbitration and Conciliation Act, 1996.

reached the settlement and if he so finds, he can make an award in terms of that settlement.[31]

If during the arbitral proceedings, the parties settle the dispute, the arbitral tribunal shall terminate the proceedings and, if requested by the parties and not objected to by the arbitral tribunal, record the settlement in the form of an arbitral award on agreed terms.[32] In other words, an arbitral tribunal has power to terminate the arbitral proceedings under Section 25(a) upon default of the claimant to communicate his statement of claim; under Section 30(2) upon settlement of dispute by the parties and under Section 38(2) upon failure of the parties to pay the amount of deposit fixed by the arbitral tribunal.[33]

On a plain reading of sub-section (2) of Section 30, it can be seen that the arbitrator gets jurisdiction to make an award on agreed terms only if there is a request made by the parties and not otherwise. The jurisdiction of an arbitrator is based on the consent of the parties, therefore, an arbitrator because of consent of the parties gets jurisdiction to decide the disputes between the parties and make an award on the basis of the findings recorded on the disputed issues.

It is open to the parties to reach a settlement, it is also open to the parties to decide whether they want an award in terms of the settlement or they want the termination of the arbitral proceedings because of the settlement reached between them. Because of the initial consent given by the parties an arbitrator gets jurisdiction to make an award on the basis of adjudication and, therefore, to enable an arbitrator to make an award based on something other than adjudication, there will have to be a fresh consent given by the parties.

A perusal of sub-section (2) of Section 30 makes it clear that if all the parties agree that they have settled the dispute, the arbitrator can terminate the proceedings in the absence of any request from the parties to make the award on agreed terms. If there is a dispute between the parties whether there is a settlement or not, in terms of the provisions of sub-section (2) of Section 30 it cannot be said that the arbitrator gets the power to decide the question about existence of settlement or otherwise.

Once the arbitral proceedings have been validly initiated, they can only be terminated under Section 30(2) or under Section 32.[34] Section 32 speaks about

[31] *Taherbhai Abdullabhai and Anr. v. Mohammed Hussain Abdullabhai And Anr.*, 2004 (3) Arb LR 371 Bom : 2004 (6) Bom CR 4.

[32] Section 30(2), The Arbitration and Conciliation Act, 1996.

[33] *M/s Chemical Sales Corporation & Others v. M/s A & A Laxmi Sales and Service Private Limited & Others*, decided on September 13, 2011, Delhi High Court.

[34] *Futuristics Offshore Services and Chemicals Ltd v. Oil and Natural Gas Corporation Ltd*, Arbitration Application No. 168 of 2012 decided on September 28, 2012 (Bombay High Court).

the termination proceedings. Under sub-section (2), if parties settle their dispute during arbitral proceedings, the arbitral tribunal shall terminate the proceedings. If the parties request the tribunal to record the settlement in the form of an arbitral award on agreed terms, the tribunal is empowered to do so. It gets clear from this discussion that, unless all the parties to the settlement make a request to the arbitrator, the arbitrator cannot make an award on the basis of the settlement.[35]

An arbitral award on agreed terms shall be made in accordance with Section 31 and shall state that it is an arbitral award,[36] i.e., an arbitral award on agreed terms is to be made in accordance with Section 31 and it has the same effect as any other arbitral award on the substance of the dispute. In other words, sub-section (3) lays down that an arbitral award on agreed terms has to be made in accordance with the provisions of Section 31.[37] Section 31 of the Act, 1996 mandates that, the arbitral award shall be made in writing and shall be signed by the members of the Arbitral Tribunal.[38]

An arbitral award on agreed terms shall have the same status and effect as any other arbitral award on the substance of the dispute.[39] The arbitral tribunal is empowered to take recourse to mediation, conciliation or other procedures to encourage settlement. If during the arbitral proceedings parties settle the dispute, it is for the arbitral Tribunal to terminate the proceedings.[40]

If a settlement agreement is arrived at under Section 74, during the course of conciliation, it will have the same status and the same effect, as if it is an arbitral award on agreed terms and on the substance of the dispute rendered by an arbitral Tribunal under Section 30.[41]

By the deeming fiction that is created by Section 74, a settlement agreement has the same effect and status as if it is an arbitral award on agreed terms on the substance of the dispute rendered by an arbitral tribunal under Section 30. The effect of a conciliated settlement is under Section 74 that the settlement agreement has the same status and effect of an arbitral award on agreed terms on the substance of the dispute under Section 30.

[35] *Taherbhai Abdullabhai And Anr. v. Mohammed Hussain Abdullabhai And Anr.*, 2004 (3) Arb LR 371 Bom : 2004 (6) Bom CR 4.

[36] Section 30(3), The Arbitration and Conciliation Act, 1996.

[37] *Taherbhai Abdullabhai And Anr. v. Mohammed Hussain Abdullabhai And Anr.*, 2004 (3) Arb LR 371 Bom : 2004 (6) Bom CR 4.

[38] *Bhupendra Kanaiyalal Thakkar v. Jatinbhai Hashmukhbhai Vakharia*, Special Civil Application No. 1252 of 2005 decided on March 14, 2005 (Gujarat High Court)

[39] Section 30(4), The Arbitration and Conciliation Act, 1996.

[40] Futuristics Offshore Services and *Chemicals Ltd v. Oil and Natural Gas Corporation Ltd*, Arbitration Application No. 168 of 2012 decided on September 28, 2012 (Bombay High Court).

[41] *National Insurance Company Limited v. Boghara Polyfab Pvt. Ltd.*, AIR 2009 SC 170 : (2009) 1 SCC 267.

Section 74 provides that the settlement agreement shall have the same status and effect as if it is an arbitral award on agreed terms on the substance of the dispute rendered by an arbitral tribunal under section 30[42]. If the settlement agreement comes into existence under Section 73 satisfying the requirements stated therein, it gets the status and effect of an arbitral award on agreed terms on the substance of the dispute rendered by an arbitral tribunal under Section 30 of the Act.[43]

Upon reading the provisions of Section 30 and Section 32 together, it becomes clear that if the parties to the arbitration state before the arbitrator that they have settled the dispute, the arbitrator has to terminate the proceedings, unless a request is made by the parties for making an award on the agreed terms, and after the arbitration proceedings are terminated the mandate of the arbitrator comes to an end.

It is thus clear, that unless there is a request made by the parties to make an award on agreed terms, the consequence of the settlement of dispute between the parties is that the arbitral proceedings are terminated and the mandate of the arbitrator also comes to an end. Therefore, to enable the arbitrator to make an award on agreed terms, there has to be a request made by the parties.

Further, provisions of Sections 30 and 32 makes it clear that, the law contemplates two types of settlements between the parties to an arbitrator in relation to the subject-matter of the arbitration i.e., (i) a settlement which results in termination of the arbitral proceedings as also termination of the mandate of the arbitration and (ii) a settlement which the parties to the settlement want to convert into an arbitral award.

FORM AND CONTENTS OF ARBITRAL AWARD

Section 31 (1) of the Act, 1996 mandates that an arbitral award shall be made in writing and shall be signed by the members of the arbitral tribunal[44]. It was upheld in the case of *State of Maharashtra and Ors. v. M/s. Ark Builders Pvt. Ltd.*[45], that, "Section 31(1) obliges the members of the arbitral tribunal/ arbitrator to make the award in writing and to sign it and sub-section (5) then mandates that a signed copy of the award would be delivered to each party." A signed copy of the award would normally be delivered to the party by the arbitrator himself. The High Court clearly overlooked that what was required by law was the delivery of a copy of the award signed by the members of the arbitral tribunal / arbitrator and not any copy of the award.

[42] *Haresh Dayaram Thakur v. State of Maharashtra and Ors.*, (2000) 6 SCC 179 : AIR 2000 SC 2281.
[43] *Mysore Cements Ltd. v. Svedala Barmac Ltd.*, AIR 2003 SC 3493 : 2003 (1) Arb LR 651 (SC).
[44] *Ramesh Pratap Singh (Dead) and Others v. Smt. Vimla Singh and Ors.*, 2004 (2) ARB LR 147 MP.
[45] (2011) 4 SCC 616 : AIR 2011 SC 1374.

For the purposes of sub-section (1) of Section 31, in arbitral proceedings with more than one arbitrator, the signatures of the majority of all the members of the arbitral tribunal shall be sufficient so long as the reason for any omitted signature is stated.[46] In *Hindustan Zinc*,[47] the Supreme Court held that an award contrary to the substantive provisions of law or the provisions of the Act or the terms of the contract would be patently illegal and if it affects the rights of the parties would be open to interference of the court under Section 31(2).

Section 31(2) of the Act permits a situation where under there can be a situation where the award may not be signed by all the members of the tribunal and still it ought to be construed as an award. The provisions of Sections 31(1) and (2) are very clear. It is ultimately the operative award which is executed under Section 36 of the Act ,and when Section 31(1) states that the award shall be made in writing and shall be signed by the members of the arbitral tribunal, it is the document signed by all the three of them which will have to be construed as the award of the arbitral tribunal and not the one signed by two or one who is dissenting. Section 31(2) provides for an exceptional situation, that is where the signature of a member of the tribunal for some reason or the other is not available.[48]

Section 31(2) only provides that for a valid award, the signatures of a majority of the members of the arbitral tribunal shall be sufficient so long as the reason for any omitted signature is stated. Section 31(2) does not dispense with the requirement of all the members of the arbitral tribunal being a party to and participating in the making of the award. The arbitrators may differ. However, it is necessary that they all participate in the making of the award. Until and unless the award is made and published, each member of the arbitral tribunal is entitled to take any view in the matter. An award cannot be made or even be said to be finalised unless all the members of the arbitral tribunal are parties thereto.

The only formality dispensed with by Section 31(2) is the requirement of the signature of the minority members of the arbitral tribunal being appended to the award. However, the participation of the members of the arbitral tribunal whose signature is not appended to the award in the making of the award is mandatory.[49] In terms of Section 31(2) of the Arbitration and Conciliation Act, 1996, the "Signatures of majority of all the members of the Arbitral Tribunal shall be sufficient so long as the reasons for any omitted signature is stated", was mandatory.

[46] Section 31(2), The Arbitration and Conciliation Act, 1996.
[47] *Hindustan Zinc Ltd. v. Friends Coal Carbonisation*, (2006) 4 SCC 445 : 2007 (1) SCALE 1.
[48] *Bfil Finance Ltd. v. G. Tech Stone Ltd.*, 2003 (1) ARB LR 184 Bom : 2002 (6) Bom CR 573.
[49] *M/s. R.R. Hi-Tech Engineering Pvt. Ltd. v. Union of India & Others*, Decided on September 15, 2010, Bombay High Court.

Under Section 31(3), the arbitral award shall state the reasons upon which it is based, unless; the parties have agreed that no reasons are to be given,[50] or the award is an arbitral award on agreed terms under Section 30.[51] An award rendered by an arbitral tribunal, selected by the parties by agreement, cannot be judged by the standards of a judgment rendered by a court of law which is written by judges trained in law and experienced in judgment writing. However, in view of the express provision of Section 31(3) of the 1996 Act, an obligation was cast on the arbitral tribunal to give reasons.[52]

In the absence of agreement dispensing with requirement to give reasons, a non-speaking award in disregard of the express mandate of Section 31(3) would in conflict with public policy, for public policy envisages compliance of laws in force in the country. An award which is based on a process of reasoning, which is totally absurd and/or perverse, would also be in conflict with public policy. An award that is patently illegal has to be set aside as otherwise it would cause gross injustice.[53]

TERMINATION OF PROCEEDINGS

There is no provision in the Act, 1996 which can throw light on the issue as to when the arbitral proceedings shall be deemed to have terminated, but Section 32 of the Act provides that the arbitral proceedings shall be terminated by the final arbitral award or by an award of the arbitral tribunal. Hence, with the aid of this section it can safely be said that, an arbitral proceedings stand terminated by the final arbitral award. At the best it could be stated that, the arbitral proceedings would stand terminated when the arbitral award is filed in the court.

An arbitral proceeding shall be terminated by the final arbitral award or by an order of the arbitral tribunal under sub-section (2).[54] The arbitral tribunal shall issue an order for the termination of the arbitral proceedings where[55]–

a. the claimant withdraws his claim, unless the respondent objects to the order and the arbitral tribunal recognises a legitimate interest on his part in obtaining a final settlement of the dispute,
b. the parties agree on the termination of the proceedings, or
c. the arbitral tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible.

[50] Section 31(3)(a), The Arbitration and Conciliation Act, 1996.
[51] Section 31(3)(b), The Arbitration and Conciliation Act, 1996.
[52] *State Of West Bengal v. Afcons Pauling (India) Limited*, Decided on September 10, 2013.
[53] *Oil and Natural Gas Commission Ltd. v. Saw Pipes Ltd.*, AIR 2003 SC 2629 : (2003) 5 SCC 705.
[54] Section 32(1), The Arbitration and Conciliation Act, 1996.
[55] Section 32(2), The Arbitration and Conciliation Act, 1996.

The arbitration proceedings can be terminated by an order of the arbitral tribunal which order can only be passed when claimant withdraws the claim or when the parties to the reference agree on the termination of the proceeding or the arbitral tribunal finds that, continuation of the arbitral proceedings has become unnecessary or impossible. As per stipulations of this Section proceedings cannot be said to have been terminated unless final award has been made by the arbitral tribunal or on the joint request depicting agreement of parties have been made to the arbitral tribunal to terminate proceedings and in pursuance thereof the arbitral tribunal had agreed to terminate the arbitral proceedings.[56]

Though the withdrawal of claim by does not amount to the termination of proceedings, in case if such move is opposed by the respondent, then, it is up to the arbitral tribunal to determine whether there is a legitimate interest on the part of the respondent in obtaining a final settlement of the dispute, and such a decision of the arbitral tribunal shall be final and binding on both the parties.

If the arbitral proceedings do not finally come to a close on the happening of any of the events specified in the Sub-section (2), the mandate of the arbitral tribunal shall terminate with the termination of the arbitral proceedings subject to the provisions of Sections 33 and 34 (4). This means that, subject to Section 33 and sub-section (4) of Section 34, the mandate of the arbitral tribunal shall terminate with the termination of the arbitral proceedings.[57] In other words, it is not necessary that every order resulting in termination of proceedings would result into an award. Stipulations contained in Section 34 are basically for setting aside an arbitral award and is in no way related to the matters of termination of proceedings.[58]

This section makes provision for termination of the arbitral proceedings upon making of the final award by the by the arbitral tribunal. Thus, for automatic termination of the proceedings, the pre-requisite is that, there must be a final award, in existence. The final award is one which decides or completes decision of claims presented.[59]

An order for termination of arbitral proceedings may be issued where the arbitral tribunal finds that continuation of proceedings has become unnecessary or impossible. If the arbitral tribunal had *suo motu* extended time that would be no ground for setting aside the award.[60]

[56] *Kifayatullah Haji Gulam Rasool v. Bilkish Ismail Mehsania*, AIR 2000 Bom 424 : 2000 (4) Bom CR 412.
[57] Section 32(3), The Arbitration and Conciliation Act, 1996.
[58] *Harinarayan G Bajaj v. Sharedeal Financial Consultants Pvt. Ltd.*, AIR 2003 Bom 296 : 2003 (4) Bom CR 139.
[59] *Kifayatullah Haji Gulam Rasool v. Bilkish Ismail Mehsania*, AIR 2000 Bom 424: 2000 (4) Bom CR 412.
[60] *N Jayalaxmi v. R. Veeraswamy*, 2003 (3) RAJ 537 (AP) : 2004 (1) ARB LR31 (AP).

However, if the arbitrator had not concluded the arbitration proceedings as had been agreed between the parties within the time frame fixed for doing so, the mandate of the arbitrator would stand terminated. The arbitrator cannot extend the time frame for making the award of his own. In case the arbitration matter involves highly technical and complex issues which are time consuming, it is open to the arbitrator or for the parties to approach the court for extension of time to conclude the arbitration hearing.[61]

Though the Act, 1996 does not prescribe any time frame within which an arbitral tribunal should make and publish the award, in large number of cases, the arbitration proceedings do not come to an end for large number of years. This defeats the very purpose for which the Act, 1996 was enacted. To overcome this problem the courts of late have started fixing time limit within which the proceedings must conclude. Even the parties in some cases, have started incorporating in the arbitration agreement the period within which the arbitration award must be made. There is no prohibition in the agreement to limit the period for making and publishing the award. Despite apparent absence of enabling provisions in the Act, 1996 the courts can in exercise of its inherent power fix a time limit for concluding arbitration proceedings. Where, however, the arbitration agreement itself provides the procedure for enlargement of time and the parties have taken recourse to it and consented to the enlargement of time by arbitrator, court cannot exercise its inherent power in extending time fixed by the parties in the absence of consent of either of them.[62]

CORRECTION AND INTERPRETATION OF AWARD; ADDITIONAL AWARD

Section 33 of the Act, 1996 deals with correction and interpretation of award; additional award, etc., under which a party can approach the arbitral tribunal for making corrections in the award in respect of computational errors, any clerical or typographical errors or any other errors of similar nature.

Section 33 is a power conferred on the arbitral tribunal to correct the errors or to make additional arbitral award.[63] Under Section 33 of the Arbitration and Conciliation Act, 1996, the learned arbitrator was entitled to consider in the additional award the claim which was made and not rejected by the learned arbitrator but remained to be considered in the impugned award by making an additional award.[64]

[61] *NBCC Ltd., v. JG Engineers (P) Ltd.*, AIR 2010 SC 640 : (2010) 2 SCC 385.
[62] *Id.*
[63] *M/s. Anuptech Equipments Pvt. Ltd., v. M/s. Ganpati Co-op Hsg. Socy. Ltd.*, AIR 1999 Bom 219: 1999 (2) Bom CR 331.
[64] *Gujarat State Fertilizers Co. Ltd v Tata Motors Ltd*, 2015 (2) ARB LR 290 (Bom) : 2015 (2) Bom CR 522.

By virtue of this Section a party can seek certain correction in computational errors or any clerical or typographical errors or any other errors of similar nature in the award with a notice to the other party or if so agreed between the parties, a party may request the arbitral tribunal to give an interpretation of a specific point or part of the award.[65] By Section 33, powers are retained in the tribunal for a specific period to correct error or pass an additional arbitral award.[66]

This section deals with correction of clerical mistake or accidental slips in an award. Omission to stamp an award is neither of the two.[67] It is not within the scope of this section to permit an arbitral tribunal to review the award or to allow the prayer as to whether the payment was to be made directly to the respondent or through the court or respondent might be asked to furnish a bank guarantee.[68]

Following are the pre-requisites for applicability of this section:

1. An application has to be filed within a period of 30 days from the receipt of the award unless another period of time has been agreed upon between them.[69]
2. The party invoking the application may request the arbitral tribunal to correct any computational errors, any clerical or typographical errors or any other errors of similar nature occurring in the award.
3. The party moving the application may request the arbitral tribunal to give an interpretation of a specific point or part of the award only if so agreed by the other party.
4. The party moving the application may request for an additional award on the claims presented in the arbitral proceedings but omitted from the arbitral award within a period of 30 days from the date of receipt of the award only if both the parties agree to such a course of action.[70] A bare reading of sub-section (3) of Section 33 of the Act, 1996 would reveal that, even the additional award, in respect of claims presented in the arbitral proceedings but omitted from the arbitral award, cannot be made by the arbitral tribunal "unless otherwise agreed by the parties."
5. It is only if the arbitral tribunal considers the request to be justified that, it shall make the additional award within 60 days from the receipt of such request.

[65] *State of Arunachal Pradesh v. Damini Construction*, (2007) 10 SCC 742 : (2007) 3 SCR 416.
[66] *M/s. Anuptech Equipments Pvt. Ltd., v. M/s. Ganpati Co-op Hsg. Socy. Ltd.*, AIR 1999 Bom 219 : 1999 (2) Bom CR 331.
[67] *Rikhabdass v. Ballabhdas*, AIR 1962 SC 551 : (1962) Supp 1 SCR 475.
[68] *State of Arunachal Pradesh v. Damini Construction*, (2007) 10 SCC 742 : (2007) 3 SCR 416.
[69] Section 33(1), The Arbitration and Conciliation Act, 1996.
[70] Section 33(4), The Arbitration and Conciliation Act, 1996.

Section 33 of the Act contemplates an application for correction or interpretation of an award or an application for an additional award. An application for correction of an award may be filed by any party to the reference to request the arbitral tribunal to correct any computation or clerical or typographical error or errors of like nature. However, an application under Section 33 of the Act for the interpretation of the award may only be filed if the parties to the reference agree. It is not the petitioner's case that the parties to the reference agreed that an application be made under Section 33 of the Act for the interpretation of the award by the arbitrator.[71]

Further, no party can approach the arbitral tribunal to give an interpretation of a specific point or on part of the award unless the opposite party had given its consent, i.e., when it comes to seeking interpretation of any specific point or part of an award, then it is incumbent upon the party seeking interpretation to obtain the consent of the other party.

A clerical error is nothing but an error which can be explained only by considering it as a slip or mistake. Apart from correction of such errors as are popularly known as purely clerical, supply of omissions of consequential orders too may be permissible in certain cases as they are in the nature, if clerical omission; but certainly such omissions as would demand judicial consideration or determination are beyond the scope of that term.[72]

Having regard to the meaning of the words "error" and "mistake", clerical error must be an unintentional deviation from accuracy in a statement or a wrong action resulting from inadvertence, faulty judgment or ignorance. But the essence of a clerical error is that, it must be an error of the nature committed, while copying, writing or doing official work. It must not be an error relating to the merits of the contents of a document or an error in regard to the substance of the matter. It is mistake or error relating to peripheral matter and not to the substance or the content.[73]

Once an award is made and published, it is not open to the arbitrators to substitute another award for it. The authority of the arbitrators cease from the time they made the award and no action of the parties by way of consent or otherwise would give the arbitrators power to make a second award.[74] An arbitrator cannot subsequently review his award.[75]

An arbitrator who has made and published the award becomes *functus officio* and he cannot add to it or vary it in any way except to correct any

[71] *Mrinal Kanti Sirkar v Mrs. Madhuchanda Sirkar & Ors*, decided on March 13, 2014, Calcutta High Court.

[72] *Bangaru Reddy v. The State*, AIR 1962 SC 1123 : (1962) Supp 2 SCR 101, *Bangaru Reddy and Anr. v. The State* AIR 1959 AP 95 : 1959 CriLJ 166.

[73] *Instrumentation Ltd. v. E Kuttappan*, (1992) 1 Kerala LJ 24; 1992 (1) Arb LR 284 82

[74] *Parshottamdas Narottamdas Patel v. Kekhushru Bapuji*, AIR 1934 Bom 6

[75] *Bhagawati Devi v. Gajadhar Prasad*, AIR 1934 All 940

clerical mistake or error arising from any accidental slip or omission.[76] In other words, no power is left with the arbitrator to make any change in substance in the award that he had made. This section gives power to the arbitrator to correct any clerical mistake or error arising from any accidental slip or omission in the award.[77]

Even if a wider interpretation is given to Section 33 to include orders passed under Section 32(2) the jurisdiction is limited to correction of errors in terms of sub-section 10(a) or to give an interpretation of a specific point or part of the award. This could only be in the event-there was some ambiguity in the award. Under sub-section (4) if there was a requirement to decide a claim then also the arbitral tribunal has jurisdiction. This could be only where the award passed had omitted a decision on a claim.[78]

[76] *Chouthmal Jivrajjee Poddar v. Ramchandra Jivrajjee Poddar*, AIR 1955 Nag 126.

[77] *Juggilal Kamlapat v. General Fibers Dealers Limited*, AIR 1962 SC 1123 : (1962) Supp 2 SCR 101.

[78] *M/s. Anuptech Equipments Pvt. Ltd., v. M/s. Ganpati Co-op Hsg. Socy. Ltd.*, AIR 1999 Bom. 219 : 1999 (2) Bom CR 331.

5

Recourse Against Arbitral Award

APPLICATION FOR SETTING ASIDE ARBITRAL AWARD

Recourse to a court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3) of Section 34 of the Act, 1996.[1] In other words, an application for setting aside of award should satisfy the requirements of sub-section (2) as well as sub-section (3) of Section 34 of the Act. Merely because the application satisfies the requirements of any one of sub-sections (2) and (3) of Section 34 of the Act, it cannot be said that it is a valid and lawful application under Section 34(1) of the Act. Such application has necessarily to satisfy the requirements of both the Sub-sections.[2]

Section 34 of the Act is based on Article 34 of the UNCITRAL Mode Law and it will be noticed that under the 1996 Act the scope of the provisions for setting aside the award is far less the same under Section 30 or Section 33 of the Arbitration Act of 1940.[3]

The expression 'award' in Section 34(1) of the said Act is clearly to the effect that, "...be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3)." The words 'only' and 'in accordance with', qualified by the words 'sub-section (2) and sub-section (3)' apparently disclose the intention of the legislature to make the compliance of both the sub-sections to be mandatory, to have a lawful application for the exercise of jurisdiction regarding the subject of setting aside the award by the court.[4]

When an application for setting aside an award is received by the court on behalf of any of the parties to the arbitration under Section 34(1) of the Act of 1996, and if on the request of any party the court considers it appropriate to adjourn the proceedings for a period to be fixed by the court in order to give arbitral tribunal an opportunity to resume arbitral proceedings or to take such actions as in its opinion will eliminate the grounds for setting

[1] Section 34(1), The Arbitration and Conciliation Act, 1996.
[2] *State of Maharashtra & Anr., v. Ramdas Construction Co. & Anr.*, 2006 (6) MhLJ 678.
[3] *Olympus Superstructures Pvt. Ltd. v. Meena Vijay Khetan*, AIR 1999 SC 2102 : (1999) 5 SCC 651.
[4] *Id.*

aside the award, the court is competent to pass an order under Section 34(4) of the Act of 1996.[5]

Section 34(1) itself provides that recourse to a court against an arbitral award may be made only by an application for setting aside such award "in accordance with" sub-section (2) and sub-section (3). Sub-section (2) relates to grounds for setting aside an award and is not relevant for our purposes. But an application filed beyond the period mentioned in Section 34, sub-section (3) would not be an application "in accordance with" that sub-section. Consequently by virtue of Section 34(1), recourse to the court against an arbitral award cannot be made beyond the period prescribed.[6] The importance of the period fixed under Section 34 is emphasised by the provisions of Section 36 which provide that "where the time for making an application to set aside the arbitral award under Section 34 has expired... the award shall be enforced under the Code of Civil Procedure, 1908 in the same manner as if it were a decree of the court."[7]

This is a significant departure from the provisions of the Arbitration Act, 1940. Under the 1940 Act, after the time to set aside the award expired, the court was required to "proceed to pronounce judgment according to the award and upon the judgment so pronounced a decree shall follow" *(Section 17)*. Now the consequence of the time expiring under Section 34 of the 1996 Act is that the award becomes immediately enforceable without any further act of the court. If there were any residual doubt on the interpretation of the language used in Section 34, the scheme of the 1996 Act would resolve the issue in favour of curtailment of the court's powers by the exclusion of the operation of Section 5 of the Limitation Act, 1963.[8]

Under Section 34(2), an arbitral award may be set aside by the court only if:

(a) The party making the application furnishes proof that
  (i) a party was under some incapacity, or
  (ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or
  (iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

[5] *Midex Overseas Ltd. v. M/s Dewas Soya Ltd. & Another*, 2001 (3) MPHT 140 : 2001 (2) MPLJ 391.
[6] *Union of India v. Wishwa Mittar Bajaj & Sons & Others*, 2007 IV AD (Delhi) 458 : 2007 (2) Arb LR 404 Delhi.
[7] *Union of India v. Popular Construction Co.*, (2001) 8 SCC 470 : 2001 (6) SCALE 657.
[8] *Id.*

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or

(b) The Court finds that;

(i) The subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

(ii) The arbitral award is in conflict with the public policy of India.

Without prejudice to the generality of sub-clause (ii) it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81.[9]

It will be noticed that under sub-clause 2(a)(iv) of Section 34, the arbitral award may be set aside by the court if the award deals with a dispute not contemplated by or not falling within the terms of the submissions of arbitrator or if it contains a decision on matters beyond the scope of the submission to arbitration. The proviso to clause (iv) deals with severability. Further, the word 'terms of the submission to arbitration' in Section 34(2)(iv) in our view, refer to the terms of the arbitration clause. This appears to be the meaning of the word if one refers to Section 28 which uses the word 'dispute submitted to arbitration', and Section 43(3) which uses the word 'submit' future dispute to arbitration.[10]

"The Court has no power to sit as court of appeal over the decision of the arbitrator and it cannot substitute its own view in place of the views of the arbitrator even if the same is erroneous" and it was held that, "award can be set aside only if any one of the five grounds as contained in Section 34(2)(a) or any one of two grounds as contained in Section 34(2)(b) of the Act exist."[11] Further, any dispute relating to specific performance of the

[9] Explanation to Section 34(2)(b), The Arbitration and Conciliation Act, 1996.
[10] *Olympus Superstructures Pvt. Ltd. v. Meena Vijay Khetan*, AIR 1999 SC 2102 : (1999) 5 SCC 651.
[11] *Ircon International Ltd. v. Arvind Construction Company Ltd.*, 2000 (1) Raj 111.

contract is not non-arbitrable dispute and held that Section 34(2)(b)(i) is not attracted.[12]

It has been the view of the Hon'ble Apex Court throughout, as it is affirmed in its latest judgment in *Ravindra Kumar Gupta and Company v. Union of India*,[13] wherein, of course by referring to both the Arbitration Act, 1940 and the Arbitration and Conciliation Act, 1996, with reference to the government contracts, that, the reasonableness of reason given by the arbitrator cannot be decided by this court by exercising its powers under Section 34(2) of the Act, for this court is not sitting as an Appellate Authority against the factual finding given by the arbitrator on various issues. Moreover, this court is not entitled to substitute its own view, which may even be a better view, for the view of the arbitrator, as long as the arbitrator's decision is not perverse or biased or cannot be termed as a legal misconduct.[14]

The expression "party" is used in Section 34(2) in its definitional sense to mean a party to the arbitration proceedings and does not include a third person, who is not a party to the agreement. To our mind the interpretation suggested by the learned ASG would make the Act totally unworkable. It is well-settled that an award is final and binding only on the parties and can be enforced only against the party to the award. A third party would therefore be in a position to challenge the award, but not be bound by it, if the challenge fails. Equally, a third party can render the limitation period envisaged under the Act otiose by merely claiming knowledge of the award long after the period of limitation has expired.[15]

Further, in *Vasantha Ramanan v. Official Liquidator and Ors.*,[16] the learned single judge took a similar view that only a party to the arbitration agreement and a party to the arbitration award can file an application to set aside the arbitration award and that too only on conditions enumerated under Section 34(2) of the Act. Hence, the plain reading of Section 34 shows that only party to the arbitration agreement and party to the arbitration award can file an application to set aside the arbitration award and that too only on the grounds provided under Section 34(2) of the Act.[17]

[12] *Olympus Superstructures Pvt. Ltd. v. Meena Vijay Khetan*, AIR 1999 SC 2102 : (1999) 5 SCC 651.
[13] (2010) 1 SCC 409 : AIR 2010 SC 972.
[14] **See also** *Kwality Manufacturing Corporation v. Central Warehousing Corporation*, (2009) 5 SCC 142 : 2009 (4) SCALE 205; *M.P.Housing Board v. Progressive Writers and Publishers*, (2009) 5 SCC 678 : AIR 2009 SC 1585 and *Ispat Engineering and Foundary Works v. SAIL*, (2001) 6 SCC 347 : AIR 2001 SC 2516.
[15] *Chennai Container Terminal Pvt. Ltd. v. Union of India and Others*, 2007 (4) CTC 284 : AIR 2007 Mad 325.
[16] (2003) 114 CompCas 747 (Mad.).
[17] *Chennai Container Terminal Pvt. Ltd. v. Union of India and Others*, 2007 (4) CTC 284 : AIR 2007 Mad 325.

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or

(b) The Court finds that;

(i) The subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

(ii) The arbitral award is in conflict with the public policy of India.

Without prejudice to the generality of sub-clause (ii) it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81.[9]

It will be noticed that under sub-clause 2(a)(iv) of Section 34, the arbitral award may be set aside by the court if the award deals with a dispute not contemplated by or not falling within the terms of the submissions of arbitrator or if it contains a decision on matters beyond the scope of the submission to arbitration. The proviso to clause (iv) deals with severability. Further, the word 'terms of the submission to arbitration' in Section 34(2)(iv) in our view, refer to the terms of the arbitration clause. This appears to be the meaning of the word if one refers to Section 28 which uses the word 'dispute submitted to arbitration', and Section 43(3) which uses the word 'submit' future dispute to arbitration.[10]

"The Court has no power to sit as court of appeal over the decision of the arbitrator and it cannot substitute its own view in place of the views of the arbitrator even if the same is erroneous" and it was held that, "award can be set aside only if any one of the five grounds as contained in Section 34(2)(a) or any one of two grounds as contained in Section 34(2)(b) of the Act exist."[11] Further, any dispute relating to specific performance of the

[9] Explanation to Section 34(2)(b), The Arbitration and Conciliation Act, 1996.
[10] *Olympus Superstructures Pvt. Ltd. v. Meena Vijay Khetan*, AIR 1999 SC 2102 : (1999) 5 SCC 651.
[11] *Ircon International Ltd. v. Arvind Construction Company Ltd.*, 2000 (1) Raj 111.

contract is not non-arbitrable dispute and held that Section 34(2)(b)(i) is not attracted.[12]

It has been the view of the Hon'ble Apex Court throughout, as it is affirmed in its latest judgment in *Ravindra Kumar Gupta and Company v. Union of India*,[13] wherein, of course by referring to both the Arbitration Act, 1940 and the Arbitration and Conciliation Act, 1996, with reference to the government contracts, that, the reasonableness of reason given by the arbitrator cannot be decided by this court by exercising its powers under Section 34(2) of the Act, for this court is not sitting as an Appellate Authority against the factual finding given by the arbitrator on various issues. Moreover, this court is not entitled to substitute its own view, which may even be a better view, for the view of the arbitrator, as long as the arbitrator's decision is not perverse or biased or cannot be termed as a legal misconduct.[14]

The expression "party" is used in Section 34(2) in its definitional sense to mean a party to the arbitration proceedings and does not include a third person, who is not a party to the agreement. To our mind the interpretation suggested by the learned ASG would make the Act totally unworkable. It is well-settled that an award is final and binding only on the parties and can be enforced only against the party to the award. A third party would therefore be in a position to challenge the award, but not be bound by it, if the challenge fails. Equally, a third party can render the limitation period envisaged under the Act otiose by merely claiming knowledge of the award long after the period of limitation has expired.[15]

Further, in *Vasantha Ramanan v. Official Liquidator and Ors.*,[16] the learned single judge took a similar view that only a party to the arbitration agreement and a party to the arbitration award can file an application to set aside the arbitration award and that too only on conditions enumerated under Section 34(2) of the Act. Hence, the plain reading of Section 34 shows that only party to the arbitration agreement and party to the arbitration award can file an application to set aside the arbitration award and that too only on the grounds provided under Section 34(2) of the Act.[17]

[12] *Olympus Superstructures Pvt. Ltd. v. Meena Vijay Khetan*, AIR 1999 SC 2102 : (1999) 5 SCC 651.
[13] (2010) 1 SCC 409 : AIR 2010 SC 972.
[14] **See also** *Kwality Manufacturing Corporation v. Central Warehousing Corporation*, (2009) 5 SCC 142 : 2009 (4) SCALE 205; *M.P.Housing Board v. Progressive Writers and Publishers*, (2009) 5 SCC 678 : AIR 2009 SC 1585 and *Ispat Engineering and Foundary Works v. SAIL*, (2001) 6 SCC 347 : AIR 2001 SC 2516.
[15] *Chennai Container Terminal Pvt. Ltd. v. Union of India and Others*, 2007 (4) CTC 284 : AIR 2007 Mad 325.
[16] (2003) 114 CompCas 747 (Mad.).
[17] *Chennai Container Terminal Pvt. Ltd. v. Union of India and Others*, 2007 (4) CTC 284 : AIR 2007 Mad 325.

The Supreme Court in *Delhi Development Authority v. R.S. Sharma and Company, New Delhi*,[18] after referring to a catena of judgments has held that an arbitration award is open to interference by a court under Section 34(2) of the Act, 1996 if it is:

(i) contrary to substantive provisions of law; or

(ii) contrary to the provisions of the Arbitration and Conciliation Act, 1996; or

(iii) against the terms of the respective contract; or

(iv) patently illegal; or

(v) prejudicial to the rights of the parties

The public policy as defence which is recognised by Section 34(2)(b)(ii) of the Act came up for consideration before the Division Bench of this Court in the *Vijaya Bank* case.[19] The Division Bench, held after referring to the observations of the Supreme Court in *Renusagar Power Co. Ltd. v. General Electric Co.*,[20] that while it was not possible to attempt a definition of the exact meaning of the expression "public policy", this much was clear, that "whatever be the width of the expression it does not include a mere contravention of law."

Section 34(2)(ii) of the Act also lays down a ground on which an arbitral award could be set aside. It is provided that if the court finds that the arbitral award is in conflict with the public policy of India, the same could also be set aside. There is an explanation added to the aforesaid provision, wherein it is provided that without prejudice to the generally of sub-clause (ii) of clause (b), an award is in conflict with the public policy of India, if the making of the award was induced or affected by fraud or corruption or was in violation of Section 75 or Section 81 of Act.[21]

Section 34(2)(v) applies to the composition of the arbitral tribunal or the arbitral procedure. The court, therefore, found merit in the contention of the respondent that Section 34(2)(v) cannot apply to a case where an interpretation is placed by the arbitrator upon the specifications contained in the contract. The arbitrator is entitled to construe the contract and this is within his jurisdiction. Insofar as this item was concerned, the court was of the view that it would not be justified in launching upon a detailed investigation into the correctness of the claim which had been awarded by the learned arbitrator. The construction which had been placed by the arbitrator was not demonstrated as being contrary to the terms of the contract. The

[18] (2008) 13 SCC 80 : 2008 (11) SCALE 663.

[19] *Vijaya Bank v. Maker Development Services Pvt. Ltd.*, 2001 (3) Bom.CR 652 : 2001 (4) ALLMR 143.

[20] AIR 1994 SC 860 : 1994 Supp (1)SCC 644.

[21] *National Thermal Power Corporation. v. Gannon Dunkerkey Ltd.*, (2002) ILR 2 Delhi 377

arbitrator had not acted outside his jurisdiction, but within his jurisdiction in construing the contract and the view which had been taken, was a possible view to take.[22]

Thus, the grounds on which an arbitral award can be challenged under the Arbitration and Conciliation Act, 1996, can broadly be classified under the following:[23]

a. Matters invalidating the arbitration agreement, the appointment of the arbitrator, lack of notice of the arbitral proceedings or matters whereby a party was otherwise unable to present his case;

b. If the award deals with disputes not covered by the terms of submission to arbitration or matters beyond the scope thereof;

c. If the composition of the arbitral tribunal or arbitral procedure, was not in accordance with Part-I or with the agreement of the parties;

d. If the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force;

e. If the arbitral award is in conflict with the public policy of India.

Under Section 34(3), an application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under Section 33, from the date on which that request had been disposed of by the arbitral tribunal: Provided that if the court is satisfied that the applicant was prevented by sufficient cause from making the application within said period of three months it may entertain the application within a further period of thirty days, 'but not thereafter'.

Section 34(3) of the Arbitration and Conciliation Act, 1996 permits an award to be challenged by filing a petition for setting aside the award within three months from the date of receipt of the arbitral award. The proviso to Section 34(3) of the Act affords a further period of thirty days after the expiry of three months from the date of receipt of the award by the challenger. Section 34(3) of the Act, however, excludes the time spent before the arbitrator in course of an application under Section 33 of the Act.[24]

These provisions are applicable only to filing of the original objections against the award. Admittedly in the present case the petitioner has filed the objections in time i.e., within a period of 3 months.[25] Further, law does not

[22] *Municipal Corporation for Greater Bombay v. Prestress Products (India)*, 2003 (2) Arb LR 624 Bom : 2003 (3) Bom CR 117.

[23] *Ibid.*

[24] *Mrinal Kanti Sirkar v Mrs. Madhuchanda Sirkar & Ors*, decided on March 13, 2014, Calcutta High Court.

[25] *State of Gujarat v. Spun Pipe & Construction Co*, AIR 2008 Guj 29 : 2008 (1) Arb LR 624 (Gujarat).

permit the petitioner to file detailed objections once the time limit prescribed under Section 34(3) of the Act has elapsed.[26]

The law with respect to condonation of delay in filing the petition under Section 34(3) of the Arbitration and Conciliation Act, 1996 is well settled. Section 34(3) of the Arbitration and Conciliation Act, 1996 provides for a period of limitation of three months to file the petition. Sub-section (3) along with the proviso of Section 34 makes it clear in absolute terms that the application for setting aside the award on the grounds mentioned in sub-section (2) of Section 34 has to be made within 3 months and the period can be further extended on sufficient cause by another period of 30 days and not thereafter. The words "but not thereafter" in the proviso to Section 34(3) makes it further clear that the delay beyond 30 days cannot be condoned by the Court.[27]

That without specifying as to what were the procedural steps, merely stating that delay occurred on account of necessary procedural steps would amount to prescribing a different period of limitation in the cases of the 'government' or 'governmental agencies' and no such provision is made under Section 34(3) of the Arbitration and Conciliation Act, 1996. That no such privileges can be conferred on the 'government' or 'governmental agencies' to seek condensation of delay or extension of time merely on the ground that the delay has been occasioned due to various channels involved in processing the matter.[28]

Section 34(3) of the Arbitration and Conciliation Act, 1996 being a special law, Section 5 of the Limitation Act, 1963 would not have any application. Since special period of limitation has been prescribed under Section 34(3) of Arbitration and Conciliation Act, 1996 for making application for any condonation of delay, period of limitation prescribed under the special law shall prevail and to that extent the applicability of Section 5 of the Limitation Act, 1963 stands excluded and the application for condonation of delay up to a period of 30 days can be made by the Court and not beyond that.[29]

In *State of H.P. v. Himachal Techno Engineers,*[30] the Supreme Court held that even if sufficient cause is made out, the delay beyond 30 days cannot be condoned. The observation of the Supreme Court is reproduced hereunder:

> *Having regard to the proviso to Section 34(3) of the Act, the provisions of Section 5 of the Limitation Act, 1963 will not apply in regard to petitions under Section 34 of the Act. While Section 5 of the Limitation Act does not place any outer limit in regard to the period of delay that could be condoned, the proviso to sub-section (3) of Section 34 of the Act places a limit on the period of condonable delay by using the words "may entertain the application within a further period of thirty days, but not thereafter". Therefore, if a petition is filed beyond the prescribed period of three months, the court has the discretion to condone the delay only to an extent of thirty days, provided sufficient cause is shown. Where a petition is filed beyond three months plus thirty days, even if sufficient cause is made out, the delay cannot be condoned.*

Although the Limitation Act, 1963 in general applies to the Arbitration and Conciliation Act, 1996 by virtue of Section 43 of the Limitation Act, 1963, but, the period of limitation for setting aside of an arbitration award shall be governed by Section 34(3) of the Arbitration and Conciliation Act, 1996 and not by the Schedule of the Limitation Act, 1963 because of Section 29(2) of the Limitation Act, 1963.[31]

In several cases, the defects may only be perfunctory and not affecting the substance of the application. For example, an application may be complete in all respects; however, certain documents may not be clear and may require to be retyped. It is possible that in such cases where the initial filing is within the specified period of 120 days (3 months and 30 days) as specified in Section 34(3) of the Act, however, the re-filing may be beyond this period. We do not think that in such a situation the court lacks the jurisdiction to condone the delay in re-filing. As stated earlier, Section 34(3) of the Act only prescribes limitation with regard to filing of an application to challenge an award. In the event that application is filed within the prescribed period, Section 34(3) of the Act would have no further application. The question whether the court should, in a given circumstance, exercise its discretion to condone the delay in re-filing would depend on the facts of each case and whether sufficient cause has been shown which prevent re-filing the petition / application within time.[32]

The purpose of specifying an inelastic period of limitation under Section 34(3) of the Act would also have to be borne in mind and the courts would consider the question whether to condone the delay in re-filing in the context of the statute.[33]

It is clear that no petition under Section 34 of the Act, 1996 can be entertained after a period of three months plus a further period of 30

[26] *Union of India v. Popular Construction Co.*, AIR 2001 SC 4010 : (2001) 8 SCC 470.
[27] *Union of India v. Wishwa Mittar Bajaj & Sons and Others*, 2007 (2) Arb LR 404 Delhi : 2007 IV AD (Delhi) 458.
[28] *Union of India and Ors v. Nav Bharat Nirmal Co. and Anr.*, 2003 (3) Arb LR 309 Delhi.
[29] *Union of India v. Popular Construction Co.*, (2001) 8 SCC 470 : 2001 (6) SCALE 657.
[30] (2010) 12 SCC 210 : (2010) 8 SCR 1025.

[31] *Union of India v. M/s. Hindustan Oil Exploration*, 198 (2013) DLT 229 : 2013 VIIAD (Delhi) 40.
[32] *DDA v. M/s Durga Construction Co.*, Decided on July 2, 2009, Delhi High Court.
[33] *M/s. Competent Placement Services v. Delhi Transport Corporation*, 2011 (2) Raj 347 (Del) : 2010 (120) DRJ 3232 (DB).

days, subject to showing sufficient cause, beyond which no institution is permissible. However, the rigors of condonation of delay in re-filing are not as strict as condonation of delay of filing under Section 34(3) of the Act. But that does not mean that a party can be permitted an indefinite and unexplainable period for refilling the petition.[34]

Thus, court would have the jurisdiction to condone delay in re-filing even if the period extends beyond the time specified in Section 34(3) of the Act. However, this jurisdiction is not to be exercised liberally, in view of the object of the Arbitration and Conciliation Act, 1996 to ensure that arbitration proceedings are concluded expeditiously. The delay in re-filing cannot be permitted to frustrate this object of the Act. The applicant would have to satisfy the court that it had pursued the matter diligently and the delays were beyond his control and were unavoidable.[35]

From the above, it is clear that while, the court would have the jurisdiction to condone delay in re-filing even if the period extends beyond the time specified in Section 34(3) of the said Act. However, the court would have to be satisfied that the petitioner had pursued the matter diligently and the delays were beyond his control and were unavoidable. It is also emphasised that a liberal approach in condoning the delay in re- filing an application under Section 34 of the Act is not called for as it would defeat the purpose of specifying an inelastic period of time within which an application for setting aside an award under Section 34 of the Act could be preferred.[36]

However, in *State of Goa v. Western Builders,*[37] the Supreme Court held that the applicability of Section 5 of the Limitation Act, 1963 stands excluded, and the court can condone the delay up to a period of 30 days but not beyond that.

The controversy, therefore, veered around the question as to when did the period of thee months prescribed under Section 34(3) expire. The term 'month' has not been defined under the Arbitration and Conciliation Act, 1996. Section 3(35) of the General Clauses Act, 1897, however, defines the word 'month' as, *"month" shall mean a month reckoned according to the British Calendar.*[38]

It is very clear that the provisions of Section 14 of Limitation Act, 1963, apply to the period of limitation prescribed in Section 34(3) of the Act, 1996. So the period, during which the *bona fide* applications were prosecuted by a

[34] *Id.*

[35] *Id.*

[36] *Nagaland Industrial Raw Materials & Supply Corporation Limited v. Union of India & Anr.*, FAO (OS) No. 230/2013 decided on November 8, 2013 (Delhi High Court).

[37] (2006) 6 SCC 239 : AIR 2006 SC 2525.

[38] *M.C.D. v. G.D. Builders*, 118 (2005) DLT 658 : (2005) ILR 1 Delhi 784.

party in a wrong forum is required to be excluded in calculating the period of limitation period prescribed in Section 34(3) of the Act, 1996, namely, three months plus 30 days grace period from the date of receiving the copy of the arbitral award or from the date as extended under Section 33 of the Act.[39]

Thus, a party cannot seek to extend the period of limitation for preferring the objections merely by filing a belated application under Section 33 of the Act before the arbitrator, or by filing an application under Section 33 of the Act which is not maintainable in the facts of a given case. If the submission of the learned counsel for the petitioner were to be accepted, it would lead to an absurd result, as is evident from the facts of this case as well. A party who has failed to file its objections within the period of limitation prescribed under Section 34(3) of the Act, would then move an application under Section 33 of the Act before the learned arbitrator even when there may be no justification for it and wait for its disposal and soon after its disposal, the party may move an application for setting aside the award, which otherwise has got time barred.[40]

On receipt of an application under sub-section (1), the court may, where it is appropriate and it is so requested by a party, adjourn the proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of arbitral tribunal will eliminate the grounds for setting aside the arbitral award.[41]

When an application for setting aside an award is received by the court on behalf of any of the parties to the arbitration under Section 34(1) of the Act of 1996 and if on the request of any party the court considers it appropriate to adjourn the proceedings for a period to be fixed by the court in order to give arbitral tribunal an opportunity to resume arbitral proceedings or to take such actions as in its opinion will eliminate the grounds for setting aside the award, the court is competent to pass an order under Section 34(4) of the Act of 1996.[42]

Giving a conjoint reading to both the sections namely, Section 32(3) and 34(4) of the Act, it would be seen that the provisions contained in Section 32(3) were subject to the provisions of Section 34(4). That, being so, the contention that the arbitral proceedings could not be resumed, is apparently untenable. If, that interpretation is given to the provision, that would make Section 34(4) completely meaningless and redundant. That could not be the

[39] *The Regional Chief Engineer v K.A.Thomas*, decided on August 29, 2013, Madras High Court.

[40] *CMI Limited v. Bharat Sanchar Nigam Ltd. & Anr.*, O.M.P. 266/2004, decided on July 8, 2010 (Delhi High Court).

[41] Section 34(4), The Arbitration and Conciliation Act, 1996.

[42] *Midex Overseas Ltd. v. M/s Dewas Soya Ltd. & Another*, 2001 (3) MPHT 140 : 2001 (2) MPLJ 391.

intention of the legislature. The intention is further gathered as Section 32(3) of the Act is made, subject to the provisions of Section 34 (4) of the Act.[43]

The object of taking recourse to the course of action specified in Section 34(4) is to enable the arbitral tribunal to resume proceedings or to take such steps as in its opinion will eliminate the grounds for setting aside the arbitral award. Directing the objector before the court to deposit the amount of the arbitral award would lie outside the jurisdiction of the court since the whole purpose of following the procedure under sub-section (4) of Section 34 is to allow the arbitral tribunal to take further action that would obviate a challenge to its award on a specific ground.[44]

Hence, it is clear that, under the provisions of Section 34(4), the court was empowered to adjourn the proceedings to allow the arbitral tribunal to resume the proceedings or to take other action as in the opinion of the arbitral tribunal would eliminate the ground for setting aside the arbitral award.[45]

Section 34(4) is an independent section and the award cannot be remitted back to the arbitrator after setting aside the same. Section 34(4) of the 1996 Act is almost equivalent to Section 16 of the 1940 Act. It is true that the arbitration award can be set aside under the new Act only on the grounds mentioned under Section 34. It is seen that arbitration award was passed violating the mandatory provisions of the Act regarding the procedure to be adopted by the arbitrator.[46]

The arbitral tribunal is bound to decide the dispute in accordance with the provisions of the Act as held by the Supreme Court in *Oil and Natural Gas Corporation Ltd. v. Saw Pipes Ltd.*[47] that:

> *The jurisdiction or the power of the Arbitral Tribunal is prescribed under the Act and if the award is dehors the said provisions, it would be, on the face of it, illegal. The decision of the Tribunal must be within the bounds of its jurisdiction conferred under the Act or the contract. In exercising jurisdiction, the Arbitral Tribunal cannot act in breach of some provision of substantive law or the provisions of the Act.*

The Apex Court in *Sangamner Bhag Sahakari Karkhana Ltd. v. Krupp Industries Ltd.*,[48] remitted the case back to the arbitrator when parties were not afforded a hearing on an issue under Section 16 instead of setting aside the award

[43] *Kamini Sadh v. Mohan Lal Chander Prakash & Ors*, 2012 VIAD (Delhi) 401.
[44] *Harinarayan G. Bajaj v Rajesh Meghani*, 2004 (2) ARB LR 101 Bom : 2004 (3) Bom CR 165.
[45] *Id.*
[46] *Oil and Natural Gas Corporation Ltd. v. Saw Pipes Ltd.*, (2003) 5 SCC 705 : AIR 2003 SC 2629.
[47] (2003) 5 SCC 705 : AIR 2003 SC 2629.
[48] AIR 2002 SC 2221 : (2002) 5 SCC 417.

under Section 30 of the old Act. The provision to remit back the award under Section 34(4) is generally intended to cure the defects in the award so that grounds of setting aside the award can be eliminated. We are of the opinion that wordings of Section 34(4) makes it clear that it is intended only to correct the curable defects for eliminating the grounds of setting aside the award and not for remitting the award after setting aside the award under Section 34(1) and (2) of the Act.

If the award is set aside for procedural violation or for any other reasons, according to the counsel for the respondent, the aggrieved party is left without any remedy. That is not the object contemplated in the Section. Section 34(4) is one of the enabling provision for remitting back the award without setting aside the award under Section 34(1) and (2) of the Act. It is an independent power.[49]

Therefore, reading Section 34 conjointly with other provisions of the Act, it appears that the legislative intent could not be that if the award is in contravention of the provisions of the Act, still however, it couldn't be set aside by the court. If it is held that such award could not be interfered, it would be contrary to the basic concept of justice. If the arbitral tribunal has not followed the mandatory procedure prescribed under the Act, it would mean that it has acted beyond its jurisdiction and thereby the award would be patently illegal which could be set aside under Section 34.[50]

GROUNDS FOR SETTING ASIDE AN ARBITRAL AWARD

Section 34 of the arbitration and Conciliation Act of 1996, deals with the setting aside of an arbitral award. The court cannot *suo moto* set aside an arbitral award. By virtue of Section 34, an arbitral award can be set aside by a court only on an application. Such an application for setting aside any arbitral award shall be made within three months from the date on which the party making the application had received the award.

However, if the court is of the opinion that, the applicant is prevented by sufficient cause from making the application within the prescribed period of three months, court may entertain the application within a further period of thirty days, but not thereafter. An application under Section 34 to set aside an arbitral award is to be filed within the prescribed period under Sub section 3 of Section 34 of the Act, 1996.[51] An application under Section 5 of the Limitation Act, 1963 to condone the delay is not maintainable.[52]

[49] *Oil and Natural Gas Corporation Ltd. v. Saw Pipes Ltd*, (2003) 5 SCC 705 : AIR 2003 SC 2629.
[50] *Id.*
[51] *Union of India v. Popular Construction Co.*, 2001 (8) SCC 470 : AIR 2001 SC 4010.
[52] *Id.*

By virtue of Section 34 of the Act, an arbitral award may be set aside by the court on following grounds:

a. **Incapacity of a Party:** An arbitral award may be set aside by the court on proof of the fact that, party was under some incapacity. An award which is invalid under the law governing minors ought to be set aside.[53]

b. **An arbitration agreement is not valid:** Invalidity of reference would be good ground for challenging the award passed by an arbitrator.[54] An arbitral award may set aside by the court if the party making the application furnishes proof that, the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force in India.

In case a contract is denied and there is no valid submission, the matter relating to the contracts cannot go to arbitration and the award on that basis is without any legal validity.[55]

If the arbitrator has not examined the plea of lack of jurisdiction, and as to whether, the contract entered into between the parties complied with the requirements of law as contained under Article 299 of the Indian Constitution, the award passed by him is liable to be set aside.[56]

Where a contract is denied and there is no valid submission, the matter relating to the contract cannot go to the arbitration and the award on that basis is without any legal validity.[57]

Further, by virtue of Section 16 of the Act, if the arbitration agreement is invalid, the plea of invalidity of an arbitration agreement may be raised before the arbitration tribunal itself to content that, it lacks jurisdiction to arbitrate. Once the award is made, the party may then make an application to set aside the award under Section 34 of the Act.

c. **Non-existence of dispute or Arbitration Agreement:** By virtue of Section 16 (1) of the Act, a party to the arbitration proceedings may raise a plea that, arbitral tribunal has no jurisdiction since there is no dispute or arbitration agreement. If the arbitral tribunal takes a decision rejecting the plea of lack of jurisdiction, the arbitral tribunal shall continue with arbitral proceedings and make an arbitral award.

[53] *Lakshminarayana Tantri v. Ramachandra Tantri*, AIR 1919 Mad 1029 (DB) : 45 Ind. Cas. 763.
[54] *Union of India v. Narinder Singh Kanwar*, AIR 1982 Pat 238.
[55] *Chinoy Chalani and Co v. Y Anjiah*, AIR 1958 AP 384.
[56] *Union of India v. Jai Society Wood Works*, AIR 1998 Delhi 187.
[57] *Rikhabdass v. Ballabhdas*, AIR 1962 SC 551 : (1962) Supp 1 SCR 475.

A party aggrieved by such arbitral award may make an application for setting aside such an arbitral award under Section 34.

Where an arbitration clause is admittedly inserted after the parties had signed the Memorandum of Understanding and had not been signed or even initiated by them, referring the matter to the arbitrator named in the said arbitration clause, would be unwarranted and unjustified, and therefore the award of the arbitrator deserved to be set aside.[58]

When both the parties accepted the existence of the arbitration clause in the agreement and they proceeded on that basis, the appellant cannot thereafter take the plea of "no arbitration clause" for the first time in appeal before the High Court.[59]

If the petitioner did not take jurisdictional point before the arbitrator and allowed the arbitrator, to pass final award, such plea cannot be allowed to be taken in the application for setting aside the award for first time. Further, court cannot probe into the mental process of the arbitrator about sufficiency of evidence, holding that mere insufficient evidence cannot nullify an award.[59A]

d. By virtue of Section 34(2)(a)(iii) of the Act, 1996 an arbitral award may be set aside by the court if the party making an application furnishes proof that, he has not given proper notice the appointment of an arbitrator or of the arbitral proceedings or was unable to present his case.

e. Arbitrator being a creature of the agreement between the parties has to operate within the four corners of the agreement and if he ignores specific terms of the contract, it would be a question of jurisdictional error on the face of the award, falling within the ambit of the legal misconduct which could be corrected by the court. An arbitrator derives his authority from the contract and if he acts in disregard to the contract, he acts without jurisdiction. A deliberate departure from contract amounts to not only manifest disregard of his authority or misconduct on his part, but it may tantamount to a *mala fide* action. If he wanders outside the contract and deals with matters not allotted to him, he commits a jurisdictional error. An arbitrator cannot ignore the law or misapply it in order to do what he thinks is just and reasonable. He is a tribunal selected by the parties to decide their dispute according to law and so is bound to follow and apply the law

[58] *Harjinder Pal v. Harmesh Kumar*, 2009 (1) Arb LR 261 (Del).
[59] *NICCO Corp v. Simplex Infrastructure*, AIR 2012 Cal 32 (DB) : 2012 (1) CHN 180.
[59A] *M/s. Sarkar Enterprises v. M/s. Garden Reach Shipbuilders & Engineers Ltd.*, AIR 2002 Cal 65.

and if he does not he can be set right by the court provided his error appears on the face of the award.[60]

An arbitral award may be set aside by the court if the award deals with a dispute not contemplated by or not falling within the terms of submissions to arbitrator or if it contains a decision on matters beyond the scope of submission to arbitration.[61]

f. By virtue of Section 34(2)(a)(v) of the Act, court can set aside the arbitral award if the party making an application furnishes proof that the composition of the tribunal was not in accordance with the agreement of the parties.

The Supreme Court is of the opinion that -[62]

(i) Section 34(2)(a)(v) of the Act applies if the composition of the arbitral tribunal or arbitral procedure was not in accordance with the agreement of the parties.

(ii) If the composition of the arbitral tribunal or the arbitral procedure is in accordance with the agreement there can be no challenge under this provision merely on the ground that the composition of arbitral tribunal was in conflict with the provisions of Part-I of the Act, 1996.

(iii) When the composition or the procedure is not in accordance with the agreement of the parties then the parties get a right to challenge the award. But even in such a case, the right to challenge the award is available only if the agreement of the parties is in conflict with a provision of Part-I which the parties cannot derogate. In other words, even if the composition of the arbitral tribunal or the arbitral procedure is not in accordance with the agreement of the parties but if such composition or procedure is in accordance with the provisions of the Act, then the parties cannot challenge the award.

(iv) If there is no agreement between the parties, providing for the composition of the arbitral tribunal or the arbitral procedure and the composition or the arbitral procedure was not in accordance with Part-I of the Act, then also a challenge to award would be available.

g. An arbitral award may be set aside by the court if it is found that, the arbitral award is in conflict with the public policy in India. The term "public policy" has not been defined in the Act. A simple attempt to

[60] *Food Corporation of India v. Chandu Construction*, (2007) 4 SCC 697 : (2007) 4 SCR 1160.
[61] *Olympus Superstructures Pvt. Ltd. v. Meena Vijay Khetan*, AIR 1999 SC 2102 : (1999) 5 SCC 651.
[62] *Narayan Prasad Lohia v. Nikunj Kumar Lohia*, AIR 2002 SC 1139 : (2002) 3 SCC 572.

describe it is contained in the Legal Glossary of the Ministry of Law, Justice and Company Affairs, Government of India, namely that, a public policy is "a set of principles in accordance with which communities need to be regulated to achieve the good of the entire community or public".[63]

Within public policy of India, lay certain determinate specified heads and that, it would not be prudent to begin search for new heads. However, in *Central Inland Water Transport Corp Ltd. v. Brojo Nath Ganguly*,[64] the Supreme Court promoted a wider stance by interpreting the term "public policy" on the pillars of public conscience, public good and public interest.

Further, the Supreme Court opined that in a case where the validity of the award is challenged, there is no necessity of giving a narrow interpretation to the term "public policy in India". On the contrary, wider interpretation is required to be given so that, the patently illegal award passed by the tribunal could be set aside.[65]

[63] P Anklesaria, "Scope of the expression 'public policy' in domestic and foreign awards", 9 AIR (2005) at 310.
[64] AIR 1986 SC 1571 : (1986) 3 SCC 156.
[65] *ONGC v. Saw Pipes*, AIR 2003 SC 2629 : 2003 (5) SCC 705.

6

Finality and Enforcement of Award

FINALITY OF AN AWARD

Subject to this Part, an arbitral award shall be final and binding on the parties and persons claiming under them respectively.[1] An award of an arbitrator is as binding on the parties to the reference as if it were a decree of the court even in respect of such provisions as have not been embodied in the decree by virtue of their not pertaining to the subject matter of suit.[2] Award is final and binding on the parties and it is not a piece of waste paper.[3]

Section 35 deals with subject to the provision of this part meaning thereby the Award reached finality as and when the action taken under Section 34 is dismissed at the end of the appeal, namely, after the appeal is dismissed as because there is no provision for second appeal. Of course, the constitutional provision to approach the Supreme Court is not and cannot be touched by this enactment.[4]

The term "this Part" used in Section 35 of the Act refers to the Chapter No: VIII only and neither to the Chapter IX (Appeals) nor to the entire Part - I of the Act. This interpretation is in consonance with the language of Section 36 of the Act, because inbuilt limitations qua enforcement/execution are legislated in Section 36 of the Act, regarding enforcement of the decree.[5]

When the award becomes final, it puts an end to the controversies between the parties and points which were taken either in attack or in defence cannot be registered.[6] If it is found that, the reference to an arbitrator is made voluntarily and the reference was not illegal for any other reason then, the agreement must be held to be binding on the parties.[7]

The award creates new right or rights in favour of the successful party, where he can enforce in the courts in substitution for the rights in which

[1] Section 35, The Arbitration and Conciliation Act, 1996.
[2] *Kolavakolanu Seetanna v. Poddri Narayanamurti Somayajulu*, AIR 1920 Mad 615 (DB) : 57 Ind. Cas. 982.
[3] *Supra* note 1; *See also M S Ramaiah v. State of Mysore*, AIR 1973 Mys 17.
[4] *Sarkar and Sarkar v. State of West Bengal & Ors.*, AIR 2006 Cal 149 : (2006) 3 CALLT 342 (HC).
[5] *Decor India P. Ltd. v National Building Consruction Corporation*, 2007 (3) Arb LR 348 Delhi : 142 (2007) DLT 21.
[6] *Municipal Committee v. Harda Electric Supply Co. (Pvt.) Ltd.*, AIR 1964 MP 101 : 1964 JLJ 57.
[7] *Radha Kishen v. Sappattar Singh*, AIR 1957 ALL 406 (DB)

the claim or defence respectively found, therefore it is implied term of the application that, the parties agree to perform the award. An obligation to similar effect also appears, in many sets of arbitration rules.[8]

An arbitrator is not required to write a detailed judgment as required in a court of law. However, an arbitrator must give reasons in support of the award, without setting out every process of reasoning, and may not deal with every point raised by the parties but it is certainly obligatory on the part of the arbitrator to set out the reasons as to why he has come to a particular conclusion.[9] However, if the arbitrator fails to mention the basis on which he had reached the conclusion while allowing compensation to the contractor on account of prolongation of the contract period, the award is liable to be set aside.

Arbitrator is the final arbiter of disputes between the parties and the award is not open to challenge on the ground that, arbitrator has drawn his own conclusions or has failed to appreciate the facts. The court cannot look into the reasonableness of reasons given by the arbitrator while making the award.[10] An award is liable to be set aside, if the reasons are totally erroneous and contrary to the materials available before the court.[11]

In *Décor India P. Ltd. v. National Building Const. Corpn. L.*,[12] the learned Single Judge minutely examined the provisions of law for distinguishing a decree passed in a civil suit and an award passed in the arbitration proceedings, and had extensively referred to the provisions of the Code of Civil Procedure, 1908 for the execution of the decrees and had then interpreted Sections 35 and 36 of the Act to hold that there was no automatic stay due to pendency of the appeal.

If we read the provisions of Sections 35, 36 and 37 of the Act and Order XLI Rule 5 of the Code of Civil Procedure, 1908 in the light of the laudable objects of the Arbitration and Conciliation Act, 1996, we find that there is no manner of doubt that the very purpose of Arbitration and Conciliation Act, 1996 is to curb the procedural delays as are inherent in the routine civil disputes in the courts. In fact a summary procedure has been envisaged in the Act in contradistinction to the Arbitration Act of 1940.[13]

Section 35 deals with, subject to the provisions of this Part, meaning thereby that the award reaches finality as and when the action taken under

[8] *Associated Electric and Gas Insurance Services Ltd. v. European Reinsurance Co. of Zurich* [2003] 1 WLR 1041 : [2003] UKPC 11 (PC), as seen in *Russell on Arbitration*, 23rd ed., para 6.163, p. 334
[9] *Anant Raj Agencies v. Delhi Development Authority*, 1999 (1) Arb LR 16.
[10] *UP State Electricity Board v. Searsole Chemicals Ltd.*, AIR 2001 SC 1171 : (2001) 3 SCC 397.
[11] *UP State Bridge Corp. Ltd. v. Union of India*, Decided on January 13, 2012.
[12] 142 (2007) DLT 21 : 2007 (3) Arb LR 348 Delhi.
[13] *Sarkar and Sarkar v. State of West Bengal & Ors.*, AIR 2006 Cal 149 : (2006) 3 CALLT 342 (HC).

Section 34 is dismissed at the end of the appeal, namely, after the appeal is dismissed, as because there is no provision for a second appeal. Of course, the constitutional provision to approach the Supreme Court is not and cannot be touched by this enactment.[14]

The courts have minutely examined the provisions of law for distinguishing a decree passed in a civil suit and an award passed in the arbitration proceedings, and has extensively referred to the provisions of the Code of Civil Procedure, 1908 for execution of the decrees. The courts have then interpreted Sections 35 and 36 of the Act to hold that there is no automatic stay due to the pendency of the appeal.[15]

Under Section 35 of the Act, an arbitral award would become final and binding on the parties and the same becomes enforceable after the expiry of the period specified under Section 34 for making an application to set aside the arbitral award. Thereafter, it can be enforced under the provisions of the Civil Procedure Code, 1908 as if the award is a decree of the court. The only other mode by which a challenge can be made to the award is by filing an appeal as against an order declining to interfere with the award or to set aside the award by approaching the appellate forum as prescribed under Section 37 of the Act.[16]

Section 35 of the Act which provides finality of arbitral awards and Section 36 of the Act provides for enforcement of awards.[17] On a conjoined reading of Section 34 (3), Section 35 and Section 36 of the Act, once the period of limitation expires, the award becomes decree and therefore the award cannot be challenged. That after the period of limitation, an application for setting aside is not maintainable at law.[18]

ENFORCEMENT OF ARBITRAL AWARD

By virtue of Section 36, where the time for making an application to set aside the arbitral award under Section 34 has expired, or such application having been made, it has been refused, the award shall be enforced under the Code of Civil Procedure, 1908 in the same manner as if it were a decree of the court.

[14] *National Aluminum Co. Ltd. v. Pressteel & Fabrications (P) Ltd. & Another*, (2004) 1 SCC 540 : AIR 2005 SC 1514.

[15] *Vipul Aggarwal v. Atul Kanodia & Co.*, AIR 2004 All 205 : 2004 (2) Arb LR 335 (All).

[16] *M/s Sri Swaminathan Construction v. Sri Thirunavukkarasu Dhanalakshmi Eduction & Charitable Trust & Others*, 2008 (4) LW 956 : (2008) 2 MLJ 637, Decided on December 14, 2007, Madras High Court.

[17] *Jyoti Motors v. Industrial Credit and Development Syndicate Ltd.*, (2002) 4 GLR 3554 : 2002 GLH (2) 29.

[18] *Union of India v. Popular Construction Co.*, (2001) 8 SCC 470 : AIR 2001 SC 4010.

The proposition of law canvassed by the party in person for the petitioner, who is seeking enforceability of the award when an application under Section 34 of the Act is pending before the District Court, Valsad, is not permissible in view of the decision rendered by the Hon'ble Supreme Court between *National Aluminum Co. Ltd. v. Pressteel and Fabrications (P) Ltd.*[19], the relevant portion of para. 10 reads as under:

> *...At one point of time, considering the award as a money decree, we were inclined to direct the party to deposit the awarded amount in the Court below so that the applicant can withdraw it, on such terms and conditions as the said court might permit it to do as an interim measure. But then we noticed from the mandatory language of Section 34 of the 1996 Act, that an award, when challenged under Section 34 within the time stipulated therein, becomes unexecutable. There is no discretion left with the Court to pass any interlocutory order in regard to the said award except to adjudicate on the correctness of the claim made by the applicant therein. Therefore, that being the legislative intent, any direction from us contrary to that, also becomes impermissible. On facts of this case, there being no exceptional situation which would compel us to ignore such statutory provision, and to use our jurisdiction under Article 142, we restrain ourselves from passing any such order, as prayed for by the applicant.*
>
> *In the aforesaid judgement, it is expressed in para-11 of the judgment that there is an automatic suspension of the execution of the award, once an application challenging the said award filed under Section 34 of the Act is pending. The amendment is also suggested but as stated herein above, especially in the judgment delivered by the Apex Court, the Court cannot recast, reframe and restructure the law on its own.*
>
> *This interpretation of Section 36 made by the Hon'ble Supreme Court is clearly suggestive of the fact that the amount awarded is not enforceable, once the application under Section 34 of the Act is pending before the District Court.*

The pendency of application under Section 34 of the Act, 1996 can never be treated as a bar for the enforceability of the order passed by the arbitrator.[20] However, it is not the duty of the court either, to enlarge the scope of the legislation or the intention of the legislature, when the language of the provision is plain and unambiguous. The court cannot rewrite or reframe the legislation for the very good reason that it has no power to legislate. The power to legislate has not been conferred on the courts. The court cannot add words to a statute or read words into it which are not actually present.[21]

[19] (2004) 1 SCC 540 : AIR 2005 SC 1514.

[20] *Atul Limited v. Justice (R) B.J. Diwan Presiding*, Special Civil Application No. 11375 of 2005, decided on 17 June, 2005, Guj HC

[21] *Union of India and Anr. v. Deoki Nandan Aggarwal*, AIR 1992 SC 96 : 1992 Supp (1) SCC 323.

Section 34 is dismissed at the end of the appeal, namely, after the appeal is dismissed, as because there is no provision for a second appeal. Of course, the constitutional provision to approach the Supreme Court is not and cannot be touched by this enactment.[14]

The courts have minutely examined the provisions of law for distinguishing a decree passed in a civil suit and an award passed in the arbitration proceedings, and has extensively referred to the provisions of the Code of Civil Procedure, 1908 for execution of the decrees. The courts have then interpreted Sections 35 and 36 of the Act to hold that there is no automatic stay due to the pendency of the appeal.[15]

Under Section 35 of the Act, an arbitral award would become final and binding on the parties and the same becomes enforceable after the expiry of the period specified under Section 34 for making an application to set aside the arbitral award. Thereafter, it can be enforced under the provisions of the Civil Procedure Code, 1908 as if the award is a decree of the court. The only other mode by which a challenge can be made to the award is by filing an appeal as against an order declining to interfere with the award or to set aside the award by approaching the appellate forum as prescribed under Section 37 of the Act.[16]

Section 35 of the Act which provides finality of arbitral awards and Section 36 of the Act provides for enforcement of awards.[17] On a conjoined reading of Section 34 (3), Section 35 and Section 36 of the Act, once the period of limitation expires, the award becomes decree and therefore the award cannot be challenged. That after the period of limitation, an application for setting aside is not maintainable at law.[18]

ENFORCEMENT OF ARBITRAL AWARD

By virtue of Section 36, where the time for making an application to set aside the arbitral award under Section 34 has expired, or such application having been made, it has been refused, the award shall be enforced under the Code of Civil Procedure, 1908 in the same manner as if it were a decree of the court.

[14] *National Aluminum Co. Ltd. v. Pressteel & Fabrications (P) Ltd. & Another*, (2004) 1 SCC 540 : AIR 2005 SC 1514.

[15] *Vipul Aggarwal v. Atul Kanodia & Co.*, AIR 2004 All 205 : 2004 (2) Arb LR 335 (All).

[16] *M/s Sri Swaminathan Construction v. Sri Thirunavukkarasu Dhanalakshmi Eduction & Charitable Trust & Others*, 2008 (4) LW 956 : (2008) 2 MLJ 637, Decided on December 14, 2007, Madras High Court.

[17] *Jyoti Motors v. Industrial Credit and Development Syndicate Ltd.*, (2002) 4 GLR 3554 : 2002 GLH (2) 29.

[18] *Union of India v. Popular Construction Co.*, (2001) 8 SCC 470 : AIR 2001 SC 4010.

The proposition of law canvassed by the party in person for the petitioner, who is seeking enforceability of the award when an application under Section 34 of the Act is pending before the District Court, Valsad, is not permissible in view of the decision rendered by the Hon'ble Supreme Court between *National Aluminum Co. Ltd. v. Pressteel and Fabrications (P) Ltd.*[19], the relevant portion of para. 10 reads as under:

> *...At one point of time, considering the award as a money decree, we were inclined to direct the party to deposit the awarded amount in the Court below so that the applicant can withdraw it, on such terms and conditions as the said court might permit it to do as an interim measure. But then we noticed from the mandatory language of Section 34 of the 1996 Act, that an award, when challenged under Section 34 within the time stipulated therein, becomes unexecutable. There is no discretion left with the Court to pass any interlocutory order in regard to the said award except to adjudicate on the correctness of the claim made by the applicant therein. Therefore, that being the legislative intent, any direction from us contrary to that, also becomes impermissible. On facts of this case, there being no exceptional situation which would compel us to ignore such statutory provision, and to use our jurisdiction under Article 142, we restrain ourselves from passing any such order, as prayed for by the applicant.*
>
> *In the aforesaid judgement, it is expressed in para-11 of the judgment that there is an automatic suspension of the execution of the award, once an application challenging the said award filed under Section 34 of the Act is pending. The amendment is also suggested but as stated herein above, especially in the judgment delivered by the Apex Court, the Court cannot recast, reframe and restructure the law on its own.*
>
> *This interpretation of Section 36 made by the Hon'ble Supreme Court is clearly suggestive of the fact that the amount awarded is not enforceable, once the application under Section 34 of the Act is pending before the District Court.*

The pendency of application under Section 34 of the Act, 1996 can never be treated as a bar for the enforceability of the order passed by the arbitrator.[20] However, it is not the duty of the court either, to enlarge the scope of the legislation or the intention of the legislature, when the language of the provision is plain and unambiguous. The court cannot rewrite or reframe the legislation for the very good reason that it has no power to legislate. The power to legislate has not been conferred on the courts. The court cannot add words to a statute or read words into it which are not actually present.[21]

[19] (2004) 1 SCC 540 : AIR 2005 SC 1514.

[20] *Atul Limited v. Justice (R) B.J. Diwan Presiding*, Special Civil Application No. 11375 of 2005, decided on 17 June, 2005, Guj HC

[21] *Union of India and Anr. v. Deoki Nandan Aggarwal*, AIR 1992 SC 96 : 1992 Supp (1) SCC 323.

Under Section 36 of the Act an arbitral award is executable as a decree. But it can be enforced only after the time for filing an application under Section 34 has expired and no application is made or such application having been made has been rejected.[22] If the petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 is filed within the time prescribed under Section 34(3) of the Arbitration and Conciliation Act, 1996 the award is automatically stayed and cannot be executed.[23]

An award, when challenged under Section 34 within the time stipulated therein, becomes unexecutable. There is no discretion left with the court to pass any interlocutory order in regard to the said award except to adjudicate on the correctness of the claim made by the applicant therein. Therefore, that being the legislative intent, any direction from us contrary to that, also becomes impermissible.[24]

Under Section 36, an arbitral award can be enforced under the Code of Civil Procedure, 1908 in the same manner as if it were a decree of the court. The arbitral award can be enforced where the time for making an application to set aside the arbitral award under Section 34 has expired or in the event of such an application having been made, it has been refused. The enforcement of an award enures to the benefit of the party who has secured an award in the arbitral proceedings.[25]

The enforcement of an award enures to the benefit of the party who has secured an award in the arbitral proceedings. That is why the enforceability of an award under Section 36 is juxtaposed in the context of two time frames, the first being where an application for setting aside an arbitral award has expired and the second where an application for setting aside an arbitral award was made but was refused.[26]

The enforceability of an award, in other words, is defined with reference to the failure of the other side to file an application for setting aside the award within the stipulated time limit or having filed such an application has failed to establish a case for setting aside the arbitral award.[27]

Under Section 9, a party could apply to the court, (a) before, (b) during arbitral proceedings, or (c) after the making of the arbitral award but before

[22] *Vipul Agarwal v. Atul Kanodia & Co. and Anr*, AIR 2004 All 205 : 2004 (2) Arb LR 335 (All).

[23] *National Buildings Construction Corporation Limited v. Lloyds Insulation India Limited*, (2005) 2 SCC 367.

[24] *National Aluminium Co. Ltd. v. Pressteel & Fabrications (P) Ltd.*, (2004) 1 SCC 540 : AIR 2005 SC 1514.

[25] *Aqdas Maritime Agency Pvt. Ltd v. Central Warehousing Corporation*, Arbitration Petition Nos. 853, 854, 855, 792 and 793 of 2014, decided on 31 July, 2014 Bombay HC

[26] *Denel Proprietary Ltd. v. Union of India*, 219 (2015) DLT 309, decided on April 9, 2015 (Delhi High Court)

[27] *Dirk India Private Limited v. Maharashtra State Electricity*, 2013 (7) Bom CR 493, decided on 19 March, 2013, Bombay High Court.

it is enforced in accordance with Section 36. The words, "in accordance with Section 36", can only go with the words, "after the making of the arbitral award". It is clear that the words, "in accordance with Section 36" can have no reference to an application made "before" or "during the arbitral proceedings". Thus, it is clear that an application for interim measure can be made to the courts in India, whether or not the arbitration takes place in India, before or during arbitral proceedings. All that Section 36 provides is that an enforcement of a domestic award is to take place after the time to make an application to set aside the award has expired or such an application has been refused.[28]

The language of Section 36 of the Act is clear and it specifically deals with enforcement of arbitration award. In view of Section 36 of the Act placing an embargo on executing the arbitration award, the Civil Court cannot exercise powers under Section 151 of the Civil Procedure Code, 1908 by issuing interim orders. Section 36 of the Act makes an arbitral award enforceable under the Code of Civil Procedure, 1908 in the same manner as if it were a decree of the Court once either the time for making an application to set aside the arbitral award under Section 34 has expired or such application having been made, it has to been refused.[29]

The question that came up for consideration in *Vipul Agarwal v. Atul Kanodia and Co. and Anr.*,[30] is whether the word 'refused' used in Section 36 of the Act, means a final refusal, after all the proceedings of appeal, etc. upto the Supreme Court are over, or a refusal by the District Judge is sufficient to make the award executable. From the scheme of Sections 34, 36 and 37, it is clear that the refusal of the application referred to in Section 36 for setting aside the award is the application filed under Section 34.

Under Section 36 of the Act, which deals with enforcement of the awards, the award has to be enforced by the court when the period of limitation for its challenge has expired or the challenge having been made has been refused. Consequently on a plain reading of Section 36, it is clear that the court must enforce the award and must allow the execution to proceed, if the award is not challenged within 3 months and 30 days of the passing of the award. It is also essential for the court to enforce the award and allow the award. It is also essential for the court to enforce the award and allow its execution to proceed, if the challenge to the award has been refused/ rejected/dismissed.[31]

[28] *Bhatia International v. Bulk Trading S.A. and Another*, (2002) 4 SCC 105 : AIR 2002 SC 1432 : (2002) 2 SCR 411.

[29] *Cooperative v. Shah*, Decided on November 14, 2008 (Gujarat High Court).

[30] AIR 2004 All 205 : 2004 (2) Arb LR 335 (All).

[31] *National Agricultural Co-operative Marketing Federation of India Limited v. Swarup Group of Industries & Anr.*, decided on April 30, 2015, Bombay High Court.

The expression 'or' in Section 36 would show that if one of the two contingencies mentioned therein applies to a case, the enforcement must be made. Hence, upon the mere expiry of the special period of limitation under Section 34(3) of the Act, the award becomes enforceable and has to be enforced. The enjoinment of the court is in the expression 'shall be enforced'.[32]

An interpretation that Section 36 refers to the refusal of the application at the stage of the appeal is not possible without straining the language of Section 36 and adding the word 'finally' as qualifying 'refused'. Such an interpretation also does not promote any purpose, which the legislature may have had in mind. The purpose of arbitration is to provide a speedy remedy. If the award cannot be executed until it has successfully borne all challenges even up to the Apex Court, it cannot be conceived of as a speedy remedy.[33]

A bare perusal of Section 36 of the Act, which is the relevant provision for enforcement of award, it would be manifest that the application for enforcement of award can be entertained either after expiry of the time for making application to set aside the arbitral award under Section 34 of the Act or if such application having been made, it has been refused by the court concerned.[34]

The mandatory language of Section 34 (Section 36) of the 1996 Act, that an award, when challenged under Section 34 within the time stipulated therein, becomes unexecutable. There is no discretion left with the court to pass any interlocutory order in regard to the said award except to adjudicate on the correctness of the claim made by the applicant therein. Therefore, that being the legislative intent, any direction from us contrary to that, also becomes impermissible.[35]

[32] *Id.*

[33] *Id.*

[34] *Bihar State Housing Board v. Harendra Nath Kapoor & Ors*, Decided on February 18, 2011, Patna High Court.

[35] *National Aluminum Co. Ltd. v. Pressteel & Fabrications (P) Ltd.*, (2004) 1 SCC 540 : AIR 2005 SC 1514.

7

Appeals

Section 37 of the Arbitration and Conciliation Act, 1996 is the provision dealing with the appeals against the orders passed by Court under certain provisions of the Arbitration and Conciliation Act, 1996. By virtue of Section 37, an appeal shall lie from the following orders (and from no others) to the court authorised by law to hear appeals from original decrees of the court passing the order, namely:

(a) If a court to which an application is made for interim order under Section 9, has granted or refused to grant any interim measure, an appeal shall lie against such order;

(b) If the court to which an application is made for setting aside of an arbitral award under Section 34, has passed an order setting aside the award or refusing to set aside the award, an appeal shall lie from such order.

Appeal shall also lie to a court from an order of the arbitral tribunal:

(a) Accepting the plea referred to in sub-section (2) or sub-section (3) of Section 16; or

(b) Granting or refusing to grant an interim measure under Section 17.

Thus, Section 37 provides for appeal to the court to which ordinarily an appeal lies from the order or decree of the court which passes the order. No second appeal shall lie from an order passed in appeal under this Section, but nothing in this section shall affect or take away any right to appeal to the Supreme Court.

After considering Section 5 of the Arbitration and Conciliation Act, 1996, the Supreme Court had held that though under Section 37(3), second appeal was barred, the right of remedy of revision under Code of Civil Procedure, 1908 was neither expressly nor impliedly taken away by the said Act.[1]

While examining a particular provision of a statute to find out whether the jurisdiction of a court is ousted or not, the principle of universal application is that ordinarily the jurisdiction may not be ousted unless the very statutory

[1] *ITI Ltd. v. Siemens Public Communications Network Ltd.*, (2002) 5 SCC 510 : AIR 2002 SC 2308.

provision explicitly indicates or even by inferential conclusion the court arrives at the same when such a conclusion is the only conclusion.[2]

The provisions of Section 37 take generally the form of Section 39 of the 1940 Act, but they are materially different from the said provision and it must be with a view to minimise the supervisory role of the courts in arbitral process which is inconsonance with the spirit of the Act as contained in Section 5.

Sub-section 1(a) and (b) of Section 37, provide for appeals against the order of courts granting or refusing to grant interim measures under Section 9 and setting aside or refusing to set aside an award under Section 34. Sub-section 1 emphasise that appeal shall not lie against any other orders. This is a major departure from the 1940 Act whereas Sub-section (1) provides for an appeal from court orders specified therein. Sub-section (2) provides for an appeal to the court from an order of an arbitral tribunal, (a) accepting the plea referred to in sub-section (2) of sub-section (3) of Section 16; and (b) granting and refusing to grant interim measure under Section 17.[3]

The words "and from no other orders" appearing in sub-section 1 of Section 37 are analogous to the provisions of Section 39 of the Arbitration Act, 1940 and came to be interpreted by a Full Bench of the Court in the case of *Union of India v. A.S. Dhupia*,[4] and the Hon'ble Supreme Court in the case of *Mahindra Supply Company v. ABC*[5], and the Supreme Court held that these words qualify the expression, "an appeal shall lie from the following orders", would qualify Section 39 as well, therefore, by the same analogy the expression "and from no other orders" used in Section 37 of the Act would equally qualify Sections 37 and 37 of the Act.

Perusal of provisions of Section 37 in the scheme of Part-I shows that it deals with only those orders which are passed by the court. It appears from Section 37 that it may not be the intention of the legislature to bar appeals against the orders passed in the proceedings which are not instituted under the Arbitration and Conciliation Act, 1996.[6]

Section 37 of the Arbitration and Conciliation Act, 1996 only provides for an appeal against certain orders passed under the provisions of the Arbitration and Conciliation Act, 1996. Section 37 of the Arbitration and

[2] *Bhatia International v. Bulk Trading S.A. and Anr.*, (2002) 2 SCR 411 : (2002) 4 SCC105 : AIR 2002 SC 1432.

[3] *National Thermal Power v. Siemens Atiengesellschaft (Sag)*, 121 (2005) DLT 36 : 2005 (2) Arb LR 172 (Delhi).

[4] AIR 1972 Delhi 108 FB : AIR 1972 Delhi 108.

[5] AIR 1962 SC 256 : (1962) 3 SCR 497.

[6] *State of Maharashtra and Anr. v. Ramdas Construction Co. & Anr.*, 2006 (6) MhLJ 678.

Conciliation Act, 1996 provides for an appeal against an order granting or refusing to grant interim measures under Section 9 of the Act.[7]

Similarly, Section 37 provides for an appeal against an order setting aside or refuse to set aside an arbitral award passed under Section 34. In order to get an order from the Court setting aside the Award, a petition is to be filed under Section 34. Thus, Section 37 provides for appeal against orders which are passed in the proceedings which are instituted under the provisions of Arbitration and Conciliation Act, 1996 and those proceedings do not arise in a pending civil suit.[8]

A bare reading of Section 37 of the Act would clearly show that an appeal would lie only against an order of the Arbitral Tribunal accepting the plea referred to in sub-section (2) or (3) of Section 16, for example, holding that the arbitral tribunal does not have the jurisdiction or accepting the plea that the tribunal was exceeding the scope of its authority.

A conjoint reading of Sections 5 and 37 makes it abundantly clear that the only orders against which appeals would lie are the orders specifically mentioned in Section 37 in case of original decrees passed by a court and Section 37(2) in respect of orders passed by an arbitral tribunal. The contention of the learned counsel for the appellant that the qualifying words used in sub-section (1) being absent in sub-section (2) of Section 37 and, therefore, an appeal can also lie from an order of the arbitral tribunal even if the said order is strictly not one falling under clause (a) or (b) has no merits and is liable to rejection because it goes against the very spirit and object of the Act. This court is of the clear opinion that a court will be competent to entertain the appeals from an order of the arbitral tribunal falling under clause (a) or clause (b) of sub-section 2 of Section 37 of the Act and from no other orders and least against an award interim, partial or final.[9]

When an appeal is held to be non – maintainable, it involves an adjudication of that question. Where an appeal is held to be not maintainable without any discussion, what would be its effect is not for consideration in this case.[10] The situation may be contextually and conceptually different where an appeal is held to be not maintainable or entertainable on the ground of its belated presentation or such other technical defects.[11] It would depend

[7] *Shin-Etsu Chemical Co. Ltd. v. Vindhya Telelinks Ltd. & Ors*, (2009) 14 SCC 24 : AIR 2009 SC 3284.

[8] *Firm Ashok Traders & Anr. etc. v. Gurumukh Das Saluja & Ors.*, AIR 2004 SC 1433 : (2004) 3 SCC 155.

[9] *National Thermal Power v. Siemens Aktiengesellschaft (SAG)*, 121 (2005) DLT 36 : 2005 (2) Arb LR 172 (Delhi).

[10] *B. Thankappan v. Trivandrum Dist. Co-op Bank Ltd*, AIR 1987 Ker 1 : ILR 1987 (1) Ker 20.

[11] *Sri A P Thomas v. The Union of India*, AIR 2014 Kant 43 : ILR 2014 Kar 592.

upon the statutory back-ground of the case, for example, *Mela Ram and Sons v. CIT.*[12]

The issue of maintainability of the appeal under Section 37 of the Act was raised before a Division Bench of the Gujarat High Court in the case of *Nirma Ltd. v. Lurgi Energie Und Entsorgung GmBH, Germany and Ors.*[13] In the said case the issues of jurisdiction were framed which was treated as preliminary issues by the arbitral tribunal conducted under the aegis of the ICC Rules. The court dwelt on the scheme of the Act and brought forth the legislative intent in incorporating Section 16 and 37 of the Act by observing as under:

> *The scheme of Section 16 and 37 is such that the Arbitral Tribunal is empowered to rule on its own jurisdiction. A plea that the Arbitral Tribunal does not have jurisdiction or a plea that the Arbitral Tribunal is exceeding the scope of its authority, has to be decided by the Arbitral Tribunal and, if it takes a decision rejecting that plea, it is duty-bound to continue with the arbitral proceedings and make an arbitral award. And, the party aggrieved by such an arbitral award is permitted to make an application for setting aside the arbitral award in accordance with Section 34. Therefore, obviously, recourse is provided for challenging 'such an award' which is made after the decision rejecting the plea regarding lack of jurisdiction or about Arbitrators exceeding the scope of authority. The decision rejecting any of those pleas and the award made thereafter are clearly distinguishable and by no stretch can be considered to be synonymous for the purpose of Section 16. If the plea regarding jurisdiction or exceeding the scope of authority were accepted, an appeal from such a decision is expressly provided in Sub-section (2) of Section 37 where it is called 'an order of the arbitral tribunal'. Thus, the legislature has consciously and clearly considered the decision on jurisdictional aspect to be not an 'award' but an 'order' or a 'decision'...*

The question also received the attention of the Court in the case of *Union of India v. M/s East Coast Boat Builders and Engineers Ltd.*,[14] holding that an order under Section 16 of the Act is to be treated as an 'order' and not an 'award' and that the provisions of Section 37 have been consciously enacted to provide relief to the aggrieved party at that stage of the arbitration proceedings where the Arbitral Tribunal decides the question of jurisdiction against it.

Any order passed in the proceedings filed for execution of an Award made under the Arbitration and Conciliation Act, 1996 are to be treated as

[12] AIR 1956 SC 367 : (1956) 1 SCR 166.
[13] 2003 (2) Arb.L.R.241: AIR 2003 Guj 145.
[14] 76 (1998) DLT 958 : (1998) ILR 2 Delhi 797.

orders passed under Section 36 of the Arbitration and Conciliation Act, 1996 and in view of the provisions of Section 37 no appeal lies against any order passed under Section 36.[15]

Section 37 contemplates that the authority which is passing the order should be 'Court' as also the authority which is hearing the appeal should also be 'Court', because it says "an appeal shall lie to the Court authorised by law to hear appeals from original decrees of the court passing the orders."[16]

An order passed under the Arbitration and Conciliation Act, 1996 against which no appeal is provided by the Arbitration and Conciliation Act, 1996 power of the High Court under the Code of Civil Procedure, 1908 to entertain Revision is not taken away.[17] It was pointed out that application of the Civil Procedure Code, 1908 to the proceedings before the Arbitrator is ruled out by the provisions of Section 19 of the Arbitration and Conciliation Act, 1996.[18]

If the legislature had intended to exclude an appeal from an order passed under the Arbitration and Conciliation Act, 1996 except those specifically mentioned in Section 37 of the Act then an appeal would not lie under Section 10 of the Delhi High Court Act, 1966 also.[19]

Further, the Supreme Court was of the opinion that, the order passed by the civil court in appeal under Section 37 of the Act is revisable by the High Court under Section 115 of the Code of Civil Procedure, 1908. The Arbitration and Conciliation Act, 1996 only bars a second appeal and not revision. The Act does not expressly prohibit the applicability of Code of Civil Procedure, 1908. It cannot be said that, a revision under Section 115 of the Code of Civil Procedure, 1908 would be a judicial interference not provided for in Section 5 of the Arbitration and Conciliation Act, 1996.[20]

That an appeal against the order referring the parties to arbitration could not be entertained under Section 37 of the Act, and it was further held that an appeal could not be maintainable even under Clause 10 of the Letters Patent Act. It was held that legislature has expressed itself that the right of an appeal against the order passed under the Arbitration and Conciliation Act, 1996 may be exercised only in support of certain orders and right to

[15] *Jet Airways (India) Ltd. v. Sahara Airlines Ltd.*, 2011 Vol. 113 BomLR 1725.
[16] *Smt. Sudarshan Chopra & Ors.-v. Vijay Kumar Chopra & Ors.*, (2002) 4 Company Law Journal 1.
[17] *ITI Ltd. v. Siemens Public Communications Network Ltd.*, (2002) 5 SCC 510 : AIR 2002 SC 2308; See also *Nirma Ltd. v. Lurgi Lentjes Energietechnik GMBH & Anr.*, (2002) 5 SCC 520 : AIR 2002 SC 3695.
[18] *Bhatia International v. Bulk Trading S.A. & Anr.*, (2002) 4 SCC 105 : AIR 2002 SC 1432 : (2002) 2 SCR 411.
[19] *Tandav Film Entertainment Pvt. Ltd. v. Four Frame Pictures & Another*, 2010 (114) DRJ 219; See also *RITES Ltd. v. JMC Projects (India) Ltd.*, 2009 (3) Raj 13 Delhi.
[20] *I.T.I. Ltd. v. Siemens Public Communications* AIR 2002 SC 2308 : (2002) 5 SCC 510.

appeal against other orders is expressly taken away and the right to appeal being a creature of statue, no litigant can claim an inherent right to appeal against a decision of a court.[21]

It was categorically held by the Supreme Court that an appeal under clause 10 of the Letters Patent would also not be maintainable against the order passed under the Section 39 of the old Act which is analogous to Section 37 of the 1996 Act.[22]

It is to be noted that it is under this Part, namely, Part-I of the Act that Section 37(1) of the Act is found, which provides for an appeal to a civil court. The term 'Court' referred to in the said provision is defined under Section 2(e) of the Act. From the said definition, it is clear that the appeal is not to any designated person but to a civil court. In such a situation, the proceedings before such court will have to be controlled by the provisions of the Code of Civil Procedure, 1908; therefore, the remedy by way of a revision under Section 115 of the Code of Civil Procedure, 1908 will not amount to a judicial intervention not provided for by Part-I of the Act.[23]

To put it in other words, when the Arbitration and Conciliation Act, 1996 under Section 37 provided for an appeal to the civil court and the application of Code of Civil Procedure, 1908 not having been expressly barred, the revisional jurisdiction of the High Court gets attracted. If that be so, the bar under Section 5 will not be attracted because conferment of appellate power on the civil court in Part-I of the Act attracts the provisions of the Code of Civil Procedure, 1908 also.[24]

Section 37 of the Act, to the extent it is relevant, provides for an appeal from an order of the arbitral tribunal accepting the plea referred to in sub-section (2) or sub-section (3) of Section 16. No appeal, however, is provided, in case such a plea is rejected. Section 5 of the Act provides that notwithstanding anything contained in another law for the time being in force, in matter governed by Part-I of the Act, no judicial authority shall interfere, except where so provided in said Part.[25]

The revisional jurisdiction of a superior court cannot be taken as excluded simply because subordinate courts exercise a special jurisdiction under a special Act. The reason is that when a special Act on matters governed by that Act confers a jurisdiction on an established court, as distinguished from a *persona designata*, without any words of limitation, then, the ordinary

[21] *Canbank Financial Services Ltd. v. Haryana Petro Chemicals Ltd.*, 2008 (2) Arb LR 365 (Delhi).
[22] *Shah Babulal Khimji v. Jayaben De Kanya*, AIR 1981 SC 86.
[23] *Hindustan Construction Co. Ltd. v. Hindustan Construction Co. Ltd.*, decided on April 4, 2013, Bombay High Court.
[24] *Id.*
[25] *United Spirits Ltd v. M/s Stitch Craft (India)*, 2013 (4) ARB LR 526 (Delhi) : 207 (2014) DLT 193.

incident of procedure of that Court's right of Appeal or revision against its decision is attracted. The right of Second Appeal to the High Court has been expressly taken away by sub-section (3) of Section 37 of the Act, but for that reason it cannot be held that the right of revision has also been taken away.[26]

Provisions of Section 37 of the Act, 1996 bars Second Appeal and not revision under Section 115 of the Code of Civil Procedure, 1908. The power of appeal under Section 37(2) of the Act against order of arbitral Tribunal granting or refusing to grant an interim measure is conferred on court. Court is defined in Section 2(e) meaning the 'principal Civil Court of Original Jurisdiction' which has 'jurisdiction to decide the question forming the subject-matter of the arbitration if the same had been the subject matter of the suit'. The power of appeal having conferred on a civil court all procedural provisions contained in the Code of Civil Procedure, 1908 would apply to the proceedings in appeal. Such proceedings in appeal are not open to Second Appeal as the same is clearly barred under sub- section (3) of Section 37.[27]

[26] *National Sewing Thread Co. Ltd. v. James Chandwick*, (1953) 4 SCR 1028 : AIR 1953 SC 357.
[27] *National Telephone Company Ltd. v. Postmaster-General*, 1913 Appeal Cases 546 (Privy Council).

8

Miscellaneous Provisions

DEPOSITS

Section 38 of the Act, 1996 speaks about deposits. Subject to the provisions of Section 38 (1) the arbitral tribunal may fix the amount of the deposit or supplementary deposit, as the case may be, as an advance for the costs referred to in sub-section (8) of Section 31, which it expects will be incurred in respect of the claim submitted to it: Provided that where, apart from the claim, a counter-claim has been submitted to the arbitral tribunal, it may fix separate amount of deposit for the claim and counter-claim.

An arbitral tribunal is entitled under sub-section (1) of Section 38 to fix the amount of the deposit or supplementary deposit, as the case may be, as an advance for the costs referred to in sub-section (8) of Section 31. The proviso to sub-section (1) of Section 38 enunciates that where, apart from the claim, a counter claim has been submitted to the arbitral tribunal, it may fix a separate amount of deposit for the claim and counter claim.[1]

The deposit referred to in sub-section (1) shall be payable in equal shares by the parties: Provided that where one party fails to pay his share of the deposit, the other party may pay that share: Provided further that where the other party also does not pay the aforesaid share in respect of the claim or the counter-claim, the arbitral tribunal may suspend or terminate the arbitral proceedings in respect of such claim or counter-claim, as the case may be.[2]

Where a party which has been directed to deposit an advance towards the costs fails to do so, and the other party also does not deposit his share, the arbitrator would be justified in taking recourse to the power conferred in Section 38(2) to terminate the counter claim as was done in the present case.[3]

An arbitral tribunal has the power to terminate the arbitral proceedings[4] under Section 25(a), upon default of the claimant to communicate his

[1] *Rehmat Ali Baig v Minocher M. Deboo*, 2010 (1) Bom CR 864.
[2] Section 38(2), The Arbitration and Conciliation Act, 1996.
[3] *Union of India v. Singh Builders Syndicate*, (2009) 4 SCC 523 : (2009) 4 SCR 563.
[4] The termination of arbitral proceedings is different from termination of the mandate of arbitrator. The mandate of arbitrator, depending upon the facts and circumstances of a case, may come to an end, but not the arbitral proceedings. For example, if the parties to the arbitration agreement had fixed a period of six months for completion of arbitral proceedings and making of an award by the Arbitral Tribunal and the Arbitral Tribunal fails to do so on or before expiry of six months, the mandate of Arbitral Tribunal shall come to an end but not the arbitration proceedings, and in such an eventuality, if a substitute arbitrator is appointed than he shall have to continue with the arbitration proceedings from the stage the same had been left by the earlier arbitrator. However, in case arbitration proceedings are terminated within the meaning of Section 32 of the Act resulting in termination of mandate of arbitrator, the same cannot continue merely by appointing another arbitrator. In such a scenario, first of all, the arbitration proceedings have to be revived after setting aside the order of Arbitral Tribunal terminating the arbitral proceedings.

statement of claim; under Section 30(2) upon settlement of dispute by the parties and under Section 38(2) upon failure of the parties to pay the amount of deposit fixed by the Arbitral Tribunal.[5]

It was held by the High Court of Punjab and Haryana that since the appellants have been proceeded *ex parte* in the case and have not deposited their share of arbitration fee, therefore, the Respondent – Corporation would pay the share of the appellants to the arbitrator in terms of Section 38(2) Proviso 1 of the Act.[6]

Upon termination of the arbitral proceedings, the arbitral tribunal shall render an accounting to the parties of the deposits received and shall return any unexpended balance to the party or parties as the case may be.[7]

The Arbitration and Conciliation Act, 1996 does not permit the parties to contract out of the provisions of the Act, and therefore an agreement in conflict with the provisions of Section 31(8) read with Section 38 of the Act are said to be invalid.[8] In the absence of any clause in the agreement providing for exorbitant cost, the question of determining the validity of the clause under sub-section (8) of Section 31 read with Section 38 of the Act would not arise.[9]

LIEN ON ARBITRAL AWARD AND DEPOSITS AS TO COSTS

Section 39 of the Act, 1996 speaks about 'lien on arbitral award and deposits as to costs'. Subject to the provisions of sub-section (2) and to any provision to the contrary in the arbitration agreement, the arbitral tribunal shall have a lien on the arbitral award for any unpaid costs of the arbitration.[10]

[5] *M/s Chemical Sales Corporation & Ors., v. M/s A & A Laxmi Sales and Service Private Limited & Ors.*, Decided on September 13, 2011, Delhi High Court.
[6] *M/s Kuber Rice & General Mills and Others v. M/s Punjab Agro Industries Corporation Ltd.*, Decided on January 21, 2013.
[7] Section 38(3), The Arbitration and Conciliation Act, 1996.
[8] *Municipal Corporation, Jabalpur v. M/s Rajesh Construction Company*, AIR 2007 SC 2069 : (2007) 5 SCC 344
[9] *S.K. Jain v State of Haryana and Anr.*, AIR 2008 P&H 30 : 2008 (2) ARB LR 554 (P&H).
[10] Section 39(1), The Arbitration and Conciliation Act, 1996.

Under Section 39(1) of the Act of 1996, the award will be operative in the competent court for admission only when the fee and cost fixed by the arbitrator is paid and no objection from the arbitrator is attached with objections of execution application to be filed under Section 34 or 36 of the Act of 1996.[11]

If in any case an arbitral tribunal refuses to deliver its award except on payment of the costs demanded by it, the court may, on an application in this behalf, order that the arbitral tribunal shall deliver the arbitral award to the applicant on payment into court by the applicant of the costs demanded, and shall, after such inquiry, if any, as it thinks fit, further order that out of the money so paid into court there shall be paid to the arbitral tribunal by way of costs such sum as the court may consider reasonable and that the balance of the money, if any, shall be refunded to the applicant.[12]

An application under sub-section (2) may be made by any party unless the fees demanded have been fixed by written agreement between him and the arbitral tribunal, and the arbitral tribunal shall be entitled to appear and be heard on any such application.[13]

The court may make such orders as it thinks fit respecting the costs of the arbitration where any question arises respecting such costs and the arbitral award contains no sufficient provision concerning them.[14]

In view of the provisions of Section 34(3) of the Arbitration and Conciliation Act, 1996, the limitation for filing the objections has to be computed from the date of delivery of the copy of the award. If both the parties pay their respective share of costs to the arbitrator, and he delivers the award to them, there arises no difficulty as the limitation for filing objections starts running from that date itself.

However, there may be a situation in which a party is not willing to pay its share of costs to the arbitrator for certain reasons. One reason may be the knowledge of a party that the award is against it, and as soon as it makes the payment and gets the copy of the award, the limitation for filing objections would start running. With a view to delay execution of award, such a party may adopt the strategy of not paying costs to the arbitrator. In such a situation the arbitrator would be within his rights to exercise his lien over the award in terms of Section 39 of the Act.[15]

As per Section 39 of the Act of 1996, arbitral tribunal shall have a lien on the arbitration award for any unpaid cost of the arbitration. The arbitral

[11] *Punjab State Warehousing Corporation v. Shiv Shankar Rice Mills and Ors.*, (2007) 4 PLR 399.
[12] Section 39(2), The Arbitration and Conciliation Act, 1996.
[13] Section 39(3), The Arbitration and Conciliation Act, 1996.
[14] Section 39(4), The Arbitration and Conciliation Act, 1996.
[15] *National Project Construction Corporation v. Sharma and Associates*, decided on February 8, 2005 (Delhi High Court).

tribunal can refuse to deliver its award if the costs of the arbitrator have not been paid. He can withhold the delivery of the arbitral award.[16]

Section 39 of the Act of 1996 contemplates that in case an arbitral tribunal refuses to deliver its award except on payment of the costs, as determined by it, either of the party may make an application on payment of the costs in the court with a direction to the arbitral tribunal to deliver the award. On such application, the court may after such inquiry, as it thinks fit, determines the money payable to the arbitral tribunal as tees and costs and the remaining amount, if any, can be refunded to the applicant and ejection can be issued to the arbitral tribunal to deliver the award.[17]

ARBITRATION AGREEMENT NOT TO BE DISCHARGED BY DEATH OF PARTY THERETO

Section 40 of the Act, 1996 speaks about Arbitration agreement not to be discharged by death of party thereto. By virtue of Section 40 (1) an arbitration agreement shall not be discharged by the death of any party thereto either as respects the deceased or as respects any other party, but shall in such event be enforceable by or against the legal representative of the deceased. The mandate of an arbitrator shall not be terminated by the death of any party by whom he was appointed.[18] Nothing in this section shall affect the operation of any law by virtue of which any right of action is extinguished by the death of a person.[19]

Section 40 of the Act states that an arbitration shall not be discharged by the death of any party thereto either as respects the deceased or as respects any other party, but shall in such event be enforceable by or against the legal representative of the deceased.[20]

Section 40 of the Arbitration and Conciliation Act, 1996 in quite definite terms provides that an arbitration agreement shall not be discharged by the death of any party thereto either as respects the deceased or as respects any other party, but shall in such event be enforceable by or against the legal representative of the deceased. A simple reading of this provision makes it clear that the arbitration agreement may be enforced by or against legal representatives of a deceased party to it.[21]

If Section 40 of the Arbitration and Conciliation Act, 1996 is read along with Section 29 of the Partnership Act, 1932 it becomes clear that the appellant's

[16] *Punjab State Warehousing Corporation v. Shiv Shankar Rice Mills and Ors.*, (2007) 4 PLR 399.
[17] *Id.*
[18] Section 40(2), The Arbitration and Conciliation Act, 1996.
[19] Section 40(3), The Arbitration and Conciliation Act, 1996.
[20] *Sri R Krishna Murthy v. Sri M Manohar*, decided on July 11, 2014 (High Court of Karnataka).
[21] *Bhuvnesh & Ors v. M/s Bhoora Ram & Anr*, decided on December 6, 2013 (High Court of Rajasthan).

right of account is confined to rendition of accounts as permitted by Section 29 of the Partnership Act, 1932. So far as the appellant's right to claim arbitration is concerned, the same cannot be taken benefit of, particularly in view of the unusual character of the partnership deed where the definition of party deliberately excludes legal heirs, legal representatives and legatees.[22]

However, it may be noted that, by virtue of Section 2 (4) of the Act, 1996, Part-I of the Act, 1996 which is from Section 2 to Section 43, shall, except sub-section 1 of Sections 40, 41 and 43, apply to every arbitration under any other enactment for the time being in force where the arbitration was pursuant to an arbitration agreement except insofar as the provisions of this Part, i.e., Part-I are inconsistent with the other enactment or with any other rule made there under.[23]

PROVISIONS IN CASE OF INSOLVENCY

Section 41 of the Act, 1996 speaks about provisions in case of insolvency. By virtue of Section 41 (1), of the Act, 1996 where it is provided by a term in a contract to which an insolvent is a party that any dispute arising there out or in connection therewith shall be submitted to arbitration, the said term shall, if the receiver adopts the contract, be enforceable by or against him so far as it relates to any such dispute. Where a person who has been adjudged an insolvent had, before the commencement of the insolvency proceedings, become a party to an arbitration agreement, and any matter to which the agreement applies is required to be determined in connection with, or for the purposes of, the insolvency proceedings, then, if the case is one to which sub-section (1) does not apply, any other party or the receiver may apply to the judicial authority having jurisdiction in the insolvency proceedings for an order directing that the matter in question shall be submitted to arbitration in accordance with the arbitration agreement, and the judicial authority may, if it is of opinion that, having regard to all the circumstances of the case, the matter ought to be determined by arbitration, make an order accordingly.[24] By virtue of Section 41, the expression "receiver" includes an Official Assignee.[25]

JURISDICTION

By virtue of Section 42, notwithstanding anything contained elsewhere in this Part or in any other law for the time being in force, where with respect

[22] *Ravi Prakash Goel v. Chandra Prakash Goel & Anr.*, AIR 2007 SC 1517 : (2008) 13 SCC 667.
[23] *M.P. Rural Road Dev. Authority & Ors., v. M/s. L.G. Chaudhary Engineers & Ors.*, AIR 2012 SC 1228 : (2012) 3 SCC 495.
[24] Section 41(2), The Arbitration and Conciliation Act, 1996.
[25] Section 41(3), The Arbitration and Conciliation Act, 1996.

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.

On a plain reading of Section 42 it is clear that when any "application" under Part-I of the Act is made in a court, then notwithstanding anything contained elsewhere in Part-I, that court alone would have jurisdiction over the arbitral proceedings, and all subsequent applications arising out of that agreement and the arbitral proceedings, shall be made only in that court and no other court. The word "court" has also been defined in Section 2(1) (e) of the Act which reads thus, "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."[26]

LIMITATIONS

By virtue of Section 43, the Limitation Act, 1963 (36 of 1963), shall apply to arbitrations as it applies to proceedings in court.[27] For the purposes of this section and the Limitation Act, 1963 (36 of 1963), an arbitration shall be deemed to have commenced on the date referred in Section 21.[28]

Where an arbitration agreement to submit future disputes to arbitration provides that any claim to which the agreement applies shall be barred, unless some step to commence arbitral proceedings is taken within a time fixed by the agreement, and a dispute arises to which the agreement applies, the court, if it is of opinion that in the circumstances of the case undue hardship would otherwise be caused, and notwithstanding that the time so fixed has expired, may on such terms, if any, as the justice of the case may require, extend the time for such period as it thinks proper.[29]

Where the court orders that an arbitral award be set aside, the period between the commencement of the arbitration and the date of the order of the court shall be excluded in computing the time prescribed by the Limitation Act, 1963 (36 of 1963), for the commencement of the proceedings (including arbitration) with respect to the dispute so submitted.[30]

[26] *Eskay Engineers Mumbai v. Bharat Sanchar Nigam Ltd., Mumbai*, 2009 (5) MhLJ 565.
[27] Section 43(1), The Arbitration and Conciliation Act, 1996.
[28] Section 43(2), The Arbitration and Conciliation Act, 1996.
[29] Section 43(3), The Arbitration and Conciliation Act, 1996.
[30] Section 43(4), The Arbitration and Conciliation Act, 1996.

9

Enforcement of Foreign Awards

A foreign arbitral award is enforceable in India when an application to the Indian court is made in an appropriate jurisdiction, and where the court is satisfied that the foreign award is enforceable under Chapter 1 of Part-II of the Arbitration and Conciliation Act, 1996, the award shall be deemed to be a decree of that court.

An award made in the territory of a State other than the State, where the recognition and enforcement of the award is sought, is a foreign award. An award made in India under Part-I of the Act, 1996 is considered as domestic award, and any award which is not a domestic award is considered as a foreign award.

Part-II of the Act, 1996 deals with two types of foreign awards viz.:

(a) The New York Convention Awards;

(b) The Geneva Convention Awards.

THE NEW YORK CONVENTION AWARDS

Section 44 to 52 of the Act, 1996 deals with the enforcement of New York Convention awards in India. By virtue of Section 44 of the Act, a foreign award becomes a New York Convention award if following conditions are fulfilled:[1]

(a) It must be an arbitral award arising out of legal relationship, whether contractual or not considered as commercial under the law in force in India.

(b) The award must have been made on or after October 11, 1960.

(c) The award must have been made in pursuance of an arbitration agreement which is in writing.

(d) New York convention must be applicable to such an arbitration agreement.

(e) The award must have been made in one of the reciprocating territories as declared by the Central Government by notification in Official Gazette, to which New York convention applies.

[1] *Centro Trade Minerals & Metals Inc. v. Hindustan Copper Ltd.*, (2006) 11 SCC 245 : (2006) Supp (2) SCR 146; **See also** *Rashmi Mehra v. EAC Trading Ltd.*, 2006 (3) Raj 405 (Bom).

The concept of commercial relationships takes within its ambit all relationships which arise out of or are ancillary and incidental to the business dealings between citizens of two states. The concept takes within its fold legal relationships pertaining to the international trade in all its forms between the citizens of different states.[2]

The very language of Section 45 of the Act clarifies the word "agreement" would mean the agreement referred to in Section 44 of the Act. Clause (a) of Section 44 of the Act refers to "an agreement in writing for arbitration to which the Convention set forth in the First Schedule applies." The First Schedule of the Act sets out the different Articles of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958. Article II of the New York Convention is extracted herein below:

1. Each contracting State shall recognise an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of defined legal relationship, whether contractual or not, concerning a subject-matter capable of settlement by arbitration.
2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.
3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.[3]

By virtue of Section 47 of the Act, 1996, party applying for the enforcement of a foreign award shall produce following evidences along with the application:

(a) the Original award or an authenticated copy of the award.

(b) the Original agreement for arbitration or a duly certified copy of the agreement.

(c) other evidence necessary to prove that the award is a foreign award.

(d) if the award is in foreign language, a translation into English certified as correct by a diplomatic or consular agent of the country to which party belongs.

However, under the following circumstances, the New York Convention Award is not enforceable:

[2] *Indian Organic Chemicals Ltd., v. Chemtex Fibers Inc.*, AIR 1978 Bom 106 : 1979 (81) Bom LR 49.

[3] *World Sport Group (Mauritius) Ltd. v. MSM Satellite (Singapore) Pte. Ltd.*, AIR 2014 SC 968 : 2014 (5) Bom CR 693.

(a) If either party of the arbitration agreement is incapable under the law applicable to them.

(b) If the agreement is not valid under the law of the country where the award is made.

(c) If the party against whom the award is invoked was not given proper notice of appointment of the arbitrator.

(d) If the party against whom the award is invoked was not given proper notice of the arbitral proceedings.

(e) If the party against whom the award is invoked was otherwise unable to present his case.

(f) If the award is contrary to the (i) fundamental policy of Indian Law; or (ii) the interest of India; or (iii) justice or morality.[4]

(g) If the award deals with a matter not falling within the terms of the submission of the arbitration.

(h) If the award deals with a matter not contemplated by the agreement.

(i) If the composition of the tribunal or procedure was not in accordance with the agreement of the parties.

(j) If the award contains decision on matters beyond the scope of the submission to arbitration.

(k) If the subject matter of the dispute or difference is not capable of settlement by arbitration under the law in existence in India.

(l) If the award has not binding on the parties, or has been set aside or suspended by a competent authority of the country in which the award was made.

(m) If there is no agreement with respect to the composition of the tribunal or procedure, the composition and the procedure should be in accordance with the law of the country where the arbitration took place.

(n) If the composition of tribunal or the procedure was not in accordance with the law of the country where the arbitration place, the arbitral award is not enforceable in India.

Any party holding a foreign award can apply for the enforcement of it, but the court before taking further effective steps for execution of the award has to proceed in accordance with Sections 47 to 49. Once the court is of the opinion that, foreign award is enforceable, it can proceed to take effective steps to execute the same. However, for enforcing a foreign award there is no need to adopt any separate proceedings, one for deciding the enforceability

[4] *Smita Conductors Ltd. v. Euro Alloys Ltd.*, (2001) 7 SCC 728 : (2001) 7 SCC 328.

of the award to make it a rule of the court or decree, and the other to take up execution thereafter.

THE GENEVA CONVENTION AWARDS

Sections 53 to 60 of the Arbitration and Conciliation Act, deal with the enforcement of the Geneva Convention Awards in India. By virtue of Section 53, "foreign award" means an arbitral award on differences relating to matters considered as commercial under the law in force in India made after the 28th day of July, 1924:

(a) in pursuance of an agreement for arbitration to which the Protocol set forth in the Second Schedule applies, and

(b) between persons of whom one is subject to the jurisdiction of some one of such Powers as the Central Government, being satisfied that reciprocal provisions have been made, may, by notification in the Official Gazette, declare to be parties to the Convention set forth in the Third Schedule, and of whom the other is subject to the jurisdiction of some other of the Powers aforesaid, and

(c) in one of such territories as the Central Government, being satisfied that reciprocal provisions have been made, may, by like notification, declare to be territories to which the said Convention applies, and for the purposes of this Chapter an award shall not be deemed to be final if any proceedings for the purpose of contesting the validity of the award are pending in the country in which it was made.

By virtue of Section 56 of the Act, 1996, any party applying for the enforcement of a foreign award shall, at the time of application, produce before the Court:

(a) the original award or a copy thereof duly authenticated in the manner required by the law of the country in which it was made;

(b) evidence proving that the award has become final; and

(c) such evidence as may be necessary to prove that the conditions mentioned in clauses (a) and (c) of sub-section (1) of section 57 are satisfied.

Where any document requiring to be produced under sub-section (1) is in a foreign language, the party seeking to enforce the award shall produce a translation into English certified as correct by a diplomatic or consular agent of the country to which that party belongs or certified as correct in such other manner as may be sufficient according to the law in force in India.

By virtue of this section, "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 over the subject-

matter of the award 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.

By virtue of Section 57, in order to enforce a foreign award:

(a) the award has been made in pursuance of a submission to arbitration which is valid under the law applicable thereto;

(b) the subject-matter of the award is capable of settlement by arbitration under the law of India;

(c) the award has been made by the arbitral tribunal provided for in the submission to arbitration or constituted in the manner agreed upon by the parties and in conformity with the law governing the arbitration procedure;

(d) the award has become final in the country in which it has been made, in the sense that it will not be considered as such if it is open to opposition or appeal or if it is proved that any proceedings for the purpose of contesting the validity of the award are pending;

(e) the enforcement of the award is not contrary to the public policy or the law of India.

Without prejudice to the generality of clause (e), it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption.

By virtue of Section 57 (2), court may refuse the enforcement of any foreign award if:

(a) the award has been annulled in the country in which it was made;

(b) the party against whom it is sought to use the award was not given notice of the arbitration proceedings in sufficient time to enable him to present his case; or that, being under a legal incapacity, he was not properly represented;

(c) the award does not deal with the differences contemplated by or falling within the terms of the submission to arbitration or that it contains decisions on matters beyond the scope of the submission to arbitration: Provided that if the award has not covered all the differences submitted to the arbitral tribunal, the Court may, if it thinks fit, postpone such enforcement or grant it subject to such guarantee as the Court may decide.

If the party against whom the award has been made proves that under the law governing the arbitration procedure there is a ground, other than the grounds referred to in clauses (a) and (c) of sub-section (1) and clauses (b) and (c) of sub-section (2) entitling him to contest the validity of the

award, the Court may, if it thinks fit, either refuse enforcement of the award or adjourn the consideration thereof, giving such party a reasonable time within which to have the award annulled by the competent tribunal.[5]

If Court is satisfied that the foreign award is enforceable in India, then the award shall be deemed to be a decree of the Court.[6] An order refusing to enforce any foreign award is appealable. Such an appeal has to be preferred to the court authorized by the law to hear appeals from such order. However, there won't be any second appeal and it may also be noted that, this will not take away the right to appeal of the party to Supreme Court under Article 136 of the Indian Constitution.

[5]Section 57(3), The Arbitration and Conciliation Act, 1996.
[6]Section 58, The Arbitration and Conciliation Act, 1996.

Section II

1

Conciliation and Mediation

CONCILIATION AS AN ALTERNATIVE DISPUTE RESOLUTION

Part-III of the Arbitration and Conciliation Act, 1996, deals with Conciliation. "Conciliation" means "settling of disputes without litigation". Conciliation is the process by which discussion between parties is kept going through the participation of the conciliator.

The parties are at liberty to evolve their own procedure of conciliation for negotiating and arriving at settlement of disputes. It is only when no such agreement or procedure has been evolved by the parties that the parties that the provisions of Part-III of the Act are invoked and made applicable.

'Conciliation' is an Alternative Dispute Resolution (ADR) process whereby the parties to a dispute use a conciliator, who meets with the parties separately in an attempt to resolve their differences. It is used to resolve disputes between parties and involves a third party taking an interventionist approach, where the third party plays an active role making independent decisions.

It is a process, whether referred to by the expression "conciliation", "mediation" or an expression of similar import, whereby parties request a third person or persons ("the conciliator") to assist them in their attempt to reach an amicable settlement of their dispute arising out of or relating to a contractual or other legal relationship. The conciliator does not have the authority to impose upon the parties a solution to the dispute.[1]

However, the parties involved are not bound by these proposals. Conciliation is a creative process, whereby parties can choose from a variety of options in determining the outcome. If conciliation does result in a court procedure, the conciliation process will be useful in recognising and simplifying the issues within the case so that it can be dealt with swiftly and effectively in court.

Conciliation is a more formal process than mediation and it could generally involve the engagement of legal representatives, thus making it a more expensive process than mediation. There is, however, the added advantage

[1] UNCITRAL Model Law on International Commercial Conciliation: From a Topic of Possible Discussion to Approval by the General Assembly, (2002) 3 Pepp Disp Resol L J 529.

that should no amicable solution be reached, the conciliator has the duty to attempt to persuade the differing parties to accept his own solution to the dispute.[2]

Conciliation is a voluntary proceeding, where the parties involved are free to agree and attempt to resolve their dispute by conciliation. The process is flexible, allowing parties to define the time, structure and content of the conciliation proceedings. These proceedings are rarely public. They are interest-based, as the conciliator will when proposing a settlement, not only take into account the parties' legal positions, but also their; commercial, financial and / or personal interests.

ADVANTAGES OF CONCILIATION

(a) *Conciliation ensures party autonomy* - The parties can choose the timing, language, place, structure and content of the conciliation proceedings. It offers a more flexible alternative, for a wide variety of disputes.

(b) *Conciliation ensures the expertise of the decision maker* - The parties are free to select their conciliator. A conciliator does not have to have a specific professional background. The parties may base their selection on criteria such as; experience, professional and/or personal expertise, availability, language and cultural skills. A conciliator should be impartial and independent.

(c) *Conciliation is time and cost efficient* - Due to the informal and flexible nature of conciliation proceedings, they can be conducted in a time and cost-efficient manner.

(d) Reserves the freedom of the parties to withdraw from conciliation without prejudice to their legal position inter se at any stage of the proceedings.

(e) *Conciliation ensures confidentiality* - The parties usually agree on confidentiality. Thus, disputes can be settled discretely and business secrets will remain confidential.

(f) It is committed to maintenance of confidentiality throughout the proceedings and thereafter, of the dispute, the information exchanged, the offers and counter offers of solutions made and the settlement arrived.

(g) It facilitates the maintenance of continued relationship between the parties ever after the settlement or at least during the period when the settlement is attempted at.

[2] Nael G Bunni, *The FIDIC Forms of Contract*, 3rd Edn., 2008, Blackwell Publishing, at 445.

DIFFERENCES BETWEEN ARBITRATION AND CONCILIATION

(a) The method of conciliation is generally applicable to existing disputes, while the mode of arbitration is available for existing as well as for the future disputes.

(b) For adopting the method of conciliation, there is no need for a prior agreement for resorting to this method, but in arbitration a prior agreement for arbitration between the parties is required.

(c) The pre-agreement in arbitration must be in writing but since no pre agreements are required in conciliation, there is no such binding in the case of conciliation.

(d) The conciliation proceedings start by sending a written invitation and a written acceptance thereof in between the parties. The invitation may be accepted or rejected by the other party as it has no binding effect, being an invitation only. The prior written agreement in arbitration commands a binding effect upon the parties and its breach by resorting to court, compels court to refer the matter to the arbitration and parties are bound by the arbitral agreement.

(e) While conciliation proceedings are in progress, there is a bar on parties from initiating arbitral or judicial proceedings as per Section 77 of the new Act of 1996. In arbitration, the arbitral agreement itself suggests for redressal of disputes through arbitration and if any party approaches court, the other party may request the court to refer the matter to arbitration and court is bound to refer such matter to the arbitral Tribunal.

(f) A settlement agreement may be made by the parties themselves and the conciliator shall authenticate the same. An arbitration award on other hand is not merely a settlement agreement but it is judgment duly signed by the arbitrator.

(g) The conciliation proceedings may be unilaterally terminated by a written declaration by a party to the other party and the conciliator, but arbitration proceedings cannot be so terminated.

(h) While the role of conciliator is to help and assist the parties to reach an amicable settlement of their dispute, the arbitrator does not merely assist the parties but he also actively arbitrates and resolves the dispute by making an arbitral award.

(i) In case of conciliation a party may require the conciliator to keep the 'factual information' confidential and not disclose it to the other party, but it is not so in arbitration as the information given by a party is subjected to scrutiny by the other party. Thus there is no question of confidentiality in case of arbitration awards.

DIFFERENCES BETWEEN CONCILIATION AND MEDIATION

(a) The power of conciliator is larger under the Arbitration and Conciliation Act, 1996 and whereas the powers of the mediator are too limited as he can only suggest proposals for the settlement.

(b) The conciliator can make proposals for settlement, formulate or reformulate the terms of a possible settlement whereas a mediator would merely facilitate a settlement between the parties.

(c) In mediation a mediator, who is neutral and intermediary, plays an active role by working out compromise formulas after hearing both the parties. But in case of conciliation, the role of conciliator, who also plays the role of neutral intermediary, is to bring the parties together in a frame of mind to forget their animosities and prepare them for a compromise by adopting amid way approach which may be acceptable to both the parties in dispute. Thus, a conciliator is an active participant in bridging the gulf between the parties and suggests solution which is acceptable to the parties.

CONCILIATION PROCEEDINGS

Sections 61 to 81 of the Arbitration and Conciliation Act of 1996, deals with the settlement of disputes by way of conciliation proceedings. Section 61 which deals with Application and Scope of the provisions, in Part-III provides, *inter alia*, that save as otherwise provided by any law for the time being in force and unless the parties have otherwise agreed, this Part shall apply to conciliation of disputes arising out of legal relationship, whether contractual or not and to all proceedings relating thereto.[3] This Part shall not apply where by virtue of any law for the time being in force certain disputes may not be submitted to conciliation.[4]

Commencement of Conciliation Proceedings

By virtue of Section 62, the party initiating conciliation shall send to the other party a written invitation to conciliate under this Part, briefly identifying the subject of the dispute. Conciliation proceedings shall deemed to have commenced when the other party accepts in writing the invitation to conciliate. If the other party rejects the invitation, there will be no conciliation proceedings.

Section 62 speaks of commencement of conciliation proceedings. It says the party initiating conciliation shall send to the other party a written invitation to conciliate under Part-III, briefly identifying the subject of the dispute and the conciliation proceedings shall commence when the other party accepts in writing the invitation of conciliation. If the other party rejects the invitation, there will be no conciliation proceedings.[5]

Part-III of the Act does not envisage any agreement for conciliation of future disputes. It only provides for an agreement to refer the disputes to conciliation after the disputes had arisen. Whereas, Section 7 of the Act which speaks of arbitration agreement provides for an agreement between the parties to submit to the arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.[6]

Further, if the party initiating conciliation does not receive a reply within thirty days from the date on which he sends the invitation, or within such other period of time as specified in the invitation, he may elect to treat this as a rejection of the invitation to conciliate and if he so elects, he shall inform in writing the other party accordingly.

Number of Conciliators

Section 63 provides for the number of conciliators. In Section 64, a provision is made that the appointment of conciliators shall be by agreement of parties or if the parties agree they may request a suitable institution or a person to appoint a conciliator on their behalf.[7]

By virtue of Section 63, there shall be one conciliator unless the parties agree that there shall be two or three conciliators. Where there is more than one conciliator, they ought, as a general rule, to act jointly.

Appointment of Conciliators

By virtue of Section 64 (1) of the Act, 1996:

(a) In conciliation proceedings with one conciliator, the parties may agree on the name of a sole conciliator;

(b) In conciliation proceedings with two conciliators, each party may appoint one conciliator;

(c) In conciliation proceedings with three conciliators, each party may appoint one conciliator and the parties may agree on the name of the third conciliator who shall act as the presiding conciliator.

By virtue of Section 64 (2), parties may enlist the assistance of a suitable institution or person in connection with the appointment of conciliators, and in particular;

[3] Section 61(1), The Arbitration and Conciliation Act of 1996.
[4] Section 61(2), The Arbitration and Conciliation Act of 1996.

[5] *VISA International Ltd. v. Continental Resources (USA) Ltd.*, (2009) 2 SCC 55 : AIR 2009 SC 1366.
[6] *Id.*
[7] *Haresh Dayaram Thakur v. State of Maharashtra and Ors.*, (2000) 6 SCC 179 : AIR 2000 SC 2281.

(a) a party may request such an institution or person to recommend the names of suitable individuals to act as conciliator; or

(b) the parties may agree that the appointment of one or more conciliators be made directly by such an institution or person: Provided that in recommending or appointing individuals to act as conciliator, the institution or person shall have regard to such considerations as are likely to secure the appointment of an independent and impartial conciliator and, with respect to a sole or third conciliator, shall take into account the advisability of appointing a conciliator of a nationality other than the nationalities of the parties.

Submission of Statement to Conciliators

By virtue of Section 65, the conciliator, upon his appointment, may request each party to submit to him a brief written statement describing the general nature of the dispute and the points at issue. Each party shall send a copy of such statement to the other party.

Section 65 provides, *inter alia*, that on being appointed the conciliator shall request each party to submit to him a brief written statement describing the general nature of the dispute and the points at issue. Each party shall send a copy of such statement to the other party.[8] Section 65 confers discretion on the conciliator to require parties to submit a brief written statement describing the general nature of the dispute and the points in issue.[9]

The conciliator may request each party to submit to him a further written statement of his position and the facts and grounds in support thereof, supplemented by any documents and other evidence that such party deems appropriate. The party shall send a copy of such statement, documents and other evidence to the other party.

At any stage of the conciliation proceedings, the conciliator may request a party to submit to him such additional information as he deems appropriate. In this Section and all the following Sections of this Part, the term "conciliator" applies to a sole conciliator, two or three conciliators as the case may be.

Conciliator not Bound by Certain Enactments

Under Section 66 the conciliator is not bound by the Code of Civil Procedure, 1908 or the Evidence Act, 1872.[10]

[8] *Id.*

[9] *Futuristics Offshore Services and Chemicals Ltd v Oil And Natural Gas Corporation*, Decided on September 28, 2012, Bombay High Court.

[10] *Id.*

Role of Conciliator

By virtue of Section 67, the conciliator shall assist the parties in an independent and impartial manner in their attempt to reach an amicable settlement of their dispute.

The conciliator shall be guided by principles of objectivity, fairness and justice, giving consideration to, among other things, the rights and obligations of the parties, the usages of the trade concerned and the circumstances surrounding the dispute, including any previous business practices between the parties.

The conciliator may conduct the conciliation proceedings in such a manner as he considers appropriate, taking into account the circumstances of the case, the wishes the parties may express, including any request by a party that the conciliator hear oral statements, and the need for a speedy settlement of the dispute.

The conciliator may, at any stage of the conciliation proceedings, make proposals for a settlement of the dispute. Such proposals need not be in writing and need not be accompanied by a statement of the reasons therefor.

Administrative Assistance

In order to facilitate the conduct of the conciliation proceedings, the parties, or the conciliator with the consent of the parties, may arrange for administrative assistance by a suitable institution or person.[11]

Communication Between Conciliator and Parties

By virtue of Section 69, the conciliator may invite the parties to meet him or may communicate with them orally or in writing. He may meet or communicate with the parties together or with each of them separately.

Unless the parties have agreed upon the place where meetings with the conciliator are to be held, such place shall be determined by the conciliator, after consultation with the parties, having regard to the circumstances of the conciliation proceedings.

Disclosure of Information

Under Section 70, when the conciliator receives factual information concerning the dispute from a party, he shall disclose the substance of that information to the other party in order that the other party may have the opportunity to present any explanation which he considers appropriate: Provided that

[11] Section 68, The Arbitration and Conciliation Act of 1996.

when a party gives any information to the conciliator subject to a specific condition that it be kept confidential, the conciliator shall not disclose that information to the other party.

Co-operation of Parties with Conciliator

Under Section 71, the parties shall in good faith co-operate with the conciliator and, in particular, shall endeavour to comply with requests by the conciliator to submit written materials, provide evidence and attend meetings.

Suggestions by Parties for Settlement of Dispute

By virtue of Section 72, each party may, on his own initiative or at the invitation of the conciliator, submit to the conciliator suggestions for the settlement of the dispute.

Settlement Agreement

By virtue of Section 73, when it appears to the conciliator that there exist elements of a settlement which may be acceptable to the parties, he shall formulate the terms of a possible settlement and submit them to the parties for their observations. After receiving the observations of the parties, the conciliator may reformulate the terms of a possible settlement in the light of such observations.

If the parties reach agreement on a settlement of the dispute, they may draw up and sign a written settlement agreement. If requested by the parties, the conciliator may draw up, or assist the parties in drawing up, the settlement agreement. When the parties sign the settlement agreement, it shall be final and binding on the parties and persons claiming under them respectively. The conciliator shall authenticate the settlement agreement and furnish a copy thereof to each of the parties.

The Court in *Haresh Dayaram Thakur v. State of Maharashtra and Ors.*,[12] while dealing with the provisions of Sections 73 and 74 of the Act, expressed that:

> *...the statutory provisions noted above the position are manifest that a conciliator is a person who is to assist the parties to settle the disputes between them amicably. For this purpose the conciliator is vested with wide powers to decide the procedure to be followed by him untrammelled by the procedural law like the Code of Civil Procedure or the Indian Evidence Act, 1872.*
>
> *When the parties are able to resolve the dispute between them by mutual agreement and it appears to the conciliator that there exists an element of settlement which may be acceptable to the parties he is to proceed in accordance with the procedure laid down in Section 73, formulate the terms of a settlement and make it over to the parties for their observations; and the ultimate step to be taken by a conciliator is to draw up a settlement in the light of the observations made by the parties to the terms formulated by him.*
>
> *The settlement takes shape only when the parties draw up the settlement agreement or request the conciliator to prepare the same and affix their signatures to it. Under Sub-section (3) of Section 73 the settlements agreement signed by the parties is final and binding on the parties and persons claiming under them. It follows therefore that a successful conciliation proceeding comes to an end only when the settlement agreement signed by the parties comes into existence. It is such an agreement which has the status and effect of legal sanctity of an arbitral award under Section 74.*

[12] (2000) 6 SCC 179 : AIR 2000 SC 2281.

If the Settlement Agreement comes into existence under Section 73, satisfying the requirements stated therein, it gets the status and effect of an arbitral award on agreed terms, on the substance of the dispute rendered by an arbitral tribunal under Section 30 of the Act. When there was substantial compliance with the requirements of Section 73, as and when the parties have arrived at a Settlement Agreement like the parties before any civil court filing a compromise petition, there should be no impediment to take up execution based on such a compromise or agreement cannot be accepted. Even a compromise petition signed by both the parties and filed in the court, per se, cannot be enforced restoring to execution proceedings unless such a compromise petition is accepted by the court and the court puts seal of approval for drawing a decree on the basis of compromise petition.[13]

Status and Effect of Settlement Agreement

By virtue of Section 74, the settlement agreement shall have the same status and effect as if it is an arbitral award on agreed terms on the substance of the dispute rendered by an arbitral tribunal under Section 30.

[13] *Id.*

2

Supplementary Provisions

Part-IV of the Arbitration and Conciliation Act, 1996, deals with supplementary provisions comprising of Sections 82 to 86.

POWER OF HIGH COURT TO MAKE RULES

Under Section 82, High Court may make rules consistent with this Act as to all proceedings before the court under this Act. It was observed by the Supreme Court that, all the High Courts have not so far made rules. Whereas, Section 84 gives the Central Government the power to make rules to carry out the provisions of the Act, the High Court should also, wherever necessary, make rules. It would be helpful if such rules deal with the procedure to be followed by the courts while exercising jurisdiction under Section 9 of the Act. The rules may provide for the manner in which the application should be filed, the documents which should accompany the same and the manner in which such applications will be dealt with by the courts. The High Courts are, therefore, requested to frame appropriate rules as expeditiously as possible so as to facilitate quick and satisfactory disposal of arbitration cases.[1]

At the same time, the court notes that to indicate a uniform approach with respect to matters of procedure as well as consolidate the practice directions issued in regard to matters concerning arbitration petitions, and causes which are filed in court, the appropriate authority may consider the feasibility of framing rules under Section 82 of the Act as well as publishing a scheme contemplated under Section 11(10).[2] However, the court clarified, that this was not a direction. It may be appropriately considered and such action as is deemed necessary, taken in that regard.

Rule 12 of the High Court Rules is not mandatory in character, but is merely directory. The object of the Rule is to make out a *prima facie* case for the satisfaction of the court to enable it to issue process to the opposite party and it does not seek dismissal of the petition without trial.[3]

[1] *M/s. Sundaram Finance Ltd. v. M/s. NEPC India Ltd.*, AIR 1999 SC 565 : (1999) 2 SCC 479.
[2] *Mr. Deepak Khosla v. Honble High Court of Delhi And Ors.*, 2014 (141) DRJ 109.
[3] *Amarnath v. Union of India*, AIR 1979 J&K 87.

The Bombay High Court in *Toepfer International Asia Pvt. Ltd. v. Thaper Ispat Ltd.*,[4] held that there is a lacuna in the Act inasmuch as if the award does not provide for interest 'after the date of award', the court cannot grant interest and that this 'lacuna has to be cured by the legislature' or that otherwise rules have to be framed by the High Court under Section 82 of the Act. However, while dealing with Section 31(7)(b), it was observed that, the view of Bombay High Court was not correct. In the case of ordinary suits, Section 34 Civil Procedure Court, 1908 enables the court to provide for interest from the date of judgment till payment. In a case where the court is silent as to the grant of interest from the date of the judgment till the date of the realisation, it is deemed to be refused and the 'commercial contracts', trade usages do have great significance.[5]

REMOVAL OF DIFFICULTIES

If any difficulty arises in giving effect to the provisions of this Act, the Central Government may, by order published in the Official Gazette, make such provisions, not inconsistent with the provisions of this Act as appear to it to be necessary or expedient for removing the difficulty: Provided that no such order shall be made after the expiry of a period of two years from the date of commencement of this Act.[6] Every order made under this section shall, as soon as may be after it is made, be laid before each House of the Parliament.[7]

POWER TO MAKE RULES

Under Section 84 (1), of this Act, the Central Government may, by notification in the Official Gazette, make rules for carrying out the provisions of this Act. Every rule made by the Central Government under this Act shall be laid, as soon as may be, after it is made before each House of the Parliament while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be; so,

[4] AIR 1999 Bom 417 : 1999 (4) Bom CR 415.
[5] 176th Report of the Law Commission on The Arbitration and Conciliation (Amendment) Bill, 2001.
[6] Section 83 (1), The Arbitration and Conciliation Act of 1996.
[7] Section 83 (2), The Arbitration and Conciliation Act of 1996.

however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule.[8]

Whereas the Section 84 gives the Central Government the power to make rules to carry out the provisions of the Act, the High Court should also, wherever necessary, make rules. It would be helpful if such rules deal with the procedure to be followed by the courts while exercising jurisdiction under Section 9 of the Act. The rules may provide for the manner in which the application should be filed, the documents which should accompany the same and the manner in which such applications will be dealt with by the courts. The High Courts are, therefore, requested to frame appropriate rules as expeditiously as possible so as to facilitate quick and satisfactory disposal of arbitration cases.[9]

REPEAL AND SAVING

Under Section 85 (1), of this Act, the Arbitration (Protocol and Convention) Act, 1937 (6 of 1937), the Arbitration Act, 1940 (10 of 1940) and the Foreign Awards (Recognition and Enforcement) Act, 1961 (45 of 1961) are hereby repealed. Section 85 of the Arbitration and Conciliation Act, 1996 provides that by virtue of the said provisions of Section 85 the Foreign Awards Recognition and Enforcement Act of 1961 and the Arbitration Act of 1940 are repealed. It further provides that notwithstanding the aforesaid repeal of the provisions of the said enactments including the Arbitration Act, 1940 and the Foreign Awards Recognition and Enforcement Act of 1961 would apply in relation to arbitral proceedings which commenced before the new Act came into force unless otherwise agreed by the parties. However, the provisions of the Arbitration and Conciliation Act would apply in relation to arbitral proceedings which commenced on or after the new Act came into force.[10]

Notwithstanding such repeal, provisions of the said enactments shall apply in relation to arbitral proceedings which commenced before this Act came into force unless otherwise agreed by the parties but this Act shall apply in relation to arbitral proceedings which commenced on or after this Act comes into force,[11] and all rules made and notifications published, under the said enactments shall, to the extent to which they are not repugnant to this Act, be deemed respectively to have been made or issued under this Act.[12]

[8] Section 84 (2), The Arbitration and Conciliation Act of 1996.
[9] *M/s. Sundaram Finance Ltd. v. M/s. NEPC India Ltd.*, AIR 1999 SC 565 : (1999) 2 SCC 479.
[10] *Fuerst Day Lawson Ltd. v. M/S. Jindal Exports Ltd.*, 1999 IIAD Delhi 265
[11] Section 85(2)(a), The Arbitration and Conciliation Act, 1996.
[12] Section 85(2)(b), The Arbitration and Conciliation Act, 1996.

A mere look at sub-section 2(a) of Section 85 shows that despite the repeal of Arbitration Act, 1940 and Foreign Awards Recognition and Enforcement Act of 1961, the provisions of the said enactment shall be applicable in relation to arbitration proceedings which have commenced prior to coming into force of the new Act. The new Act came into force on January 26, 1996. The question therefore, arises whether on that date the arbitration proceedings in the present case had commenced or not. For resolving this controversy we may turn to Section 21 of the new Act which lays down that unless otherwise agreed to between the parties the arbitration suit in respect of arbitration dispute commenced on the date on which the request for referring the dispute for arbitration is received by the respondents. It is, therefore, quite clear that the date of receipt of notice for referring the disputes to arbitration is the date on which the arbitration proceeding has commenced.[13]

It was held that there was no agreement between the parties laying down the date of commencement of the arbitration proceedings contrary to the intention of the provisions of Section 85 and section; it was observed that the rule adopted in *Taylor v. Taylor* is well recognised and is founded on sound principle. It was further observed in the above mentioned decision that:

> *Its result is that if a statute has conferred a power to do an act and has laid down the method in which that power has to be exercised, it necessarily prohibits the doing of the act in any other manner than that which has been prescribed. The principle behind the rule is that if this were not so, the statutory provision might as well not have been enacted.*[14]

> *Section 85 of the 1996 Act repeals the 1940 Act. Sub-section (2) of Section 85 provides for a non-obstante clause. Clause (a) of the said Sub-section provides for saving clause stating that the provisions of the said enactments shall apply in relation to arbitral proceedings which commenced before the said Act came into force. Thus, those arbitral proceedings which were commenced before coming into force of the 1996 Act are saved and the provisions of the 1996 Act would not apply in relation to arbitral proceedings which commenced on or after the said Act came into force. Even for the said limited purpose, it is necessary to find out as to what is meant by commencement of arbitral proceedings for the purpose of the 1996 Act where for also necessity of reference to Section 21 would arise. The Court is to interpret the repeal and savings clauses in such a manner so as to give a pragmatic and purposive meaning thereto. It is one thing to say that commencement of arbitration proceedings is dependent upon the fact of each case*

[13] *Konkan Railway Corporation Ltd. v. Rani Construction P. Ltd*, (2000) 8 SCC 159 : 2000 (7) SCALE 211
[14] *Fuerst Day Lawson Ltd. v. M/s Jindal Exports Ltd.*, 1999 II AD Delhi 265