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3. *3 Notice Invoking Arbitration Clause*
   Client/Matter: -None-
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   Client/Matter: -None-
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   Client/Matter: -None-
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1. Features of Arbitration and Conciliation Act, 1996

1. 'ARBITRATION' – MEANING OF

Section 2(1)(a) of the Arbitration and Conciliation Act, 1996 defines 'arbitration' to mean 'any arbitration whether or not administered by permanent arbitral institution'.

Arbitration is a reference to the decision of one or more persons, either with or without an umpire, of some matter or matters in difference between the parties. [1]

> In ***Halsbury's Laws of England*** [2], the term 'arbitration' has been defined as : 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. Conciliation is a process of persuading parties to reach agreement, and is plainly not arbitration; nor is the chairman of a conciliation board an arbitrator.

In English law, arbitration is a mechanism for the resolution of disputes which takes place, usually in private, pursuant to an agreement between two or more parties, under which the parties agree to be bound by the decision to be given by the arbitrator according to law or, if so agreed, other considerations, after a fair hearing, such decision being enforceable at law. Sometimes the submission instead of being voluntary is imposed by statute. In this work, such arbitrations will be referred to as 'statutory arbitrations'. [3]

With the ever widening expansion of international trade and commerce, complex questions on private international law, effect of local laws on contract between parties belonging to different nations are certain to crop up. Arbitration has been considered to be a civilised way of resolving disputes avoiding court proceedings. This approach manifests faith of the parties in the capacity of the tribunal of their choice to decide even a pure question of law. [4]

An 'international commercial arbitration' means 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 (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. [5] The definition of the term 'international commercial arbitration' makes no distinction between an international commercial arbitrations which takes place in India and an internal commercial arbitration which take place outside India. [6]

The term 'commercial' occurring in the phrase 'international commercial arbitration' in the Act is given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, any trade transactions for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; consultancy; carriage of goods or passengers by air, sea, rail or road. [7] Any service or activity which in the modern complexities of business would be considered to be a lubricant for the wheels of commerce is 'commercial'. [8]

2. FEATURES OF ARBITRATION AND CONCILIATION ACT, 1996

The 1996 Act, strictly speaking, has three distinct features, which are as follows:

(1) Party autonomy is paramount. Court's intervention has been expressly excluded except when it is so specifically stated;

(2) An arbitral tribunal is required to be fair, independent and impartial and is required to conduct arbitrations according to the principles of natural justice unfettered by procedural laws; and

(3) In addition to provisions contained in sections 1 to 43, dealing with domestic arbitrations, Conciliation has been given recognition.

A study of sections 2 of the 43 of the *Arbitration and Conciliation Act, 1996*, which fall under Part I, reveals that the principles contained in the said provisions are aimed to achieve the following results:

(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 courts 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 arbitral tribunal does not succeed, the arbitral proceedings shall continue till an arbitral award is made;

(f) If the parties cannot agree to choose a venue, the arbitral tribunal shall determine the venue having regard to the circumstances of the case;

(g) Review of an award by the arbitral tribunal within the time stated in the Act rather than remittance of the award 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.

The Act was enacted to consolidate and to amend the law relating to 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. [9]

The Act being both an amending and consolidating Act is intended to be a selfcontained Code and, therefore, exhaustive on the law of the subject or on some particular point. A corollary will follow that it declares the whole of law upon the particular subject or point and will carry with it a negative import that it shall not be permissible to do what is not mentioned in it and further that what is permissible thereunder will be done only in the manner indicated and no other. [10]

The Act was drafted taking the UNCITRAL Model Law on International Commercial Arbitration as adopted by UN Commission on International Trade Law, 1985 as its basis. [11] It is an integrated version of the 1940 Act which governed the domestic arbitrations, the Arbitration (Protocol and Convention) Act, 1937, and the Foreign Award (Recognition and Enforcement) Act, 1961, which governed interventional arbitral awards. Chapters I to VIII of the Act are taken from Chapters I to VIII of the UNCITRAL Model Law. [12]

For interpretation of the *Arbitration and Conciliation Act, 1996*, the Model Law and judgments thereon are not a guide since the Act and the Model Law are not identically worded. [13]If, however, there be a lacunae in the provisions of the Act on any point then the relevant provisions of the Model Laws and Rules can be read to interpret the provision because while enacting the Indian Act, the Model Laws and Rules were taken into account. [14]

The notable features of the Act are that it minimises judicial intervention and reduces the grounds of challenge to the award. The object of the Act is to ensure speedy decision of the disputes between the parties. [15] It is intended to ensure fair and efficient and speedy trial giving finality to the decision. It is also intended to minimise the supervisory role of the courts and enhance the assistance. In other words, the main object is to drastically curtail supervisory role of the courts, demolish

various stages and proceedings through which an award was required to pass through in the mechanism of old enactments so that the object of speedy resolution of dispute is achieved. [16]

The 1996 Act contains a coherent and model framework. It envisages only one award under one set of rules. It does not contemplate multi-layer awards governed by different sets of rules. It has introduced several changes, of which three are worth taking note of: (*i*) fair resolution of a dispute by an impartial tribunal without any unnecessary delay or expenses; (*ii*) party autonomy is paramount subject only to such safeguards as are necessary in public interest; and (*iii*) the Arbitral Tribunal is enjoined with a duty to act fairly and impartially. [17]

3. STATEMENT OF OBJECTS AND REASONS

The main objectives of the Act are as follows:

(i) To comprehensively cover international commercial arbitration and conciliation as also domestic arbitration and conciliation;

(ii) To make provision for an arbitral procedure which is fair, efficient and capable of meeting the needs of the specific arbitration;

(iii) To provide that the arbitral tribunal gives reasons for its arbitral award;

(iv) To ensure that the arbitral tribunal remains within the limits of its jurisdiction;

(v) To minimise the supervisory role of courts in the arbitral process;

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

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

(viii) 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

(ix) 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. [18]

4. REFERENCE TO ARBITRATION

Only disputes can be referred to arbitration. Under the 1940 Act, ‘arbitration agreement’ had been defined as ‘a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not’ (section 2a). However, under the 1996 Act, ‘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’ (section 7).

Under the 1940 Act, claims and differences could also be referred to arbitration but under the 1996 Act, only disputes can be referred to arbitration. In order to be entitled to seek appointment of an arbitrator, it is, therefore, imperative that the party seeking appointment of an arbitrator must show that there are disputes which need to be adjudicated upon. In this connection, it is necessary to ascertain as to what amounts to a ‘dispute’.

There is no provision in the 1996 Act for referring a matter to the arbitral tribunal with the intervention of the court. However, if during the pendency of the proceedings in the court, parties have entered into an arbitration agreement, then they have to proceed in accordance with the provisions of the Act. [19]

5. EXISTENCE OF DISPUTE – PRE-REQUISITE FOR ARBITRATION

When an arbitration clause states that disputes between the parties shall be referred to arbitration, it means that crystallized disputes shall be a matter of adjudication. It can, therefore, be inferred that what the parties agreed to between themselves in the agreement was that those points on which the parties cannot agree will be put up to the arbitrator for adjudication and not mere claims, which were never put up before the opposite party for payment before invocation of the arbitration clause. In addition, if the clause in the agreement enjoins upon a party to quantify the claims, then any claim which has not been quantified before being sent to the respondent cannot be adjudicated upon.

> Since the 1996 Act provides for adjudication of disputes through an arbitral process, it is necessary to understand as to what 'dispute' means in legal parlance. When one party asserts a right and the other repudiates the same, that is a dispute. Similarly any question on which parties join issue whether the court can legally enquire into it, is a dispute. It is analogous to a cause of action before a civil court. Where there is a difference between the parties about the liability of each other, a dispute is clearly made out. [20]

> The word 'difference' or the word 'dispute' has a particular meaning in the law of arbitration. It is not every kind of difference or dispute which is referable to arbitration. A difference may be, for instance, regarding the meaning of a particular term in the contract. It may be that one party feels that he has performed the contract but the other party says that the real meaning of the contract is something else and what has been done is not the true performance of the contract. This then would be a difference. Under the law of arbitration, a dispute means that one party has a claim and the other party says, for some specific reasons that this is not a correct claim. This is a dispute. [21]

> The use of the words 'differences' or 'disputes' in an arbitration agreement is important in defining its scope, since they mean more than the existence of a claim, about which there may be no dispute or difference; thus the word 'claim' on its own has led to difficulty. [22]

> It is only the existence of a difference or dispute which confers jurisdiction upon an arbitrator to adjudicate upon the dispute and if there is no dispute, there can be no right to demand arbitration at all. [23] Where there was an arbitration clause in a contract for supply of goods and the question was whether or not there was a dispute, it was held that non-payment of price for one reason or the other constitutes dispute and the award made on such a dispute was not without jurisdiction. [24]

6. MATTERS WITHIN PARTIES' DISCRETION AS PER ACT

The *Arbitration and Conciliation Act* provides liberty to the parties to reach an agreement in respect to a number of acts to be performed during the course of arbitration proceedings. It is only when the parties fail to agree upon the procedure to be followed that the arbitral tribunal or the court has been authorized to step in and decide upon the matter. The parties can decide upon the procedure to be followed in respect to the following:

(1)	Administrative assistance to be provided to arbitrators	S. 6
(2)	Determination of number of arbitrators	S. 10(1)
(3)	Procedure for appointing arbitrators	S. 11(2)
(4)	Nomination of an arbitrator by a party	S. 11(3)
(5)	Procedure to be followed in case of failure of appointment procedure	S. 11(5) & S. 11(6)

(6)	Challenge to authority of an arbitrator	S. 12(3)
(7)	Procedure for challenging arbitrator	S. 13(1)
(8)	Termination of mandate of an arbitrator	S. 14(1)(b)
(9)	Appointment of substitute arbitrator	S. 15(2)
(10)	Interim measures of protection	S. 17(1)
(11)	Evolving procedure for conducting arbitral proceedings	S. 19(2)
(12)	Decision on venue of arbitration	S. 20(1)
(13)	Commencement of arbitral proceedings	S. 21
(14)	Language for conducting arbitral proceedings	S. 22(1)
(15)	Time schedule for completing pleadings	S. 23
(16)	Basis and manner of presenting the case	S. 24
(17)	Default in adhering to time schedule	S. 25
(18)	Appointment of experts	S. 26(1)(a)
(19)	Participation of experts in proceedings	S. 26(2)
(20)	Making available documents etc. by experts	S. 26(3)
(21)	Determining law governing proceedings	S. 28(1)(b)(ii)
(22)	Fair and equitable adjudication by tribunal	S. 28(2)
(23)	Majority decision whether to prevail	S. 29(1)
(24)	Authorising presiding officer to devise procedure	S. 29(2)
(25)	Procedure for mediation, conciliation etc.	S. 30(1)
(26)	Settlement to be recorded as award	S. 30(3)
(27)	Dispensing with reasons in award	S. 31(3)(a)
(28)	Costs of arbitration	S. 31(8)(a)
(29)	Time limit for correction etc. in award	S. 33(1)
(30)	Time limit for seeking additional award	S. 33(4)
(31)	Conciliation of disputes	S. 61(1)
(32)	Determination of number of conciliators	S. 63(1)
(33)	Conciliation by sole conciliator	S. 64(1)(a)
(34)	Nomination of conciliator	S. 64(1)(b)

(35)	Nomination of third conciliator	S. 64(1)(c)
(36)	Seeking assistance for appointing conciliator	S. 64(2)
(37)	Administrative assistance to conciliators	S. 68
(38)	Venue of conciliation	S. 69(2)
(39)	Termination of proceedings on signing settlement.	S. 76(a)

7. COMPARISON OF PROVISIONS OF 1996 Act and 1940 ACT

The *Arbitration and Conciliation Act, 1996* makes a radical departure from the *Arbitration Act* of 1940. It has embodied the relevant rules of the modern law but does not contain all the provisions thereof. The new Act is not as extensive as the English *Arbitration Act, 1996*. The new Act was enacted in the light of the UNCITRAL Model Rules but in certain respects the Legislature has gone beyond the scope of the said rules[25]The decided cases under the 1940 Act have to be applied with caution for determining the issues under the 1996 Act. [26]The provisions of both these Acts are entirely different. The philosophy of 1996 Act is totally different. The new Act is required to be read keeping in view the UNCITRAL Model Rules. [27]There is not much of a difference between the old Act and the new Act insofar as enforcement of a foreign award is concerned. Definition of foreign award is the same in both the enactments. Sections 48 and 47 of the new Act correspond to sections 7 and 8 respectively of the Foreign Awards Act. The only difference appears to be that while under the Foreign Awards Act a decree follows, under the new Act foreign award is already stamped as a decree. Thus, if the provisions of the Foreign Awards Act and the new Act relating to the enforcement of the foreign award are juxtaposed there would appear to be hardly any difference. [28]

A comparison of the provisions of the 1996 Act with the 1940 Act is as under:

Section in Act 1996	**Section in 1940 Act**
Preamble	Preamble
1	1
2(1)(a)	Similar provision did not exist in the 1940 Act
2(1)(b) and 7	2(a)
2(1)(c)	2(b) and 27
2(1)(d)	Similar provision did not exist in the 1940 Act
2(1)(e)	2(c)
2(1)(f)	Similar provision did not exist in the 1940 Act
2(1)(g)	2(d)
2(1)(h)	Similar provision did not exist in the 1940 Act
2(2) and (3)	Similar provision did not exist in the 1940 Act
2(4)	46
2(5)	47
2(6) to 2(9)	Similar provision did not exist in the 1940 Act

Section in Act 1996	Section in 1940 Act
3	42
4	Similar provision did not exist in the 1940 Act
5 and 6	Similar provision did not exist in the 1940 Act
7(2) to 7(5)	Similar provision did not exist in the 1940 Act
8	34
9	41(b) and Sch. II
10(1)	Similar provision did not exist in the 1940 Act
10(2)	Sch I, Rule 1
11(1) and (2)	Similar provision did not exist in the 1940 Act
11(3)	10(1)
11(4) to (12)	Similar provision did not exist in the 1940 Act
12(1) and (2)	Similar provision did not exist in the 1940 Act
12(3)	Similar provision did not exist in the 1940 Act
12(4)	Similar provision did not exist in the 1940 Act
13(1) to (5)	Similar provision did not exist in the 1940 Act
13(6)	11(3)
14(1)(a)	8(1)(b) and 11(1)
14(1)(b)	Similar provision did not exist in the 1940 Act
14(2) and (3)	Similar provision did not exist in the 1940 Act
15(1) and (2)	Similar provision did not exist in the 1940 Act
15(3)	Similar provision did not exist in the 1940 Act
15(4)	Similar provision did not exist in the 1940 Act
16 and 17	Similar provisions did not exist in the 1940 Act
18	Similar provision did not exist in the 1940 Act
19(1)	Similar provision did not exist in the 1940 Act
19(2)	Similar provision did not exist in the 1940 Act
19(3) and (4)	Similar provision did not exist in the 1940 Act
20	Similar provision did not exist in the 1940 Act
21	Corresponds partly to S. 37(3)
22 to 26	Similar provisions did not exist in the 1940 Act
27(1) and (2), 27(3) and (4) 43(1)	Similar provisions did not exist in the 1940 Act
27(5)	43(2)

Section in Act 1996	Section in 1940 Act
27(6)	43(3)
28	Similar provision did not exist in the 1940 Act
29(1)	10(2)
29(2)	Similar provision did not exist in the 1940 Act
30	Similar provision did not exist in the 1940 Act
31(1)	14(1)
31(2)	10(2)
31(3) and (4)	Similar provision did not exist in the 1940 Act
31(5)	14(1)
31(6)	27(1)
31(7)	Similar provision did not exist in the 1940 Act
31(8)	S. 38 and Sch. I, Rule 8
32	Similar provision did not exist in the 1940 Act
33(1)(a)	Similar provision did not exist in the 1940 Act
33(1)(b)	Similar provision did not exist in the 1940 Act
33(2) to (7)	Similar provision did not exist in the 1940 Act
34	Partly new. Cases relating to setting aside award broadly applicable.
35	Sch. I, Rule 7
36	Similar provision did not exist in the 1940 Act
37	Substantially new. Cases u/s 39(1)(vi) and 39(2) shall apply.
38	Similar provision did not exist in the 1940 Act
39(1)	Similar provision did not exist in the 1940 Act
39(2)	38(1)
39(3)	38(2)
39(4)	38(3)
40	6
41	7
42	31(4)
43(1)	37(1)
43(2)	37(3)
43(3)	37(4)

Section in Act 1996	Section in 1940 Act
43(4)	37(5)
44 to 81	Similar provisions did not exist in the 1940 Act
82	44
83 to 85	Similar provisions did not exist in the 1940 Act
First, Second and Third Schedules	Similar provision did not exist in the 1940 Act

1 *Collins v. Collins* , 28 LJCH 186.

2 4th Ed., Vol. 2, para 502.

3 Bernstein, *Handbook of Arbitration Practice,* 3rd Ed., para 2.03, p. 13.

4 *Tarapore and Co. v. Cochin Shipyard Ltd., AIR* 1984 SC 1072 : 1985 Arb LR 2 : (1984) 2 SCC 680 [*LNIND 1984 SC 378*].

5 Section 2(1) *(f), Arbitration and Conciliation Act, 1996*.

6 *Bhatia International v. Bulk Trading S.A., AIR* 2002 SC 1432 : (2002) 4 SCC 105 [*LNIND 2002 SC 1441*].

7 *R.M. Investments & Trading Co. P. Ltd. v. Boeing Co., AIR* 1994 SC 1136 : (1994) 4 SCC 541 : 1994 (1) Arb LR 282; *National Thermal Power Corp. v. Singer* , [1992] 2 Com LJ 256 ; *Suresh Narain Sinha v. Akhauri Balbhadra Prasad,* : 1957 BLJR 216; *Kamyni Engg. Corp. Ltd. v. Societe De Traction D' Electricite Societe Anonyme,* : 66 Bom LR 758; *Atiabari Tea Co. Ltd. v. State of Assam, AIR* 1961 SC 232 : [1961] 1 SCR 809 [*LNIND 1960 SC 175*].

8 *Fatehchand Himmatlal v. State of Maharashtra, AIR* 1977 SC 1825 : (1977) 2 SCC 670 [*LNIND 1977 SC 63*].

9 *Introduction to the Act of 1996; J. Belli Gowder v. Joghi Gowder,* ; *Govindji Jevat and Co. v. Cannanore Spinning and Weaving Mills Ltd.,* : 1968 Ker LJ 635 (DB).

10 *Union of India v. Wishwa Mitter Bajaj & Sons,* 2007 (3) RAJ 663 : 2007 (2) Arb LR 404 (Del); *Purshottam Dass Chokhani v. Sarita Devi Nathani,* 2006 (2) RAJ 599 (Gau)(DB); *Anuptech Equipments Pvt. Ltd. v. Ganapati Co-op. Housing Society Ltd.,* : [1999] 2 Bom CR 331 [*LNIND 1999 BOM 86*] : [1999] 3 All MR 580 ; *S.N. Srikantia and Co. v. Union of India,* : 68 Bom LR 586; *Vallabh Pitte v. Narsingdas Govindram Kalani,* (DB); *Union of India v. Mohindra Supply Co., AIR* 1962 SC 256 : (1962) 2 SCJ 179; *Madhavdas Devidas v. Vithaldas Vasadeodas,* : [1952] 54 Bom LR 94 (DB).

11 *Kohinoor Creations v. Syndicate Bank* , 2005 (2) Arb LR 324 : 2005 (2) RAJ 622 (DB) (Del); *A. Ramakrishna v. Union of India,* 2004 (3) RAJ 554 (AP); Paragraph 3 of Statement of Objects and Reasons of the Act.

12 *NEPC India Ltd v. Sundaram Finance Ltd.,* (1999) 2 SCC 479 [*LNIND 1999 SC 26*] : AIR 1999 SC 565 [*LNIND 1999 SC 26*]: 1999 (1) RAJ 365, overruling *Sundaram Finance Ltd. v. NEPC India Ltd.,* AIR 1999 SC 565 [*LNIND 1999 SC 26*]: (1999) 1 Arb LR 305 : (1999) 2 SCC 479 [*LNIND 1999 SC 26*] ; *Vikrant Tyres Ltd. v. Techno Export Foreign Trade Co. Ltd.,* 2005 (3) RAJ 612 (Ker).

13 *Konkan Railway Corporation Ltd. v. Rani Construction (P) Ltd.,* (2002) 2 SCC 388 [*LNIND 2002 SC 84*] : AIR 2002 SC 778 [*LNIND 2002 SC 84*].

14 *Union of India v. East Coast Boat Builders & Engineers Ltd.,* : 1998 (2) Arb LR 702 : 1999 (2) RAJ 221.

15 *Shin Etsu Chemical Co. Ltd. v. Aksh Optifibre Ltd.,* (2005) 7 SCC 234 : AIR 2005 SC 3766 : [2005] 127 Comp Cas 97 : 2005 (3) Arb LR 1; *Kohinoor Creations v. Syndicate Bank* , 2005 (2) Arb LR 324 : 2005 (2) RAJ 622 (DB) (Del); *Anuptech Equipments Pvt. Ltd. v. Ganpati Co-op. Housing Society Ltd.,* ; *Electrical Mfg. Co. Ltd. v. National Thermal Power Corp. Ltd.,* 2006 (1) RAJ 399 (Del); *Decor India Pvt. Ltd. v. NBCC Ltd.,* 2008 (2) RAJ 425 (Del) (DB).

16 *Western Shipbreaking Corps. v. Clare Haven Ltd.* , 1998 (Supp) Arb LR 53 : 1998 (1) RAJ 367 (Guj).

17 *Centrotrade Minerals & Metals Inc. v. Hindustan Copper Ltd* ., (2006) 11 SCC 245 [*LNIND 2006 SC 375*] : 2006 (2) RAJ 531.

18 Gazette of India, Extra., Part II, S. 1.

19 *Tamil Nadu Electricity Board v. Sumathi, AIR* 2000 SC 1603 : (2000) 4 SCC 543 [*LNIND 2000 SC 750*].

20 *Jammu Forest Co. v. State of J & K* , AIR 1968 J&K 86 : 1968 Kash LJ 134; *Chandmull Ganeshmull v. Nippon Munkwa Kabushiki Kaisha,* (DB); *Nandram Hanutram v. Raghunath & Sons Ltd.,* : 93 Cal LJ 92; *T. Wang v. Sona Wanqdi,* (DB).

21 *Salecha Cables (P) Ltd. v. HPSEB* , 1995 (1) Arb LR 422 : 1995 AIHC 762 (HP).

22 *Russell on Arbitration* , 21st Ed., p. 62.

23 *Mathuradas Goverdhandas v. Khusiram Benarshilal* , [1949] 53 Cal WN 873 (DB).

24 *Nanalal M. Varma and Co. Ltd. v. Alexandra Jute Mills Ltd.,* : 1989 (1) Arb LR 235 (DB).

25 *Rashtriya Ispat Nigam Ltd. v. Verma Transport Co.,* (2006) 7 SCC 275 [*LNIND 2006 SC 1439*] : AIR 2006 SC 2800 : 2006 (3) RAJ 199.

26 *Firm Ashok Traders v. Gurumukh Das Saluja,* (2004) 3 SCC 155 : AIR 2004 SC 1433; *HBHL-VKS v. Union of India,* 2007 (2) RAJ 644 (Del) (FB).

27 *India Household and Healthcare Ltd. v. LG Household and Healthcare Ltd.,* (2007) 5 SCC 510 [*LNIND 2007 SC 296*] : AIR 2007 SC 1376 : 2007 (2) RAJ 20 (SC); *Sundaram Finance Ltd. v. NEPC India Ltd., AIR* 1999 SC 565 : 1999 (1) RAJ 365 overruling AIR 1999 Mad 29 [*LNIND 1998 MAD 690*]; *Fiat India Pvt. Ltd. v. Rahul Udyog Viniog Ltd.,* AIR 2004 NOC 99 : 2003 (3) Cal LT 381 (Cal).

28 *Thyssen Stahlunion GMBH v. Steel Authority of India Ltd., AIR* 1999 SC 3923 : (1999) 9 SCC 334 [*LNIND 1999 SC 906*] : 1999 (3) RAJ 355 (SC).

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2 Arbitration Agreement

PC Markanda: Arbitration Step by Step

P C Markanda

2 Arbitration Agreement

1. 'ARBITRATION AGREEMENT' – WHAT IS

'Arbitration agreement' has been defined in section 7 of the 1996 Act as under:

Section 7. Arbitration agreement. —

(1) In this Part, '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;

(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 .

The expression '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.' [1]

The basis of agreement under the Act is a written submission by the parties. No particular form is necessary but the words used for this purpose must be words of choice and determination to go to arbitration and not problematic words of mere possibility. It is not even necessary that a formal word such as 'arbitration' is used but what is essential is that the parties should intend to make a reference or submission and should be *ad idem* in this respect. [2]

Russell states: An arbitration agreement is an agreement to submit present or future disputes (whether they are contractual or not). 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. [3]

When an agreement is entered into between the parties with an understanding that all or certain disputes which have arisen or which may arise between them shall be resolved in arbitration, it will be known as an arbitration agreement. Such an agreement may be a stand alone document or may form part of the main contract. In actual

practice, an arbitration agreement is a part of the main contract and forms one of the clauses of the main contract. However, if the main contract, for any reason, is declared to be void, the arbitration agreement would not survive for resolution of disputes. But if the main contract is declared to be frustrated, the arbitration clause will survive because it is only the performance of the contract which has come to an end.

2. DRAFTING OF ARBITRATION CLAUSE

(A) Critical Attributes

The courts have adopted a very liberal approach while interpreting as to what constitutes an arbitration clause. Clauses in contracts, which did not even contain the terms ‘arbitration’ or ‘arbitrator’ have been interpreted to be arbitration clauses. However, to avoid any confusion at a later stage on whether a particular clause is, in fact, an arbitration clause or not, the following points must be kept in mind:

(1) The intention of the parties to settle their disputes by means of adjudication by a private tribunal must be clearly stated;

(2) The clause must indicate that present or future differences or disputes that have arisen or may arise between the parties in connection with their dealings shall be referred to arbitration; and

(3) It should be clearly indicated that the decision of the arbitral tribunal shall be final and binding on the parties.

(B) Optional but Relevant Additional Elements

The above list contains the bare minimum essentials that must be incorporated in an arbitration clause. Without these critical essential attributes, the clause would not be considered as an arbitration agreement by the courts. In addition, the person who drafts an arbitration agreement may also provide for:

(1) Procedure to be followed by the parties before invocation of the arbitration clause.

(2) Number of arbitrators that would constitute the arbitral tribunal.

(3) Qualifications required for becoming a member of the arbitral tribunal.

(4) The persons/institutions/officers empowered to make the appointment.

(5) The period within which an appointment ought to be made and the authority or body which would make the appointment in case any party or the two appointed arbitrators fail to make the appointment within the stated time.

(6) Venue of arbitration.

(7) Language in which proceedings are to be conducted.

(8) Time limit for finalisation of award.

(9) The law which would govern the parties and the court which would have jurisdiction in the matter.

Russell states: When drafting an arbitration agreement care needs to be taken to ensure that it is appropriate for the particular circumstances of the case. The following is the checklist of the matters which need to be considered when drafting an arbitration agreement:—

1 Have the parties been properly identified?

2 Is there a clear reference to arbitration?

3 Where is the seat of arbitration to be?

4 Is there a choice of the proper law of the contract?

5 Is the law of arbitration agreement to follow the proper law of the contract?

6 Is there a choice of the procedural law?

7 How will the tribunal be appointed?

8 Is there an appointing authority?

9 Is the tribunal required to have any particular attributes or qualification?

10 How many members of the tribunal will there be?

11 Are there to be procedural and/or evidential rules, and if so, which ones?

12 What will be the language of arbitration?

13 Should the tribunal be given power to order provisional relief under *section 39 of the Arbitration Act, 1996*?

14 Is specific provision for confidentiality required?

15 Should applications and appeals to the court be excluded?

16 Is a waiver of sovereign immunity required?

17 Are provisions for multi-party arbitration consideration and concurrent hearings required? [4]

The rules of interpretation require that an arbitration clause should be read in the ordinary and natural sense, except where that would lead to absurdity. No part of a term or clause should be considered as a meaningless or surplusage, when it is in consonance with the other parts of the clause and expresses the express intention of the parties. [5]

3. SAMPLE ARBITRATION CLAUSES

With the essential elements of an arbitration clause in the background, sample arbitration clauses are set out below:

case a dispute or difference of any kind whatsoever, arises out of or relates to the contract, between the parties to the contract, it is a term of the agreement that before invoking arbitration, the aggrieved party shall refer the matter to (_____ for his decision / mediation to be carried out by _____ / the senior management of both companies for negotiations / dispute resolution board to consist of _____).

On the failure of the procedure prescribed above or if a party is dissatisfied with the decisions/recommendations aforesaid, and notwithstanding anything else contained elsewhere in the agreement, a party to the agreement may refer to arbitration to be conducted by (___, resident of ____ / a person to be nominated by ___ / a person to be mutually decided by the parties) to adjudicate upon the aforesaid disputes and differences that have arisen between the parties.

Pending submission of and/or decision on a dispute or difference as aforesaid or until the arbitral award is published, the parties shall continue to perform all of their obligations under this Agreement without prejudice to a final adjustment in accordance with such award.

The decision of the arbitrator arrived at after hearing the parties shall be final and binding upon the parties. The arbitration proceedings shall be conducted in accordance with the *Arbitration and Conciliation Act, 1996* or any statutory modifications or re-enactments thereof. It is also agreed by the parties that the arbitration proceedings shall be conducted in ___ language. The venue of arbitration shall be _____ and any proceedings arising out of this contract shall be subject to the jurisdiction of _____ court.

In case a dispute or difference of any kind whatsoever, arises out of or relates to the contract, between the parties to the contract, it is a term of the agreement that before invoking arbitration, the aggrieved party shall refer the matter to (_____ for his decision / mediation to be carried out by _____ / the senior management of both companies for negotiations / dispute resolution board to consist of _____).

On the failure of the procedure prescribed above or if a party is dissatisfied with the decisions/recommendations aforesaid, and notwithstanding anything else contained elsewhere in the agreement, the aggrieved party may by a notice in writing evince his intention to refer the disputes and differences that have arisen between the parties to arbitration. The arbitral

tribunal shall consist of three arbitrators, one each to be nominated by the respective parties and the third to be appointed by the nominated arbitrators.

Pending submission of and/or decision on a dispute or difference as aforesaid or until the arbitral award is published, the parties shall continue to perform all of their obligations under this Agreement without prejudice to a final adjustment in accordance with such award.

The decision of the arbitral tribunal arrived at after hearing the parties shall be final and binding upon the parties. The arbitration proceedings shall be conducted in accordance with the *Arbitration and Conciliation Act, 1996* or any statutory modifications or re-enactments thereof. It is also agreed by the parties that the arbitration proceedings shall be conducted in ___ language. The venue of arbitration shall be _____ and any proceedings arising out of this contract shall be subject to the jurisdiction of _____ court.

4. SCOPE OF ARBITRATION AGREEMENT

The Supreme Court [6] has laid the following principles as to the scope of the arbitration clause:

(1) An arbitration clause is a collateral term of a contract as distinguished from its substantive terms; but nonetheless it is an integral part of it;

(2) However, comprehensive the terms of an arbitration clause may be, the existence of the contract is a necessary condition for its operation, it perishes with the contract;

(3) The contract may be *non est* in the sense that it never came legally into existence or it was void *ab initio* ;

(4) Though the contract was validly executed, the parties may put an end to it as if it had never existed and substitute a new contract for it solely governing their rights and liabilities thereunder;

(5) In the former case, if the original contract has no legal existence, the arbitration clause also cannot operate, for alongwith the original contract, it is also void; in the latter case, as the original contract is extinguished by the substituted one, the arbitration clause of the original contract perishes with it; and

(6) Between the two falls, many categories of disputes in connection with a contract, such as the question of repudiation, frustration, breach etc. In those cases, it is the performance of the contract that has come to an end, but the contract is still in existence for certain purposes in respect of disputes arising under it or in connection with it. As the contract subsists for certain purposes, the arbitration clause operates in respect of these purposes.

Scope of the 1996 Act is very wide and it not only contains arbitration agreement in writing but also other agreements as mentioned in section 7(4). If there is any arbitration agreement in any other enactment for the time being in force i.e. statutory agreement, provisions of 1996 Act shall apply except sections 40(1), 41 and 43. [7]

An arbitration agreement has necessarily to be in writing. It may be contained, *inter alia* , in a document signed by the parties, or in an exchange of letters, telex, telegrams or any other means of telecommunication, which provide a record of the agreement. [8] An arbitration agreement must be in writing though no special form is prescribed for that. Such an agreement can be in one document or can be gathered from several documents also. It can be gathered from correspondence consisting of letters, fax messages, telegrams or even telex messages. Reference in a contract to a document containing an arbitration clause also constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that arbitration clause part of the contract. [9]

Where the parties have agreed to settle their dispute by arbitration and if there is an agreement in that respect, the courts will not permit recourse to any other remedy without invoking the remedy by way of arbitration, unless of course both the parties to the dispute agree on another mode of dispute resolution. [10]

The words ‘arising out of’ have been given a wide meaning. It has been said that they cover every dispute except a dispute as to whether there was ever a contract at all. [11] If the parties to a contract make provision in it as to their rights, should certain events occur in the course of the contract, and a dispute arises between them as to their rights following the occurrence of these events, then that dispute as to their rights arises out of the contract. [12]. The words embrace issues of frustration, [13] nondisclosure [14], construction [15], *quantum meruit* , [16] the existence of a custom, disputes as to any state of circumstances which, if proved, would be relevant on any issue as to the true meaning and effect of the contract [17], a dispute as to whether the contract has been varied or replaced by a fresh contract [18] and a claim for damages for breach of the arbitration agreement itself. [19]

The law on the point is succinctly stated in ***Halsbury's Laws of England,*** [20] as follows:

Where a contract contains an arbitration clause in sufficiently wide terms, the decision of the certifier may be reviewed. In such a case, the contractor can recover without a certificate, the employer can claim for a defective work despite the existence of a certificate expressing the architect's satisfaction, amounts certified can be reviewed and the contractor can recover for extra work despite the earlier refusal of an architect or engineer to give a written order to do the work. A clause giving an arbitrator power to open up, review and revive the certificate, opinion or decision of the certifier and to determine all disputes and matters submitted to him as if no such certificate, decision or opinion had been given will certainly be wide enough. Current standard form contracts give such powers to the arbitrator.

In certain cases, despite an arbitration clause, on the proper construction of the contract some decisions of a certifier will not be subject to review. Thus, where matters left by the contract to the decision or determination of the engineer were excepted from the arbitration clause, it was held that the Engineer's certificate of completion and satisfaction was binding.

If there is no concluded contract between the parties, then there is no question of arbitration in such a case. Where a contractor submitted a tender and it was accepted by the government with a condition that a formal agreement containing an arbitration clause was to be executed by the contractor but no such agreement was entered into, it was held that due to non-execution of formal agreement, there existed no concluded contract and thus arbitration clause could not be invoked. [21]

Arbitration agreement is a matter of contract. So long as the contract does not militate against the provisions of the Act, nothing prevents the parties from giving full effect to it. [22] An agreement comes into being only when both the parties agree on the terms and conditions thereof. Thus, an arbitration clause cannot be unilaterally altered by one of the parties and being a sacrosanct clause, cannot be re-written unless agreed to by both the parties. [23]

5. PARTY TO ARBITRATION AGREEMENT

(A) Definition of ‘Party’

Section 2(1)(e) of the Arbitration and Conciliation Act, 1996 defines a ‘party’ to mean ‘a party to an arbitration agreement’. Obviously, therefore, only those who are parties to the arbitration agreement can invoke the arbitration clause to get their disputes adjudicated upon. A third party to an arbitration agreement cannot be entertained by the courts or by the arbitral tribunals.

‘Party’ means a party to an arbitration agreement. [24] Parties can be contractually bound to an arbitration agreement even in the absence of their signatures. [25] An arbitration agreement is not discharged by the death of a party. It remains enforceable by or against the legal representatives of the deceased. [26] A person who signs an agreement in his official capacity (and not in his individual capacity) cannot, after his retirement, file an application for enforcing the award. [27]

(B) Who can Enter into and Enforce Arbitration Agreements?

(1) *Companies:* A company can enter into an arbitration agreement. [28] In case of incorporated companies, it is only the Company or its Board of Directors or, subject to the Articles of Association, its Chairman, who can enter into an agreement. [29] Under an arbitration agreement entered into by a company, a shareholder cannot seek appointment of an arbitrator. [30] In the case of a limited company, only the persons in whom

the management of the company was vested could apply but a single shareholder of the company could not do so. [31] Similarly, dispute pertaining to withholding of wages cannot be subject-matter of arbitration under an arbitration agreement entered into by a company. [32]

(2) *Firms:* One partner of a firm cannot enter into an agreement to refer on behalf of firm unless all partners join in the reference. [33] An arbitration agreement entered into by a partner on behalf of the firm can be said to be impliedly ratified by the subsequent acts of the other partner. [34] A partner of an unregistered firm cannot apply to enforce a right arising from the contract between the partners. [35] However, a partner of an unregistered firm can apply for appointment of an arbitrator when the firm is dissolved or for rendition of accounts of the dissolved firm. [36] The words 'to sue' in section 69(3) (a) of the Partnership Act must be understood on applying to any proceedings for dissolution of partnership or for accounts of a dissolved firm or to realise the property of a dissolved firm. [37] If a sole proprietorship firm is not a legal entity, a petition seeking appointment of arbitrator should be filed by the sole proprietor in his name on behalf of sole proprietorship firm and not in the name of sole proprietorship firm. [38]

(3) *Third parties:* A court is authorised to determine whether a party, which although not formally a party to the arbitration agreement, can be made a party to the arbitration proceeding. [39] Persons claiming under a party to an arbitration agreement, in addition to the party itself, would be entitled to claim its benefits and be bound by the obligation imposed thereby. [40] If the arbitration agreement is capable of assignment, then the assignee would step into the shoes of his assignor. [41]

> Third parties to the arbitration agreement cannot be impleaded nor they have any right to invoke the arbitration agreement. [42] Persons who are not parties to the arbitration agreement and not claiming under such parties, are not bound by such agreement. [43] The party which invokes this section must not only be entitled to enforce the award, but must also be bound to perform it. [44] If some of the respondents impleaded in a petition seeking appointment of an arbitrator are not parties to the arbitration agreement, they cannot be compelled to participate in the arbitral proceedings. [45] By merely putting signatures on an agreement, the signatories cannot become parties to the arbitration agreement or to the reference. [46]
>
> The fact that a person claiming under a party to an agreement is empowered to move a judicial authority does not establish that all outsiders can claim a right to enforce an arbitration agreement to which they are not parties under the law. [47] If a party who was not made a part of the reference participates under protest, an award made against such a party is not valid. [48]

(4) *Karta:* A *Karta* of a joint family can make a valid reference to arbitration and where he acts *bona fide* the award binds other members. [49]

(5) *Sub-contracts:* Where a term in a sub-contract provides for making of direct payment by the owner to the sub-contractor, then in such circumstances, the owner is a necessary party to the reference and an award passed without joining him would be bad in law. [50] However, in case of back-to-back contracts, a sub-contractor cannot seek arbitration on the basis of the arbitration clause contained in the principal agreement entered into between the owner and the main contractor, unless the arbitration clause is separately and specifically made a part of the subcontract. [51]

(6) *Transferee:* A transferee of a motor vehicle from a person, who is a party to the contract of motor insurance containing the arbitration clause, cannot be deemed to be a party to the arbitration agreement. [52] However, it has been held that upon devolution of interest, transferee upon whom interest is developed was entitled to be impleaded. [53] However, in certain cases, a beneficiary could apply if the party to the agreement was unwilling to do so. [54]

(7) *Minor:* A minor cannot sue the partners for an account of the firm or for payment of his share of the property, or profits of the firm, except when he severs his connection with the firm. Hence, a minor is a necessary party to the arbitration. [55] A reference made by one of the executors of a Will without consulting his coexecutors would be illegal. [56]

6. ESSENTIALS OF ARBITRATION AGREEMENT

2 Arbitration Agreement

The well settled principles in regard to what constitutes an arbitration agreement have been laid down by the Supreme Court [57] as follows:

(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 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. The essential attributes or elements of an arbitration agreement 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; and (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 exclude 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, when 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 far reference to arbitration. For example, use of word 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 parties so decide, the disputes shall be referred to arbitration', or 'any disputes between the 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.

> 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. [58]

> > Davies L.J. in *Baron* v. *Sunderland Corp.* [59] stated: It is necessary in an arbitration clause that each party shall agree to refer disputes to arbitration; and it is an essential ingredient of an arbitration clause that either party may, in the event of a dispute arising refer it, in the manner provided, to arbitration. In other words, the clause must give bilateral rights of reference.

> It is nowhere stipulated in the 1996 Act that 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 clause non-existent in law. [60] Mere non-mentioning of the arbitrator's name in the arbitration agreement does not make it vague and uncertain nor incapable of being enforced by the party wishing to get the disputes resolved through arbitration.

(A) Arbitration Agreement must be Clear and Certain

In case an arbitration agreement is vaguely worded, it cannot be given effect to. As such, while drafting an arbitration clause, nothing should be left to guesswork and intention to settle disputes by means of arbitration should be expressly indicated. If a clause is loosely or vaguely drafted, the courts would have no option but to strike down the same and thereafter the parties would have to seek redressal of their grievances through court proceedings.

A commercial contract *inter parties* must be interpreted in such a manner as to give business efficacy to the contract rather than to invalidate it. [61] To be valid, the terms of an arbitration agreement must be clear and certain. An arbitration agreement is void if its terms are uncertain or there is no clear reference to arbitration. Even if valid, disputes about the meaning of terms, their incorporation, and so forth can be costly and delay arbitration proceedings. [62]

Mere absence of the name of the arbitrator or his designation cannot necessarily have the effect of taking an agreement out of the category of an arbitration agreement if otherwise the intention of the parties to agree to arbitrate is clear. Also, mere non-mentioning of the name of the arbitrator in the space provided for it in the clause providing for arbitration would not make the agreement invalid or inoperative. [63] An agreement is not to be culled out from ambiguity. The golden principle is that ambiguous words are to be left out and ignored while interpreting a given agreement clause. [64]

(B) Arbitration Agreement to be in Writing

An arbitration agreement is required to be in writing. It can be said to be in writing if it is signed by the parties; or if there exists a record of exchange of letters, telex, telegrams or other means of telecommunication; or, if parties exchange statements of claims and defence in which the existence of the agreement is alleged by one party and not denied by the other. The Act does not recognize oral arbitration agreements.

An arbitration agreement has to be in writing. It may be in the form of an arbitration clause in a contract or in the form of a separate agreement. Further, even a reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and reference is such as to make that arbitration clause part of the contract. [65] An arbitration agreement has to be in writing even though it may not be signed. [66] A hand written arbitration clause shall prevail over the printed clause. [67] The location of the arbitration clause cannot be held to restrict its application to a part of dispute. [68]

An arbitration agreement is a contract within the meaning of *section 91 of the Evidence Act*. Parties, thus, cannot lead evidence to vary or add to the terms of the agreement by saying that they made the reference in any other capacity save that appearing from the agreement itself. [69]

When a contract is with the Union or the State Government, then such an agreement must conform with the provisions of 299 of the *Constitution of India* and a valid contract can come into existence only after acceptance thereof by a duly authorized person.[70] The words ‘expressed’ and ‘executed’ in *Article 299(1) of the Constitution* suggest that there should be a formal written contract, a binding contract by tender and acceptance can only come into existence if the acceptance is by a person duly authorized in this behalf by the President of India. [71] Where execution of a formal agreement is a condition precedent to the contract and the same is not done, it would not bind the parties, there being no arbitration agreement between the parties. [72]

Under *section 2(4) of the Arbitration and Conciliation Act*, if there is a provision for arbitration under any other enactment, then there need not be a separate agreement in writing between the parties as contemplated under section 7(4). [73] An

arbitration clause printed on the back page of a goods receipt, which is not specifically brought to the notice of the other party, cannot amount to a concluded contract between the parties. [74]

(C) Written Agreement – What is

To avoid any controversy with regard to what is or what is not to be considered as agreement in writing, is contained in section 7 of the Act itself which provides for:

(1) a document signed by the parties [75];

(2) an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement [76]; or

An agreement shall be deemed to be in existence if one party alleges its existence and the other party does not deny it. [77] Thus, the party going to the court would not be required to prove the existence of an arbitration agreement in writing nor there would arise an occasion for providing a certified copy of the said arbitration agreement.

In ***Halsbury's Laws of England*** [78], it is stated:

> If the agreement is written, it may be included in a particular contract by reference or implication. The agreement between the parties may incorporate arbitration provisions which are set out in some other document, but in order to be binding, the arbitration provisions must be brought to the notice of both the parties.
>
> It is inherent in case of incorporation by reference that the parties are concerned not with one document alone but with at least two, one of which contains an arbitration clause and the other of which does not. In some cases, the one document may constitute a contract between other parties. A common case is where the two documents concerned are a charter party and a bill of lading. If the relevant contract between the relevant parties is contained in the document which does contain the arbitration clause, no question of incorporation arises. Where this is not the case, the question whether the document containing the arbitration clause is incorporated in the relevant contract between the relevant parties is, as always, a question of construction.

(D) Signatures – Whether Necessary to Constitute Arbitration Agreement

An arbitration agreement need not be signed by the parties if it is established by another written contemporaneous document, which is binding between the parties. [79] It is also not a necessary requirement of law that an arbitration agreement must be signed by both parties. [80]

It is a common practice in the construction industry to delay signing contract documents although work proceeds. The practice can lead to disputes about whether an arbitration clause has been incorporated. These disputes are resolved by reference to the same principles of construction as those for whether a contract has come into existence, by a careful examination of whether all the terms have been agreed despite the absence of formality. [81]

Where the arbitration agreement left the identity of the arbitrator vague and uncertain, and was not duly signed by the contesting parties, then the mere vague and uncertain arbitration clause would not be of any avail to the petitioner to take aid of section 11(5) of the Act because the basic requirement of agreement to be in writing and of being signed were not present. [82]

(E) Naming of Arbitrator in Arbitration Agreement not Essential

It is not a requirement of law that the arbitration clause must mention the name of the arbitrator. An arbitration clause which provides that a named authority shall appoint an arbitrator when disputes arise between the parties or that the parties shall mutually decide upon the name of the arbitrator are valid in law. However, where the

arbitration clause names an arbitrator, care should be taken to ensure that the identity of the said arbitrator is not vague or uncertain.

> Mere absence of the name of the arbitrator or his designation cannot necessarily have the effect of taking an agreement out of the category of an arbitration agreement if otherwise the intention of the parties to agree to arbitrate is clear. The naming of the arbitrator in the arbitration agreement is not necessary and in any case it would not make it non-existent. Also, mere non-mentioning of the name of the arbitrator in the space provided for in the clause providing for arbitration would not make the agreement invalid or inoperative. [83]

(F) Identity of Arbitrator must be Certain

While framing an arbitration clause, if the parties opt to name an arbitrator or authorise a person to nominate him, it must be ensured that the identity of the person who is to act as the arbitrator or the person, who has to appoint the arbitrator, must be certain. While drafting the clause, the identity of the said person should not be left to guesswork.

> An arbitration clause provided that in the event of disputes, the matter shall be referred for adjudication of the Chief Engineer/Additional Chief Engineer and the arbitration agreement showed that the authors had expressed alternative intentions without deciding in favour of either. It was held that ambiguity was patent and the clause was held to be void for uncertainty. [84] An arbitration clause provided that in case of dispute the matter 'shall be referred to the sole arbitration of Major General I/C'. It was contended by the government that the words 'Major General' were superfluous. It was however, held that the expression 'Major General' was not a surplusage and the arbitrator to be appointed has to be a Major General. [85]

> When the name of the arbitrator to be appointed was not mentioned and the column was left blank, it was held that mere non-mentioning of the name of arbitrator or authority, who may be called upon to appoint the arbitrator, did not by itself nullify the agreement in any manner. [86]

> When an arbitration clause provided that in case the officer to whom the matter was originally referred vacated office or was transferred, his successor in office shall be deemed to be the sole arbitrator. The expression 'successor' does not mean single successor but would include successive successors in office. [87]

(G) Transfer of Arbitrator Appointed by Designation

> Where an arbitrator appointed by designation relinquishes his post, after reference of disputes, either by transfer, retirement, resignation or otherwise, the arbitrator so appointed is divested of his jurisdiction to act as an arbitrator. [88] The Orissa High Court has, however, held that where the parties to the contract knew fully well that officers of the Union Government were liable to transfer to distant parts of India at short notice. They were aware that arbitration proceedings may take some time and thus with full knowledge of facts agreed to in the arbitration agreement to arbitration by Superintending Engineer 'for the time being', it meant that if on the date of reference the Superintending Engineer of the Circle within whose jurisdiction the work in question was completed, he may dispose of the reference even though he may be transferred elsewhere prior to his giving his decision. [89]

> The arbitration clause 'in the event of the Director General of Supplies and Disposals, to whom the matter is originally referred being transferred or vacating his office for any other reason, his successor in office shall be deemed to have been appointed the sole arbitrator in accordance with the terms of this agreement' was held to mean not only one or single successor but would include successive successors in office. [90]

7. ARBITRATION CLAUSE – WHAT IS

The courts have held the following clauses to be arbitration clauses:

(1) Where the parties have agreed that if disputes arise between them in respect of subject-matter of the contract, such dispute shall be referred to arbitration, then such an arrangement would spell out an arbitration agreement. [91]

(2) Where the agreement provides that the determination is to be accepted as a substitute for a judgment of a court. [92]

(3) Where a clause stated that 'that if any dispute touching the effect and meaning of this agreement arises in between the parties, it shall be referred to the Chairman of the board whose decision shall be final and binding on the parties,' it was held to be an arbitration clause. [93]

(4) Where it is provided that in the matter of dispute, the case shall be referred to certain authority whose order shall be final, it amounts to valid arbitration agreement. [1]

(5) If 'A' accepts the tender for execution of certain works offered by 'B' and gives the work order to 'B' which contains all the terms of the contract including the arbitration clause and, in spite of the fact that the formal agreement was signed at a later date, it is clear that the parties treated themselves bound by the agreement from the date of work order and, therefore, the arbitration agreement existed from the date of the work order. [2]

(6) If the letter of acceptance mentioned that an agreement which was being drawn and would be entered into in due course and the agreement could be signed only after completion of the building, the agreement was held to be valid. [3]

(7) Where the General condition of a contract provided that disputes concerning work or execution or failure to execute work whether arising during the progress of the work or after its completion or abandonment thereof shall be referred to a sole arbitrator, it would be termed as an arbitration clause. [4]

(8) The tender enquiry contained a query: 'Do you agree to sole arbitration by Director General of Supplies and Disposals or his nominee', to which defendant submitted that 'we feel there should be unattached arbitrator'. It was held that it satisfied the test of written agreement as required by the Act since the consensus of both parties to terms embodied in acceptance of tender in writing had been established. [5]

8. ARBITRATION CLAUSE – WHAT IS NOT

The courts have held the following clauses not to amount to an arbitration clause:

(1) Where a clause in a works contract provided that the decision of the Executive Engineer would be final on certain matters, it cannot be said to be an arbitration clause. [6]

(2) If the clause in a contract provides that in case of any dispute arising out of a contract, the matter shall be referred to the concerned court under whose jurisdiction the work is situated, it is not an arbitration agreement. [7]

(3) A clause providing for settlement of questions relating to specifications, design, quality and workmanship and other technical aspects by an officer of one of the parties, cannot be said to be an arbitration clause. [8]

(4) Where a clause in a contract provided that the decision of the Estate Officer, for the time being, shall be final, conclusive and binding on all parties to the contract upon all related matters, it was held that such a clause did not contemplate arbitration. [9]

(5) A clause vesting the Superintending Engineer only with supervision and administrative control of the work did not amount to an arbitration clause. [10]

(6) A clause in a contract *inter alia* providing that 'executive committee should constitute an arbitration committee' cannot be said to be an arbitration agreement. [11]

(7) Where parties agree to set up a private court to give final judgment it will not be seen as an agreement to refer disputes to arbitration. Similarly, a provision for amicable settlement through an Association will not be an arbitration agreement. [12]

(8) A provision in a tender stated that the DGS & D Form No. 68 would be applicable 'including/excluding, clause no. 24' (arbitration clause). It was held that no valid arbitration clause existed between the parties as the word 'excluding' had not been scored out. [13]

(9) A clause in an agreement for sale of goods provided that any dispute arising in relation to the agreement would be settled by arbitration of a neutral person agreed to by both the parties. In addition, it also provided that in case of litigation, court at 'C' would have exclusive jurisdiction. Held that the clause in the agreement was vague and uncertain and could not be said to be an arbitration clause and the expression 'neutral person agreed to by both' was uncertain and as to who would be the neutral person had been left to guesswork. [14]

(10) A construction contract contained a clause to the effect that the question whether the disputes under the contract were to be referred to arbitration was to be a matter for further negotiations. This was held not to be an arbitration clause. [15]

(11) Where the stipulation in the contract was: '...the decision of the Managing Director of U.P.S.I.C. shall be final, conclusive and binding on both the parties to the contract upon all questions relating to any claim, right or matter or thing in any way arising out of or relating to the contract' it was held that the stipulation was more in the nature of the Managing Director being an expert for deciding matters pertaining to the contract and the intention of the parties was to avoid disputes rather than to decide formulated disputes in quasi-judicial manner. [16]

(12) A clause in an agreement provided: 'In the event of any dispute or difference between the parties... the contractor, after 90 days of his presenting his final claim on disputed matters, may demand in writing that the dispute or difference be referred to arbitration, such demand for arbitration shall specify the matters which are in question, dispute or difference, and only such dispute or difference of which the demand has been made and no other, shall be referred to arbitration.' It was held that this was not an arbitration agreement. At best the clause contemplates a contingent agreement or an agreement to agree in the future. [17]

(13) An agreement providing that the parties 'may' agree to go in for a suit or they 'may' also go to arbitration is not an arbitration clause. [18]

(14) Where the parties stipulated that 'Disputes shall be referred to arbitration if the parties so determine', it was not an arbitration clause. [19]

9. EXPERT DETERMINATION AND ARBITRATION – DISTINCTION

Russell [20] states : Many cases have been fought over whether a contract's chosen form of dispute resolution is expert determination or arbitration. This is a matter of construction of the contract, which involves an objective enquiry into the intentions of the parties. First, there are the express words of the dispute clause. If specific words such as 'arbitrator', 'arbitral tribunal', 'arbitration' or the formula 'as an expert and not as an arbitrator' are used to describe the manner in which the dispute resolver(s) is (are) to act, they are likely to be persuasive, although not always conclusive. Where there is express wording which is ambiguous, the court looks first at the other words in the document to resolve the ambiguity. Where there is no express wording, the court will refer to certain guidelines. Of these, the most important used to be whether there was an 'issue' between the parties, such as the value of an asset, on which they had not taken defined positions, in which case the procedure was held to be expert determination; or a 'formulated dispute' between the parties where defined positions had been taken, in which case the procedure was held to be arbitration. This imprecise concept is still being relied on. It is unsatisfactory because some parties to contracts deliberately choose expert determination for dispute resolution. The next guideline is the judicial function of an arbitral tribunal as opposed to the expertise of the expert; judges are not permitted to apply any special expertise and arbitration awards have been set aside where arbitrators have applied their expertise in ways not expected by the parties. This distinction has been blunted slightly by the *Arbitration Act, 1996* under which a tribunal can, unless the parties agree that it should not do so, take the initiative in ascertaining the facts and the law; but the tribunal will still have to give parties an opportunity to put their case on the material. An arbitral tribunal arrives at its decision on the evidence and submissions of the parties and must apply the law or, if the parties agree, other considerations, an expert, unless it is agreed otherwise, makes his own in-quiries, applies his own expertise and the case of 'look-sniff arbitrations' and any other similar commercially and/or contractually accepted procedure. The final guideline, that the parties agree to accept an expert's decision as final, whereas an arbitral tribunal's award can be appealed, has become less important because of the restrictions on appeals from arbitration awards introduced by the *Arbitration Act*

1979.

An arbitrator who said that the hearing should take the form of meetings between himself and technical representatives of the parties, and not a trial-type hearing with oral evidence, cross-examination and speeches, was said by the courts to have adopted a process which was ‘really that of a valuation, rather than an rbitration.’ [21]

10. ARBITRATION AGREEMENT AND VALUATION / CERTIFICATION – DISTINCTION

In *Re Dawdy v. Hartcup* [22], Lord Esher M.R. stated: It has been held that if a man is, on account of his skill in such matters, appointed to make a valuation, in such manner that in making it he may, in accordance with the appointment, decide solely by the use of his eyes, his knowledge and his skill, he is not acting judicially; he is using the skill of his valuer, not of a judge. In the same way, if two persons are appointed for a similar purpose, they are not arbitrators but only valuers. They have to determine the matter by using solely their own eyes and knowledge and skill.

If, on the other hand, a person is appointed with the intention that he should hear the parties and their evidence and decide in a judicial manner, then he is an arbitrator, although mere absence of a hearing, provided it does not result in any unfairness to the parties, will not necessarily invalidate an award. [23]

If it appears from the terms of the agreement by which a matter is submitted to a person's decision, that the intention of the parties was that he should hold an enquiry in the nature of a judicial enquiry and hear the respective cases of the parties and decide, upon evidence led before him, then the case is one of arbitration. The intention in such cases is that there shall be a judicial enquiry worked out in a judicial manner. On the other hand, there are cases in which a person is appointed to ascertain some matters for the purpose of preventing differences from arising, not of settling them when they have arisen and where the case is not one of arbitration but of a mere valuation. [24]

11. ‘ARBITRATOR’ AND ‘MEDIATOR’ – DISTINCTION

The person asked to act as an arbitrator in the settlement of disputes and to record settlement agreed on 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. There is a distinction between ‘arbitrator’ and ‘mediator’. An arbitrator is a person to whom differences and disputes are submitted by the parties. His functions are quasi-judicial in nature. A ‘mediator’ on the other hand is one requested to mediate or intervene between the parties, as a friend, to bring about a settlement. His act is not that of an arbitrator. The settlement brought about by him is not an award within the meaning of the Act. [25]

12. ARBITRATION AGREEMENT BY EXCHANGE OF LETTERS

An arbitration agreement can come into existence by means of correspondence exchanged between the parties. [26] A letter was sent by one party mentioning therein that disputes which arise in future shall be resolved through arbitration. The employer accepted the same without any change and issued letter of award of work accordingly. Such an acceptance constitutes an arbitration agreement. [27] Correspondence exchanged between the parties revealed an admission by the opposite party about existence of an arbitration agreement. Therefore, applying provisions of section 7(4) (c), it can be said that arbitration agreement exists between the parties. [28]

The terms of an arbitration agreement may be collected from a series of documents. It is not necessary to constitute an arbitration agreement that its terms should be contained in one document. [29]

Existence of an arbitration clause can be spelt out from the conduct of the parties. [30] Where a party sent the contract to the other for signing the same but the other party did not sign or confirm the contract but opened Letters of Credit pursuant thereto, it can be said that the contract stood confirmed and the arbitration clause contained therein was binding on both the parties. [31]

The claimants submitted to the Association a claim against the respondent which they signed and sent it to the Association. The arbitrators appointed by the Association placed the document before the respondent who wrote answers thereon and signed. Held, that the document constituted a written agreement. [32] An arbitration agreement contained in the award signed by both the parties is a valid arbitration agreement. [33]

Whether there is an arbitration agreement or not has to be decided with respect to the contract document and not with respect to any contention raised before a court after disputes have arisen. However, reference to pleadings in a court would be relevant if the plea was that the arbitration agreement is contained in exchange of claim statement and the defence statement in which existence of dispute of agreement is alleged by one party but not denied by the other. [34]

13. ARBITRATION AGREEMENT – INCORPORATION BY ANOTHER AGREEMENT

Section 7 makes it abundantly clear that it is not necessary that an arbitration agreement must be a formal agreement, or that all the terms must be reduced in writing to form a part of one document. Thus, complicated questions of construction of documents particularly when arbitration agreement is stated to be from another document, are likely to come up before the courts. An arbitration clause contained in a standard form agreement can be incorporated into an agreement entered into between the parties if the said standard form agreement is specifically referred to in the said agreement and all its terms and conditions are made a part thereof.

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. [35] When a contract refers to another document containing arbitration clause, that document can be deemed to be incorporated in the contract if it contains agreement between parties. [36] An arbitration agreement may arise independently of any other terms of a contract between the parties which must be written but need not necessarily be signed by the parties. [37]

> In *Commercial Arbitration* [38] by Mustill and Boyd, it is stated: the parties need not set out the terms of the arbitration agreement in the contract itself. It is sufficient for the clause to be incorporated by reference either to a standard form of contract or to a set of trade terms which themselves include provisions requiring disputes to be submitted to arbitration. Nor need the contract itself be contained in a single document.

An agreement to submit to arbitration involves a submission signed by both the parties, but an agreement to submit may be collected from a series of documents, even though connected by parol evidence, and the signatures on any document forming part of agreement is sufficient to bind the parties signing to the submission contained in the agreement. [39]

14. ARBITRATION CLAUSE IN SUBSEQUENT AGREEMENT

In a number of contracts, it is stipulated that the provisions of an earlier contract between the same parties shall be deemed to be part of the subsequent contract. There is nothing wrong in such a stipulation and the same is good in law. Instead of reproducing the contents of the earlier contract into the new contract, it will suffice if it is said to be incorporated. However, care must be taken to ensure that while providing for such incorporation, the arbitration clause in the principal contract is specifically mentioned and incorporated in the subsequent contract. This is so for the reason that an arbitration clause is distinct from other clauses of the contract. If it is intended that the arbitration clause of an earlier contract be deemed to be incorporated in the subsequent contract then it has to be so stated in clear and unambiguous language.

An arbitration clause in one contract can be imported into a subsequent contract between the parties if it is not inconsistent with the terms of the subsequent contract, such incorporation of arbitration clause to a subsequent contract is statutorily recognized in the new Act. [40]

If the subsequent agreement, creates new rights and liabilities and can be considered as a new agreement between the parties, then the arbitration clause under the old agreement will not apply to such new rights and liabilities. If, however, the subsequent variations are minor modifications to the original agreement, the other clauses of the old agreement continue to govern the parties including the arbitration clause. [41] Where the original agreement was not substituted by another and the plaintiff relied on the original contract in his suit, the arbitration clause contained in the original contract continues to apply. [42] Printed terms and conditions of another document, do not get incorporated, merely because a reference is made to some of its terms. [43]

Where the parties enter into a fresh contract or where a subsidiary contract in addition to the original contract is entered into and the subsidiary contract does not contain an arbitration clause, then the arbitration clause in the original agreement does not apply [44] and an arbitrator who can decide only matters relating to the original contract cannot look into disputes arising out of the second contract. [45] The same would be the case where the original contract was replaced by novation, by another contract which did not contain any arbitration clause. [46]

When the parties entered into a supplementary agreement, which contained not only the arbitration clause but also other terms of the contract similar to the original contract and the original contract had neither been rescinded nor superseded, it was held that the parties did not intend to substitute and/or rescind the earlier agreement and thus, it cannot be said that the arbitration clause stood perished or that there was any substitution of a new contract or rescission or alteration of the original contract. [47]

15. ARBITRATION AGREEMENT SURVIVES EVEN WHEN CONTRACT FRUSTRATES

When parties incorporate an arbitration clause in their contract, they make it clear that as and when any disputes emanate between them, the same shall be resolved as per stipulation of that clause. In case the work under the contract becomes impossible to execute, then in that event the performance of the contract comes to an end but the arbitration clause survives and parties can seek adjudication of their disputes by means of arbitration.

An arbitration clause is a collateral term in the contract, which relates to resolution of disputes and not performance. Even if performance of the contract comes to an end on account of repudiation, frustration or breach of contract, the arbitration agreement would survive for the purpose of resolution of disputes arising under or in connection with the contract. This position is now statutorily recognized under section 16(1) which *inter alia* provides that an arbitration clause which forms part of the contract has to be treated as an agreement independent of the other terms of the contract; and a decision that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause. [48]

In case of frustration, it is the performance of the contract which comes to an end but the contract would still be existing for purposes such as the resolution of disputes arising under or in connection with it. The question as to whether the contract became impossible of performance and was discharged under the doctrine of frustration would still have to be decided

under the arbitration clause which operates in respect of such purposes. [49] Where the parties to the agreement agree to incorporate an arbitration clause, that clause stands apart from the rights and obligations under the contract. [50] The plea of frustration of contract cannot be allowed to be taken in cases where the arbitrator has died during the course of arbitration proceedings. [51]

16. ARBITRATION CLAUSE DELETED – EFFECT OF

Certain organisations, due to their unhappy experience in the past, have decided to delete the arbitration clause printed in the notice inviting tenders. If while inviting tenders, the employer deletes the arbitration clause that is printed in the tender, then its effect is that parties will not have recourse to arbitration in case disputes arise between the parties. In such case, recourse is available to the parties by means of a civil/money suit before the appropriate court of law.

Where an arbitration clause was deliberately and consciously struck off in the original agreement signed by both the parties, it is explicit that they have done away with the arbitration machinery. Such an agreement does not visualise any arbitration arrangement between the parties and consequently the court has no jurisdiction to make any subsidiary exercise visualised in a situation when in fact an arbitration arrangement exists but with some gaps or deficiencies in the working arrangement. [52]

In *State of Kerala v. Siby Varghese* [53], it was held that: In the instant case, it is the specific finding that in the original agreement signed by the parties, there is no clause for referring the dispute to arbitration. The agreement has been reduced to writing and has been signed by both the parties. The reason for the absence of the arbitration clause was the policy decision of the Corporation. A copy of the agreement which was handed over to the party containing standard specifications contained an arbitration clause which was to be deleted but slipped through without being struck out. That was not a sufficient indication of the intention of both the parties for arbitration. [54]

17. MATTERS BARRED FOR ADJUDICATION BY ARBITRATOR

If the parties have stipulated in the contract that certain types of disputes shall not be the subject-matter of arbitration, then the arbitrators would be exceeding their jurisdiction if they make an award on excepted matters. Arbitrators derive their powers from the agreement between the parties. Thus, if the parties have agreed that certain categories of disputes have to be kept out of the purview of the arbitration clause, the arbitral tribunal cannot exceed its jurisdiction and decide upon such matters.

Where the parties entered into a contract for supply of goods and question arose whether dispute was covered by an arbitration clause, it was held that in view of an independent clause in contract providing for dispute over rates of payment and making decision of Superintending Engineer final, dispute regarding rates does not fall within arbitration clause. [55]

It is for the parties to make their own contract and not for the court to make one for them. Court is only to interpret the contract. If it is found that the dispute raised in the suit is outside or independent of the contract it follows that the arbitration clause will not encompass that dispute. [56]

Not all matters are capable of being referred to arbitration. As a matter of English law, certain matters are reserved for the court alone and if a tribunal purports to deal with them the resulting award will be unenforceable. These include matters where the type of remedy required is not one which an arbitral tribunal is empowered to give. For example, a tribunal cannot impose fines or custodial sentences, and is not therefore suited to dealing with criminal matters. The basis of the arbitration agreement, namely a contractual undertaking for private dispute resolution, makes it unsuitable for dealing with

such issues. [57]

The earlier view [58] that the decision of the Superintending Engineer regarding levy of compensation on account of delay under Clause 2 of PWD agreement was not referable to arbitration, does not hold the field any longer. In a recent judgment, [59] the Supreme Court has upheld the award of an arbitrator wherein the decision of the Superintending Engineer levying liquidated damages upon the contractor was overturned. It was held that a party cannot be a judge in its own cause and where it is responsible for the delay, it cannot at the same time recover liquidated damages from the contractor. It was held that reasonableness of the order of the Superintending Engineer levying liquidated damages can be adjudicated upon by the arbitrators.

If the employer has not given the site on time and/or has failed to supply drawings and instructions on time, and/or where it has failed to supply stipulated materials, and/or in any other manner it has incapacitated the contractor from carrying out the works, it has no right whatsoever to levy liquidated damages upon the contractor. However, in Government departments, liquidated damages are invariably levied even if the contractor is not at fault. This was highly unjust. Now, after the aforesaid judgment, the decision of the concerned officer levying liquidated damages would not be considered final and binding and would be subject to adjudication by the arbitral tribunal.

18. ARBITRATION CLAUSE – WHEN EXTINGUISHES

An arbitration clause is distinct from the other clauses in the contract. Total breach of the substantive stipulations even when it is accepted by the other party does not abrogate the arbitration clause and even the party in default may invoke the same. [60] An arbitration clause stands apart from the rest of the contract. Thus, the question as to whether the contract becomes impossible of performance and was discharged under the doctrine of frustration will still have to be decided under the arbitration clause which operates in respect of such purposes. [61]

Even though the contract may be void, the arbitral clause has to be considered as an independent agreement and will not suffer the consequences of being void. It is for the arbitrator to decide whether the contract is void. [62] An arbitrator's decision that the contract is null and void shall not affect *ipso jure* the validity of the arbitration clause. But, the question would be different where the entire contract containing the arbitration clause stands vitiated by reason of fraud. [63] A contract with an arbitration clause, rolls, as it were, two contracts into one. No doubt, if the main contract does not exist, the arbitration clause cannot exist. [64]

It cannot be laid as an abstract proposition that whenever the contracted work is completed, all rights and obligations of the parties under the contract, *ipso facto* come to an end and the arbitration agreement also perishes with the contract. Each case is required to be considered on its own facts. [65]

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2 *Delhi Development Authority v. Jacksons Engineers Pvt. Ltd.* , 1996 (Suppl) Arb LR 296 (Del) (DB).

3 *Russell on Arbitration,* 22nd Ed., para 2.002, p. 26.

4 *Russell on Arbitration* , 22nd Ed., para 2.022, pp. 33-34.

5 *National Agri. Co-op. Marketing Fed. India Ltd. v. Gains Trading Ltd.,* (2007) 5 SCC 695 : AIR 2007 SC 2327.

6 *Union of India v. Kishorilal Gupta, AIR* 1959 SC 1362 : (1960) 1 SCR 493 [*LNIND 1959 SC 137*] ; *Vinod Shantilal Gosalia v. Anil Vassudev Salgaocar* , 1996 (Suppl.) Arb LR 380 (Bom).

7 *Grid Corp. of Orissa Ltd. v. Indian Charge Chrome Ltd.,* : 1998 (2) Arb LR 128.

8 *Taipack Ltd. v. Ram Kishore Nagar Mal,* 2007 (4) RAJ 108 : 2007 (3) Arb LR 402 (Del).

9 *Patitapabann Mohapatra v. S.E., Eastern Circle,* 2008 (3) Arb LR 136 (Ori) (DB).

10 *BL International Ltd. v. Export Credit Guarantee Corp. of India Ltd.,* (2004) 3 SCC 553 : (2004) 118 Comp Cas 213; *State of U.P. v. Bridge & Roof Co. Ltd. (India),* (1996) 6 SCC 22 [*LNIND 1996 SC 1284*] : AIR 1996 SC 3515.

11 Per PILCHER J. in *HE Daniel Ltd. v. Carmel Exporters and Importers Ltd* ., (1953) 2 Llyod's Rep 103 : *(1953) 2 QB 242*; *Government of Gibraltar v. Kenney* , *(1956) 2 QB 410*; *Ram Lal Jagan Nath v. State of Punjab* , AIR 1966 P&H 436 : (1966) 68 Pun LR 522 (FB).

12 Per Viscount Dilhorne in *The Evje* , (1974) 2 Llyod's Rep 57.

13 *Kruse v. Questier* , (1953) 1 Lloyd's Rep. 310; *(1953) 1 QB 669*; *Gunter Henck v. Andre & Cie SA* , (1970) 1 Llyod's Rep 235.

14 *Stebbing v. Liverpool and London and Globe Insurance Co. Ltd., (1917) 2 KB 433*.

15 *Thorburn v. Barnes* , (1867) LR 2 CP 384.

16 *Union of India v. D.P. Wadia & Sons,* (DB).

17 *Produce Brokers Co. Ltd. v. Olympia Oil and Cake Co. Ltd.* , *(1916) AC 314*.

18 *Faghirzadeh v. Rudolf Woolf SA (Pty) Ltd.* , (1977) 1 Llyod's Rep. 630.

19 *Mantovani v. Carapelli Spa* , (1980) 1 Llyod's Rep 375.

20 4th Ed., Vol.4, para 1215, p. 619.

21 *Union of India v. Pioneer Const.,* 2004 (2) RAJ 39 (Cal).

22 *CMC Ltd. v. Unit Trust of India,* (2007) 10 SCC 751 [*LNIND 2007 SC 270*] : AIR 2007 SC 1557 : 2007 (2) RAJ 202.

23 *NHAI v. Bumihiway DDV Ltd. (JV),* (2006) 10 SCC 763 [*LNIND 2006 SC 767*] : 2006 (3) RAJ 682.

24 Section 2(1) (h), *Arbitration and Conciliation Act, 1996*; *C.G. Therbor v. Union of India,* : (1968) 70 Pun LR (D) 148.

25 *Chennai Container Terminal Pvt. Ltd. v. Union of India* , 2007 (3) Arb LR 218 (Mad) : *2007 (1) MLJ 1* [*LNIND 2006 MAD 3085*] ; *Fisser v. International Bank* , 282 F.2d 231, 233 (2d Cir 1960).

26 *Ravi Prakash Goel v. Chandra Prakash Goel, AIR* 2007 SC 1517 : (2007) 2 Arb LR 1 : (2007) 2 RAJ 382; *Sunderlal Haveliwala v. Bhagwati Devi,*.

27 *T.S. Narayanaswamy v. Swayam Sewa Co-op. Group Housing Society* , 1998 (3) RAJ 368 (Del).

28 *Sudhir Kumar Saha v. J.N. Chemicals Pvt. Ltd.,* : 1984 Arb LR 207; *B.Gopal Das v. Kota Straw Board P. Ltd., AIR* 1971 Raj 258 : 1971 RLW 151.

29 *C.G.Thorborg v. Union of India,* AIR 1968 Del 292 [*LNIND 1967 DEL 151*]: (1968) 70 Pun LR(D) 148.

30 *C.G.Thorborg v. Union of India,* AIR 1968 Del 292 [*LNIND 1967 DEL 151*]: (1968) 70 Pun LR(D) 148.

31 *Indian Mutual General Insurance Society v. Himalaya Finance & Const. Co.,* AIR 1974 Del 114 [*LNIND 1973 DEL 25*]: 1973 RLR 430.

32 *Antony D' Cruz v. B. Ramdas,* : ILR (1979) 2 Ker 419 (DB).

33 *Diwan Chand v. Punjab National Bank Ltd* ., AIR 1932 Lah 291 .

34 *Sanganer Dal & Flour Mills v. Food Corporation of India,* AIR 1992 SC 481 : (1992) 1 SCC 145 [*LNIND 1991 SC 545*] ; *Mahinder Kaur Kochar v. Punjab National Bank,* AIR 1981 Del 106 [*LNIND 1980 DEL 245*] (DB); *Tek Chand Agarwal v. Roop Chand,* 1987 (2) Arb LR 82 (Del); *Sankar Das Rup Lal v. Governor General in Council,* AIR 1952 P&H 234; *Hanuman Chamber of Commerce Ltd. v. Jassam Ram Hiranand,* AIR 1949 EP 46 : (1948) 50 Pun LR 181.

35 *Jagdish Chandra v. Kajaria Traders (India) Ltd* ., AIR 1964 SC 1882 : (1964) 8 SCR 50 [*LNIND 1964 SC 166*].

36 *Vishwanath Prasad Murarka v. Yamuna Prasad* , 1990 (1) Arb LR 218 : 1989 Pat LJR 674.

37 *Musarrat Jahan v. Swapan Kumar Poddar,* AIR 1994 Cal 5 [*LNIND 1993 CAL 258*]: 1994 (1) Arb LR 85 : 1994 (1) Cal LT 387 : 1994 (2) Civ LJ 357 : 1994 (3) Cur CC 304; *Hafiz Qamar Din v. Nur Din,* AIR 1944 Lah 136 : 162 IC 670.

38 *Svapn Const. v. IDPL Employees Co-op. Group Housing Society Ltd.,* 2006 (1) RAJ 486 (Del).

39 *Orion Shipping and Trading Co. v. Eastern States Petroleum Corp* ., 312 F.2d 299 (2d Cir. 1963).

40 *Patanjal v. Rawalpindi Theatres Pvt. Ltd.,* : ILR (1969) Del 393 (DB).

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42 *L&T Ltd. v. D.L.F. Industries Ltd.,* 2002 (3) Arb LR 316 (Del); *General Manager, Oriental Fire & General Insurance Co. Ltd. v. Mahendra Prashad Gupta,* AIR 1983 Pat 190 : 1983 Pat LJR 711; *I.T.C. Classic Finance Ltd. v. Grapco Mining & Co. Ltd.,* AIR 1997 Cal 397 [*LNIND 1997 CAL 112*]: 1998 (1) Arb LR 1 : 1998 (1) ICC 506.

43 *Patanjal v. Rawalpindi Theatres Pvt. Ltd.,* : ILR (1969) Del 393 (DB); *Saibalani Devi v. Dipti Baikash Bhaduri,*.

44 *Probodh K. Sarkar v. Union of India,* : 56 Cal WN 439; *Chennai Container Terminal Pvt. Ltd. v. Union of India,* AIR 2007 NOC 325 : 2007 (3) Arb LR 218 (Mad) : *2007 (3) MLJ 1* [*LNIND 2007 MAD 3773*] (DB).

45 *Svapn Const. v. IDPL Employees Co-op. Group Housing Society Ltd.,* 2006 (1) RAJ 486 (Del).

46 *Padam Chand Jain v. Hukam Chand Jain,* : 1998 (2) Arb LR 466 : 1999 (1) RAJ 267.

47 *Ibid* ; *Oriental Fire and General Insurance Co. Ltd. v. Mahendra Prasad Gupta,* AIR 1983 Pat 190 : 1983 Pat LJ 711 (DB).

48 *Sukalu Ram Gond v. State of M.P.* , 1994 (2) Arb LR 254 : (1994) 5 SCC 570 [*LNIND 1994 SC 690*].

49 *Keshrimal Pyarchand v. Basantilal Pyarchand,* (DB).

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77 See section 7(4) (c).

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3 Notice Invoking Arbitration Clause

PC Markanda: Arbitration Step by Step

P C Markanda

3 Notice Invoking Arbitration Clause

1. NOTICE – PRE-REQUISITE FOR COMMENCEMENT OF ARBITRATION

The general principle is that arbitration is deemed to be commenced when one party serves a notice on the other party intimating that he proposes to invoke the arbitration agreement and calls upon the other party to take some steps towards setting the arbitration process in motion. Unless and until a notice is served on the opposite party calling upon them to appoint an arbitrator in terms of the arbitration agreement, it cannot be expected of the opposite party to know that the party invoking the arbitration agreement is desirous of getting the disputes resolved through arbitration. Another object of the notice is that it would serve as a record, for limitation purposes, to indicate the date when the notice was sent.

> In the absence of agreement to the contrary, an arbitration is treated as being commenced when a notice in writing is served on the other party requiring him to agree to the appointment of an arbitrator or, if the parties are each to make an appointment, requiring him to appoint an arbitrator. Where, however, the arbitration agreement specifies the person to be appointed as arbitrator, the arbitration is treated as being commenced when a notice in writing is served on the other party requiring him to submit the dispute to that person. Finally, if the arbitrator is to be appointed by someone other than a party to the arbitration proceedings, such as an arbitration institution, the arbitration is treated as being commenced when notice in writing is given to that other person requesting him to make the appointment. [1]

> A notice of arbitration or the commencement of arbitration may not bear the same meaning, as different dates may be specified for commencement of arbitration for different purposes. What matters is the context in which the expressions are used. The date on which the request for the dispute to be referred to arbitration is received by the respondent from the claimant is the date on which arbitration commences in respect of that particular dispute. [2]

> The courts have been reluctant to require too much technicality in a notice of arbitration. If the notice simply says that a party requires the dispute to be submitted to arbitration that may be sufficient to commence the arbitration because it is by implication a request to the other to agree to the appointment of an arbitrator or to appoint his arbitrator. It is preferable, however, that the notice should make clear what is required of other party and it is not unusual to impose a time limit for compliance, failing which, if appropriate, an application can be made to court to have the arbitrator appointed. [3] If the communication states '... we hereby submit our claim for Rs. 118.87 crores, on account of non-completion of erection and commissioning of contracts; non-fulfillment of performance guarantee; supply of defective equipments; delay in execution of the job and non-performance of the plant in accordance with the contract', then it definitely indicates that there is a request for entering on the reference of dispute to the arbitration. [4]

2. ESSENTIALS OF NOTICE SEEKING APPOINTMENT OF ARBITRATOR

A notice of arbitration is a written communication by which the reference may be initiated. In the absence of any requirement contained in the arbitration agreement, there are no specific requirements as to the form of the notice. The usual manner is writing of a letter by the claimants to the respondents seeking arbitration alongwith the list of quantified disputes, if so required by the terms of the arbitration agreement. If the arbitration clause provides for appointment of an arbitrator by a specified/designated authority, then the communication invoking the arbitration

clause must be addressed to the said authority and to no other. While framing a notice invoking arbitration to a party or a designated authority, the following points should be kept in mind:

(1) Notice must be addressed to the proper authority and sent to its designated official address;

(2) It should be mentioned that all pre-conditions/procedures prescribed in the arbitration clause have been followed before invoking the arbitration clause;

(3) Though it may not be contractually required, it is advisable to append a list of disputes that require adjudication;

(4) A period of 30 clear days should be prescribed for making the appointment;

(5) It should be specified that in the event of failure to appoint an arbitrator within the stated period, appropriate remedy would be sought; and

(6) The notice seeking appointment of arbitrator should be sent to the opposite party preferably by registered post or by similar means, which provides proof of delivery.

> In case the arbitration agreement provides for appointment of 3 arbitrators, one each to be nominated by the parties and the third to be appointed by the two nominated arbitrators, the name and address of the nominee arbitrator should also be mentioned in the letter invoking arbitration.

The party, which is called upon to appoint an arbitrator in consonance with the arbitration clause, has to be given a notice properly containing complete particulars and has to be duly received by the party. [5] A specific notice invoking arbitration agreement is required to be given before the time of thirty days starts running against the respondent. A mere threat to initiate appropriate legal proceedings, would not be sufficient to put the other party to notice. [6]

It has to be satisfactorily proved to the court that the notice had been sent to the respondent. If such a notice is not sent by registered post or courier then a presumption cannot be drawn in favour of delivery. The onus is on the petitioner to prove that the notice was received by the respondent. [7] Where the notice is vague, indefinite and does not even refer to number, date of agreement and its very receipt by respondent is doubtful, then merely because it bears stamp of a department which does not in any way depict that it was received by correct branch of the department would not be a sufficient service so as to construe receipt of the notice by the concerned department. [8]

Where the petitioner had already made a request for appointment of a sole arbitrator with mutual consent, to which there had been no response from the respondent, it was not necessary for the petitioner to once again undergo the formality of issuing a fresh notice seeking consent of the respondent for appointment of a mutually acceptable sole arbitrator. [9]

3. SERVICE OF NOTICE – MANNER OF

Subject to an agreement as to the manner of service, a written communication is deemed to have been received when it is delivered to the addressee personally or at his place of business, habitual residence or mailing address. Where such place cannot be found after making reasonable inquiry, the communication is taken to be delivered if it had been 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. *Section 3 of the Arbitration and Conciliation Act, 1996* provides the manner in which written communications are to be served, and the same provides as under:

3. Receipt of written communications.—

(1) *Unless otherwise agreed by the parties,—*

(a) *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*

(b) *if none of the places referred to in clause (a) can be found after making a reasonable inquiry, 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.

(2) *The communication is deemed to have been received on the day it is so delivered.*

(3) *This section does not apply to written communications in respect of proceedings of any judicial authority.*

Parties are free to agree upon the manner in which the notice invoking 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 made in accordance with such contractual provisions. [10]

Section 3 of the 1996 Act requires service of 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 *Evidence Act*. [11]The *General Clauses Act*[12] 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 affected at the time at which the letter would be delivered in the ordinary course of post.

4. NOTICE TO BE SENT AT LAST KNOWN ADDRESS

The object of such a notice is obviously to bring to the knowledge of a party the intention of the other party to act upon the arbitration agreement. All that is necessary is that such a notice must be sent by post to the person's last known place of address. If, therefore, a notice is duly sent to the person's address and there is evidence to that effect, it must be treated as a good and proper notice. [13]

If a registered letter addressed to a person at his 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 in the premises, there is no reason why it should not be served on him. If he is compelled to be 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 them to the address where he had gone or to deliver them to some other person authorised by him. [14]

5. COMMUNICATION WHEN CONSIDERED AS DELIVERED

As against the usual manner of computing period for purposes of limitation up to the day when the letter is mailed to the other party, sub-section (2) of section 3 stipulates that it shall be the date on which the opposite party receives the communication. It is submitted that in case the addressee is not available on the date the communication is sought to be delivered or initially refuses to take delivery of the communication, but subsequently accepts it, then the communication shall be deemed to have been delivered on the day when the postal authorities had called upon the addressee on the first occasion.

6. NOTICE TO BE SENT AT CORRECT ADDRESS

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. [15]

A notice can be said to be validly served when:

(1) 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

(2) 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. [16]

7. NOTICE TO BE SERVED ON COMPETENT PERSON

Where a notice was received by a clerk of a society, it was held not to be a good service. In such a case, the right person to be served was the secretary or the director of the society. [17] If a notice is served upon the General Manager, who was not a signatory to the agreement, the period of limitation would not start running from the said date but from the date when the Chief Engineer, who signed the agreement, received the award. The word 'party' as referred to in the Act has to be construed to be a person directly connected with and involved in the proceedings. [18]

8. TIME LIMIT FOR COMMENCING PROCEEDINGS

The procedure for commencement of arbitration proceedings and constituting the arbitral tribunal will be dependent on what the parties have agreed between themselves in the arbitration agreement or subsequent to the reference of disputes to the arbitral tribunal. Under the Act, the parties have been given total freedom to agree between themselves as to the date from which the proceedings shall be deemed to have commenced. It is stated that determination of the date of commencement is of critical importance to the parties in view of the applicability of the Law of Limitation. Once the date of commencement of arbitration proceedings is determined, time stops running and thus there can be no question of the time limit subsequently expiring as regards cause of action included in the reference.

If there be no agreement between the parties as to the date of commencement of arbitral proceedings, the arbitral proceedings shall commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent. As per *section 37(3) of the Arbitration Act*, 1940, 'an arbitration shall be deemed to be commenced when one party to the arbitration agreement serves on the other parties thereto a notice requiring the appointment of an arbitrator...'. In other words, while under the *Arbitration Act*, 1940, arbitration was taken to commence when the claimant invoked the arbitration clause, under the 1996 Act, the clock stops running when the request for seeking arbitration is received by the respondent.

9. SEEKING ARBITRATION WITHIN STIPULATED TIME

The arbitration agreement between the parties may:

(1) impose a time limit for commencement of arbitration proceedings; and/or

(2) provide that a claim may be barred or extinguished after the lapse of the period mentioned in the arbitration agreement.

However, parties cannot by contract stipulate a period of limitation which is shorter than the period prescribed by the *Limitation Act*. The portion of the clause which provides for such a curtailed period of limitation is void, as per the amendment to *section 28 (b) of Indian Contract Act, 1872*. For example, if a clause provides that the employer shall be discharged of any liability if the contractor fails to lodge its claim within 120 days of finalization of the bill, then such a clause would be void to the extent that the period specified, i.e. 120 days would not be binding on the parties. In such a case, the period for lodging a claim would be regulated by the Indian *Limitation Act*, more specifically Article 137 thereof, which provides that a party can prefer a suit within a period of 3 years from the date of cause of action. The above-said amendment to section 28 of the Contract Act is effective from 8 January 1997 and applies to all cases which have arisen thereafter.

> Clause (b) of section 28 of the Contract Act keeps the rights of the contractor to claim the amount which was due to him alive irrespective of a clause in the agreement which limits the period within which he may seek arbitration. [19]

> It is possible for a party to waive any objection to arbitration, while still relying on limitation clause as barring or extinguishing the claim. [20] Where a term of the contract provided that the contractor shall submit the return regarding additional work to the department by the tenth day of the month otherwise the claim shall stand extinguished would not negative the claim of the contractor particularly when the Department had itself allowed part payment against such extra items. Furthermore, if a certain work has been done, the person doing the work is entitled to reasonable compensation unless it was intended that the work was being done *gratis* . [21]

10. NOTICE TO SPECIFY MATTERS IN DISPUTE

It is doubtful if the date of commencement of arbitration would be reckoned from the date when a vague and uncertain notice is served by the claimants on the respondents. The notice served on the respondents must meet the stipulations contained in the arbitration agreement. Failure to comply with this may make the notice ineffective meaning thereby that the time may not stop running for purposes of limitation. However, if the stipulations in the arbitration agreement simply enjoin upon the claimants to convey their intentions to seek arbitration, a simple notice to that effect would be sufficient to meet the requirements of section 3 of the 1996 Act. In CPWD contracts, the arbitration clause, inter alia, provides as follows:

> It is a term of this contract that the party invoking arbitration shall give a list of disputes with amounts claimed in respect of each such dispute alongwith the notice for appointment of arbitrator and giving reference to the rejection by the Chief Engineer of the appeal.

While seeking reference to arbitration under such a clause, it is essential that not only a list of disputes be submitted but that the disputes ought to be quantified in terms of money or relief sought.

FIDIC conditions of contract too specify the following procedure for raising claims:

> **53.1 Notice of Claims.—** Notwithstanding any other provision of the Contract, if the Contractor intends to claim any additional payment pursuant to any Clause of these Conditions or otherwise, he shall give notice of his intention to the Engineer, with a copy to the Employer, within 28 days after the event giving rise to the claim has first arisen.

> **53.2 Contemporary Records.—** Upon the happening of the event referred to in Sub-Clause 53.1, the Contractor shall keep such contemporary records as may reasonably be necessary to support any claim he may subsequently wish to make. Without necessarily admitting the Employer's liability, the Engineer shall, on receipt of a notice under Sub-Clause 53.1, inspect such contemporary records and may instruct the Contractor to keep any further contemporary records as are reasonable and may be material to the claim of which notice has been given. The Contractor shall permit the Engineer to inspect all records kept pursuant to this Sub-Clause and shall supply him with copies thereof as and when the Engineer so instructs.

> **53.3 Substantiation of claims.—** Within 28 days, or such other reasonable time as may be agreed by the Engineer, of giving notice under Sub-Clause 53.1, the Contractor shall send to the Engineer an account giving detailed particulars of the amount claimed and the grounds upon which the claim is based. Where the event giving rise to the claim has a continuing effect, such account shall be considered to be an interim account and the Contractor shall, at such intervals as the Engineer may reasonably require, send further grounds upon which it is based. In cases where interim accounts are sent to the Engineer, the Contractor shall send a final account within 28 days of the end of the effects resulting from the event. The Contractor shall, if required by the Engineer so to do, copy to the Employer all accounts sent to the sent to the Engineer

pursuant to this Sub-Clause.

53.4 Failure to Comply.— If the Contractor fails to comply with any of the provisions of this Clause in respect of any claim which he seeks to make, his entitlement to payment in respect thereof shall not exceed such amount as the Engineer or any arbitrator or arbitrators appointed pursuant to Sub-Clause 67.3 assessing the claim considers to be verified by contemporary records (whether or not such records were brought to the Engineer's notice as required under Sub-Clause 53.2 and 53.3).

An analysis of the clause would show that:

(1) Clause 53.1 requires the contractor to notify the Engineer of any event leading to the delay and also expects him to inform the Engineer of his intention to make a claim for the same. This clause does not require the contractor to quantify the claim or to send vouchers etc. at that stage. It only requires a notification of intention to prefer a claim.

(2) Clause 53.2 requires the Engineer to notify the contractor to keep ready contemporary records pertaining to the claims.

(3) Clause 53.3 follows up on clause 53.2 and again requires a notice from the Engineer to the contractor to submit details of expenses incurred.

(4) Notwithstanding the above, Clause 53.4 makes it clear that non-furnishing of details as per clauses 53.1 to 53.3 does not debar a claim at all. It only restricts the contractor to the determination as made by the Engineer or Arbitrators as the case may be.

(5) Thus, non-furnishing of details in accordance with clauses 53.1 to 53.3 is not fatal to a claim and cannot be made a sole ground for rejection of the claim in toto. However, in order to avoid time-consuming technical objections during arbitration proceedings, it is advisable for the party to follow the procedure prescribed in the above clauses so as to allow the Engineer and the Employer an opportunity to examine his claims fully.

11. PRE-REFERENCE PROCEDURES

Where an arbitration clause requires a party to follow a set procedure before invocation of arbitration, the stipulated procedure must be strictly adhered to. In case the procedure is not followed in its entirety, the party would not be entitled to seek arbitration and the courts may refuse to make the appointment on the ground that the application seeking appointment is premature. In CPWD contracts, the arbitration clause provides the following procedure:

(1) If the contractor considers any work demanded of him to be outside the requirements of the contract, or disputes any drawings, record or decision given in writing by the Engineer-in-Charge on any matter in connection with or arising out of the contract or carrying out of the work, to be unacceptable, he shall promptly within 15 days request the Superintending Engineer in writing for written instruction or decision. Thereupon, the Superintending Engineer shall give his written instructions or decision within a period of one month from the receipt of the contractor's letter.

If the Superintending Engineer fails to give his instructions or decision in writing within the aforesaid period or if the contractor is dissatisfied with the instructions or decision of the Superintending Engineer, the contractor may, within 15 days of the receipt of Superintending Engineer's decision, appeal to the Chief Engineer who shall afford an opportunity to the contractor to be heard, if the latter so desires, and to offer evidence is support of his appeal. The Chief Engineer shall give his decision within 30 days of receipt of contractor's appeal. If the contractor is dissatisfied with this decision, the contractor shall within a period of 30 days from receipt of the decision, give notice to the Chief Engineer for appointment of arbitrator failing which the said decision shall be final binding and conclusive and not referable to adjudication by the arbitrator.

(2) Except where the decision has become final, binding and conclusive in terms of Sub Para (i) above, disputes or difference shall be referred for adjudication through arbitration by a sole arbitrator appointed by the Chief Engineer, CPWD, in charge of the work or if there be no Chief Engineer, the administrative head of the said

> CPWD. If the arbitrator so appointed is unable or unwilling to act or resigns his appointment or vacates his office due to any reason whatsoever another sole arbitrator shall be appointed in the manner aforesaid. Such person shall be entitled to proceed with the reference from the stage at which it was left by his predecessor.

A perusal of the above clause shows that the procedure set out is as follows:

(a) If a contractor disputes any decision or considers any work to be beyond the contract, he shall, within 15 days, request the Superintending Engineer, in writing, for written instructions or decision;

(b) Thereupon, the Superintending Engineer shall give his written instructions or decision within a period of one month from the receipt of the contractor's letter;

(c) If the Superintending Engineer fails to give his instructions or decision in writing within the aforesaid period or if the contractor is dissatisfied with the instructions or decision of the Superintending Engineer, the contractor may, within 15 days of the receipt of the Superintending Engineer's decision, appeal to the Chief Engineer;

(d) The Chief Engineer shall give his decision within 30 days of receipt of the contractor's appeal; and

(e) If the contractor is dissatisfied with this decision, the contractor shall, within a period of 30 days from receipt of the decision, give notice to the Chief Engineer for appointment of arbitrator.

The above-procedure providing for a decision first by the Superintending Engineer and then an appeal to the Chief Engineer must be adhered to by the party and it is only thereafter that he can seek appointment of an arbitrator. If the party does not follow the procedure, then the Chief Engineer or the court, as the case may be, would be justified in rejecting its request for appointment of an arbitrator. To avoid time-consuming technical objections, a party which seeks to have the matter resolved through arbitration should adhere to the time limits provided in the arbitration clause. However, as stated above, a time limit which limits the period of limitation is not binding in law.

12. PAYMENT OF FEES AS PRE-CONDITION FOR ARBITRATION

Certain organisations, such as State PWDS, have recently started incorporating a new sub-clause in the arbitration clause to the effect that the party seeking arbitration should deposit a certain percentage of the amount of claims alongwith the letter invoking the arbitration clause. The avowed purpose of such a clause is to discourage frivolous claims. However, in practicality it is seen that the said clause discourages contractors from seeking arbitration. The courts, including the Supreme Court, have upheld such clauses and hence, where such a clause exists, the party seeking arbitration must deposit the prescribed amount, failing which he would not be entitled to seek arbitration. The said subclause reads as under:

> (viii) It shall be an essential term of this contract that in order to avoid frivolous claims, the party invoking arbitration shall specify the disputes based on facts and calculations stating the amount claimed under each claim and shall furnish a ‘deposite-at-call’ for ten percent of the amount claimed, on a scheduled bank in the name of the Arbitrator, by his official designation who shall keep the amount in deposit till the announcement of the award. In the event of an award in favour of the claimant, the deposit shall be refunded to him in proportion to the amount awarded with respect to the amount claimed and the balance, if any, shall be forfeited and paid to the other party.

Where a clause in a contract provided that no reference of arbitration shall be maintainable unless the contractor furnished, to the satisfaction of the Executive Engineer-in-charge, a sum of money equivalent to 7% of the amount of claims, then no arbitration can commence till the claimant makes the required deposit. [22] Such a deposit is a balancing factor to prevent frivolous and inflated claims. [23] Even if an arbitrator is appointed by a court, without the aforesaid deposit having been made, the same is liable to be set aside since it was contrary to the stipulations contained in the arbitration clause. [24] An arbitrator cannot proceed with the arbitration matter if the claimant has failed to deposit the fee as stipulated in the arbitration agreement. [25]

13. EXISTENCE OF DISPUTES – PRE-REQUISITE FOR INVOCATION OF ARBITRATION

Section 7(1) enjoins upon the party invoking the arbitration agreement 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. It would, thus, be clear that the Act contemplates that before invocation of the arbitration agreement, the applicant should have crystallized disputes in hand and not mere claims.

An application for arbitration can be made only when a dispute arises between the parties to the arbitration agreement. [26] To give arbitrators jurisdiction to make an award in dispute regarding a contract, it is incumbent on the party claiming arbitration to show that there are disputes between him and the opposing party arising out of or in relation to contract entered into between them. [27] Non-payment of price for one reason or the other constitutes dispute and the award made on such a dispute was not without jurisdiction. [28]

Russell [29] states: It will normally be appropriate to commence arbitration proceedings only once an actual dispute has arisen between the parties. This is reflected from the fact that most arbitration agreements refer specifically to ‘disputes’ or ‘differences’ being submitted to arbitration and in such a case a tribunal will not have jurisdiction to deal with the matter until a dispute or difference has arisen. Common sense also suggests that it will usually be precipitate to set in motion arbitration proceedings where the proposed respondent has not yet had the opportunity to accept liability or comply with whatever is being demanded of him.

14. ‘DISPUTE’ – MEANING OF

If one party asserts a right and the other repudiates the same, that is a dispute. Similarly, any question on which parties join issue whether the court can legally enquire into it, is a dispute. It is analogous to a cause of action before a civil court. Where there is a difference between the parties about the liability of each other, a dispute is clearly made out. [30]

A mere failure to pay is not necessarily a difference, and the mere fact that the party could not or would not pay does not in itself amount to a dispute, unless the party who chooses not to pay raises a point of controversy regarding, for instance, the basis of payment or the time or manner of payment. [31] Failure to perform the contract and to pay the amount claimed may take place under such circumstances as may lead to the inference of repudiation and denial of the right of the other party. Failure to pay under a claim of right is certainly a dispute. [32]

15. ‘DISPUTE’, ‘DIFFERENCE’ – DISTINCTION

The word ‘difference’ or the word ‘dispute’ has a particular meaning in the law of arbitration. It is not every kind of difference or dispute which is referable to arbitration. A difference may be, for instance, regarding the meaning of a particular term in the contract. It may be that one party feels that he has performed the contract but the other party says that the real meaning of the contract is something else and what has been done is not the true performance of the contract. This then would be a difference. Under the law of arbitration, a dispute means that one party has a claim and the other party says, for some specific reasons that this is not a correct claim. This is a dispute. [33] Reference can be made if there is a dispute, *i.e.* a claim made by one party and repudiated or denied by the other party and the reference has to be made in accordance with the provisions of the agreement. [34]

There is authority for the view that the word ‘differences’ has a wider scope than ‘disputes’ although we knew of no case where the distinction has been decisive on an issue of jurisdiction. In practice, the words appear to have been used

interchangeably. A dispute or difference nonetheless so because the divergence of view as to law or fact has been indicated by phrases of courtesy rather than the language of violence. [35]

The use of the words ‘differences’ or ‘disputes’ in an arbitration agreement is important in defining its scope, since they mean more than the existence of a claim, about which there may be no dispute or difference; thus the word ‘claim’ on its own has led to difficulty. [36]

> Russell [37] states: The question whether there is a dispute or merely a claim will for example arise where a party wishes to include the claim within the term of the existing reference covering other, clearly disputed issues. In *Lesser Design & Build Ltd. v. University of Surrey* [38], claims made under a JCT building contract were held to be ‘in dispute’ simply because they were not agreed; the claims had not actually been rejected and the time for payment had not yet arrived. By contrast, however, the court felt unable in the same case to extend the reference to matters which had not even been claimed at the time the arbitration was commenced.

16. DETERMINATION OF DISPUTES

The test is whether recourse to the contract by which the parties are bound is necessary for the purposes of determining the matter in dispute between them. If such recourse to the contract is necessary, then the matter must come within the scope of the arbitrator's jurisdiction. [39] An arbitration clause must be interpreted broadly, and all doubts as to whether a dispute is encompassed by a particular clause must be resolved in favour of arbitration, even where the problem is thec construction of the contract language itself. [40]

Dispute as to whether certificate has been improperly refused is a question that can be gone into by the arbitrator as being within the arbitration clause of the agreement. [41] So also a claim for payment for works done, payment of which has been refused. [42] A claim for damages and quantum thereof was subject to arbitration clause. [43] The words ‘interpretation or application of the contract’ are frequently used in arbitration agreements and they generally cover disputes between the parties in regard to construction of the relevant terms of the contract as well as their effect. [44]

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1 *Russell on Arbitration* , 21st Ed., para 5.027, pp. 183-184.

2 *Milkfood Ltd. v. GMC Ice Cream (P) Ltd., AIR* 2004 SC 3145 : (2004) 7 SCC 288 [*LNIND 2004 SC 439*] : 2004 (1) RAJ 684.

3 *Russell on Arbitration* , 21st Ed., para 5.029, pp. 184-185.

4 *ABB ABL Ltd. v. Cement Corp. of India* , 1999 (3) RAJ 234 (Del) : (1999) 78 DLT 132.

5 Engg. Dev. Corp. v. M.C.D., 2005 (Supp) Arb LR 225 : 2006 (1) RAJ 132*(Del); K. Bikramm Singh v. Lalit Kala Academy,* 2007 (3) RAJ 329 (Del).

6 *Indo Pacific Aviation Pvt. Ltd. v. Pawan Hans Helicopters Ltd.,* 2008 (1) RAJ 681 (Del).

7 *Ibid. Agra Development Authority v. Sheikhein Int'l,* AIR 2008 NOC 22 : 2007 (3) Arb LR 1 (All) (DB).

8 Ibid.

9 *Yogesh Kumar Gupta v. Anuradha Rangarajan,* 2007 (2) RAJ 436 (Del) : 2007 (2) Arb LR 447 (Del).

10 *Russell on Arbitration* , 21st Ed., para 5.033, p. 186.

11 *Kapur & Sons v. Raj Kumar Khanna* , AIR 1955 P&H 235 : (1955) 57 Pun LR 340 (DB).

12 Act X of 1897, section 27.

13 *Chotumal Nathuram Joshi v. Bhagwandas Zutalal Marwadi,* : 1973 Mah LJ 637 [*LNIND 1972 BOM 80*].

14 *Madan & Co. v. Wazir Javir Chand* , 1988 (2) RCR 634 (SC); *State of M.P. v. Hiralal* , JT 1996 (1) SC 669 ; *Anil Jain v. Madhunam Appliances (P) Ltd.* , 1997 (2) Arb LR 325 (Del).

15 *Schumacher t/a Vita Konzern v. Laurel Island Ltd.* , [1995] 1 Lloyd's Rep. 208.

16 Section 3(1).

17 *Naresh Kumar Gupta v. Nav Bharat Times Co-op. Group Housing Society Ltd.* , 1994 (1) Arb LR 1 (Del).

18 *Union of India v. Tecco Trichy Engineers & Contractors,* (2005) 4 SCC 239 [*LNIND 2005 SC 275*] : AIR 2005 SC 1832 : 2005 (1) Arb LR 409 : 2005 (1) RAJ 506 (SC).

19 *J.K. Anand v. Delhi Development Authority* , (2001) 59 DRJ 380 [*LNIND 2001 DEL 655*]; *Hindustan Construction Company v. Delhi Development Authority* , 1999 (1) Arb LR 272; *Oriental Insurance Company Limited v. Karur Vyasa Bank Limited,* AIR 2001 Mad 489 [*LNIND 2001 MAD 416*]: (2001) 3 LW 866; *R.R. Constructions v. St. Ann's Coperative Group Housing Society,* 2008 (2) RAJ 605 (Del).

20 *Aktiebolaget Legis v. Berg (V) & Sons Ltd* ., [1964] 1 Llyod's Rep. 203; *Smeaton Handscomb & Co. Ltd. v. Sasson I Setty Son & Co.* , *[1953] 1 WLR 1481*.

21 *Punjab State v. Amar Nath Aggarwal Const. (P) Ltd* ., (1993) 3 PLR 1.

22 *S.K. Jain v. State of Haryana,* (2009) 4 SCC 357 [*LNIND 2009 SC 425*] : 2009 (1) Arb LR 525 : (2009) 2 RAJ 197; *J.G. Engineers (P) Ltd. v. NBCC Ltd.,* 2009 (2) RAJ 122 (Del).

23 *National Building Construction Corp. v. State of Haryana,* AIR 2007 P&H 111 : 2007 (146) Pun LR 708 (DB).

24 *Municipal Corporation, Jabalpur v. Rajesh Construction Co.,* (2007) 5 SCC 344 [*LNIND 2007 SC 476*] : AIR 2007 SC 2069 : 2007 (2) RAJ 274.

25 *Municipal Corporation v. Rajesh Construction Co.,* (2007) 5 SCC 344 [*LNIND 2007 SC 476*] : AIR 2007 SC 2069 : 2007 (5) JT 540 : 2007 (2) Arb LR 65 : (2007) 2 RAJ 274.

26 *Jammu Forest Co. v. State of J&K* , AIR 1968 J&K 86 : 1968 Kash LJ 134; *Nandram Hanutram v. Raghunath & Sons,* : 93 Cal LJ 92; *Dawoodbhai Abdulkader v. Abdulkader Ismailji,* ; *Dilip Construction Co. v. Hindustan Steel Ltd.,* : 1973 MPLJ 786 (DB).

27 *Mahomed Haji Hamed v. Pirojshaw R. Vakharia & Co.,*.

28 *Nanalal M. Varma and Co. Ltd. v. Alexandra Jute Mills Ltd.,* : 1989 (1) Arb LR 235 (DB).

29 *Russell on Arbitration* , 21st Ed., pp. 176-177.

30 *Jammu Forest Co. v. State of J&K* , AIR 1968 J&K 86 : 1968 Kash LJ 134; *Chandmull Ganeshmull v. Nippon Munkwa Kabushiki Kaisha,* (DB); *Nandram Hanutram v. Raghunath & Sons Ltd.,* : 93 Cal LJ 92; *T.Wang v. Sona Wanqdi,* (DB).

31 *Dawoodbhai Abdulkader v. Abdulkader Ismailji,*.

32 *Nandram Hanutram v. Raghunath & Sons Ltd* ., AIR 1954 Cal 245 [*LNIND 1953 CAL 186*]: 93 Cal LJ 92.

33 *Salecha Cables (P) Ltd. v. HPSEB* , 1995 (1) Arb LR 422 : 1995 AIHC 762 (HP).

34 *Continental Construction Ltd. v. National Hydroelectric Power Corp. Ltd.* , 1998 (1) Arb LR 534 (Del).

35 Per Mccardie in *Selby v. Whitbread & Co.* , *[1917] 1 KB 736*.

36 *Russell on Arbitration,* 21st Ed., p. 62.

37 *Russell on Arbitration,* 21st Ed., p. 177.

38 56 Build LR 57.

39 *Ruby General Insurance Co. Ltd. v. Pearey Lal Kumar, AIR* 1952 SC 119 : [1952] SCR 501 [*LNIND 1952 SC 9*].

40 *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.* , 460 US 23-26 : 103 SCT 927 : 74 L.Ed. 2d 765 (1983).

41 *Maltex Malsters (P) Ltd. v. Allied Engineers,* (DB) : ILR 1975 Del 57.

42 *Gannon Dunkerley & Co. v. Union Carbide (India) Ltd.,* ; *Kumar and Kumar v. Union of India,* : 1978 Pat LJR 416.

43 *Reliable Water Supply Service of India (P) Ltd. v. Union of India* , [1972] 4 SCC 168 : AIR 1971 SC 2083.

44 *Printers (Mysore) Pvt. Ltd. v. Pothan Joseph, AIR* 1960 SC 1156 : [1960] 3 SCR 713 [*LNIND 1960 SC 140*].

4 Appointment of Arbitrator

PC Markanda: Arbitration Step by Step

P C Markanda

4 Appointment of Arbitrator

1. PARTIES FREE TO AGREE UPON PROCEDURE FOR APPOINTMENT OF ARBITRATOR

If the parties have agreed between themselves as to the manner in which the arbitrator shall be appointed, then the appointment has to be made in the manner prescribed. However, if the procedure fails due to inaction or refusal of one party, then, on an application by one of the parties to the agreement, the Chief Justice or his designate shall have jurisdiction to appoint an arbitrator and while making the appointment, they shall give due regard to the qualifications of the arbitrator, if any, prescribed in the arbitration agreement.

Sub-section (2) of section 11 provides that parties are free to agree on the procedure for appointing an arbitrator. [1]If the parties have agreed on a procedure for appointment of an arbitrator or arbitrators, sub-sections (3) and (5) will have no application. Where the arbitration clause does not provide as to how the appointment of the arbitrator is to be made, then the parties shall adopt the procedure as prescribed under the Act. [2] Recourse to sub-section (6) can be had only where the parties have agreed on a procedure for appointment of an arbitrator. [3]

While sub-section (4) provides for a situation where the arbitration agreement itself prescribes the procedure for appointment of an arbitrator, sub-section (5) applies where the arbitration agreement does not so prescribe. It is only where the parties to an arbitration agreement do not mutually agree or are unable to agree on the arbitrator would the question of one of the parties requesting the Chief Justice, to appoint the arbitrator, arise. [4] Failure on the part of the respondent to agree to the appointment of the arbitrator within 30 days from the date of receipt of notice would give right to the petitioner to approach the Chief Justice and another opportunity to the respondent to make the appointment of an arbitrator shall not be afforded. [5]

If a party refuses to act or does not act as per the agreed procedure under the contract for referring the matter to arbitration, such party cannot insist that arbitrators should be appointed as per the machinery provided under the contract. This would result in giving premium to a defaulting party who may be interested only in delaying the proceedings. [6] However, where an agreement specifically provides for appointment of two gazetted railway officers of equal status as arbitrators, it is incumbent upon the court to give effect to the stipulation. [7]

The person designated in the agreement derives his power to appoint an arbitrator from the arbitration agreement. [8] If the power to appoint the arbitrator was vested with the Chairman, a party cannot approach the court directly for appointment of arbitrator by giving notice to the other party. [9] If the parties have stipulated in the arbitration agreement as to the manner in which the appointment of an arbitrator shall be made, the procedure contemplated by them shall be followed and the arbitrator or arbitrators shall be appointed in accordance with the procedure agreed upon. [10]

An arbitration clause clearly provided that if the two arbitrators appointed by the parties failed to reach a consensus, the presiding arbitrator ‘shall be appointed by the Council of IRC.’ In view of the said clause, the only course open to the petitioner was to approach the IRC and only on its failure to appoint an arbitrator would it be entitled to approach the court. [11]

2. APPOINTMENT OF ARBITRATOR BY CHIEF JUSTICE OR HIS DESIGNATE

Section 11, which deals with appointment of arbitrator through the intervention of the court (when the parties or the authority designated under the agreement fail to do so), reads as follows:

11. Appointment of arbitrators.—

(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.*

(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 subsection (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 situate and, where the High Court itself is the Court referred to in that clause, to the Chief Justice of that High Court.*

The rationale behind conferring power on Chief Justice or his designate is: (i) to confer the power on the highest judicial authority in the State for matters relating to domestic arbitration, and on the Chief Justice of India for matters relating to international commercial arbitration, is to add the greatest credibility to the arbitral process and to ensure utmost authority to the process of constituting Arbitral Tribunal, excluding exercise of power by District Court; and (ii) to exclude exercise of power by the court on an entity leading to obvious controversies in matters of procedure to be followed and rights of appeal governing the matter, so as to restrict interference by courts in the arbitral process. [12]

A combined reading of sub-sections (5) and (6) of section 11 clearly indicates that the Chief Justice comes in only when the parties fail to act on an agreed procedure. [13] When the parties do not concur in the appointment of an arbitrator or arbitrators, or the party who was to appoint the arbitrator does not make the proper appointment in accordance with the agreement within time, the court may, on the application of the party who gave the notice, appoint an arbitrator who shall have the like power to act in the reference and to make an award as if he had been appointed with the consent of all the parties. [14] No time limit is specified within which appointment of arbitral tribunal has to be made. [15]

3. DRAFTING OF PETITION FOR APPOINTMENT OF ARBITRATOR

Circumstances under which a party has to approach the Chief Justice or his designate or institution named by him are enumerated in sub-sections (4), (5) and (6) of Section 11. The Supreme Court as well as various High Courts have provided Rules as to the manner in which an application seeking appointment of an arbitrator is to be drafted. As per the Rules framed by the Supreme Court, a party seeking appointment of an arbitrator has to file a petition in writing and this has to be accompanied by:

(1) the original arbitration agreement or a duly certified copy thereof;

(2) the names and addresses of the parties to the arbitration agreement;

(3) the names and addresses of the arbitrator, if any, already appointed;

(4) the names and addresses of the person or institution, if any, to whom or to which any function has been entrusted by the parties to the arbitration agreement under the appointment procedure agreed upon by them;

(5) the qualifications required, if any, of the arbitrator by the agreement of the parties;

(6) a brief written statement describing the general nature of the disputes and the points at issue;

(7) the relief or remedy sought; and

(8) an affidavit, supported by relevant documents, to the effect that the conditions to be satisfied under sub-section (4) or sub-section (5) or sub-section (6) of Section 11, as the case may be, before making the request to the Chief Justice, have been satisfied.

All the High Courts have provided their own schemes for filing of applications seeking appointment of an arbitrator and the same are, by and large, similar to that prescribed by the Supreme Court. The fee to be filed with an application too has been fixed by the Supreme Court and the High Courts. It is also prescribed in the said Rules that if the application filed by a party does not satisfy the conditions prescribed, the same is liable to be rejected.

4. ISSUES TO BE DETERMINED BY CHIEF JUSTICE BEFORE APPOINTING ARBITRATOR

When a petition under section 11 of the Act seeking appointment of an arbitrator is listed before the Chief Justice or his designate, he has to first satisfy himself that an arbitration agreement exists between the parties and that the procedure prescribed for appointment of an arbitrator has failed. On being satisfied *prima facie* that the matter deserves further consideration, the Chief Justice or his designate would issue notice to the other party to the arbitration agreement to answer the averments made in the application. The Registry of the High Court or Supreme Court, as the case may be, shall thereafter issue summons alongwith a copy of the application to the other party calling upon it to file its reply and to appear on a specified date before the court. As per Rule 11 of the Rules framed by the Supreme Court, the notice shall be issued in the manner as prescribed in *section 3 of the Arbitration and Conciliation Act, 1996*.

The Supreme Court in *National Insurance Co. Ltd. v. Boghara Polyfabs (P) Ltd* . [16] has categorised the issues which the Chief Justice or his designate may or may not decide while deciding upon an application seeking appointment of an arbitrator, in the following manner:

(1) *Issues which Chief Justice/designate will have to decide:*

  (a) whether the party making the application has approached the appropriate court;

  (b) whether there is an arbitration agreement; and

  (c) whether the party who has applied under section 11 of the Act is a party to such an agreement.

(2) *Issues which Chief Justice/designate may choose to decide:*

  (a) whether the claim is a dead (long barred) claim or a live claim;

  (b) whether the parties have concluded the contract/transaction by recording satisfaction of their mutual rights and obligations or by receiving the final payment without objection.

(3) *Issues which Chief Justice/designate should leave exclusively to the Arbitral Tribunal:*

  (a) whether a claim made falls within the arbitration clause (as for example, a matter which is reserved for final decision of a departmental authority and accepted or excluded from arbitration);

  (b) merits of any claim involved in the arbitration.

In addition to the above, it is mandatory for the Chief Justice/designate to ensure that the procedure prescribed in the arbitration agreement has been followed by the parties before approaching the court with an application under section 11. If the procedure agreed upon between the parties in the arbitration agreement itself or otherwise stipulated in the contract has not been followed, the Chief Justice or his designate would refuse to appoint an arbitrator.

Under sub-sections (5) and (6) of section 11, the Chief Justice or his designate has firstly to decide his own jurisdiction, i.e. whether the applicant has approached the right High Court. He then has to decide whether there is an arbitration agreement and whether the applicant is a party to such an agreement. [17] The Chief Justice, while deciding issues such as live claims and limitation, records *prima facie* finding only to put arbitration proceedings in motion. However, if there is a valid dispute on the question of limitation, it is appropriate that the Chief Justice or his designate merely records his satisfaction that there exists such a dispute and leaves it for the decision of the arbitral tribunal. [18]

4 Appointment of Arbitrator

Where the parties agreed to a procedure which permitted the appointing authority to forward a panel of probable arbitrators to the petitioner within sixty days from the date of receipt of a valid demand, in that case an attempt to abridge the time by seeking intervention of the court was not permissible. [19]

5. EXISTENCE OF DISPUTES ESSENTIAL BEFORE INVOCATION OF ARBITRATION CLAUSE

The duty of an arbitral tribunal is to adjudicate upon disputes that have arisen between the parties. Disputes mean crystallized disputes and not mere claims. In many arbitration clauses it is generally stipulated that the party seeking arbitration shall inform the opposite party of the claims which it wishes to be adjudicated upon. If such a stipulation exists, a request for appointment of an arbitrator without such a list of quantified claims would not be proper.

The party submitting the claims should specify in the said notice that if the claims are not settled within 15 days (or any other time which may be mentioned in the letter invoking arbitration), then the same shall be deemed to be disputes which would be referred to arbitration. If an agreement provides that the employer or his nominee would consider the claims within a fixed number of days, then on the expiry of the said period, it can be taken that there is a refusal to pay or settle the disputes.

An application for appointment of an arbitrator may be filed under section 11 only if there are disputes in existence between the parties. [20] A dispute arises when a claim is asserted by one party and denied by the other on whatever grounds. [21] Repudiation and denial of the claim can justly be inferred from the conduct of the party and other circumstances. [22] Mere failure or inaction to pay does not lead to the inference of the existence of dispute. Dispute entails a positive element and assertion in denying and not merely inaction to accede to a claim or a request. [23]

Even a demand raised in the application for appointment of an arbitrator, which is denied by the other party in its reply, would give rise to disputes which can be referred to arbitration. [24] Once the claims are refuted on merits and it is not mentioned while rejecting the claims that the claims fall within the finality clause, then the matter can be referred for adjudication of an arbitrator. [25]

6. FAILURE OF PERSONA DESIGNATA TO REFER ALL DISPUTES

In some agreements, a stipulation is made that the detailed claims together with quantum thereof shall be submitted to the *persona designata* . Accordingly, till such time compliance with the said stipulation is made, no appointment of an arbitrator can be made. It sometimes happens that the *persona designata* does not refer all the claims but makes reference of claims selectively to the arbitrator whom he appoints. It is submitted that the parties had vested authority in the *persona designata* to only appoint the arbitrator and hence, he cannot exclude some claims from being adjudicated upon in arbitration.

A *persona designata* cannot be choosy in selecting the claims which need to be referred to arbitration. He had been chosen by the parties simply for the purpose of appointing an arbitrator but had not been authorised by the parties to scan through the claims of either party to the agreement and to refer only such claims to arbitration which he pleases. If such a course is allowed to be adopted by the *persona designata* , then it would amount to passing of a nil award without the claims being adjudicated.

If the respondent segregates claims made by the petitioner and refers some of them to the arbitrator, it amounts to failure on the part of the respondent to act and thus the petitioner is justified in approaching the Chief Justice. [26] It is only the arbitrator who can decide as to admissibility of claims and not the *persona designata* . [27]

7. INACTION BY THE DESIGNATED AUTHORITY OR PERSON TO APPOINT ARBITRATOR

On receipt of a notice seeking appointment of an arbitrator, the authority or person designated in the agreement to make the appointment, should act without any delay, and, in any case, before expiry of 30 days from the date of receipt of the request. At this stage, the only function of the said authority or person is to make the appointment and it should not make a roving enquiry as to the nature of the claims. Such an authority or person must not forget that the parties, by an agreement between them, did not intend to entrust any other function to it except to make the appointment. The person designated in the agreement would be justified in refusing to appoint an arbitrator if the pre-conditions or procedure stipulated in the agreement has not been followed. However, if for any other reason, the person designated in the agreement, fails to act or delays the appointment, then the aggrieved party would have a right to approach the Chief Justice or his designate and in that event the right of the party or the designated person is forfeited and it is only the Chief Justice who can make the appointment.

Even though mode and machinery has been provided in the 1996 Act, what should the aggrieved party do when such mode or machinery provided for appointment of an arbitrator fails? The provisions of sub-section (6) of section 11 specifically stipulate that where under an appointment procedure agreed upon by the parties a person, including an institution, fails to perform any function entrusted to him, the other party is entitled to request the Chief Justice for securing the appointment of an arbitrator. [28] Invocation of section 11(6) is based on default of a party to the arbitration agreement. [29]

If appointment of an arbitrator is made after 30 days of notice, but before the first party has moved the court under section 11, that would be sufficient. It is only after a party approaches the court under section 11 that the right of the opposite party to appoint an arbitrator ceases [30] and it must be deemed to have forfeited its right to appoint an arbitrator. [31] There is nothing in the Act which requires the court to again give an opportunity to the defaulting party to exercise his authority under the arbitration clause. [32] But if the applicant has not complied with procedure laid down in the arbitration agreement, it cannot be said that there was failure on the part of the *persona designata* to appoint an arbitrator. [33]

Public undertakings are very slow in reacting to requests made by contractors for appointment of an arbitrator. However, courts cannot allow administrative authorities to sleep over matters and leave citizens without any remedy. In case appointment is not made in time on the request made by the contracting party, then the appointment of arbitrator shall be made by the High Court. [34]

The expression ‘a party may request the Chief Justice or any person or any institution designated by him to take necessary measure’ suggests a wider discretion to the Chief Justice. He has to use his judicial discretion for taking the necessary measure. Now, the function of the Chief Justice is not to act in administrative capacity, but in judicial capacity. Thus, a wider discretion is to be read in the Chief Justice for taking the necessary measures ‘independent’ of the appointment procedure agreed upon by the parties. [35]

8. CHIEF JUSTICE TO APPOINT ARBITRATOR WHEN NAMED ARBITRATOR FAILS TO ACT

If there is a clause for reference in case of dispute to any authority then it has to be considered as a clause for arbitration by implication. Thus, where an authority is named as an arbitrator to settle the disputes between the parties, then it has to respond to the notice from the party invoking the arbitration clause and on the failure of such named arbitrator to act, it is for the Chief Justice to appoint an arbitrator. [36]

9. WHEN NAMED ARBITRATOR MAY NOT BE ALLOWED TO ACT

It has now become common place for persons who have retained this power of appointment of an arbitrator, not to act at all or to act with such obduracy as to render an arbitration clause totally meaningless. The State is expected to act without arbitrariness and with fairness. Having already decided that the department was justified in claiming liquidated damages, and having declined the petitioner's request for the appointment of an arbitrator, there is a strong pervading risk that a fair decision would not be rendered. In such a case, it can be said that since the said officer also had the power to nominate an arbitrator, presumably also in service, it was possible that his bias would permeate to his nominee. [37]

If it appears to the court that justice would be denied if the person named in the agreement is allowed to act as an arbitrator, then such an arbitrator who has shown bias against the aggrieved party shall be removed and in such a case the court shall appoint the arbitrator. [38] However, the Madras High Court has taken a different view, according to which if the arbitrator is named in the arbitration agreement itself, the provisions of section 11 are not attracted and the court has no jurisdiction to try and decide a petition filed for appointment of another arbitrator. [39]

It is expected of an arbitrator not only to be fair and impartial but also that he should enjoy the confidence of the parties and if he does not meet these criteria, he would not qualify to act as arbitrator. Where an arbitration clause provided that in the event of disputes, the matter would be referred to the Architect and there had been civil and criminal cases against the said Architect for siphoning of funds from the society, it was held that it would be fair and just to appoint a retired Judge in place of the named arbitrator. [40]

10. APPOINTMENT MADE DURING PENDENCY OF APPLICATION UNDER SERCTION 11 – INVALID

If one party demands appointment of an arbitrator within thirty days and the other party does not make the appointment, the right to appoint does not get automatically forfeited after the expiry of the said thirty days. If the appointment is made even after thirty days, but before the first party has moved the Chief Justice under this section, that would be sufficient. It is only after a party approaches the Chief Justice under this section that the right of the opposite party to appoint an arbitrator ceases. [41] An appointment made during the pendency of a petition in the court, is invalid and the person appointed by the *persona designata* could not be recognized as a duly appointed arbitrator. [42]

11. APPOINTMENT BY NON-DESIGNATED AUTHORITY

It is only the authority named in the arbitration agreement which has the power to make the appointment of an arbitrator where one party makes a request for the same in writing. Any other authority, even if it be a higher officer, shall not have the jurisdiction to appoint the arbitrator. If the authority or person authorised to make the appointment is not in position to do so, then appointment made by any other authority or person, albeit of equal or higher rank, is invalid.

Where an appointment of an arbitrator is made by a person other than the one named in the agreement to make such appointment, then the proceedings before such arbitrator and award made by him are null and void since acquiescence cannot cure defect of jurisdiction. [43]

12. CHIEF JUSTICE CAN REFUSE TO APPOINT ARBITRATOR

The Chief Justice or his designate can appoint an arbitrator only if there exists an arbitration agreement between the parties. In case the arbitration agreement is not valid, the Chief Justice or his designate shall refuse to make the appointment.

The Special Conditions of Contract between the parties provided that if claims are of value of more than twenty per cent of the contract value, then arbitration will not be a remedy for settlement of dispute. Hence, an application for appointment of an arbitrator where the value of the claim was more than twenty per cent of the contract value would not be maintainable in view of the exclusionary clause contained in the Special Conditions of Contract. [44]

Jurisdiction to appoint an arbitrator to adjudicate the dispute between the parties stems from the existence of an arbitration agreement. In the absence of an arbitration agreement between the parties, the court has no jurisdiction to appoint the arbitrator. [45] If *prima facie* , the Chief Justice is not sure that there exists an arbitration agreement between the parties, there should be no reference to arbitration. [46]

An arbitration clause provided that if the two arbitrators appointed by the parties failed to reach a consensus, the presiding arbitrator 'shall be appointed by the Council of IRC'. Therefore, the only course open to the parties was to approach the IRC and only on its failure to appoint an arbitrator, would it be entitled to approach the Court. [47]

13. SUPPLYING VACANCY ON RESIGNATION OF ARBITRATOR

If the arbitration agreement provides that in case a vacancy caused due to resignation, vacation of office, or if the arbitrator appointed is unable or unwilling to act due to any reason whatsoever, the authority appointing the arbitrator may appoint a new arbitrator to act in his place then the act of supplying the vacancy by the *persona designata* cannot be challenged. [48]

The object of the legislation is to promote arbitration. The provision empowers the court to appoint a fresh arbitrator on being satisfied, among other things, that the arbitration agreement does not show that it was intended that the vacancy should not be supplied. Normally, if the parties intended that the vacancy should not be supplied, it is for them to say so in the agreement. In the absence of any such intention in the agreement, the court has to presume that the parties did not intend that the vacancy should not be supplied. [49]

When the arbitrator appointed by the *persona designata* had declined and/or resigned and/or expressed unwillingness to act as an arbitrator and there was no evidence to show that the parties intended that the power of the appointing authority to appoint a new arbitrator would revive, it would only be the court which could appoint an arbitrator when the arbitration agreement did not show the intention of the parties that the vacancy should not be filled up. [50]

Where one of the arbitrators resigned and the arbitration agreement did not provide that the vacancy should not be filled up, the court is competent to appoint an arbitrator to fill up the vacancy so caused and not the *persona designata* since he had already exhausted his power by once appointing an arbitrator. [51]

14. 'WITHIN THIRTY DAYS' – MEANING OF

4 Appointment of Arbitrator

When it is stipulated – whether in an agreement, or in an arbitration clause, or in a notice seeking appointment of arbitrator – that appointment be made 'within thirty days', then a question arises as to how the period of 30 days is to be computed. The first and foremost principle of calculation of any period of time is to discard the terminal days, i.e. the day on which the notice was received as well as the last day. Thus, if a notice seeking appointment of an arbitrator is received on 15 January, 2012, then the first day from which the period of 30 days would be calculated would be 16 January, 2012. Counting 30 days from 16 January, 2012, the end date would be 14 February, 2012, i.e. the period of 30 days would be said to expire on the mid-night of 14 and 15 February, 2012 and thus an application made on 15 February, 2012 shall be within time. In other words, the expression 'within thirty days' means thirty clear days.

The rule of law is that when words such as so many clear days or so many days at least are used or not less than so many days are to intervene, the two terminal days must be excluded from the computation. [52] Clear days means from mid-night to mid-night. [53]

The party to whom a notice is given must be given the stipulated period to make the appointment or to concur in the appointment. [54] The party to whom a notice is given must not only make the appointment within the stipulated period, but the same must also be notified to the other party. [55] The expression 'within 15 days' means clear 15 days excluding the due date of payment. [56] In computing the period of one month, the day on which the court made the order to make up the court fee, can be excluded. [57]

15. FAILURE TO APPOINT ARBITRATOR WITHIN THIRTY DAYS

If within the statutory period after service of notice the opposite party does not appoint an arbitrator, it is well within the rights of the party giving notice to move the court for appointment of an arbitrator and thereafter the court assumes jurisdiction to appoint another arbitrator. [58] The absence of time limit in section 11(6) does not mean that the aggrieved party cannot request the Chief Justice or the person designated by him to take necessary measure if no appointment is made by the appointing authority within a reasonable time. If the petition has been filed 30 days after the demand for appointment of an arbitrator had been made, no objection can be taken by the respondents against the application. [59]

It is correct that the aggrieved party can approach the Chief Justice for appointment of arbitrator after the expiry of notice period of thirty days but if the agreement between the parties provides for a period of notice of one hundred twenty days, then an application moved prior to expiry of thirty days is premature. [60]

16. APPOINTMENT BY DESIGNATION – POST ABOLISHED

The court appointed an officer not by name but by his official designation as D.O.F., the question whether the officer who acted as arbitrator had that designation and had authority to act as such is a matter of fact. Since the post of D.O.F. was non-existent at the time of appointment, therefore, nobody had jurisdiction to act as arbitrator and proceedings held were invalid. [61]

An arbitration clause provided that the power to nominate an arbitrator was conferred on the Secretary in the Ministry of Food and Agriculture and not on a Secretary in any other ministry. The reason was that on the date of the contract the Secretary to the Ministry of Food and Agriculture was the officer dealing with the subject-matter of the contract. In view of this the 'Secretary in the Ministry of Food and Agriculture' authorized to nominate an arbitrator was the Secretary in-charge of the department of Food who was concerned with the subject matter of the contract. [62]

Under an arbitration clause, a Major General in-charge Administration was to be the arbitrator. It was held that there would be no vacancy within the meaning of this clause simply because the particular Major General who was holding the office at the time of the contract ceased to hold office, if he was succeeded by a successor, who was also holding a rank of a Major General. So long as the Major General was succeeded by a Major General in the particular office, and so long as the course of such succession was not changed by introduction by an officer holding a different rank, no vacancy in the office of arbitrator would arise at all. [63]

17. 'NO CLAIM CERTIFICATE' GIVEN – EFFECT OF

A contractor/vendor cannot be compelled to give a 'no-claim certificate' upon the demand of the other party to the contract. However, practically it is seen that on completion of works, the employer often insists that the contractor/vendor should give such a certificate. In such a situation, the contractor/vendor is in a dilemma – if he gives the certificate, he forfeits his right to make any further claims, however, if he does not do so, then the final payment is withheld. Faced with such a situation, contractors/vendors often give a 'noclaim certificate' as demanded by the employer. The law comes to the aid of such contractors/vendors and it has been held that such certificates must be deemed to have been given under duress or coercion.

It is a well known and a notorious fact that unless a no claim certificate is issued by the contractor payment of final bill will not be made, but that will not prevent the contractor from raising its claim before an arbitrator. [64] It is a matter of fact that no contractor, on his own, would voluntarily agree to give a no-claim certificate. There has to be a reason for giving a no-claim certificate. Taking notice of this ground reality, the Supreme Court in *R.L. Kalathia & Co. v. State of Gujarat* , [65] has held that a contractor would not be debarred from making a claim merely because he has given a no-claim certificate. If a party had to give a 'no-claim certificate' before finalising the bills and had received the payment under coercion, misrepresentation, mistake, duress etc., the said party has a right to raise the legitimate disputes and get the matter referred to an arbitrator for adjudication, but where the full and final payment was accepted voluntarily and unconditionally, then subsequent claims for further amounts in respect of the same work done is not an arbitrable dispute and it is only when the court, on facts, decides that the dispute is an arbitrable dispute, it would be referred to the arbitrator for adjudication. [66]

The question whether the final measurements were accepted under undue influence, pressure and misrepresentation and thus, not accepted at all has to be determined by arbitrators. [67] Merely because the petitioner has signed on a bill regarding measurements cannot be a ground to oust the arbitration clause since disputes and differences still remained as per the arbitration agreement between the parties. [68]

Where there was a specific bar in the agreement prohibiting arbitration once the final bill was paid to the contractor after giving a no-claim certificate and where the contractor accepted the final bill without reserving any right to submit claims, in that case, the contractor is prohibited from raising any further disputes. [69]

18. LIMITATION PERIOD FOR INVOKING ARBITRATION

Parties cannot, by contract, stipulate a period of limitation which is less than the period prescribed by the *Limitation Act*. Quite often, agreements stipulate that the arbitration clause has to be invoked within a fixed number of days after rejection of claim, failing which the right of the contractor to seek arbitration seizes and the other party is discharged of its obligations under the contract. The portion of the clause providing for such a contracted period of limitation is void as per the amendment to *section 28 (b) of Indian Contract Act, 1872*. For example, if a clause provides that the employer shall be discharged of any liability if the contractor fails to lodge its claim within 120 days of finalization of the bill, then such a clause would be void to the extent that the period specified, i.e. 120 days would not be binding on the parties. In such a case, the period for lodging a claim would be regulated by the Indian *Limitation Act*, more specifically Article 137 thereof, which provides that a party can move an application within a

period of 3 years from the date of cause of action. The above-said amendment to section 28 of the Contract Act is effective from 8 January, 1997 and applies to all cases which have arisen thereafter.

In *Major (Retd.) Inder Singh Rekhi v. Delhi Development Authority* , [70] the Apex Court has laid down that the denial of claim by itself will be a cause for arbitration. Admission of the liability within the period of limitation certainly can extend the period of limitation, but the assertion of the claim cannot extend the liability on the opposite party. [71]

Where the petitioner himself pleaded that the accounts were finalised in May, 1990 and preferred to file the petition under section 11 in 1998 for appointment of arbitrator, it was held that the application was barred by limitation as the petitioner could have raised dispute about the dues allegedly not released or seek the disputes to be referred to an arbitrator in terms of the arbitration agreement within 3 years from the date when the cause of action arose. [72]

When the right to apply for arbitration accrued in favour of the petitioner in 1994 but they decided to approach the court in 1998 for direction to the appointing authority to appoint an arbitrator, the prayer was declined by the court since the application had been moved much beyond period of 3 years from the date the cause of action arose. [73] When an application has been moved by a party to the agreement within three years of preparation of final bill, it cannot be said that the application for appointment of arbitrator is barred by limitation. [74] For computation of the period of limitation, the relevant date is the date on which right to apply for arbitration accrues, i.e. the date on which differences arise between the parties. [75]

19. ARBITRATION CLAUSE DELETED – EFFECT OF

Where the arbitration clause was deliberately and consciously struck off by parties, the court cannot appoint an arbitrator in such a case. [76] It was the signed agreement between the parties which was binding on the parties and only such written terms in the original agreement signed by the parties should be taken into consideration and not the terms contained in the copy of the agreement which was supplied to the applicant after some time. [77]

The contract when awarded contained an arbitration clause. Subsequently, the employer unilaterally deleted the said clause. When the contractor invoked the arbitration clause, it was resisted by the employer on the ground of admissibility. It was held that the question of admissibility of claim can only be seen by the arbitrator. An arbitrator was then appointed by the Chief Justice for determining the question and for adjudication of claims. [78]

20. QUALIFICATION OF ARBITRATOR

Under the repealed 1940 Act, there was no stipulation to the effect that the arbitrator must possess certain qualifications. Under the 1996 Act, the Legislature has recognized the need to have persons with the requisite qualification, agreed to between the parties, to act as arbitrators. The need and necessity for having persons with particular qualifications as arbitrators is that the disputes which are of technical nature can best be judged by persons having expertise in the field to which the dispute relates. The Chief Justice or his designate cannot ignore the wishes of the parties to the arbitration agreement.

Sub-section(8) provides that in the event of the appointment procedure, agreed upon by the parties, cannot be given effect to then the Chief Justice or the person or institution designated by him shall have due regard to any qualification required of the arbitrator by the agreement of the parties. Thus, if the parties desire to appoint an arbitrator with particular qualifications, then such a qualification must be mentioned in the arbitration agreement itself. When the appointment procedure cannot be followed for any reason then the Chief Justice must know clearly the intention of the parties. For instance, if there be a dispute with regard to a construction contract, and the arbitration agreement provides that the Superintending Engineer or Chief Engineer shall be the arbitrator, the

intention of the parties is absolutely clear that they want the disputes to be resolved through the arbitration of a technical person, and the Chief Justice would thus, not be justified in appointing an arbitrator other than a technical person. Thus, while appointing an arbitrator, the Chief Justice or his nominee shall keep in view, that the person to be appointed as an arbitrator:

(1) must possess the qualifications which the arbitration agreement prescribes;

(2) must have none of the disqualifications which the arbitration agreement provides; and

(3) must not have any interest in the subject-matter or closeness with the parties as would make him, or appear to make him, incapable of acting in an impartial manner.

While appointing an arbitrator, the Chief Justice or the person designated by him is required to give due regard to any qualification which may be required of the arbitrator as per agreement of the parties and further may have due regard for other considerations for securing the appointment of an independent and impartial arbitrator. [79] The Chief Justice or the designate Judge would be entitled to seek the opinion of an institution in the matter of nominating a qualified arbitrator in terms of sub-section (8) of section 11 if the need arises. [80]

In the matter of settlement of disputes by arbitration, the agreement executed by the parties has to be given great importance and an agreed procedure for appointing the arbitrators has been placed on high pedestal and has to be given preference to any other mode for securing appointment of an arbitrator. It is for this reason that in sub-section 8(a) of section 11, it is specifically provided that the Chief Justice or the person or the institution designated by him, in appointing an arbitrator, shall have due regard to any qualifications, required of the arbitrator by the agreement of the parties. [81]

Where the contract condition specifically provided that two gazetted officers of the Railways were to act as arbitrators, the order of the High Court appointing a retired judge as the arbitrator was held to be bad in law. [82] If the disputes are of a technical nature, a qualified Engineer will be surely better than an advocate. [83]

Commercial contracts frequently provide that the arbitrator shall provide certain particular qualifications. These may be expressed in a positive or negative form. In some instances, the contract states positive qualifications i.e. it stipulates those characteristics which the appointed arbitrator must possess. These may be expressed in precise terms – for example, the arbitrator may have to be a member of a specified trade association. [84]

21. WRIT NOT MAINTAINABLE AGAINST ORDER APPOINTING ARBITRATOR

A writ petition is not an appropriate remedy for impeaching the validity of contractual obligation. [85] The right to get disputes referred to arbitration is a contractual right, for which remedy is provided in the *Arbitration and Conciliation Act* itself and, therefore, writ jurisdiction of the court cannot be invoked for that purpose. [86] The exception, if any, can be made only in case where a statutory agreement exists and the authorities fail to discharge their statutory obligations under the said statute. [87] Objections which are capable of being taken before the arbitrator cannot be allowed to be taken before the High Court by way of writ petition. [88]

In case of an order being passed by the Chief Justice or designated Judge of the High Court, an appeal will lie against that order under *Article 136 of the Constitution* to the Supreme Court. However, in case of order passed by Chief Justice of India or designated Judge of Supreme Court, no appeal shall lie. Since order of the Chief Justice of the High Court or the designated Judge is a judicial order, the said order would no longer be open to scrutiny under *Article 226 of the Constitution*. [89]

22. REVIEW NOT PERMISSIBLE IN ARBITRATION MATTERS

Power of review by the authority can be exercised only when there is a provision in the statute. When there is no provision in the statute for an authority to review its own orders then it cannot be reviewed. [90]The Chief Justice while functioning under section 11 is functioning as the specified authority and not as a civil court in the strict sense of the term. Under the scheme of the Act only in the event there is a procedural irregularity, which vitiates the proceedings, the order can be reviewed, but a substantive review would not be available. [91]

Once a relief sought at the time of arguing the main matter has been refused, no review petition would lie which would amount to rehearing of the original matter. The power of review cannot be compared with appellate power, which enables a superior court to correct all errors committed by a subordinate court. It is not rehearing of the original matter. [92]

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1 *Indian Iron and Steel Co. Ltd. v. Tiwari Roadlines,* AIR 2007 SC 2064 : (2007) 5 SCC 703 [*LNIND 2007 SC 611*] ; *Engineering Projects Ltd v. Jaipur Stock Exchange Ltd.,* AIR 2007 NOC 1556 (Raj) .

2 *Universal Const. & Trading Co. v. Garhwal Mandal Vikas Nigam Ltd.,* 2004 (1) RAJ 528 (All); *India Household and Healthcare Ltd. v. LG Household and Healthcare Ltd.,* (2007) 5 SCC 510 [*LNIND 2007 SC 296*] : AIR 2007 SC 1376 : 2007 (2) RAJ 382; *G. Premji Trading Pvt. Ltd. v. Ashoka Alloys Ltd.,* : 1998 (Supp) Arb LR 373 : 1999 (1) RAJ 244; *B.T. Patil & Sons v. Konkan Railway Corp. Ltd.* , 1998 (Supp) Arb. LR 189 : 2000 (1) RAJ 74 (Bom); *Jesmajo Industrial Fabrications Karnataka Pvt. Ltd. v. I.O.C Ltd.,* 2003 (3) Arb LR 289 : 2004 (1) RAJ 24 (Bom); *K. Bikramm Singh v. Lalit Kala Academy,* 2007 (3) RAJ 329 (Del); *Haldiram Manufacturing Co. Ltd. v. SRF Int'l,* 2007 (3) RAJ 590 (Del) : 2007 (3) Arb LR 1; *Oriental Insurance Co. Ltd. v. Unitech Ltd.,* 2007 (4) RAJ 614 : 2008 (1) Arb LR 187 (Del); *Jagdambey Builders Pvt. Ltd. v. Harsh Rathore,* AIR 2008 NOC 1937 (Raj); *S.K. Tekriwal v. State of Jharkhand,* AIR 2005 Jhar 48 : 2006 (2) Arb LR 318 : 2006 (3) RAJ 415; *Wipro Finance Ltd. v. S.R.G. Infotech (India) Ltd.,* 2005 (4) RAJ 1 (Del); *Krishna Construction v. Union of India,* AIR 2007 NOC 828 (MP)..

3 *Indian Iron and Steel Co. Ltd. v. Tiwari Roadlines,* (2007) 5 SCC 703 [*LNIND 2007 SC 611*] : AIR 2007 SC 2064 : 2007 (2) Arb LR 270.

4 *ABLE Associates v. K.S. Ramakrishna Rao,* 2008 (1) RAJ 73 (AP).

5 *Manoranjan Mondal v. Union of India,* ; *Misti Enterprises v. Brittania Engg. Product & Services Ltd.,* : 1993 (2) Arb LR 501; *Narayan Roy v. State of Tripura,* : 1993 (2) Arb LR 257; *Ravi Engg. Works v. Narang Steel Rolling Mills* , AIR 1994 P&H 183 : 1994 (2) Arb LR 73.

6 *ibid* ; *Larsen & Toubro v. Konkan Railway Corp. Ltd.* , 1999 (2) Arb LR 354 (Bom); *Canara Bank v. Klen and Marshals Manufactures and Exporters Ltd* ., 2006 (3) Arb LR 254 (Kant) : 2006 (3) Kar LJ 456 [*LNIND 2006 KANT 174*].

7 *Union of India v. M.P. Gupta,* (2004) 10 SCC 504*; Union of India v. V.S. Engg. (P) Ltd.,* (2006) 13 SCC 240 [*LNIND 2006 SC 983*] : AIR 2007 SC 285 : (2007) 49 AIC 596 (SC) : 2007 (1) RAJ 100.

8 *Surendranath Paul v. Union of India,* (DB).

9 *National Projects Construction Corp. Ltd v. S.P. Enterprise (P) Ltd.,* AIR 1989 Cal 155 [*LNIND 1988 CAL 207*]: 1989 (2) Arb LR 1 : C (1989) 1 Cal WN 339 (DB); (*Sunil Mukherjee v. Union of India,* , distinguished; *Ved Prakash Mithal v. Union of India,* : 1985 Arb LR 443 (FB); and *Brij Bhushan Lal v. Chief Engineer* , AIR 1972 P&H 266, dissented from.

10 *India Hoisery Works v. Bharat Woolen Mills Ltd.,* : 92 Cal LJ 7 (DB).

11 *You One Maharia (I) JV v. NHAI,* (2007) 7 SCC 704 [*LNIND 2007 SC 984*] : AIR 2007 SC 2954 : 2007 (4) RAJ 38 : (2007) 3 Arb LR 293.

12 *S.B.P. & Co. v. Patel Engg. Ltd.,* (2005) 8 SCC 618 [*LNIND 2005 SC 851*] : AIR 2006 SC 450 : (2005) 128 Comp Cas 465 : 2005 (3) RAJ 388.

13 *Ranjul Baruah v. Numaligarh Refinery Ltd.,* : (2001) 2 GLT 414; *Executive Engineer, Upper Painganga Project Division v. M.V. Panse,* : (1999) 4 Bom CR 822 [*LNIND 1998 NGP 7*] ; *State of Punjab v. Darshan Singh Ahuja* , 1999 (2) Arb LR 676 (P&H); *Municipal Corporation of City of Pune v. Bombay Cable Car Co. Pvt. Ltd.,* 2006 (3) RAJ 651 (Bom).

14 *Executive Engineer v. Gangaram Chhapolia,* : (1979) 48 CLT 575; *K. Bikramm Singh v. Lalit Kala Academy,* 2007 (3) RAJ 329 (Del); *Continental Construction Ltd. v. National Hydroelectric Power Corp. Ltd.* , 1998 (1) Arb LR 534 (Del); *Sharan Solutions (India) Pvt. Ltd. v. Ericsson India Pvt. Ltd.,* 2006 (4) Arb LR 461 (Del).

15 *Delta Mechcons (I) Ltd. v. Marubeni Corporation,* (2008) 15 SCC 772 [*LNIND 2007 SC 721*] : 2007 (2) Arb LR 288 : (2007) 3 RAJ 111.

16 (2009) 1 SCC 267 [*LNIND 2008 SC 1869*] : AIR 2009 SC 170 : (2008) 4 RAJ 557 : (2008) 3 Arb LR 633.

17 *IVRCL Infrastructures & Projects Ltd. v. Bhanu Construction,* AIR 2008 NOC 25 (AP) .

18 *DHV BV v. Tahal Consulting Engineers Ltd.,* (2007) 8 SCC 321 [*LNINDORD 2007 SC 3*] : AIR 2007 SC 3113 : 2007 (4) Arb LR 428*; N. Sreenivasa v. Kuttukaram Machines Tools Ltd.,* 2007 (3) RAJ 559 (Kant).

19 *Technoma (I) v. Union of India,* AIR 2007 NOC 1724 (Cal); *Talupula Engg. Co. v. Union of India,* 2008 (1) Arb LR 470 (All) : (2008) 1 AWC 671.

20 *Prabhu Steel Industries Ltd. v. Union of India,* 2005 (1) RAJ 682 (Del); *M.V.V. Satyanarayana v. Union of India* , 1999 (2) RAJ 173 (AP); *Balika Devi v. Kedar Nath Puri,*.

21 *Continental Const. Ltd. v. National Hydrolectric Power Corp. Ltd* ., 1998 (2) RAJ 168 (Del); *Major (Retd.) Inder Singh Rekhi v. Delhi Development Authority,* (1988) 2 SCC 338 [*LNIND 1988 SC 191*] : AIR 1988 SC 1007 : 1988 (2) Arb LR 270; *Orissa State Co-op. Marketing Federation Ltd. v. Associated Marketing Co.,* : (1982) 52 Cut LT 150.

22 *State of Orissa v. B.C. Pasayat,* : (1983) 55 Cut LT 67 ; *Nandaram Hanutram v. Raghunath and Sons,* : 93 Cal LJ 92; *Uttam Chand v. Jeeva Mamooji,* ; *Balmukand Ruia v. Gopiram Bhotica,* ; *Ladha Singh Bedi v. Jyoti Prasad Singh Deo,* ; *Mathuradas Goverdhandas v. Khusiram Banarsilal* , (1949) 53 Cal WN 873 (DB).

23 *Major (Retd.) Inder Singh Rekhi v. Delhi Development Authority,* (1988) 2 SCC 338 [*LNIND 1988 SC 191*] : AIR 1988 SC 1007 : 1988 (2) Arb LR 270.

24 *Anushree Constructors & Consultants Pvt. Ltd. v. P.S.L.Engineering Pvt. Ltd.* , 1996 (2) Arb LR 333 (Del).

25 *Anand Builders v. Union of India* , 1996 (2) Arb LR 374 (Bom).

26 *Earnest Builders v. Union of India* , 2002 (2) Arb LR 548 : 2002 (3) RAJ 88 (Del) : (2002) 98 DLT 71.

27 *Parmar Construction Co. v. Delhi Development Authority* , 2000 (Supp) Arb LR 272 (Del) *; Sharma & Sons v. Engineer-in-Chief, Army Headquarters, New Delhi* , 2000 (2) Arb LR 31 (AP); *Rajeev Traders v. General Manager, South Central Railway,* 2003 (1) Arb LR 624 : 2003 (1) RAJ 220 (AP); *Earnest Builders Pvt. Ltd. v. Union of India,* 2007 (3) Arb LR 183 : 2007 (4) RAJ 345 (Del).

28 *Deepa Galvanising Engg. Industires Pvt. Ltd. v. Govt. of India* , 1998 (1) ICC 410 (AP); *Boghara Polyfab Pvt. Ltd. v. National Insurance Co. Ltd.,* AIR 2008 NOC 27 : 2007 (6) AIR Bom R 173 (Bom).

29 *NHAI v. Bumihiway DDV Ltd. (JV),* (2006) 10 SCC 763 [*LNIND 2006 SC 767*] : 2006 (2) RAJ 682 : (2006) 4 Arb LR 1; *G.D. Tiwari & Co. v. Union of India* , 1985 Arb LR 463 : (1984) 26 DLT 74 (DB).

30 *Datar Switchgears Ltd. v. Tata Finance Ltd* ., (2000) 8 SCC 151 [*LNIND 2000 SC 1360*] : 2000 (3) Arb LR 447 [*LNIND 2000 SC 1360*] : (2000) 3 RAJ 181; *Union of India v. Bharat Battery Manufacturing Co. (P) Ltd.,* (2007) 7 SCC 684 [*LNIND 2007 SC 951*] : 2007 (4) RAJ 1; *Nucon India (P) Ltd. v. DVB,* ; *Explosives Consultant v. IDL Industries Ltd* ., AIR 2001 AP 256 [*LNIND 2001 AP 156*]; *IOC Ltd. v. Kiran Const. Co* ., 2002 (3) Arb LR 447 (Del)(DB); *SPM Engineers v. Gauhati Municipal Corp* ., AIR 2002 Gau 114 : 2002 (3) RAJ 129; *Svapan Const. v. IDPL Employees Co-op. Group Housing Society Ltd.,* 2006 (1) RAJ 486 (Del); *Union of India v. R.R. Industries,* 2005 (2) RAJ 177 : 2005 (120) DLT 572 (Del) (DB); *Union of India v. Dhanurdhar Champatiray,* 2004 (3) RAJ 253 (Ori) (DB); *Punjab State Civil Supplies Corp. v. Aman Rice Mills,* (2004) 2 Pun LR 863 : 2004 (3) RAJ 333 (P&H); *Galada Power Telecommunication v. Transmission Corp. of A.P,* AIR 2003 NOC 435 (AP); *Raj Kishan & Co. v. N.B.C.C. Ltd.,* 2005 (Supp) Arb LR 166 (Del); *Batavar Lal M. Patel v. N. B. C. C. Ltd.,* 2004 (3) Arb LR 97 (Del); *N.T.P.C. v. Gauri Shankar Agarwal & Co.,* 2005 (Supp) Arb LR 402 (Del) (DB); *Southern Railway v. West Coast Agencies,* 2005 (Supp) Arb LR 428 (Ker) (DB); *Modern (India) Architect Pvt. Ltd. v. N. P. C. C. Ltd.,* 2005 (Supp) Arb LR 58 (Del); *Shri Shiv Shakti Project Pvt. Ltd. v. Airport Authority of India,* AIR 2006 NOC 1414 : 2006 (4) Arb LR 487 (Raj); *Delhi Assam Roadways Corporation Ltd. v. Hindustan Cooper Ltd.,* AIR 2007 NOC 1223 (Raj); *D.C. Kapur v. DDA,* 2006 (3) RAJ 702 : 2007 (1) Arb LR 486 (Del); *Avinash Sharma v. MCD,* 2007 (4) Arb LR 147 (Del) : (2007) 97 DRJ 132; *Indiana Conveyors Ltd. v. Indian Rare Earths Ltd.,* 2008 (1) RAJ 568 (Ori).

31 *P. Kamaran v. Executive Engineer, Works Division* , 1999 (2) RAJ 435 (Bom); *Vidhyawati Construction Co. v. Union of India,* 2006 (2) Arb LR 487 (MP); *Kumagai Gumi Co. Ltd. v. Delhi Metro Rail Corp. Ltd.,* (2004) 13 SCC 22 : 2006 (2) RAJ 215 : 2005 Supp Arb LR 600; *Cherian and Kurian v. State of Kerala,* AIR 2006 Ker 330 : 2007 (2) RAJ 104 : 2007 (1) Arb LR 21 (Ker).

32 *Nandyal Coop. Spinning Mills Ltd. v. K.V. Mohan Rao,* (1993) 2 SCC 654 [*LNIND 1993 SC 200*] : 1993 AIR SCW 2060 : 1993 (2) Arb LR 359; *Fertilizer Corporation of India Ltd. v. Ranjit Kumar Mishra,* ; *Baba Rangi Ram Pvt. Ltd. v. Union of India,* 2007 (4) RAJ 61 : 2007 (2) Arb LR 468 (P&H).

33 *D.S. Gupta Pvt. Contractors Ltd. v. Unison Hotels Ltd.* , 2002 (3) Arb LR 36 (Del).

34 *Union of India v. V.S. Engg. (P) Ltd.,* (2006) 13 SCC 240 [*LNIND 2006 SC 983*] : AIR 2007 SC 285 : (2007) 49 AIC 596 : 2006 (4) Arb LR 236.

35 *Shankar Traders v. Union of India,* AIR 2006 Cal 335 [*LNIND 2006 CAL 385*]: 2007 (2) RAJ 549 : 2007 (1) Arb LR 10 (Cal).

36 *G. Venkata Reddy & Co. v. APMDC Ltd.,* 2008 (2) Arb R 301 (AP) : (2008) 2 ALT 720.

37 *B.W.L. Ltd. v. M.T.N.L.* , 85 (2000) DLT 84 [*LNIND 2000 DEL 212*] : 2000 (2) Arb LR 190 (Del).

38 *Guruman Const. Corp. v. Municipal Corp. of Delhi* , 2001 (1) Arb LR 180 (Del).

39 *Kamala Solvent v. Manipal Finance Corp. Ltd* ., AIR 2001 Mad 440 [*LNIND 2001 MAD 557*].

40 *Jansatta Shakari Awas Samiti Ltd. v. Organic India,* AIR 2006 NOC 453 : 2006 (1) RAJ 124 : 2005 (Supp) Arb LR 216 (Del); *Bihar State Mineral Dev. Corp. v. Encon Builders (I) (P) Ltd.,* (2003) 7 SCC 418 [*LNIND 2003 SC 691*] : AIR 2003 SC 3688 : (2003) 3 RAJ 1 : (2003) 3 Arb LR 133.

41 *Datar Switchgears Ltd. v. Tata Finance Ltd* ., (2000) 8 SCC 151 [*LNIND 2000 SC 1360*] : 2000 AIR SCW 3925 : 2000 (3) Arb LR 447 [*LNIND 2000 SC 1360*].

42 *Union of India v. Seth Const. Co* ., 1998 (1) Arb LR 253 : 1998 (1) ICC 814 (Bom); *Cdr. S.P. Puri v. Agriculture Produce Market Committee,* 2007 (2) RAJ 524 (Del) : (2007) 98 DRJ 592.

43 *Consolidated Construction Co. v. State of Orissa,* : (1979) 48 Cut LT 138 [AIR 1961 Ori 143 held not good law in view of *Waverly Jute Mills Co. Ltd. v. Raymon & Co. (India) (P) Ltd.,* AIR 1963 SC 90 : [1963] 3 SCR 209 [*LNIND 1964 SC 416*] ; *Khardah Co. Ltd. v. Raymon & Co. (India) (P) Ltd.,* AIR 1962 SC 1810 : [1963] 3 SCR 183 [*LNIND 1962 SC 235*], and *Union of India v. Om* Prakash, (1976) 4 SCC 32 [*LNIND 1976 SC 150*] : AIR 1976 SC 1745].

44 *Trimurti Constructions v. Union of India,* AIR 2006 NOC 1286 (Raj).

45 *Amardeep Developers Pvt. Ltd. v. Oswal Chemicals & Fertilizers Ltd.,* 2008 (3) Arb LR 200 (Del).

46 *Pradip V. Vinayak v. Sulakshna A. Naik,* 2006 (3) RAJ 657 (Bom).

47 *You One Maharia (I) Ltd. v. NHAI,* (2007) 7 SCC 704 [*LNIND 2007 SC 984*] : AIR 2007 SC 2954 : 2007 (4) RAJ 38 : (2007) 3 Arb LR 293.

48 *Maheshwari Engineers v. Union of India,* : (1999) 5 ALD 308 [*LNIND 1999 AP 583*].

49 *Crompton Greaves Ltd. v. Toshiba Anand Lamp Ltd.,* : 1987 (1) Arb LR 38 : 1986 Ker LT 734 [*LNIND 1986 KER 102*] (DB) *; Sindhy Resettlement Corp. Ltd. v. Ambavi Raghu,* AIR 1983 Guj 233 [*LNIND 1983 GUJ 4*]: (1983) 2 GLR 1035; *Purna Nand v. M.C.D.,* 2006 (3) RAJ 410 : 2006 (3) Arb LR 401 (Del).

50 *Shila Bannerji v. State of West Bengal,*.

51 *East India Construction (P) Ltd. v. Union of India,* AIR 1970 Cal 243 [*LNIND 1969 CAL 211*]; *Sunil Mukherjee v. Union of India,* (Cal); *Jind Coop. Sugar Mills Ltd. v. Sunder Das & Co.* , 1991 (2) Arb LR 310 (P&H) *; V.G. Ghawda Pvt. Ltd. v. Union of India,* ; *Universal Consortium Engineers (P) Ltd. v. State Trading Corp. of India Ltd.* , 1995 (2) Arb LR 242 (Del); *Sheila Banerjee v. State of West Bengal,* ; *Punjab Housing Development Board v. Jit Singh Jaimal Singh* ; 1999 (2) Arb LR 689 : (1999-3) 123 Pun LR 51; *Aravali Leasing Ltd. v. Unicols Bottlers Ltd* ., 1998 (2) Arb LR 337 : 1998 (3) RAJ 402 (Del).

52 *Satya Narayan Agarwall v. Baidyanath Mandal,* : 1971 BLJR 34 (DB); *Rambharoseylal Gohoi v. State of Madhya Pradesh,* : 1955 Nag LJ 124.

53 *McDonald & Co. v. Naraindas Pokardas, AIR* 1927 Sind 126.

54 *Sukhamal Bansidhar v. Babu Lal Kedia,* : 18 ALJ 652 (DB).

55 *Tero v. Harris, (1847) 11 QB 7* .

56 *Padmacharan v. Superintendent of Police,* AIR 1965 Ori 71 : (1964) 6 OJD 117 : 30 Cut LT 271 : (1964) Cut 296 (DB).

57 *Badri Nath Tirath Ram v. State of Pepsu,* AIR 1957 Pepsu 14 (DB)

58 *Nandyal Co-op Spinning Mills Ltd. v. K.V. Mohan Rao,* (1993) 2 SCC 654 [*LNIND 1993 SC 200*] : 1993 (1) Arb LR 469; *General Marketing and Mfg. Co. Ltd. v. Union of India* , 1993 (2) Arb LR 432 (Del); *Puran Chand v. H.P. Forest Corporation* , 1995 (1) Arb LR 113 (HP); *Mohinder Kumar Jain v. Beas Construction Board* , 1999 (3) RAJ 423 (SC); *Union of India v. Srinavasa Forest Co-op. Store* , 2000 (3) Arb LR 39 (AP); *Niranjan Swain v. State of Orissa, ; Banabehari Das v. Executive Engineer* , (1979) 48 Cut LT 241 ; *Fertilizer Corp. of India Ltd. v. Ravi Kumar Ohri,* ; *Executive Engineer v. Gangaram Chhapolia,* ; *General Marketing & Mfg. Co. Ltd. v. Union of India* , 1993 (2) Arb LR 432 (Del); *Vidhyawati Const. Co. v. Union of India,* 2006 (2) Arb LR 487 (MP) : (2006) 1 MPLJ 88; *Cdr. S. P. Puri v. Agriculture Produce Market Committee,* 2006 (4) Arb LR 26 (Del) : (2007) 98 DRJ 592; *Amar Constructions v. C.P.W.D.,* 2006 (4) Arb LR 32 : (2006) 134 DLT 584 (Del) *; Ashok Parbanda v. Vipin Kumar Parbanda,* 2006 (4) Arb LR 141 (Del); *Oriental Insurance Co. Ltd. v. Unitech Ltd.,* 2007 (4) RAJ 614 : 2008 (1) Arb LR 187 (Del); *Avinash Sharma v. MCD,* 2007 (4) RAJ 380 : 2007 (4) Arb LR 147 (Del); *Aloki India Ltd. v. Meera International,* 2006 (3) RAJ 517 (Mad); *Computer Unlimited v. Xerox (I) Ltd.,* 2007 (2) Arb LR 251 : 2007 (3) RAJ 691 (Del); *Gurdeep Singh v. NDMC,* 2007 (2) RAJ 76 (Del); *Ayush Construction Pvt. Ltd. v. State of HP,* AIR 2008 NOC 590 (HP); *Kotak Mohindra Bank Ltd. v. Prem Power Corporation Pvt. Ltd.,* 2008 (2) Arb LR 39 (Del); *Thomas & Co. Pvt. Ltd. v. Bell Poly Moulders Pvt. Ltd.,* 2008 (2) Arb LR 98 (Del); *Surana Telecom Ltd. v. BSNL,* 2008 (2) Arb LR 94 (Del).

59 *Union of India v. V.S. Engg. Pvt. Ltd.,* (2006) 13 SCC 240 [*LNIND 2006 SC 983*] : AIR 2007 SC 285 : (2007) 49 AIC 596 : 2006 (4) Arb LR 236; *Naginbhai C. Patel v. Union of India* , 1999 (2) Arb LR 343 (Bom); *Akshaya Jain v. Airports*

cAUTHORITY of India , 2000 (3) Arb LR 563 : 2000 (3) RAJ 256 (Del); *National Aluminium Co. Ltd. v. Metalimpex Ltd* ., 2000 (3) Arb LR 422 (SC); *Amar Construction v. CPWD* , 2007 (2) RAJ 513 (Del); *Vinay Aggarwal v. G.M., East Coast Railways,* AIR 2008 NOC 1936 (Ori); *Bhagwan Devi v. Delhi Agricultural Marketing Board,* 2006 (3) RAJ 372 : 2006 (2) Arb LR 374 (Del) : 131 (2006) DLT 411.

60 *P. Siva Prasad v. South Central Railway* , 2002 (2) Arb LR 357 (AP).

61 *Om Parkash v. Union of India,* : 1962 All LJ 1006 (B); *Union of India v. Om Parkash,* : 1987 (1) Arb LR 310; *State of A.P. v. Chelamani Ramalinga Reddy* , 1990 (1) Arb LR 287 (AP).

62 *Union of India v. D.N. Revri & Co.,* (1976) 4 SCC 147 [*LNIND 1976 SC 309*] : AIR 1976 SC 2257.

63 *Bharat Construction Co. Ltd. v. Union of India,* (DB).

64 *Jiwani Engineering Works (P) Ltd. v. Union of India,*.

65 (2011) 2 SCC 400 [*LNIND 2011 SC 69*] ; *NTPC Ltd. v. Reshmi Constructions,* (2004) 2 SCC 663 [*LNIND 2004 SC 3*] : AIR 2004 SC 1330 : (2004) 1 Arb LJ 156 : (2004) 1 RAJ 232; *National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd.,* (2009) 1 SCC 267 [*LNIND 2008 SC 1869*] : AIR 2009 SC 170 : (2008) 3 Arb LR 633 : (2008) 4 RAJ 557.

66 *Kwality Const. Engineers v. University Engineer, University of Hyderabad* , 1998 (1) ALT 791*; State Govt. of Karnataka v. B. Ranveer Kumar Sharma* , 1998 (2) Arb LR 632 (Kant); *Mehta and Co. v. Union of India,* (Del); *B.D. Chawla v. Union of India,* (Del) : 1984 RLR 241; *S.C. Konda Reddy v. Union of India,* : (1981) 2 Kant LJ 276 (DB); *Ram Singh v. National Capital Territory of Delhi* , 1996 (1) Arb LR 56 (Del); *Premier Electrical Corp. v. New Delhi Municipal Committee* , 1995 AIHC 4825 (Del); *ACE Construction Mines and Mineral Cooperative Society Ltd. v. Rajasthan State Mines and Minerals Ltd.,* (Raj).

67 *Hindustan Steel Ltd. v. Dalip Const. Co* ., AIR 1969 NSC 3.

68 *Chiranji Lal Gupta v. Union of India,* 2008 (1) RAJ 436 (P&H).

69 *Sai Engg. Contractors v. South Central Railway,* AIR 2007 DOC 123 : 2006 (6) ALD 7 (AP).

70 (1988) 2 SCC 338 [*LNIND 1988 SC 191*] : AIR 1988 SC 1007 : 1988 (2) Arb LR 270.

71 *R.P. Souza & Co. v. Chief Engineer, PWD, Panaji,* : 2000 (1) RAJ 34.

72 *Rajbir Singh v. Union of India,* : 1998 (2) Arb LR 516; *ONGC Ltd. v. Amtek Geophysical Pvt. Ltd.,* 2004 (3) Arb LR 260 (Del); *Prabhu Steel Industries Ltd. v. Union of India,* 2005 (1) RAJ 682; *Krishna Construction Co. v. Engineer Member, DDA,* 2005 (1) RAJ 517 (Del); *Rajesh Kumar Garg v. MCD,* 2008 (2) Arb LR 107 (Del).

73 *Pandit Munshi Ram and Asso. (Pvt.) Ltd. v. Delhi Development Authority,* ; *Union of India v. Momin Const. Co* ., (1997) 9 SCC 97 [*LNIND 1995 SC 104*] : AIR 1995 SC 1927; *M.V.V. Satyanarayana v. Union of India* , 1999 (2) RAJ 173 (AP).

74 *R.P. Souza and Co. v. Chief Engineer, PWD,* ; *Dominant Offsets Pvt. Ltd. v. Adamovske Strojirny,*.

75 *Ashi P. Ltd. v. Union of India* , 2005 (3) RAJ 567 (Del).

76 *State of Kerala v. C. Abraham,* : 1989 (1) Arb LR 286 : (1988) 2 KLT 768 (FB).

77 *M. Dayanand Reddy v. A.P. Industrial Infrastructure Corp. Ltd* ., (1993) 3 SCC 137 [*LNIND 1993 SC 263*] : AIR 1993 SC 2268 : 1993 (2) Arb LR 251.

78 *Lal Babu Singh v. State of Bihar,* (Jhar).

79 *Northern Railways Admin. v. Patel Engg. Co. Ltd.,* (2008) 10 SCC 240 [*LNIND 2008 SC 1644*] : 2008 (3) Arb LR 349; *HBHL-VKS (JV) v. Union of India,* 2007 (1) Arb LR 252 (Del) (FB); *Tata Finance Ltd. v. Sumit Khamsera,* AIR 2006 Raj 43 : 2006 (1) RAJ 531.

80 *S.B.P. & Co. v. Patel Engg. Ltd.,* (2005) 8 SCC 618 [*LNIND 2005 SC 851*] : AIR 2006 SC 450 : (2005) 128 Comp Cas 465 : 2005 (3) RAJ 388.

81 *Indian Iron and Steel Co. Ltd. v. Tiwari Roadlines,* (2007) 5 SCC 703 [*LNIND 2007 SC 611*] : AIR 2007 SC 2064 : 2007 (2) Arb LR 270.

82 *Union of India v. M.P. Gupta,* (2004) 10 SCC 504 : 2005 (1) Arb LR 368 : 2005 (1) RAJ 399.

83 *Union of India v. New India Constructors,* : (1955) 57 Pun LR 192 (DB) *; Mohinder Singh & Co. v. Union of India* , AIR 1972 J&K 63; *K.C. Chibber v. Delhi Development Authority* , 1997 (2) Arb LR 329 (Del).

84 *Jungheim, Hopkins & Fonkelmann* , *[1909] 2 KB 948; Oakland Metal Co. Ltd. v. D. Benaim & Co. Ltd* ., [1953] 2 Llyod's Rep 192 : *[1953] 2 QB 261: Macleod Ross & Co. Ltd. v. Cradock Manners Ltd* ., [1954] 1 Llyod's Rep 258.

85 *Har Shankar v. Deputy Excise and Taxation Commissioner,* (1975) 1 SCC 737 [*LNIND 1975 SC 587*] : AIR 1975 SC 1121 : [1975] 3 SCR 254 [*LNIND 1975 SC 587*] : 1975 Tax LR 1569.

86 *Nagendra Nath Chakraborty v. State of West Bengal,* : 1986 (2) Arb LR 25 (DB); *Thansingh Nathmal v. Superintendent of Taxes, AIR* 1964 SC 1419 : [1964] 6 SCR 654 [*LNIND 1964 SC 26*] : (1964) 15 STC 468.

87 *Om Prakash Satish Kumar Thapar v. Union of India* , (1996-2) 113 Pun LR 42 (DB); *Nandlal Bhandari Mills Ltd. v. M.P. Electricity Board,* (DB).

88 *Krishak Bharati Co-op. Ltd. v. Alutec Inc.* , 2002 (3) Arb LR 302 (Del)(DB).

89 *S.B.P. & Co. v. Patel Engg. Ltd.,* (2005) 8 SCC 618 [*LNIND 2005 SC 851*] : AIR 2006 SC 450 : (2005) 128 Comp Cas 465 : 2005 (3) RAJ 388; *Larsen & Toubro v. Fertilizers and Chemicals Travancore Ltd.,* (2008) 1 SCC 252 : AIR 2008 SC 465 : 2008 (1) RAJ 126; *Maharishi Dayanand University v. Anand Cooperative L/C Society Ltd.,* (2007) 5 SCC 295 [*LNIND 2007 SC 529*] : AIR 2007 SC 2441 : 2007 (2) Arb LR 294.

90 *Patel Narshi Thakerishi v. Pradyumanshinghji Arjunsinghji,* (1971) 3 SCC 844 : AIR 1972 SC 1273; *M.J. Kutinha v. Nathal Pinto Bai,* AIR 1941 Mad 272 [*LNIND 1940 MAD 262*]: 1940 MWN 1140 : *(1940) 2 MLJ 780* [*LNIND 1940 MAD 262*] : 52 MLW 753; *Anatharaju Shetty v. Apparvu v. Hegade,* AIR 1919 Mad 244 : 53 IC 56 : 37 MLW 162.

91 *Manish Engg. Enterprises v. M.D., IFFCO,* 2008 (3) Arb LR 110 (All).

92 *Jain Studios Ltd. v. Shin Satellite Public Co. Ltd.,* (2006) 5 SCC 501 [*LNIND 2006 SC 492*] : AIR 2006 SC 2686 : 2006 (3) RAJ 83 : 2006 (3) Arb LR 59; *Maheshwari Bros. Ltd. v. NHAI,* 2007 (2) RAJ 477 (DB).

End of Document

5 Conducting and Controlling Arbitration Proceedings

1. NOTICE FOR COMMENCEMENT OF ARBITRATION

Section 21 of the 1996 Act deals with commencement of arbitral proceedings and reads as under:

> ***Section 21. Commencement of arbitral proceedings.—*** *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.*

Invocation of arbitration agreement is possible only when a notice is served on the opposite party. Whether or not it is obligatory on the part of the party invoking the arbitration agreement to enumerate all the disputes required to be adjudicated together with quantum thereof, would depend upon the wording of the arbitration agreement. If there is no such obligation on the party invoking arbitration to spell out disputes together with amount thereof then a simple notice calling upon the persona designata to appoint the arbitrator, will be sufficient.

(Also see Chapter 3: Notice Invoking Arbitration Clause)

2. COMPOSITION OF ARBITRAL TRIBUNAL

Stipulations in the arbitration agreement about the composition of arbitral tribunal have got to be followed scrupulously. It has to be followed in its entirety otherwise any award made by a tribunal, other than one mentioned in the arbitration agreement, shall be bad in law. This is one of the grounds mentioned in section 34(2) (a)(v) which *inter alia* states that 'An arbitral award may be set aside by the court only if the composition of the arbitral tribunal was not in accordance with this Part.'

(A) Award by Illegally Appointed Arbitrator

Unless the arbitrator withdraws from his office or the other party agrees to the challenge, the arbitral tribunal is to decide on the challenge, and if the challenge is not successful, the arbitral tribunal has to continue with the proceedings and make an arbitral award. After the award is made, a party challenging the appointment of the arbitrator can make an application for setting aside the award in accordance with the provisions of section 34. [1] If the original appointment of arbitrators is bad, the tribunal constituted is without jurisdiction and no subsequent realisation of a mistake or any attempt to rectify matters by one party can clothe with jurisdiction a tribunal which is in its inception illegal and without jurisdiction, and the award by such tribunal is invalid. [2]

As per the arbitration clause, the General Manager of the respondent was to appoint two arbitrators and these two were to appoint the presiding arbitrator. Instead, the General Manager appointed all the three arbitrators. Held that the composition of the arbitral tribunal was not in accordance with the stipulations of the arbitration agreement and thus the award made by the arbitral tribunal was vitiated. [3]

The court while making appointment of two arbitrators gave a direction that they shall appoint the third arbitrator. However, the two arbitrators without appointing the third arbitrator commenced the arbitration proceedings and made an award. It was held that non-compliance of the directions of the Chief Justice vitiated the award and was contrary to the provisions of sections 10, 11 and 34 of the Act. [4]

Where the arbitration clause provided for arbitration by a panel of arbitrators, the assumption of jurisdiction by a sole arbitrator would be illegal and consequently the award passed by such an arbitrator was set aside. [5]

An arbitrator was appointed while an application under section 11 was pending in the court. The arbitrator thereafter also made an award. It was held that the right of the *persona designata* to make an appointment ceased after filing of the application for appointment of an arbitrator in the court and thus, the award made by the arbitrator was bad in law. [6]

When a party objects to the jurisdiction of the arbitrator and participates under protest, any award made by such an arbitrator would be void once the court holds that the protest of the party was factually correct. [7]

The arbitration clause in a contract provides a complete machinery for the appointment of arbitrator, either by the Chief Engineer or by the contractor. Such a clause has to be applied *in toto* . Appointment of arbitrator beyond the time specified in the contract by either of the parties would be illegal and award made by such an arbitrator would be liable to be set aside. [8]

(B) Defect in Appointment of Arbitrator – Acquiescence

In certain cases, it may be possible that both the parties to the contract consciously and deliberately do not raise any objection as to the continuance of an arbitral tribunal. This would be deemed to be a case of acquiescence. Parties thereafter lose the right to object and an award made by such a tribunal will not be interfered with. In this connection, reference may be made to section 4 of the Act which deals with waiver of right to object and states:

Section 4. Waiver of right to object.—A party who knows that—

(a) *any provision of this Part from which the 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.

A party may raise objection to the award on the ground of lack of jurisdiction on the part of the arbitral tribunal but the objection has to be taken at the earliest opportunity so that the right to object is not lost. In such cases where the party takes part in the arbitral proceedings with full knowledge of the facts, is in a different position from the one who does not associate himself with the arbitral proceedings. The latter category does not lose his right to object as long as he acts without undue delay to challenge the award; while it is incumbent on the former category to raise objection to the jurisdiction of the arbitral tribunal either forthwith or within such time as is allowed by the arbitration agreement or the tribunal. Such an objection against the jurisdiction of the arbitral tribunal must be raised in writing and sent to the tribunal with a copy to the other party. However, such a party, in order to watch its own interest, is not precluded from taking part in the arbitral proceedings under protest without prejudice to his right to raise objection after the award is made. If a party fails to do so, then such a party cannot raise objection before the court unless he shows that at the time he took part or continued to take part in the arbitral proceedings, he did not know nor had means to discover with due diligence the objection. Failure to object at the appropriate time would amount to waiver of the objection.

Waiver is an intentional relinquishment of a known right or such conduct as warrants an inference 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. [9]

'Waiver' is not strictly defined in its application in arbitration proceedings. As per the dictionary meaning a person is said to waive an injury when he abandons the remedy which the law gives him for it, and 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. [10]

Where though a party is aware from the beginning that by reason of some disability, the matter is legally incapable of being submitted to arbitration, participates in arbitration proceedings without protest and fully avails of the entire arbitration proceedings and then when he sees that the award has gone against him challenges the proceedings as without jurisdiction on the ground of a known disability, the same cannot be allowed. Long participation and acquiescence in the proceedings preclude such a party from contending that the proceedings were without jurisdiction. [11]

If an arbitral tribunal was not properly constituted and it made the award, it was held that objection should have been raised at the earliest opportunity and in any case before filing the written statement. Failure to object to the jurisdiction of the arbitral tribunal would amount to waiver and the award made could not be challenged on the ground of improper *constitution* of the tribunal. [12]

When both the parties by mutual consent appointed an arbitrator to adjudicate on matters which were of technical nature and the parties appeared before the arbitrator, submitted their claims and counter-claims, produced evidence and raised no protest, the Government was estopped from challenging the authority of the arbitrator by its own act, conduct and acquiescence. [13]

When the petitioners were aware of alleged bias of the arbitrator some months prior to the commencement of the arbitration and did not even participate in the arbitration proceedings, but allowed arbitration to continue and culminate in award, the petitioners could not be allowed to raise objection and seek setting aside of award on ground of bias at a late stage. [14]

Where the arbitrator held more than 13 hearings while he was Chief Engineer, and then as Additional Director General and thereafter as Director General of Works, CPWD and after his retirement from service held hearing while holding post of Member, Union Public Service Commission, it could not be urged by the objector that the sole arbitrator had no jurisdiction to proceed with the arbitration matter and pass the award in any capacity other than the Chief Engineer, CPWD. [15]

3. ARBITRATION PROCEEDINGS

(A) Preliminary Meeting

Russell [16] states: It is customary for the arbitrator to hold preliminary meeting with the parties, before commencing the usual hearing. The proceedings at this preliminary meeting are somewhat in the nature of the proceedings on a summons for directions in an action in the High Court.

Matters usually dealt with:

The subjects generally dealt with are applications by either party:

(a) For delivery of points of claim and defence;

(b) For particulars of his opponent's claim or counter-claims, as the case may be;

(c) For discovery and inspection of documents;

(d) For inspection of property and things—

(i) by parties

(ii) by the arbitrator;

(e) For the arrangement of other matters to shorten or facilitate the hearing;

(f) For the fixing of a time and place of hearing.

(i) To make declaration of impartiality

When the arbitral tribunal is duly constituted, all the members should make a declaration in writing about their independence and impartiality. In fact, section 12 of the Act enjoins upon the person likely to be appointed as arbitrator to 'disclose in writing any circumstances likely to give rise to justifiable doubts as to his independence or impartiality'. Over a period of time the litigants and those appointed as arbitrators have understood the stipulation to mean that the declaration as to independence and impartiality has to be made after their appointment and in the presence of the parties. It is also a requirement under section 12 that arbitrators from the time of their appointment and 'throughout the arbitral proceedings, shall, without delay, disclose to the parties in writing' subsequent events which may give rise to doubts about their independence or impartiality.

(ii) To devise procedure

At the first meeting of the tribunal with the parties, various decisions with regard to conduct of the arbitral proceedings are discussed. This holds good in case of arbitration by a sole arbitrator as well as in case of multi-member arbitral tribunals. The first step to be taken in the preliminary meeting is to devise the procedure, with the agreement of the parties, for submission of pleadings. However, if the parties cannot agree on procedure, then it shall be for the arbitral tribunal to lay down the procedure. In addition, the arbitral tribunal should give detailed directions which are necessary for smooth conduct of arbitral hearings.

During the preliminary hearing, the arbitral tribunal should also elicit information from the parties on whether they would like to proceed on the basis of documentary evidence alone or whether they would like to lead oral evidence. It is now quite common in arbitrations, where retired judges are members of the tribunal, that oral evidence is preferred since they are accustomed to deciding disputes on the basis of such evidence.

Section 24, which deals with 'Hearings and written proceedings', stipulates that:

Section 24. Hearings and written proceedings.—

(1) *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.

(2) *The 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.*

(3) *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.

Any party which wishes to be represented by a lawyer should state so in writing so as to enable the other party to engage a lawyer, if it so wishes. In fact, it is not a requirement of law that parties must be represented by lawyers. It cannot be a matter of debate that lawyers have the art of presentation and can present the matter in a proper manner as compared to most of the litigating parties. A lawyer would be able to assist the arbitral tribunal legally and would also be able to quote various legal authorities in support of his arguments. Another big advantage of a lawyer representing a party is that his assistance to the arbitral tribunal will help it to make and publish the award in accordance with law and the chances of the award being set aside would be minimal.

(iii) To decide language to be used

Section 22 of the Act provides for the language to be used in arbitral proceedings and it reads as under:

Section 22. Language.—

(1) *The parties are free to agree upon the language or languages to be used in arbitral proceedings.*

(2) *Failing any agreement referred to in sub-section (1), the arbitral tribunal shall determine the language or languages to be used in the arbitral proceedings.*

(3) *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.*

(4) *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.*

The choice has been left to the parties to determine the language or languages in which they would like the arbitral proceedings to be conducted. The need and necessity for the provision seems to have arisen because of the parties hailing from different regions of the country where different languages are spoken, as also because of the members constituting the arbitral tribunal belonging to different parts of the country. In order to overcome the situation that may arise between the parties regarding divergence of opinion

on the language or the languages in which the arbitral proceedings may be conducted, sub-section (2) provides that the matter shall be resolved by the arbitral tribunal and the decision taken by it shall be final and binding between the parties. It is submitted that there is no provision under the 1996 Act which could enable the party or parties to re-open the issue and change the decision taken by the arbitral tribunal with regard to the adoption of the language or languages to be used for conducting arbitral proceedings.

If the choice of language or languages in which the arbitral proceedings shall be conducted has not been decided by an agreement between the parties, then the language or languages decided by the arbitral tribunal shall, for all intents and purposes, be the language or languages in which the proceedings shall be conducted by the tribunal and written statement shall be filed by a party. Further, not only the hearings shall be conducted in the same language or languages but even the arbitral award shall be written in that language, inasmuch as any decision or other communication which may, during the course of arbitral hearing, become necessary shall be given by the arbitral tribunal in the language or languages adopted. It is thus clear that if the party or the parties deviate from the decision given by the arbitral tribunal, in the absence of any agreement between the parties, on the choice of the language or languages in which the arbitral proceedings may be conducted, that is not permissible. Any communication which may be sought to be placed on record of the arbitral tribunal, in the language or the languages other than those for which the decision had already been taken, may not succeed. Furthermore, 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.

(iv) Translation of documents

If any document is in a language different from the one agreed to between the parties, or in the event of disagreement, by the arbitral tribunal, then all the proceedings, communications, directions, decisions, notings, award, or other communications shall be made in that language or those languages, as the case may be. In case there is a documentary evidence which the party or the parties wish to place on the record of the arbitral tribunal, then the same may be taken on record only if a translated copy, in the language or languages finally decided by the parties or the arbitral tribunal, as the case may be, is given. In short, any document not in the language or languages adopted for arbitral proceedings, cannot be taken on record in the absence of a translated copy thereof.

In case of document being in a foreign language, its translated version shall be duly authenticated by the Embassy/High Commission/Consulate to be true and correct. No departure whatsoever can be made on this account because a translated version, wrongly done, may cause injustice to the parties.

(v) To decide venue

Generally, the venue of arbitration is mentioned in the arbitration agreement. Where there is no such stipulation about the venue then there are good chances of stalemate because each party would insist on its own stand. However, remedy is available in section 20 of the Act vesting authority in the arbitral tribunal to determine the place where the arbitral proceedings shall be held in case the parties cannot agree on the venue. However, if there is no unanimity amongst the members of the arbitral tribunal as to where the arbitral proceedings would be conducted, then it is submitted, majority view shall prevail. *Section 20 of the Arbitration and Conciliation Act* reads as under:

Section 20. Place of arbitration.—

(1) *The parties are free to agree on the place of arbitration.*

(2) *Failing any agreement referred to in sub-section (1), 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.*

(3) *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.*

Under the 1940 Act, in the absence of any stipulation as to the venue where the arbitration hearings were to take place, the arbitrators usually did not look to the convenience of the parties and their witnesses while fixing the place of hearing, but, more often than not, they looked to their own convenience. Section 20(1) leaves no choice with the arbitral tribunal in fixing the place for holding arbitration hearings and it has been left exclusively to the parties to determine for themselves as to where they would like to meet for furtherance of the cause of arbitration. However, if the parties fail to reach an agreement on the choice of venue, then and only then the matter goes to the arbitral tribunal for determining the place for holding arbitration meetings and that too not arbitrarily but having regard to the circumstances of the case, including the convenience of the parties.

Notwithstanding an agreement between the parties with regard to the choice of the venue, the arbitral tribunal has been given a wide discretion to decide when and where part of the proceedings shall take place, subject to an agreement in writing between the parties for holding discussions amongst themselves or for hearing witnesses, experts or the parties or for inspection of documents, goods or other property. This discretion has been given to the arbitral tribunal subject to the condition that there is no bar placed on the arbitral tribunal not to meet at a place other than the one fixed by them.

It is not open to the arbitrator to fix the venue of arbitration of his choice regardless of the convenience of the parties and their witnesses, the subject matter of the reference and the balance of convenience. [17]

Where the arbitration clause provided that the venue of arbitration shall be in New Delhi, the arbitrator cannot change the same without the consent of the parties and if he does so, the aggrieved party can immediately approach the court for relief. [18] The place of arbitration is often specified in the arbitration agreement, by the selection of a particular place or country in which the arbitration is to be held. If the seat is not agreed by the parties, the matter may be resolved by the arbitration institution or the person the parties have agreed should have the power to designate the seat, or by the arbitral tribunal if the parties have authorized the tribunal to do so. The rules of various arbitration institutions contain a means of establishing the place of arbitration in the absence of express agreement by the parties. In all other cases it is necessary to look at the parties' agreement and all the relevant circumstances. A reference to arbitration under the English *Arbitration Act* would be construed as implying that England would be the place of arbitration. Simultaneously, provisions in the arbitration agreement stipulation for arbitration by a local tribunal or institution may indicate the appropriate place of arbitration. [19]

If the petitioner wants the arbitral tribunal to hold arbitral proceedings at a place other than that agreed upon between the parties in the arbitration agreement on the ground that in another arbitration between the same parties, proceedings were being conducted at that place, it was held that the if in some other proceedings, a different place of arbitration had been agreed upon, it would not affect the written agreement between the parties in respect of the contract in question. [20]

An agreement contained an arbitration clause which *inter alia* provided for venue of arbitration to be Bhubaneshwar in Orissa in the event of disputes arising between the parties. Disputes arose between the parties. The presiding arbitrator decided to hold hearings at Singapore instead of Bhubaneshwar but the District Judge, when approached by a party to the arbitration agreement, ordered that hearing be held only at Bhubaneshwar. A civil revision petition was preferred against the said order. Held that the only aggrieved party was the presiding arbitrator and if he had no objection, no other party could approach the High Court in revision. [21]

Russell [22] states: 'In fixing the place of trial the arbitrator should take all the circumstances into consideration and decide according to the balance of convenience. The chief circumstances to be taken into consideration are the place where most of the witnesses reside; the situation

of the subject-matter of the dispute, and the balance of convenience and expense.'

(B) Fixation of Fees for Members of Arbitral Tribunal

The members of the arbitral tribunal may, on their own, or in consultation with the parties, fix a reasonable fees which they wish to charge from the parties. Generally, the fee is fixed on per day or per session basis, in addition to lump sum fees which they intend to charge towards reading fee. There is no hard and fast rule in *ad hoc* arbitrations for the fixation of fees. Parties generally leave it to the members of the arbitral tribunal to fix their fees. There is no cap on the amount which the parties would be required to pay.

When the arbitration is conducted by an institution then the members of the arbitral tribunal are paid by the arbitral institution in accordance with the fee structure fixed by it. The fee is fixed according to the amount of claims and counter-claims i.e. higher the amount of claims, more the fees and vice versa. The members of the arbitral tribunal are paid fixed travel allowance on per day basis and the total fees payable under the rules of the arbitral institution is paid only after the award is made. Thus, if an arbitrator does not complete the arbitral proceedings and quits before making the award, he gets nothing except conveyance allowance already paid.

Recently, the Supreme Court in *Union of India v. Singh Builder Syndicate* [23] expressed its deep sense of anguish and concern on the part of the arbitrators for having made the arbitration a five-star culture. It will be useful to reproduce verbatim the observations made in the said judgment which are as follows:

When the arbitration is by a tribunal consisting of serving officers, the cost of arbitration is very low. On the other hand, the cost of arbitration can be high if the Arbitral Tribunal consists of retired judge(s). When a retired judge is appointed as arbitrator in place of serving officers, the Government is forced to bear the high cost of arbitration by way of private arbitrator's fee even though it had not consented for the appointment of such non-technical non-serving person as arbitrator(s) The large number of sittings and charging of very high fees per sitting, with several add-ons, without any ceiling, have many a time resulted in the cost of arbitration approaching or even exceeding the amount involved in the dispute or the amount of award. When an arbitrator is appointed by a court without indicating fees, either both parties or at least one party is at a disadvantage. Firstly, the parties feel constrained to agree to whatever fees is suggested by the arbitrator, even if it is high or beyond their capacity. Secondly, if a high fees is claimed by the arbitrator and one party agrees to pay such fee, the other party, which is unable to afford such fee or reluctant to pay such high fee, is put to an embarrassing position. He will not be in a position to express his reservation or objection to the high fee, owing to an apprehension that refusal by him to agree for the fee suggested by the arbitrator, may prejudice his case or create a bias in favour of the other party who readily agreed to pay the high fee. It is necessary to find an urgent solution for this problem to save arbitration from the arbitration cost. Institutional

arbitration has provided a solution as the arbitrators' fees is not fixed by the arbitrators themselves on case-to-case basis, but is governed by a uniform rate prescribed by the institution under whose aegis the arbitration is held.

(i) Schedule of fees of various arbitral institutions

The schedule of fees payable to arbitrators as fixed by various reputed arbitral institutions is set out below. The same may be adopted by the arbitral tribunals while fixing their fee during the course of preliminary hearing with the parties:

Rules and Regulations of the Indian Council of Arbitration

Rule 32

Other expenses: The arbitrator may be paid an amount of Rs. 750/- towards local conveyance for attending each arbitration hearing in the city of his residence. In respect of joint trial, the hearing will be treated as one irrespective of the number of cases. Any travelling and other expenses incurred by the arbitrator or the Registrar for attending the arbitration hearings in a city other than the place of residence, shall also be reimbursed to him as provided hereinafter. All the above expenses shall form part of the arbitration cost.

Rule 33

(1) An arbitrator who has to travel shall be paid travelling expenses by air or rail (air conditioned wherever available) or car (when neither air nor rail transport is available) at actual. In addition, he may be paid out-of-pocket expenses at actual for boarding, lodging and local transport subject to maximum of Rs. 6,000/- per day in metropolitan towns, Rs. 3,000/- in class A cities and Rs. 2,000/- in other

cities. An arbitrator who makes his own arrangements for boarding, lodging, local transport etc. may be paid out of pocket expenses at the rate of Rs. 1,000/- per day, without production of vouchers. The limits for stay of the Registry officials will be of those applicable to arbitrators.

(2) The cost to be incurred on payment of expenses referred to in sub-Rule (1) to an arbitrator nominated by a party will be borne and paid by the party nominating the arbitrator. However, if an appointed arbitrator changes his residence after his nomination by a party, he will not be entitled to reimbursement of any enhanced expenses for attending the arbitration hearing, unless the party nominating him agrees to reimburse the same to him. The expenses payable to the third arbitrator or sole arbitrator appointed by the Counsel under Rule 23(a) & (b) will be borne and paid by both the parties in equal proportion or in such other manner as may be determined by the Arbitral Tribunal.

Amount in Dispute	**Arbitrator's Fee**	**Administrative Fee**
Upto Rs. 5 lac (Rs. 500,000)	Rs. 30,000/-	Rs. 15,000/-
From Rs. 5 lac one to Rs. 25 lac (Rs. 500,001 to 2,500,000)	Rs. 30,000/- plus Rs. 1,500/- per lac or part thereof subject to a ceiling of Rs. 60,000/-	Rs. 15,00/- plus Rs. 750/- per lac or part thereof subject to a ceiling of Rs. 30,000/-
From Rs. 25 lac one to Rs. 1 crore (Rs. 2,500,001 to Rs. 10,000,000)	Rs. 60,000/- plus Rs. 1,200/- per lac or part thereof subject to a ceiling of Rs. 1,50,000/-	Rs. 30,000/- plus Rs. 600/- per lac or part thereof subject to a ceiling of Rs. 75,000/-
From Rs. 1 crore one to Rs. 5 crore (Rs. 10,000,001 to Rs. 50,000,000)	Rs. 1,50,000/- plus Rs. 22,500/- per crore or part thereof subject to a ceiling of Rs. 2,40,000/-	Rs. 75,000/- plus Rs. 11,250/- per crore or part thereof subject to a ceiling of Rs. 1,20,000/-
Rs. 5 crore one to Rs. 10 crore (Rs.50,000,001 to Rs. 100,000,000)	Rs. 2,40,000/- plus Rs. 15,000/- per crore or part thereof subject to a ceiling of Rs. 3,15,000/-	Rs. 1,20,000/- plus Rs. 8,000/- per crore or part thereof subject to a ceiling of Rs. 1,60,000/-
Over Rs. 10 crore (Rs. 1,00,000,000)	Rs. 3,15,000/- plus Rs. 12,000/- per crore or part thereof	Rs. 1,60,000/- plus Rs. 6,000/- per crore or part thereof.

1. Arbitrator's fee:

	Amount in Dispute (in rupees)	**Amount of fee (in rupees)**
(i)	Where the total amount in dispute does not exceed Rs. 5 lakh	Rs. 30,000
(ii)	Where the total amount in dispute exceeds Rs. 5 lakh but does not exceed Rs. 25 lakh	Rs. 30,000 plus Rs. 1,500 per lakh or part thereof subject to a ceiling of Rs. 60,000
(iii)	Where the total amount in dispute exceeds Rs. 25 lakh but does not exceed Rs. 1 crore	Rs. 60,000 plus Rs. 1,2600 per lakh or part thereof subject to a ceiling of Rs. 1,50,000
(iv)	Where the total amount in dispute exceeds Rs. 1 crore but does not exceed Rs. 5 crore	Rs. 1,50,000 plus Rs. 22,500 per crore or part thereof subject to a ceiling of Rs. 2,40,000
(v)	Where the total amount in dispute exceeds Rs. 5 crore but does not exceed Rs. 10 crore	Rs. 2.40,000 plus Rs. 15,000 per crore or part thereof subject to a ceiling of Rs. 3,15,000
(vi)	Where the total amount in dispute exceeds Rs. 10 crore	Rs. 3,15,000 plus Rs. 12,000 per crore or part thereof.

Singapore International Arbitration Centre *(SIAC)*

Schedule of Fees

Arbitrator's Fees

The arbitrator's schedule of fees is effective as of 1 July 2010. The fee calculated in accordance with the schedule is the maximum amount payable to one arbitrator.

Sum in Dispute	**Administration Fees**
Up to 50,000	5,500

Sum in Dispute		Administration Fees
50,001 to 100,000		5,500 + 12% excess over 50,000
100,001 to 500,000		12,000 + 5.5% excess over 100,000
500,001 to 1,000,000		35,000 + 4% excess over 500,000
1,000,001 to 2,000,000		59,000 + 2% excess over 1,000,000
2,000,001 to 5,000,000		81,000 + 1% excess over 2,000,000
5,000,001 to 10,000,000		120,000 + 0.5% excess over 5,000,000
10,000,001 to	50,000,000	148,000 + 0.25% excess over 10,000,000
50,000,001 to	80,000,000	263,000 + 0.1% excess over 50,000,000
80,000,001 to	100,000,000	297,000 + 0.075% excess over 80,000,000
Above 100,000,001		314,000 + 0.06% excess over 100,000,000

London Court of International Arbitration

1. Fees and expenses of the Tribunal*

4(a) The Tribunal's fees will be calculated by reference to work done by its members in connection with the arbitration and will be charged at rates appropriate to the particular circumstances of the case, including its complexity and the special qualifications of the arbitrators. The Tribunal shall agree in writing upon fee rates conforming to this Schedule of Arbitration Costs prior to its appointment by the LCIA Court. The rates will be advised by the Registrar to the parties at the time of the appointment of the Tribunal but may be reviewed annually if the duration of the arbitration requires.

Fees shall be at hourly rates not exceeding 400

However, in exceptional cases, the rate may be higher provided that, in such cases, (a) the fees of the Tribunal shall be fixed by the LCIA Court on the recommendation of the Registrar, following consultations with the arbitrator(s) and (b) the fees shall be agreed expressly by all parties.

4(b) The Tribunal's fees may include a charge for time spent travelling.

4(c) The Tribunal's fees may also include a charge for time reserved but not used as a result of late postponement or cancellation, provided that the basis for such charge shall be advised in writing to, and approved by, the LCIA Court.

4(d) The Tribunal may also recover such expenses as are reasonably incurred in connection with the arbitration, and as are in a reasonable amount provided that claims for expenses should be supported by invoices or receipts.

Rules of Arbitration of the International Chamber of Commerce

A. Arbitrator's Fees

Sum in dispute (in US Dollars)			**Fees (**)**		
Minimum			**Maximum**		
Upto			50,000	$3.000	18.0200%
From	50,001	To	100,000	2.6500%	13.5680%
From	100,001	To	200,000	1.4310%	7.6850%
From	200,001	To	500,000	1.3670%	6.8370%
From	500,001	To	1,000,000	0.9540%	4.0280%
From	1,000,001	To	2,000,000	0.6890%	3.6040%
From	2,000,001	To	5,000,000	0.3750%	1.3910%
From	5,000,001	To	10,000,000	0.1280%	0.9100%
From	10,000,001	To	30,000,000	0.0640%	0.2410%
From	30,000,001	To	50,000,000	0.0590%	0.2280%
From	50,000,001	To	80,000,000	0.0330%	0.1570%
From	80,000,001	To	100,000,000	0.0210%	0.1150%
From	100,000,001	To	500,000,000	0.0110%	0.0580%
Over	500,000,000				0.0400%

(ii) Tribunal to fix amount of deposit

The arbitral tribunal has been given the option to fix a reasonable amount payable by way of deposit and such decision has been made final and binding on the parties. The deposit shall be treated by the arbitral tribunal as an advance for the costs referred to in sub-section (8) of section 31. The costs determined by the arbitral tribunal shall be payable in advance by the parties and the costs so deposited shall be subject to adjustment at the end of the arbitral proceedings. A separate fees shall be payable to the arbitral tribunal if counter-claims are also preferred by the respondents.

Section 38 of the Act which deals with 'deposits' states:

Section 38. Deposits.—

(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.

(2) *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.

(3) *Upon termination of the arbitral proceedings, the arbitral tribunal shall tender an accounting to the parties of the deposits received and shall return any unexpected balance to the party or parties, as the case may be.*

The best course for the arbitrator is to make a record about his fees and, the reasons therefore, if any, in the record of the proceedings itself within the knowledge of both the parties and if he does not do so, he will be involved in defending himself against the allegation of misconduct, if made. [24]

Where the parties have expressly agreed with the arbitrator that he shall be paid, he is entitled upon publication of an award to bring an action on the agreement for the amount of the remuneration. [25] If the amount has been agreed in advance, either as single inclusive fees, or as a rate per hour or per day, the arbitrator may recover accordingly. If not, the arbitrator is entitled to a reasonable fee. Even if the parties and the arbitrator do not expressly agree between themselves for payment, it may be possible to imply a promise from the terms of the agreement between the parties.

Even where the parties have not made any specific provision for the arbitrator to be paid, an arbitrator appointed to decide a commercial dispute has a right to be paid a reasonable fee. This is so whether the arbitrator is a lawyer or a layman. [26]

(iii) Whether tribunal can revise fees?

Depending on the facts and circumstances of each case, the arbitral tribunal may revise the fees initially fixed on the amount of claims and counter claims preferred by the parties. The need and necessity of calling upon the parties for the supplementary deposits, it seems, would arise when the arbitral proceedings turn out to be complicated or get protracted, which exigencies could not have been envisaged when a call for the initial deposits was made by the arbitral tribunal. Alternatively, such a situation could also arise when the claimants and/or the respondents revised upwards the amount of the claims and/or counter claims. The arbitral tribunal shall call upon the parties to make the deposit within a reasonable period of time. The deposits so made shall be subject to adjustment at the time of the conclusion of the arbitral proceedings. Where the arbitral proceedings turn out to be complicated, protracted and required even a spot inspection, and the arbitrator accepts an extra amount as fees from both the parties, he is not guilty of misconduct. [27]

(iv) One party fails to pay fees – Remedy

The call for deposit of the amount, as fixed by the arbitral tribunal, keeping in view the

magnitude of the work, shall be made in equal shares by the parties in advance. If either party expresses inability to pay or refuses to pay his share of the deposit, it is now permissible for the other party to pay the share of the defaulting party and the arbitral tribunal shall debit the amount, after determination of the costs under section 31(8), at the time of making the award. If a party decides not to pay the share of the defaulting party, the claim/counter claim, as the case may be, of the party paying shall be adjudicated upon by the arbitral tribunal and the proceedings with regard to the claim/counter claim of the defaulting party may either be suspended by the arbitral tribunal or, in the alternative, if the facts and circumstances of the case so warrant, to terminate the arbitral proceedings.

(v) Tribunal obliged to render accounts

The deposits made by the parties, as per the call given by the arbitral tribunal, is subject to rendition of accounts by the arbitral tribunal. This account shall be given only after culmination of the arbitral proceedings, i.e. between the time when the arbitral proceedings are concluded, with the consent of the parties, and the making of the award. Any amount which remains unexpended shall be returned to the party or parties, as the case may be. It is submitted that failure to give accounts on termination of arbitral proceedings may be considered as a serious default on the part of the arbitral tribunal, which may have an effect when the matter comes to the court under section 34 of the Act.

(C) Submission of Pleadings

Section 23 of the Arbitration and Conciliation Act, 1996 provides the manner in which pleadings are to be filed before the arbitral tribunal and the same reads as follows:

Section 23. Statements of claim and defence.—

(1) *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 respondents shall state his defence in respect of these particulars, unless the parties have otherwise agreed as to the required elements of those statements.*

(2) *The parties may submit with their statements all documents they consider to be relevant or may add a reference to the documents or other evidence they will submit.*

(3) *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 inappropriate to allow the amendment or supplement having regard to the delay in making it.

It is incumbent upon the party making the claim to state:

(1) the facts supporting the claim;

(2) the points at issue; and

(3) the relief or remedy sought.

On receipt of statement of claim from the claimants, the respondents shall state:

(a) the defence in respect of each of the claims made against him;

(b) any other information/statement rebutting the claim.

The respondent ought to deal with each and every point raised by the claimant together with any documentary evidence in support thereof. Every issue raised or allegation made by the claimant must be distinguished or disputed expressly and nothing should be left to guesswork. It is generally noticed that reply tendered by the respondent, especially government/semigovernment organizations, is evasive and not to the point. This leads the arbitral tribunal to draw adverse inference. It is not always that a weak defence leads to an evasive defence statement, but often it can be attributed to a casual approach on the part of the person drafting the same. A little care in drafting the statement of defence by the respondents would certainly help in avoiding undue burden on its employer and avoid any award going against it.

On receipt of statement of defence from the respondent, the claimant, if permitted by the arbitral tribunal, shall submit a rejoinder together with further documents which may be necessary to be filed to meet the points raised by the respondents, within the time allowed. If some document which is necessary to be appended with the rejoinder is not immediately available, the claimant may reserve the right to produce the same at a later date.

Whether the parties particularly wish it or not, the arbitrator must obtain a clear statement of the disputes which are submitted to him for his decision, particularly if the disputes are not already defined by the terms of the submission. For example, in the case of disputes arising out of a contract in which there is an arbitration clause, it

not infrequently happens that at the date of the appointment of the arbitrator the disputes are not fully defined. An account may have been delivered, dispute may have arisen upon that account, an arbitrator may have been appointed, yet at the date of the preliminary meeting or the hearing it may not be clear what is in dispute between the parties or what it is the parties desire the arbitrators to decide. [28]

(i) Parties to stick to time schedule

Generally, there is no unanimity amongst the parties as to the period within which they shall be in a position to complete the pleadings. It has been observed that private parties do not pose any problem. They are always willing to cut down the time within which they shall be in a position to complete the pleadings. However, government/semi-government organizations often seek much more time than the arbitral tribunal would like to allow. The primary reason for their seeking more time is that after the concerned officer or the advocate has framed the pleadings, the same are sent to the Head Office for vetting. Even if the arbitral tribunal insists on allowing a short period to government/semi-government body, it cannot succeed because invariably there is a request in writing to permit further time. Arbitral tribunals, normally, are generous in allowing more time unless further demand of extension of time for submission of pleadings is considered to be not justified.

Arbitration being a private procedure established by 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. [29]

The arbitrator has implied power to order each party to deliver particulars of the claim, and of the counter-claim, if there should be one, in order to enable his opponent to know the case he has to meet and to prepare his evidence for the trial. What particulars are to be stated must depend on the facts of each case. It is absolutely essential that the proceedings, not to be embarrassing to the defendants, should state those facts which will put the defendants on their guard, and tell them as to what they will have to meet when the case comes on for trial. [30] Irregularity, if any, made by the arbitrator in accepting the counter-claim beyond the time fixed by him can be deemed to be waived by a party which takes part in the proceedings with full knowledge of the irregularity and without protest. [31]

(ii) Particulars supporting claim/defence

It has been made mandatory on the part of the parties, while submitting their claim statement and statement of defence, as the case may be, to:

(1) submit all documents which are considered to be relevant; and

(2) add a reference to the documents or other evidence proposed to be submitted at a later date.

Russell [32] states: 'In all cases it will be a question for the arbitrator to decide what are reasonable particulars to order and he will be asked to fix and must fix a time within which the particulars are to be delivered. The time will necessarily depend upon the labour involved, and the other circumstances brought to his notice at the time when the application is made.

Depending upon the terms of the submission, it may not only be necessary to order particulars, but also to define the actual disputes between the parties, though not necessarily by pleading or points of claim and defence, and this is absolutely necessary.'

(iii) Amendment of pleadings–Whether barred

If the parties to the contract have agreed between themselves that none of them shall add, alter, delete, substitute, amend all or any part of the statements or particulars or documents since placed on record of the arbitrator, then any reception of material thereafter by the arbitrator shall be against the express agreement between the parties and any award by the arbitral tribunal based on such material is liable to be set aside. However, if the parties have not placed any such restriction on themselves, then:

(1) either party may amend or supplement his claim or defence;

(2) such amendment or supplementing of the claim/defence can be made only if the arbitral proceedings are still continuing; and

(3) the amendment or supplementing of the claim/defence may be allowed by the arbitral tribunal if the request for such amendment/supplementing had been made without any unreasonable delay.

It is advisable that at the time of drafting the claim statement or the defence statement, a paragraph be added to the effect that the party reserves its right to add, alter or otherwise amend the pleadings in the event of any new fact or document coming to its

knowledge. If it does not do so, it may lose its right to amend the claim statement in terms of *section 23(3) of the Arbitration and Conciliation Act*. A right should also be reserved to add more documents at a subsequent point of time. However, it must be understood that mere reservation of right does not mean that a party can amend its pleadings or add more documents at any point of time but it has to do so within a reasonable time and without any undue delay since section 23(3) allows the arbitral tribunal to allow amendment of pleadings and submission of additional documents 'having regard to the delay in making' an application for the same. Where after statements of claims and defence were submitted and at the time the parties met for the first time before the arbitrator, one of the parties desired an amendment to add a new point, in that case the arbitrator had the discretion to allow or refuse to allow such an amendment. [33] An arbitrator has the power to allow a party to make corrections of apparent errors in the statement of claim as well as affidavit. [34] When the objecting party has suffered no prejudice by amendment of an issue and parties well knew the amended claim and have contested the case before the arbitrator on that footing, the contention of the objector that by amending the issue behind his back, the arbitrator was guilty of misconduct, is of no force. [35] In general, *bona fide* amendments should be allowed freely, unless the arbitrator is satisfied beyond doubt that the amendment is not *bona fide* (for example, designed to secure delay) and that the adjournment must inevitably seriously prejudice the other party in some way which cannot be met by an award of costs thrown away, or in appropriate cases by an award of interest on any eventual sum awarded. [36]

(iv) Arbitrator may refuse amendment

An application for amendment of pleadings, if moved by a party, would normally be allowed by an arbitral tribunal provided it does not change the nature of the claim nor is intended to delay the arbitral proceedings. It is a matter of common experience that in order to delay the outcome of the adjudication process, the respondent generally, moves application for amendment of pleadings at quite a belated stage. This is bound to result in wastage of time and money because the opposite party will be given an opportunity of filing a reply to the said amendment application followed by a rejoinder by the party moving the application. Thereafter, the parties shall argue the matter over one or two hearings, followed by internal meetings of the arbitral tribunal to arrive at a decision. If the tribunal allows the application for amendment, then the parties would have to amend the pleadings. Thus, once an application for amendment of pleadings is moved and opposed by the other party, it usually results in a delay of about 5-6 months. Since applications for amendment result in delay in the arbitration process, the arbitral tribunal should compensate the affected party with costs for the delay. There is no hard and fast rule for determining the costs to be imposed but generally it is noticed that the arbitral tribunals call upon the party moving the application to bear the fees and travelling expenses of the arbitral tribunal together with other expense, if any, incurred on arrangement of the venue of hearing.

It must always be borne in mind that the arbitrator has no power to allow an amendment, the effect of which would be to alter the terms of the submissions under

which his powers arise; that is to say, he cannot, without the agreement of the parties in writing, allow a fresh dispute to be introduced as an amendment, which is not comprised in the submission. [37]

In dealing with amendments generally, the arbitrator should follow the procedure adopted by the courts. The main principle is that amendments should be allowed when they can be made without manifest and grave injustice. Generally speaking, any injustice which might otherwise be done can be cured by an order that the party asking for the amendment shall pay the costs occasioned thereby.

> Bowen L.J. in *Cropper v. Smith* [38] observed: There is one panacea which heals every sore in litigation, and that is costs. I have very seldom, if ever, been unfortunate enough to come across an instance where a person has made a mistake in his pleadings which has put the other side to such a disadvantage as that it cannot be cured by the application of that healing medicine.

(D) Framing Points of Differences

Normally, in arbitration proceedings, instead of framing formal issues as done in courts, parties submit to the arbitral tribunal areas of differences on which they wish the tribunal to make the award. If the parties are not able to formulate the areas of differences, then the arbitral tribunal finalises the same after consultation with the parties. However, in arbitrations conducted by technical persons, the practice of formulating areas of differences also is usually not followed. In such proceedings, the parties understand that the claims are the issues and they straight away address the tribunal on the same without indulging in procedural formalities.

If at the time of making of the award, the arbitrator corrected certain issues, which did not in any manner prejudice the cause of either party and more so, when the parties have fought the case before the arbitrator on the basis of the amended claim, it cannot be said that he was guilty of misconduct because of having amended the issue behind the back of the parties. [39]

It cannot be said that the provisions of *CPC* regarding the formal framing of issues or their formal determination separately is a procedure at all enjoined as compulsory in an arbitration proceeding. [40] However, the earlier view of the Orissa High Court was that the provisions made in Order 14 of the *CPC* for framing of issues has application to arbitration proceedings, [41] but in a later decision, it has been held that where a party tenders an application to the arbitrator for framing of issues and the arbitrator formulates points on which he

has to consider disputes between parties, technicalities of settling issues as required under Order 14 Rule 1, *CPC* need not be followed. [42] The arbitrators are not bound to decide the case on the basis of the issues framed by them. [43]

Merely because an issue has not been framed will not prejudice any of the parties as both the parties were aware of their respective pleadings and have gone to the trial being well aware of their respective cases as pleaded in the objection/reply. [44]

(E) Admission/Denial of Documents

In support of the pleadings, both the parties append a number of documents, which consist primarily of the correspondence exchanged between the parties. After completion of pleadings and exchange of documents, arbitral tribunals normally call upon the parties to submit admission/denial statements within the period agreed upon between the parties or determined by the arbitral tribunal. The parties, thereafter, on checking of their respective correspondence files, compile a statement of letters which they admit fully; or whose receipt they admit but contents are in dispute; and lastly, such letters whose receipt itself is denied. Such a tabulated statement can be exchanged between the parties with a copy to the arbitral tribunal. There is no bar in sending the tabulated statement by e-mail which should be followed by a hard copy thereof. In a large number of cases, arbitrators insist on exchange of admission/denial statement in the arbitration hearings primarily to ensure compliance of orders within the time allowed.

Certain documents, whose receipt has been denied by a party, need to be proved by the other party before the same are taken on record by the arbitral tribunal. There are many ways in which denied documents can be proved. It may be proved by filing of affidavits; production of dispatch register; letter from postal authorities of delivery of letters etc. Those documents which cannot be proved may not be allowed to be relied upon during the course of arguments. When an affidavit is filed by a party to prove documents, denied by the opposite party, then the opposite party shall have a right to cross-examine the deponent. In respect of documents, whose receipt is admitted but contents are denied, it is a matter of procedure to be decided between the parties and the arbitral tribunal as to whether oral evidence would be led to prove the contents of the said documents or the matter would be heard on documentary evidence as filed.

(F) Filing of Affidavits in Support of Claims/Counter-claims

Appreciation of evidence filed by parties is within the exclusive domain of an arbitral tribunal. *Section 19 of the Arbitration and Conciliation Act, 1996* provides as follows:

Section 19. Determination of rules of procedure.—

(1) *The arbitral tribunal shall not be bound by the Code of Civil Procedure, 1908 (V of 1908) or the Indian Evidence Act, 1872 (1 of 1872).*

(2) *Subject to this Part, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting its proceedings.*

(3) *Failing any agreement referred to in sub-section (2), the arbitral tribunal may, subject to this Part, conduct the proceedings in the manner it considers appropriate.*

(4) *The power of the arbitral tribunal under sub-section (3) includes the power to determine the admissibility, relevance, materiality and weight of any evidence.*

After completion of pleadings or after framing of the areas of differences, the arbitral tribunal, after due consultation with the parties, may decide upon the manner in which the case should proceed. At this stage, the parties may decide to follow any one of the following procedures:

(1) Parties may proceed straightaway to the argument stage bypassing the need to formally prove the documents filed;

(2) Parties may agree to file affidavits by way of evidence and also decide not to crossexamine the deponents. The matter can, thereafter, be set down for arguments on the merits of the case;

(3) Parties may decide to file affidavits in lieu of examination-in-chief. Thereafter, the deponent may be cross-examined by the respondent.

(4) Parties may decide to carry out examination-in-chief as well as cross-examination orally.

In commercial disputes, it is generally preferable to decide the dispute on the basis of documentary evidence alone, unless the parties wish to supplement the same or add certain information based on the personal knowledge of a deponent.

(G) Recording of Evidence

If the parties decide that oral evidence is required, then a question normally arises as to whether oath is to be administered to the witness. While it was obligatory to administer oath under the 1940 Act, it is no longer a requirement of law to administer oath to the witnesses or the parties. However, it is prudent to administer oath to the witnesses. In case of an arbitral tribunal consisting of a sole arbitrator, oath should be administered by the arbitrator, whereas in case of a multi-member tribunal, normally oath is administered by the presiding arbitrator.

The next issue which confronts the parties is to the manner in which oral evidence should be recorded. Practically, it is observed that evidence is recorded, either in the form of questions and answers or in narrative form. Evidence is dictated (either by the witness himself or by the arbitrator) to a stenographer who later types out the same. However, this method has a lot of disadvantages since a witness may later dispute or deny having made a particular statement as typed. The preferable method of recording evidence is to get the same typed during the hearing itself and to obtain the signatures of the deponent on each date of his deposition.

No questions can be allowed to be asked from the witnesses about formation of the contract because of the prohibition contained in *sections 91* and *92* of the *Evidence Act*. Normally, questions pertaining to a witnesse's opinion on the conditions of the contract too are not allowed. It needs to be ensured by the arbitral tribunal that only questions directly related to the points of differences are allowed to be asked. It is correct that as per *section 138 of the Evidence Act*, cross-examination of a witness need not be confined to the contents of the affidavit/examination-in-chief. This may be true in so far as court proceedings are concerned but in arbitral proceedings which are, in fact, summary proceedings, only questions concerning the claims or the counter-claims should be allowed to be asked from the witness. However, if the arbitral tribunal feels that the particular question being asked will throw some light on the controversy, the arbitral tribunal may allow the question.

During the course of cross-examination, sometimes questions are asked which have no relevance whatsoever to the areas of differences as determined by the parties and/or by the arbitral tribunal. In such a case, it is the duty of the opposite party to object to the question. The arbitral tribunal, in that event, should consider the question and its relevance and after due deliberation either allow or disallow the question. In either situation, it is the duty of the arbitral tribunal to record the question asked, together with the objection of the party.

(H) Appointment of Expert

Need and necessity for appointment of an expert arises when the arbitral tribunal does not possess that specialisation which is essential for adjudicating the disputes. The old Act of 1940 contained no provision vesting authority in the arbitral tribunal to make the appointment of an expert, whereas under section 26 of the 1996 Act, there is a specific provision authorising the arbitral tribunal to make appointment of one or more experts. Section 26 reads as under:

Section 26. Expert appointed by arbitral tribunal.—

(1) *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.*

(2) *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.*

(3) *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.*

(i) Manner of appointment of expert

In the absence of an agreement between the parties on part or whole of the subjectmatter of the dispute, the arbitral tribunal: —

(1) may appoint one or more experts;

(2) may ask such expert/experts to determine specific issues; and

(3) shall deliberate upon such specific issues.

Furthermore, the arbitral tribunal in order to facilitate the task of the expert/experts, may direct a party:

(a) to give the expert any relevant information; or

(b) to produce, or to provide access to, any relevant documents, goods or other property, for its inspection.

(ii) Who is ‘Expert’

As per *section 45 of the Evidence Act*, the definition of the word 'expert' is: 'When the court has to form an opinion upon a point of foreign law, or of science or art, or as to identity of hand-writing or finger impressions, the opinions upon that point of persons specially skilled in such foreign law, science or art, or in questions as to identity of hand-writing or finger impressions are relevant facts. Such persons are called experts.'

In *P. Ramanatha Aiyar's Advanced Law Lexicon,* [45] an expert is defined as: 'In a general sense, an expert is a person of peculiar knowledge or skill as to some particular subject, such as any art or science, or particular trade, or profession, or any special branch of learning; or is professionally or peculiarly acquainted with its practices and usages; a person who has technical or peculiar knowledge in relation to matters with which the mass of mankind are supposed not to be acquainted; he who has some special, particular or practical knowledge in relation to some special department of the affairs of men as would qualify him to stand as an expert, skilled enough to teach others.'

In *Board of Education of Claymont Special School Dist. v. 13 Acres of Land in Brandywine, Del Super* , [46] expert testimony was stated to be an 'opinion evidence of some person who possesses special skill or knowledge in some science, profession or business, which is not common to the average man and which is possessed by the expert by reason of his special study or experience'. It is also stated: 'Testimony given in relation to some scientific, technical or professional matter by experts, i.e. persons qualified to speak authoritatively by reason of their special training, skill or familiarity with the subject. Evidence of persons who are skilled in some art, science, profession, or business, which skill or knowledge is not common to their fellow men, and which has come to such experts by reason of some special study and experience in such art, science, profession or business.'

(iii) Evidence of expert

If the parties have not devised or have failed to devise any agreed basis, then on the request of a party or the arbitral tribunal on its own motion, where considered necessary, on receipt of written or oral request of the expert, shall: —

(1) ask the expert to participate in the oral arbitral proceedings;

(2) permit the parties to put questions to such expert/experts who had made the report;

(3) permit the parties to present their own expert witnesses to have their views on the points in issue.

The parties may wish to adduce expert opinion evidence to support their respective cases in the arbitration and, if so, they should obtain an appropriate direction from the tribunal. The direction should cover the form in which the expert's evidence is to be given, and in most cases it will also specify the maximum number of experts on whose evidence the parties may rely and, in broad terms at least, the nature of evidence to be given. So, for example, it may provide that each party may adduce evidence from one expert in relation to the particular technical issues raised by the case and from one expert in relation to the computation of the alleged loss. Byspecifying these matters in the direction it will avoid a multiplicity of experts from a party on the same issue. It will also prevent a situation where each party adduces expert evidence on different aspects of the case and there are then delays whilst they seek to address the case put forward by the other. [47]

The tribunal has power to appoint experts, legal advisers or technical assessors and may allow them to attend the hearing. Their fees and expenses fall to be included as expenses of the arbitrators and can therefore form part of the tribunal's award on costs. The expert or legal adviser is to report to the tribunal and to the parties whereas an assessor simply assists the tribunal on technical matters but in any event the parties must be given an opportunity to comment on ‘any information, opinion or advice offered by any such person’. The tribunal must also, of course, reach its own decision and cannot delegate this to the expert, legal adviser or technical assessor. [48]

Expert evidence is almost invariably given in the form of a written report which is produced prior to the hearing and on which the expert is cross examined at the hearing. As with factual witnesses, the direction should specify a date on which the reports are to be produced or the date should be capable of being precisely determined by reference to other events in the arbitration. [49]

Russell [50] states: ‘Arbitrators may properly delegate their duties if so authorised by the terms of the submission or by agreement of the parties, e.g. to accountants, surveyors, lawyers etc. His (the third party's) decision then comes before the arbitrator in the shape of an admission, which is nothing more than a matter of evidence agreed upon.

It is permissible to an arbitrator to take assistance in technical matters, in so far as such assistance is necessary, for the discharge of his duties. [51] If an arbitrator had asked some persons about questions of law, or if he had consulted them as to the style, syntax or grammar of his award, he was quite within his rights to do so, but if he arrived at any findings of fact by consulting outsiders and allowed the persons sitting with him to affect his decision as assessors, then it must be held that there had been misconduct. [52]

(iv) Expert cannot be cross-examined

Sub-section (2) of section 26 makes it clear that the Legislature did not intend the parties to cross-examine the expert, otherwise it would not have stipulated that 'the expert shall, after delivery of his written or oral report, participate in an oral hearing where the parties have opportunity to put questions to him and to present expert witnesses in order to testify on the points at issue'. The stipulation speaks of putting questions to the expert and not subjecting him to cross-examination.

Putting questions to the expert and subjecting him to cross-examination operate in different directions. If it is confined to putting questions to the expert, it is obvious that only such questions can be put to him which would relate to seeking clarifications or elucidations from him on such points which are contained in his report. In other words, expert can be asked to clarify or elucidate certain points which the party had not been able to make out.

It is not the intention of the Legislature to subject the expert to grilling in the form of cross-examination. Cross-examination of a witness, in the ordinary course, is when the witness gives an affidavit or makes an oral statement on oath in the form of examination-in-chief. In case an expert gives a report on a specific issue, then such a report cannot be considered to be examination-in-chief. Furthermore, opportunity of putting questions to the expert is given to both the parties. There is no situation envisaged in the *Evidence Act*, where both the parties can crossexamine a particular witness. Invariably, the party producing the witness gets the statement of the witness recorded in the form of examination-in-chief and the examination of the witness by the adverse party is called cross-examination.

The expert can only be asked questions directly related to the report, but in the case of cross-examination, as per *section 138 of the Evidence Act*, 'crossexamination need not be confined to the facts to which the witness testified on his

examination-in-chief'. If an expert was intended to be allowed to be cross-examined by the Legislature, then instead of stipulating that the expert can be 'put questions', it would have been stipulated that the expert can be subject to 'cross-examination'.

(v) Expert obliged to show documents to parties

An expert appointed by the arbitral tribunal submits his report to it on specific issues referred to him. Even though it is not a requirement of the Act that a copy of the report should be supplied to the parties, but it is desirable that the arbitral tribunal should make photocopies of the report and supply the same to both the parties so as to enable them to study the report before meeting the expert during the course of a oral hearing held for the purpose of putting questions to him.

If the parties have agreed on the procedure or modalities with which the issue has to be resolved, then that procedure or modality shall be given effect to; failing that, a party will have a right to:

(1) ask the expert to make available for examination all documents, goods or other property available with him; and

(2) such documents, goods or other property must be those which formed the basis of the compilation of his report.

(l) Court's Assistance in Taking Evidence

Under the provision of section 43 of the 1940 Act, the arbitrator could take the assistance of the court in having summons issued to the parties or their witnesses. Section 26 of the 1996 Act also confers specific authority on the arbitral tribunal to approach the court to ensure the presence of such a witness. This can be done either by the arbitral tribunal *suo motu* or on the request of one or both the parties. The arbitral tribunal can authorize the parties or one of them, as the case may be, to approach the court of competent jurisdiction to seek its assistance in taking such evidence.

(i) Applications seeking production of witness or documents

While seeking such assistance of the court, it is imperative that the following particulars are stated in the application wherein request for summoning the witness

is made or in respect of which the court is to be requested for recording the evidence:

(1) Names and addresses of the parties and the arbitrators;

(2) General nature of the claim and the relief sought;

(3) Particulars of the witness or expert sought to be produced before the tribunal, together with his address;

(4) Documents sought to be got produced from such witness or expert witness or the property which is sought to be inspected.

On receipt of the application from the arbitral tribunal or by a party with the approval of the arbitral tribunal, the court shall execute the request by ordering that the evidence be provided directly to the arbitral tribunal. It can also make an order to issue processes to the witnesses as it can do in case of suits. It may also be noted that persons who fail to attend the hearings before the tribunal in accordance with the summons so issued by the court, shall be subjected to like disadvantages, penalty and punishment by order of the court on the representation of the tribunal.

The meaning of the word 'process' used in this section includes summonses and commissions for the examination of witnesses and summons to produce documents. Such summons are to be issued only after the party concerned has given the addresses of any person to be heard as a witness on the subject-matter of the testimony required and also when description of the document to be produced or property to be inspected has been given. [53]

(ii) 'Refusing to give their evidence'

The expression 'refusing to give their evidence' refers to a case where a person, when placed on oath, refuses to give any evidence, or answer questions put to him. It does not include a case where a party elects not to produce any evidence. [54] If any witness is guilty of any contempt to the arbitrator he can be punished by the court. [55] Thus, the court can punish a person who fails to attend, makes any other default, refuses to give evidence, or is guilty of any contempt to the arbitrator during the investigation of the reference. Such a person would, if the arbitrator makes a representation to the court, be subject to the like disadvantages, penalties and punishments by the court as he would incur for like offences in suits tried before the court.

Section 27 is confined to witnesses and witnesses alone. It has no application where the party to an arbitration agreement has to be summoned for appearance before the arbitrator so that he may participate in the proceedings and state his defence. [56]

(iii) Permission of arbitrator necessary before approaching court

It would not be proper on the part of an arbitrator to disallow the request of a party for moving the court to take out summons for the appearance of a witness, especially if the witness is very material and important for the case. [57]Section 27 of the 1996 Act provides for the quickest possible method for production of documents in the possession of a third party. [58] If one of the parties, without seeking approval of the arbitral tribunal, approaches the court for taking evidence by invoking provisions of this section, the application cannot be entertained. [59]

The Act is totally silent about the procedure or the remedy which may be available to a party if the arbitral tribunal refuses to examine the witnesses holding that they are not relevant for the proper disposal of the matter *inter se* the parties pending adjudication before him. The only remedy available to the petitioner is to file objections under section 34, if on pronouncement of award, he is of the view that the arbitrator has not adjudicated upon the disputes in accordance with law and procedure. [60]

(J) Oral Arguments

After the evidence has been recorded, oral arguments are to be led first by the claimant. While every lawyer has his own way of arguing a matter, but in arbitration matters it is suggested that a party should first narrate briefly the nature of the project and the events which led to the formation of the dispute. By way of an example, the introductory aspect of the subject-matter can be stated as given below:

(1) Name of work:

(2) Tenders invited on:

(3) Tenders opened on:

(4) Letter of award of work:

(5) Tendered amount:

(6) Amount of work actually done:

(7) Stipulated period allowed for completion of work:

(8) Stipulated date of completion of work:

(9) Actual date of completion of work:

(10) Status of final bill:

Effort should be made to see that the arbitral tribunal notes down the data as mentioned above. If it is found that the arbitral tribunal is simply hearing and is not noting anything, then the arbitral tribunal could be requested to note down the data since reference to the same would be made by both the parties during the course of oral arguments. This would surely prompt the arbitral tribunal to make a note of the data mentioned above.

Thereafter, the claimant should take up detailed arguments on each of his claims. The person arguing the matter should be thoroughly conversant with the claims, including technical details thereof, since many queries are asked by the tribunals, especially tribunals consisting of technically qualified arbitrators. These have to be answered quickly, precisely and with clarity. At times, it is not possible to offer a reply for want of knowledge. In such a case, the person arguing the matter should seek time to answer on the next date of hearing. It must be noted that an imprecise reply would act against the interest of the party. On the contrary, seeking time and then reverting back with the reply on the next date of hearing would convey, in no uncertain terms, that the party is rendering proper cassistance and is not misleading the arbitral tribunal.

While arguing a matter, it is necessary to remember that it is not expected that the tribunal should know as much as the claimant knows about the facts leading to the dispute. Therefore, the party arguing the case should assume the role of a teacher and start from the basics. Each step should be explained meticulously. First of all, relevant parts of the claim statement and defence statement should be read. Thereafter, the same should be explained in detail alongwith a reference to the relevant documents and evidence on record. It is important that the arguing party does not read the whole letter but confines itself to the relevant paras because it may be that the rest of the letter has no relevance to the dispute under reference. If repeated reminders have been sent seeking a particular payment, reference should be made to the said letters as well as the replies thereto to bring home the point that the respondent has either not replied or has evaded reply.

After establishing the basis of the claim and the justification for the same, the next step is to explain the manner in which the claim has been quantified. Tabulated statements justifying the amount claimed have to be explained in detail, together with vouchers showing the expenditure.

While presenting a case, the person arguing should keep in mind that while he had taken a lot of time to fully grasp the matter in dispute, the person hearing and adjudicating the matter cannot be expected to understand the same instantly. Therefore, the golden rule is to pace out the arguments. Some people, on account of their over-enthusiasm, rush through

with the matter at break-neck speed. This is highly undesirable. It is the duty of the arguing party to ensure that the point argued by him has been duly registered by the arbitral tribunal.

After facts relating to the dispute have been brought to the notice of the arbitral tribunal, it is time to support the case with relevant case law. In matters relating to disputes emanating from building and engineering contracts, it is true that there are not many reported decisions from the High Courts and Supreme Court. Under the circumstances, there is no other way except to rely upon foreign case law or authorities. Many arbitrators, particularly technical persons, are not interested to hear case law. They insist that they will go by their technical knowledge. This is not a good approach. It needs to be brought to the notice of the arbitral tribunal that any decision against the law laid down by courts shall vitiate the award and is unlikely to meet favour from the court.

After arguments on one claim are over, the next claim be taken up, and likewise arguments on other claims shall follow. There may be certain claims which are almost of identical nature. These can be clubbed together for the purpose of arguments. Even the correspondence may be common. Thus, if similar claims are clubbed, there will be no need to read the same letters time and again. This will incidentally save on time and also avoid annoyance of such arbitrators who do not like to hear repetitive arguments.

In certain arbitrations, a procedure is devised by the parties/arbitral tribunal that after the claimant completes arguments on one claim, the respondent advances counter arguments on the same. This is followed by the rejoinder by the claimants. In this way, finality is attached to each claim. In other arbitrations, the procedure followed is that the claimant shall advance arguments on all the claims preferred by him and the respondent also takes up arguments only thereafter. Opportunity to lead rebuttal arguments is given to enable the claimant to meet any new point which the respondent has raised. This opportunity is not meant for re-arguing the whole matter.

It is noted from reported judgments that in majority of the cases, there is a claim for compensation. The claim arises on account of defaults/breaches of contract on the part of the respondent. Primary reasons for this claim is on account of non-availability of site, drawings and designs, instructions/decisions, stipulated materials etc. and suspension of work for owner's convenience; misleading information in Notice Inviting Tender (NIT), when the items have already been executed. It needs to be noted at this stage that whatever resources are idle or under-deployed, must be brought to the notice of the respondent, from time to time, alongwith the intention to claim extra for the delayed performance. If the same is not brought to the notice of the respondent, it will be prejudicial to the interest of the claimant.

(K) Closing Proceedings

When the arbitral proceedings come to an end, the arbitral tribunal should record that both the parties have completed their respective arguments and that they have nothing further to state. This may be done in the form of minutes of a meeting issued at a later point of time or alternatively, the parties may be requested to append their signatures on the notings made by the arbitral tribunal to the effect that the case is closed for making the award; or, the parties may be asked to give in their own handwriting a note to the effect that they have had full opportunity to present their case and that they have nothing further to add.

(L) Written Arguments

Even though the arbitral tribunal might have been taking exhaustive notes, during the course of oral arguments, but it may still require that the parties submit written arguments. In a way, it is in the interest of the litigating parties to submit written arguments at the conclusion of the oral hearings since it is very much possible that in an arbitration proceeding – which has been going on for months together (sometimes for years together) – the arbitral tribunal might have skipped or forgotten certain vital points or arguments which may have material effect on their decision. However, care must be taken to make the written arguments crisp and cogent. It needs no emphasis to say that if the written arguments are too lengthy, it is possible that the arbitral tribunal may not be able to study the same with the attention that it deserves. Written arguments should be framed in such a manner that they are self-speaking and should be in such a sequence that the arbitral tribunal takes full interest to go through each word.

Some arbitrators, after the conclusion of oral arguments, do not call upon the parties to submit written arguments. As already stated, it is in the interest of the parties to state their case in writing and request the arbitral tribunal to allow them a reasonable period of time within which it is proposed to submit written arguments. If such a request is made, an arbitral tribunal should not refuse permission to file written arguments and if it does so, it may be fatal to the award. However, the arbitral tribunal can insist on submission of the written arguments in a shorter period of time than sought by the party. It is a matter of adjustment on which no party should pick up cudgels. For example, if a party seeks 6 week's time for submission of written arguments and the arbitral tribunal is willing to allow 2 weeks, certainly the tribunal can be persuaded to allow 3 or 4 weeks. In that event, the party wishing to submit written arguments should make extra efforts and achieve the target.

(M) Making and Publishing Award

After the conclusion of the arbitration proceedings, the arbitral tribunal should devote adequate time and effort at the time of preparation of the award. In a multi-member arbitral body, there have to be deliberations for which internal meetings may be held from time to time. In most of the cases, there is unanimity amongst the members and the award may be finalised in a shorter time. However, if one of the members of the tribunal decides to give a dissenting award, it may take extra time to declare the award.

Writing of an award is a difficult task. As per *section 31(3) of the Arbitration and Conciliation Act, 1996*, now it is mandatory on the part of an arbitral tribunal to give reasons in support of the award. As such, the arbitral tribunal has to support each of their conclusions with reasons. To give finality to an award, an arbitral tribunal makes one draft award after another. Each time, number of additions and deletions are made in the draft awards till it attains finality. Thereafter, a number of photo-copies are required to be made for being delivered to the parties and to the members of the arbitral tribunal. Sometimes, even spiral binding of the award is required to be done.

(N) Delivery of Award

Sub-section (5) of section 31 of the Act states 'After the arbitral award is made, a signed copy shall be delivered to each party.' A bare reading of the stipulation would normally convey that after the arbitral tribunal has signed a copy of the award, it shall send it to

the parties to the arbitration agreement. But it is not so. This would be apparent from a perusal of the judgment reported as *Union of India v Tecco Trichy Engineers & Contractors* [61] which *inter alia* states:

> The delivery of an award under sub-section (5) of section 31 is not a matter of mere formality. It is a matter of substance. It is only after the stage under section 31 has passed that the stage of termination of the arbitral proceedings within the meaning of section 32 of the Act arises. The delivery of the arbitral award to the party, to be effective, has to be 'received' by the party. This delivery by the Arbitral Tribunal and receipt by the party of the award sets in motion several periods of limitation such as an application for correction and interpretation of an award within 30 days under section 33(1), an application for making an additional award under section 33(4) and an application for setting aside an award under section 34(3) and so on. As this delivery of the copy of the award has the effect of conferring certain rights on the party as also bringing to an end the right to exercise those rights on expiry of the prescribed period of limitation which would be calculated from that date, the delivery of the copy of the award by the Tribunal and the receipt thereof by each party constitutes an important stage in the arbitral proceedings.
>
> 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 will be delivered to each party. A signed copy of the award would normally be delivered to the party by the arbitrator himself. [62] The expression 'party making that application had received the arbitral award' cannot be read in isolation and it must be understood in the light of what is said earlier in section 31(5) that requires a signed copy of the award to be delivered to each party. Reading the two provisions together it is quite certain that the limitation period prescribed under section 34(3) would commence only from the date a signed copy of the award is delivered to the party making the application for setting it aside. [63]

(O) Irregularities in Arbitration Proceedings

While conducting arbitral proceedings, the arbitral tribunal as well as the parties should guard against the following irregularities:

(1) Composition of arbitral tribunal or procedure is not in accordance with the agreement of the parties; [64] or

(2) Non-adherence to a stipulation in the arbitration agreement or not raising an objection without undue delay; [65] or

(3) One party alleges existence of the agreement and the other does not deny; [66] or

(4) Appointing an arbitrator who does not answer the description given in the arbitration agreement; [67] or

(5) An arbitrator is appointed beyond 30 days of receipt of a request to do so from the other party, [68] or the appointment of third arbitrator is made beyond 30 days; [69] or

(6) An arbitrator is biased or has an interest in the subject-matter of arbitration; [70] or

(7) The arbitrator does not possess the requisite qualification as required by the arbitration agreement; [71] or

(8) Not challenging jurisdiction of an arbitral tribunal within 15 days after becoming aware of the *constitution* of arbitral tribunal; [72] or

(9) Failure of arbitrator to act without undue delay; [73] or

(10) Preferential treatment to one of the parties; [74] or

(11) Deviation from procedure agreed upon between the parties; [75] or devised by the arbitral tribunal; [76] or

(12) Reception of inadmissible, irrelevant, immaterial evidence; or [77]

(13) Change of venue from the one agreed upon by the parties; [78] or

(14) Change of language from the one agreed by the parties; [79] or

(15) Undue delay in submission of pleadings; [80] or

(16) Failure to submit documents or evidence together with pleadings; [81] or

(17) Allowing submission of documents or amendment or supplementing pleadings belatedly; [82] or

(18) Refusal to allow witnesses to appear and/or disallowing oral hearing as agreed to between parties; [83] or

(19) Calling an arbitration meeting without adequate notice; [84] or

(20) Refusal to permit cross-examination of expert witnesses; [85] or

(21) Dispensing with terms of contract and of trade usage; [86] or

(22) One arbitrator taking decisions by ignoring other members of the arbitral tribunal; [87]or

(23) Compelling a party to conciliate against his wishes. [88]

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2 *Budhraja Mining & Const. Ltd. v. Union of India,* AIR 2008 Ori 98 : 2008 Supp (1) OLR 825; *Gosho Kabushiki Kaisha Ltd. v. Mulchand Harichand, AIR* 1941 Sind 111.

3 *Jimmy Construction Pvt. Ltd. v. Union of India,* 2008 (2) Arb LR 591 (Bom).

4 *Haresh Chinnubhai Shah v. Rajesh Prabhakar Jhaveri,* 2004 (2) RAJ 179 : 2004 (1) Arb LR 536 (Bom).

5 *Gupta Flour and Oil Mills v. National Insurance Company Ltd.,* 2005 (1) Arb LR 25 (P&H); *Dharma Prathishthanam v. Madhok Construction Pvt. Ltd.,* (2005) 9 SCC 686 [*LNIND 2004 SC 1115*] : AIR 2005 SC 214 : 2004 (3) Arb LR 432.

6 *Universal Const. & Trading Co. v. Garhwal Mandal Vikas Nigam Ltd.,* 2004 (1) RAJ 528 (All).

7 *ONGC Ltd. v. Oil Field Instrumentation,* 2005 (1) RAJ 69 (Bom); *Chinoy Chalani and Co. v. Y. Anjiah* , AIR 1958 AP 384 : ILR (1958) AP 243 (DB).

8 *State of Gujarat v. R. Engineer,* 2007 (1) RAJ 78 : 2006 (4) Arb LR 58 (Guj) (DB).

9 *Chinoy Chalani and Co. v. Y. Anjiah* , AIR 1958 AP 384 : ILR (1958) AP 243 (DB); *F. Gangjee v. Indo Eastern Trading Co. Ltd.* , AIR 1955 NOC 2933 (Cal); *Nihal Chand v. Shanti Lal* , AIR 1935 Oudh 349 (DB).

10 *Choudhri Murtaza Hussain v. Mst. Bibi Bachunnissa* , (1876) LR 3 IA 209; *N. Chellappan v. Secretary, Kerala State Electricity Board,* (1975) 1 SCC 289 [*LNIND 1974 SC 379*] : AIR 1975 SC 230.

11 *Prasun Roy v. Calcutta Metropolitan Development Authority,* (1987) 4 SCC 217 [*LNIND 1987 SC 500*] : AIR 1988 SC 205 : 1987 (2) Arb LR 196; *Arbn. Jupiter General Insurance Co. Ltd. v. Corporation of Calcutta* , AIR 1956 Cal 470 [*LNIND 1956 CAL 77*]; *Choudhri Murtaza Hussein v. Bibi Bachunnissa,* (1876) 3 Ind App 209; *Nutan K.V. Crimpers v. Tilak Raj Kapoor* , 2000 (1) Arb LR 151 : 2000 (1) RAJ 25 (Del); *Inder Sain Mittal v. Housing Board, Haryana,* (2002) 3 SCC 175 [*LNIND 2002 SC 139*] : AIR 2002 SC 1157; *Russell on Arbitration* , 20th Ed., p. 131; *Neelkantan and Bros. v. Superintending Engineer, National Highways, AIR* 1988 SC 2045 : 1989 (1) Arb LR 34 : (1988) 4 SCC 462 [*LNIND 1988 SC 391*] ; *Bihar Plastic Industries v. New India Assurance Co. Ltd.* , 1998 (Supp) Arb LR 13 : 1998 (2) RAJ 19 (Pat); *Haryana State Agriculture Marketing Board v. Dharma Pal,* 2006 (3) RAJ 687 (P&H).

12 *BHEL v. Globe Hi-Fabs Ltd.,* 2004 (3) RAJ 245: (2004-3) 138 Pun LR 22 (Del).

13 *State of Himachal Pradesh v. Lila Devi* , AIR 1987 HP 248 : 1986 (2) Arb LR 287 (DB); *Pratiba Sarkar v. Corporation of Calcutta* , AIR 1973 Cal 434 [*LNIND 1973 CAL 155*] (DB).

14 *Asiatic Salvors v. Dodsal Private Ltd* ., AIR 1987 Bom 335 [*LNIND 1987 BOM 256*]: 1987 (2) Arb LR 315.

15 *Kerala State Const. Corp. Ltd. v. National Building Const. Corp. Ltd* ., 1998 (3) RAJ 458 (Del).

16 *Russell on Arbitration* , 20th Ed., p. 253.

17 *Sanshin Chemicals Industry v. Oriental Carbons and Chemicals Ltd.,* (2001) 3 SCC 341 [*LNIND 2001 SC 432*] : AIR 2001 SC 1219 : (2001) 1 RAJ 247 : (2001) 1 Arb LR 521; *U.P. Ban Nigam v. Bishan Nath Goswami* , AIR 1985 All 351 : 1984 Arb LR 203.

18 *Jagson Airlines Ltd. v. Bannari Amman Exports (P) Ltd.* , 2003 (2) Arb LR 315 (Del).

19 *Russell on Arbitration* , 21st ed., para 2.098 on pp. 75-76 relied upon in *Sanshin Chemical Industries v. Oriental Carbons and Chemicals Ltd.,* (2001) 3 SCC 341 [*LNIND 2001 SC 432*] : AIR 2001 SC 1919 : (2001) 1 RAJ 247 : (2001) 1 Arb LR 521.

20 *Shin Satellite Public Co. Ltd. v. Jain Studios Ltd.,* (2006) 2 SCC 628 [*LNIND 2006 SC 64*] : AIR 2006 SC 963 : 2006 (1) RAJ 963 : 2006 (1) Arb LR 286.

21 *AES Distribution Pvt. Ltd. v. Grid Corp. of Orissa,* AIR 2004 Ori 198 : 2005 (1) Arb LR 217 : 2005 (1) RAJ 343 (DB).

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24 *Jeevan Industries (P) Ltd. v. Haji Bashiruddin Madhusudan Dayal* , AIR 1975 Del 215 [*LNIND 1974 DEL 208*] (DB).

25 *Roberts v. Eberhardt,* (1857) 3 CBNS 482 : 28 LJCP 74; *Re Coombs and Freshfields and Fernley,* (1850) 4 Exch 839 ; *Hoggins v. Gordon, (1842) 3 QB 466*.

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27 *Shambhu Dayal v. Basdeo Sahai* , AIR 1970 All 525 : 1970 All LJ 297 (FB).

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29 *Amalgamated Metal v. Seng* , (1977) 2 Lloyd's Rep. 317.

30 *Phillips v. Phillips* , *(1878) 4 QBD 127*.

31 *Pioneer Engineering Works v. Union of India* , AIR 1959 Pat 374 : 1959 BLJR 128 : ILR 38 Pat 88 (DB).

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35 *Madanlal Roshanlal Mahajan v. Hukamchand Mills Ltd* ., AIR 1967 SC 1030 : (1967) 1 SCR 105 [*LNIND 1966 SC 150*] ; *Jayashree Patnaik v. Urban Cooperative Bank, Bhubaneshwar,* 2003 (2) Arb LR 294 (Ori–DB).

36 *Hudson's Building and Engineering Contracts,* 11th Ed., Vol. 2, para 18.161, p. 1682; *Jayashree Patnaik v. Urban Cooperative Bank, Bhubaneshwar,* 2003 (2) Arb. LR 294 (Ori—DB).

37 *Wilson v. Conde d'Eu Ry.,* (1887) 51 JP 230.

38 *(1884) 26 Ch D 700*.

39 *Madanlal Roshanlal Mahajan v. Hukamchand Mills Ltd., AIR* 1967 SC 1030 : (1967) 1 SCR 105 [*LNIND 1966 SC 150*].

40 *Arbn. Jupiter General Ins. Co. Ltd. v. Corporation of Calcutta* , AIR 1956 Cal 470 [*LNIND 1956 CAL 77*]; *Unit Officer, NPCC Ltd. v. Madhusudan Deb Barman* , AIR 1979 Gau 62 (DB); *McKenzies Ltd. v. State of Mysore* , AIR 1978 Kant 89 : ILR (1977) 2 Kant 1534 (DB).

41 *Regional Provident Fund Commissioner v. Hind Builders* , AIR 1985 Ori 103 [*LNIND 1984 ORI 84*]: 1985 Arb LR

196; *State of Orissa v. Gangaram Chhapolia* , AIR 1982 Ori 277 [*LNIND 1982 ORI 75*]: 54 Cut LT 214.

42 *Central Coalfields Ltd. v. Ashok Trasport Agency* , AIR 1987 Ori 287 [*LNIND 1987 ORI 139*]: 1987 (2) Arb LR 351 : (1987) 1 OLR 184.

43 *Rash Behari Sen v. Anand Sarup* , AIR 1962 P&H 51 : (1961) 63 Pun LR 887.

44 *Moti Lal v. State of H.P* ., AIR 1996 HP 90 [*LNIND 1996 HP 14*].

45 3rd Ed., p. 1722.

46 11 Terry 387, 131 A 2d 180.

47 *Russell on Arbitration* , 21st Ed., para 5.172, p. 229.

48 *Russell on Arbitration* , 21st Ed., para 5.172, p. 229.

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55 *Union of India v. Bhatia Tanning Industries* , AIR 1986 Del 195 : (1986-1) 89 Pun LR (Del 92) : 1985 Arb LR 31 (DB).

56 *Ibid.*

57 *Lilit Madhan v. Building Committee, Council of Institute of Company Secretaries of India* , AIR 1995 Del 180 [*LNIND 1994 DEL 429*].

58 *Jiwan Kumar Lohia v. Durga Dutt Lohia* , 1987 (2) Arb LR 100 (Cal).

59 *Satinder Narayan Singh v. Indian Labour Co-op. Society Ltd.,* 2008 (1) Arb LR 355 (Del).

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64 Section 34(2) (a)(v).

65 Section 4 (b).

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67 Section 12(3).

68 Section 11(4) (a).

69 Section 11(4) (b).

70 Section 12(3) (a).

71 Section 12(3) (b).

72 Section 13(2).

73 Section 14(1) (a).

74 Section 18.

75 Section 19(2).

76 Section 19(3).

77 Section 19(4).

78 Sections 20(1) and 20(2).

79 Section 22(1).

80 Section 23(1).

81 Section 23(2).

82 Section 23(3).

83 Section 24(1).

84 Section 24(2).

85 Section 26(2).

86 Section 28(3).

87 Section 29.

88 Section 62.

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6 Challenge to Jurisdiction of Arbitrator

1. INTRODUCTION

Under the 1940 Act, a challenge to the jurisdiction of the arbitrator could only be made before the courts. The courts, in turn, would take their own time in deciding the issue. Sometimes, the matter lingered on for years together. There was hardly any case which was decided even in a year. Under the 1996 Act, however, the bottleneck has been sought to be overcome. Now, there is no need to rush to the court since the Legislature has given power to the arbitral tribunal to determine its own jurisdiction. Section 16 of the Act which deals with this aspect of the matter reads as under:

Section 16. Competence of arbitral tribunal to rule on its jurisdiction.—

(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.*

(2) *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 that he has appointed, or participated in the appointment of, an arbitrator.*

(3) *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.*

(4) *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.*

(5) *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.*

(6) *A party aggrieved by such an arbitral award may make an application for setting aside such an arbitral award in accordance with section 34.'*

2. ARBITRAL TRIBUNAL TO RULE ON ITS OWN JURISDICTION

Under the 1996 Act, if a party wishes to challenge the jurisdiction of the arbitrator, it can do so by filing an application under section 16. In the said application, the party must state in detail the grounds on which it seeks to base its challenge. The jurisdiction of the arbitral tribunal to adjudicate on the disputes between the parties is dependent on the powers conferred by the arbitration agreement or by the court when the matter is remitted back to the arbitral tribunal for consideration. For instance, under section 34(4), the court will define the time within which

the tribunal shall resume the arbitration proceedings or to take such other action, as in the opinion of arbitral tribunal, will eliminate the grounds for setting aside the award.

On receipt of a written challenge, the tribunal may withdraw from the arbitral process or they may ask the other party to file its reply to the application. After receipt of the reply, the arbitral tribunal may hear the parties on the challenge, and thereafter, render its decision on the said challenge. In case the parties agree to the grounds of challenge, then they are empowered to remove an arbitrator in terms of section 15(1) (a) of the 1996 Act.

A perusal of the provisions of the Act reveals that challenge to jurisdiction of the arbitral tribunal can be made with regard to the following:

(1) if an arbitrator has failed to disclose in writing any circumstances likely to give rise to justifiable doubts as to his independence or impartiality; [1]

(2) if an arbitrator, after the time of his appointment and throughout the arbitral proceedings, failed to disclose to the parties in writing the circumstances which may give rise to justifiable doubts as to his independence or impartiality; [2]

(3) if an arbitrator does not possess the qualifications agreed to by the parties [3], provided that challenge on such objection is raised within fifteen days of becoming aware of any circumstances, send a written statement of the reasons for the challenge; [4]

(4) if an arbitrator exceeds the scope of his authority which shall be raised immediately on its happening; [5] and

(5) whether the scope of the award is wider than permitted by the agreement and/or the reference. [6]

The 1996 Act is a marked improvement over the 1940 Act, which did not contain any provision authorising the arbitral tribunal to rule on its own jurisdiction. All challenges to jurisdiction under the 1940 Act, therefore, had to be made to the courts. The courts, thereafter, used to take considerable time to decide upon the challenge. After the decision of the trial court, the parties also had a right to challenge the same in appeal. Section 16(5) and (6) expressly foreclose such a right to approach the court after a decision by the arbitral tribunal rejecting an application challenging its jurisdiction. Thus, if an arbitral tribunal rejects a challenge to its jurisdiction, the contesting party would have to wait till the declaration of the arbitral award before it can agitate the issue before the court. The only course open to a party, whose application has been rejected, is to proceed with the arbitration under protest. In case an arbitral tribunal upholds a challenge to its jurisdiction, the aggrieved party can immediately file an appeal against the said order under section 37(2) (a) of the Act.

If a party raises a plea regarding existence or validity of the arbitration agreement before the arbitral tribunal then it becomes the responsibility of the arbitral tribunal to go into the question and give a decision thereon. [7] Pleas which can be taken under sub-sections (2) and (3) of section 16 are pleas regarding the jurisdiction of the arbitral tribunal and they do not concern the merits of the controversy between the parties. An order of the arbitral tribunal deciding a claim or a counter-claim cannot be termed as an order passed by the arbitral tribunal accepting or rejecting a plea referred to in the said sub-sections. [8]Section 16(2) read with section 16(1) would disclose that the point of jurisdiction would include any controversy as regards the existence or validity of an arbitration agreement which would obviously cover any plea regarding exclusion of the subject-mater from arbitration. [9]

The UNCITRAL Model Law, on which the 1996 Act is based, allows a party a right to challenge the appointment of an arbitrator before the arbitrator himself and if the party is unsuccessful, Article 12(3) of the Model Law grants to that party a last resort to the court to challenge the appointment at that stage itself. However, the 1996 Act makes a distinct departure in this regard, inasmuch as with a view to prevent dilatory tactics, the Parliament has not allowed the unsuccessful party to challenge the appointment immediately and requires such a party to wait till an award has been made. A writ petition is also not maintainable against such an order. [10]

The scheme evolved by sections 12, 13 and 16 of the new Act is totally different from what was provided under the 1940 Act. The departure is made in the present Act clearly with a view that spokes should not be put in passing the arbitral award by raising such pleas. Section 5 of the 1996 Act mandates that no judicial authority shall intervene except where so provided by Part-I. [11]If the plea of jurisdiction is not raised under section 16 of the Act, then it cannot be raised under section 34. However, both under sections 13 and 16, a party cannot file such a petition unless the procedure contemplated

therein is followed. [12]

An order of the arbitral tribunal that it has jurisdiction to entertain disputes is not illegal as power is conferred on it under statute ‘to rule on its own jurisdiction’. After the arbitral tribunal has ruled jurisdiction in its favour, the aggrieved party can challenge it only after arbitration proceedings are over and award has been made. [13] Such an order cannot be said to be illegal or without jurisdiction at that stage. [14] After the arbitral tribunal, has ruled on its jurisdiction, the arbitral proceedings shall continue but the party aggrieved by the decision of the arbitral tribunal will have a right to challenge it, after the award has been made, under section 34, on the ground that ‘the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbiration, or it contains decisions on matters beyond the scope of the submission to arbitration.’ [15]

3. TIME FOR RAISING OBJECTIONS TO JURISDICTION

The preamble of the Act makes it amply clear that the Parliament enacted the Act almost on the same line as the Model Law which was drafted by UNCITRAL. The whole object and scheme of the Act is to secure an expeditious disposal of disputes. Therefore, where a party raises a plea that the arbitral tribunal has not been properly constituted or has no jurisdiction, it must do so at the threshold before the arbitral tribunal so that remedial measures may be immediately taken and time and expense involved in hearing of the matter before the arbitral tribunal, which may ultimately be found to be either not properly constituted or lacking in jurisdiction, in proceeding for setting aside the award, may be avoided. A plea that the tribunal has been wrongly constituted has to be raised before the date of submission of the statement of defence, whereas a plea that the arbitral tribunal is exceeding its jurisdiction must be raised as soon as a matter which is beyond the jurisdiction of the arbitral tribunal is raised for the first time. Undue delay in filing an application challenging the jurisdiction of the tribunal may be fatal to the case of the objecting party, however, the arbitral tribunal has been empowered to entertain even belated applications provided it considers the delay to be justified.

It is a requirement of law that the respondent must state his objection with regard to jurisdiction of the arbitrator before filing the statement of defence. However, the respondent may be allowed to raise objection to the jurisdiction of the arbitrator even subsequent to the filing of the defence statement, provided he can show good reasons to the arbitral tribunal for raising such an objection at a belated stage. [16]

An objection to the jurisdiction of the arbitrator has to be raised not later than the submission of the statement of defence. Section 16 does not prohibit a challenge being raised even at a later stage. Where the petitioner raised the challenge in the defence statement itself, it cannot be said that the petitioner should have raised the objection in the earlier three arbitral meetings and thus, it is not a case of waiver. [17] If a party allowed an arbitrator to proceed with the reference without objecting to his jurisdiction or competence, it cannot be subsequently heard to say that the award should be set aside on the ground that the arbitrator was not competent to decide the dispute in question. [18]

A challenge made to the jurisdiction of the arbitrator by the opposite party before filing its statement of defence is valid. The mere fact that till then it had participated in the arbitration proceeding did not tantamount to its acceptance of the jurisdiction of the arbitrator, and would not estop it from challenging the jurisdiction of the arbitrator. [19]

4. JURISDICTION OF ARBITRAL TRIBUNAL – SCOPE OF

The Act has given a very wide process and deep area of operation to the arbitrators and the court's powers have been statutorily curtailed. The tribunal's authority is not confined to the width of its jurisdiction but goes to the very root of its jurisdiction. [20] Validity of an action of termination of the contract is also a subjectmatter to be decided by the arbitrator in the arbitration forum. The jurisdiction of the arbitral tribunal extends to all such matters which do not come under the category

of excepted matters mentioned in the contract. [21] Likewise, arbitrator has jurisdiction to decide on his own jurisdiction. He also has the jurisdiction to decide whether a particular item is covered by a particular clause or not. [22] Dispute regarding payment of interest on the amount of claims is a dispute arising under the contract. [23]

When on reference to arbitration, one of the parties claimed that the dispute was not arbitrable, the arbitrator must give decision on such claim. [24] Where the arbitrators made the award after considering all matters placed before them, the objections must be deemed to have been rejected. [25] It is proper for an arbitrator to make such enquiries as are necessary to enable him to decide whether he has or has not the jurisdiction over a matter which one or other party asks him to consider. [26] When an arbitration agreement is very widely worded then it is for the arbitrators to determine the effect thereof and decide the issue of arbitrability of the claims preferred by the parties as per reference. [27]

The test for determining if the point on which the parties are in a dispute or difference is whether recourse to the contract by which the parties are bound is necessary. If such recourse to the contract is necessary, then the matter must come within the scope of the arbitrator's jurisdiction. [28] The expression ‘in the matter of dispute’ is comprehensive enough to cover all disputes arising out of the agreement. [29] Thus, claims based on *quantum meruit* , frustration of contract, nonpayment under a promissory note, as also interest come within the arbitration clause. [30] A claim for damages would be included in an arbitration clause, [31] but not a claim in tort like damages for libel. [32] Where a contract is not denied but the terms are in dispute, or where it is said that a contract originally existed but it became void because of supervening circumstances, and this is denied by the other side, the dispute is one under the contract. [33]

An arbitration agreement must be in writing and if that *sine qua non* is absent, the result would be that the initial lack of jurisdiction on the part of the arbitrator cannot be cured by oral acquiescence on the part of the party and any admission of liability by such party before the arbitrator can avail the other side nothing as it is made before an authority, who, for want of an arbitration agreement, initially has no jurisdiction to act as an arbitrator. [34]

> Russell [35] states: An arbitrator should satisfy himself that the submission is wide enough to cover the disputes with which he is to deal. In this connection, he should go beyond a mere formal examination to make sure that he has authority to decide the dispute put before him. In addition, he should, as soon as he knows what the real nature of the dispute is, consider whether he is authorised to deal effectively with it, or whether something further is not needed - some special powers to give direction, for instance, or authority to deal with some related dispute that ought to be dealt with at the same time if it is not to lead to multiplicity of proceedings between the parties. Such matters are best settled at the earliest possible moment, for it they are left until a late stage of the arbitration it will often be found that one side or the other refuses to agree to amendment of the submission in the hope of thereby securing some tactical advantage, whereas at the inception of the arbitration it is less likely that the giving of additional powers to the arbitrator will seem to favour one side or the other. In cases where the arbitrator has at that stage sufficient understanding of the dispute, points of this sort can with advantage be dealt with at the preliminary hearing.

A tribunal should consider the existence and scope of its jurisdiction. Usually, if there are concerns about the tribunal's jurisdiction then one of the parties will raise them. Indeed, if the parties fail to raise objections to jurisdiction in a timely fashion, they may lose their right to do so at a later stage. Even if neither of the parties raises any objection to jurisdiction, the tribunal may still wish to consider the position. It will want to be satisfied, for example, that it is a *bona fide* reference. If there are specific concerns, for example about whether the particular dispute falls within the scope of the arbitration clause, the tribunal may want to satisfy itself that it has jurisdiction to proceed. [36]

5. ARBITRAL TRIBUNAL CANNOT COMMENT WHEN APPOINTMENT MADE BY CHIEF JUSTICE

If the appointment of the arbitral tribunal or one of its members has been made by the Chief Justice or his designate, then such a decision is final and binding on the parties. The Chief Justice or his designate, must be

deemed to have made the appointment after satisfying himself that an arbitration agreement exists between the parties. A party cannot re-agitate the matter before the arbitral tribunal since such a tribunal cannot sit over the verdict passed by the court. However, in a case where an arbitral tribunal has been constituted by the parties themselves without recourse to section 11, the arbitral tribunal will have the jurisdiction to decide all matters as contemplated by section 16.

> When the Chief Justice or the Judge designated by him makes the appointment of the arbitrator, the arbitrator cannot go behind the decision and rule on his own jurisdiction or on the existence of an arbitration clause. Section 16 has full play only when an arbitrator is constituted without intervention under section 11(6) or section 8. The decision of the Chief Justice on the issue of jurisdiction and the existence of a valid arbitration agreement would be binding on the parties when the matter goes to the arbitrator and at subsequent stages of the proceeding, except in an appeal to the Supreme Court in the case of decision being by the Chief Justice of the High Court or by a Judge of the High Court designated by him. [37]

6. ARBITRAL TRIBUNAL TO DECIDE WHETHER CLAIMS ARE FILED WITHIN TIME

> The question whether the claims have been filed within time or not and whether there is accord and satisfaction between the parties is to be decided by the arbitrator and not by court. [38] In an application for appointment of arbitrator, the opposite party opposed the application on the ground that the claim was barred by limitation which was not decided by the court but instead an arbitrator was appointed. The arbitrator took the view that the court while appointing him must have turned down the plea of limitation and proceeded to make the award. Held, that the arbitrator had no reason to assume that since the court had made the reference, the plea must have been overruled. The plea should have been treated as one of the matters referred to arbitration and decided by him. [39]

The Supreme Court in *National Insurance Co. Ltd. v. Boghara Polyfabs (P) Ltd* . [40] has categorised the issues which the Chief Justice or his designate may or may not decide while deciding upon an application seeking appointment of an arbitrator, in the following manner:

(1) Issues which Chief Justice/designate will have to decide:

- (a) whether the party making the application has approached the appropriate court;
- (b) whether there is an arbitration agreement; and
- (c) whether the party who has applied under section 11 of the Act is a party to such an agreement.

(2) Issues which Chief Justice/designate may choose to decide:

- (a) whether the claim is a dead (long barred) claim or a live claim;
- (b) whether the parties have concluded the contract/transaction by recording satisfaction of their mutual rights and obligations or by receiving the final payment without objection.

(3) Issues which Chief Justice/designate should leave exclusively to the arbitral tribunal:

- (a) whether a claim made falls within the arbitration clause (as for example, a matter which is reserved for final decision of a departmental authority and accepted or excluded from arbitration);
- (b) merits of any claim involved in the arbitration.

In addition to the above, it is mandatory for the Chief Justice/designate to ensure that the procedure prescribed in the arbitration agreement has been followed by the parties before approaching the court with an application under section 11. If the procedure agreed upon between the parties in the arbitration agreement itself or otherwise

stipulated in the contract has not been followed, the Chief Justice or his designate would refuse to appoint an arbitrator.

Under sub-sections (5) and (6) of section 11, the Chief Justice or his designate has firstly to decide his own jurisdiction, i.e. whether the applicant has approached the right High Court. He then has to decide whether there is an arbitration agreement and whether the applicant is a party to such an agreement. [41] The Chief Justice, while deciding issues such as live claims and limitation, records *prima facie* finding only to put arbitration proceedings in motion. However, if there is a valid dispute on the question of limitation, it is appropriate that the Chief Justice or his designate merely records his satisfaction that there exists such a dispute and leaves it for the decision of the arbitral tribunal. [42]

The question of limitation is to be decided by the arbitrator. [43] However, whether an application for appointment of an arbitrator has been made within time or not is for the court to see and not the arbitrator. [44]

Reference to arbitration must be sought within 3 years from the date when the cause of action arose. Where the contractor served notice in August, 1979, claiming damages for losses sustained due to delay in delivery of work site and there was no response from the respondent inasmuch as the supplementary agreement executed thereafter allowing higher rate for various items of work but the contractor reserved no right for claiming damages under the old contract, invocation of arbitration clause in December, 1985 is palpably barred by limitation. [45]

7. ARBITRAL TRIBUNAL NOT TO EXCEED AUTHORITY

A claimant may submit a large number of claims before the arbitrator. It is the duty of the arbitrator to determine whether the disputes fall within its authority to adjudicate or whether it is barred by the terms of the agreement entered into between the parties. If the parties have consciously kept certain types of claims from being adjudicated in arbitration, then the arbitrator cannot assume to itself the authority to adjudicate on such claims. An arbitrator derives his authority from the agreement and since he is a creature of the agreement, he cannot ignore the provisions of the agreement. Otherwise also, as per section 28 of the 1996 Act, an arbitrator has to decide the disputes in accordance with the terms of the agreement.

The arbitrator is a creature of the agreement itself and, therefore, is duty bound to enforce the terms of the agreement and cannot adjudicate a matter beyond the agreement itself. [46] The determination of the question whether any particular dispute or difference that has arisen between the parties is referable to arbitration must depend on whether the dispute or difference in question is one to which the agreement applies. [47] Where additional work ordered on the contractor is carried out and he claims higher rates for such work, the matter is referable to the arbitrator. [48] When an agreement was terminated before the due date, the claims arising out of such termination are referable to arbitration. [49] If in order to adjudicate upon the claims set up by a party, the arbitrator has to look into the contents of the agreement, it is sufficient to state that the said dispute arises out of the agreement. [50] When a claim in dispute is not shown to have been excluded from the ambit of an arbitration clause, the same has to be referred to arbitration. [51]

8. DISPUTE NOT COVERED BY ARBITRATION CLAUSE – NOT ARBITRABLE

If an agreement entered into between the parties excludes certain categories of disputes from being adjudicated upon in arbitration, then an arbitral tribunal should not assume jurisdiction to entertain such excepted matters. The question whether a claim is within the purview of the arbitration clause or not is to be decided by the arbitrators. Great care should be taken by the arbitrators in exercising their verdict because any decision given by them cannot be challenged by either party till the conclusion of the case. Thus, if the verdict given by the arbitrators is erroneous and the award is set aside due to the said error, then the entire time, money and effort put in by the parties in the proceedings is rendered futile.

Where a party conceded applicability of the arbitration clause to all claims except certain claims and took recourse to the contract, it was held that it could not be said that dispute did not arise out of the contract. The expression ‘arising out of’ is very much wider than ‘under’ the agreement. [52] The question as to effect (scope) will ordinarily be for the arbitrator to decide, i.e. to decide the issue of arbitrability of the claims preferred before him. [53] When a dispute is not related to the arbitration agreement, reference cannot be made to the arbitrator. [54]

If the parties agree to have a specific clause prohibiting award of damages, the contractor will not be entitled to the award of damages. But so long as compensation for such delays is not specifically prohibited, the repercussions of delay caused by either of the parties in completing the construction and to apportion the responsibility and consequence thereof would be within the jurisdiction of the arbitrator. When it is specifically prohibited, then it has to be presumed that both the parties were expecting delays in certain respects which had been provided for and taken into consideration while entering into the agreement. [55]

9. TEST FOR DETERMINING DISPUTES

The test for determining whether a dispute is one ‘arising out of the contract’ or ‘in connection with the contract’ is whether recourse to the contract by which both the parties are bound is necessary for the purpose of determining whether the claim of the party is justified or not. If it is necessary, it must be held that the matter is within the scope of the arbitration clause and the arbitrators have jurisdiction to decide the disputes. [56] What has to be determined is whether the disputes involve the interpretation of the contract or arise thereunder. [57]

Where a dispute, though not arising under the contract, is inextricably connected with or indisputably linked up with the contract, it can be said that the dispute is connected with the contract. [58] The dispute or difference which the parties to an arbitration agreement agree to refer must consist of a justiciable issue triable civilly. A fair test of this is whether the difference can be compromised lawfully by way of accord and satisfaction. [59]

When an award was challenged on the ground that the dispute decided was outside the scope of reference, being expressly excluded by the agreement of the parties, it was held that court had jurisdiction to look into the contract because the matter related to inherent jurisdiction of the arbitrator. [60] If a dispute related to a claim for extra cost by the contractor, the award thereon would be bad if the terms of the contract prohibited any increase in rates till completion of work and in such a case the court would be free to look into the terms of the contract. [61]

An arbitrator cannot be said to have acted arbitrarily in not deciding arbitrability of the disputes referred to him as a pre-issue where the parties had agreed, during the course of arbitration hearings, that the pre-issue of arbitrability need not be decided and all claims be decided claim-wise. [62]

In view of a specific stipulation in the agreement regarding payment for extra work only when there are written instructions from the Engineer-in-charge, any award made by the arbitrator in contravention of the terms of the contract is bad in law and the award was liable to be set aside. Likewise, when the notice inviting tender clearly stated that the site was available for inspection, the award on account of difficulties faced in excavating the earth is bad in law because the contractor must be deemed to have inspected the site and must have been aware of the difficulties to be faced in excavating the earth. [63]

10. EXCEPTED MATTERS—NOT ARBITRABLE

6 Challenge to Jurisdiction of Arbitrator

On a reference being made to the arbitrator as per the arbitration clause, the arbitrator allowed the claim put forth by the Government on account of compensation for delay in performance of contract. On the question whether matters regarding quantum of compensation could be referred to an arbitrator, it was held that the opening words of the arbitration clause, *viz* ., 'except where otherwise provided in the contract' placed the question of awarding compensation outside the purview of the arbitrator. [64] However, in a very recent pronouncement by the Apex Court in *J.G. Engineers Pvt. Ltd. v. Union of India,* [65] it has been held as under:

> 18. Thus what is made final and conclusive by Clauses (2) and (3) of the agreement, is not the decision of any authority on the issue whether the contractor was responsible for the delay or the Department was responsible for the delay or on the question whether termination/ rescission is valid or illegal. What is made final, is the decisions on consequential issues relating to quantification, if there is no dispute as to who committed breach. That is, if the contractor admits that he is in breach, or if the arbitrator finds that the contractor is in breach by being responsible for the delay, the decision of the Superintending Engineer will be final in regard to two issues. The first is the percentage (whether it should be 1% or less) of the value of the work that is to be levied as liquidated damages per day. The second is the determination of the actual excess cost in getting the work completed through an alternative agency. The decision as to who is responsible for the delay in execution and who committed breach is not made subject to any decision of the respondents or its officers, nor excepted from arbitration under any provision of the contract.
>
> 19. In fact the question whether the other party committed breach cannot be decided by the party alleging breach. A contract cannot provide that one party will be the arbiter to decide whether he committed breach or the other party committed breach. That question can only be decided by only an adjudicatory forum, that is, a court or an Arbitral Tribunal.

If the arbitration clause opens with the words 'unless otherwise provided', the arbitrator could not have gone into the merits of the levy of compensation by the Engineer. [66] In case there is a specific prohibition in the contract against entertainment of claims, but in utter disregard of such prohibition, the arbitrator hears the matters and makes an award, the arbitrator is guilty of legal misconduct. [67] When a claim is not arbitrable, it does not become arbitrable only because of its inclusion in the notice invoking the arbitration clause. [68]

The arbitrators are bound to decide whether a particular dispute comes within the stipulations of the contract. The arbitrators cannot enlarge their jurisdiction by stating that if they were to strictly follow the stipulation, then there would be few disputes referable to arbitration. The parties choose their terms for arbitration between themselves, and if certain disputes are placed beyond the realm of arbitration, then the arbitrators must accept the wisdom of the parties which choose to contract in such a manner. [69]

In a supply contract, dispute arose about the rate at which payment was to be made. The stand of the defendants that the stipulation in arbitration clause 'in the event of a dispute the decision of the Superintending Engineer of the Circle will be final' ousted the jurisdiction of the arbitrator from adjudicating on such claims, was upheld by the Supreme Court. [70]

A supply contract stipulating time to be the essence of the contract was entered into between the parties. A provision existed in the contract whereby the Superintending Engineer was vested with the authority to levy liquidated damages in case of late supply. For certain reasons, the contractor could not make the supply within the stipulated time. The principal instead of levying damages or canceling the contract asked the contractor to make the supply and in accordance thereto the contractor supplied the balance material. It was held that the principal cannot subsequently impose damages on the contractor for late supply. [71]

If, as per the conditions of the contract, decision of the Superintending Engineer had been made final and binding on the parties to the arbitration agreement and yet the respondents made a reference of the said claims to the arbitrator, it was held that the respondent, by calling upon the arbitrator to give his decision on the counter-claims, waived their right to contend that these were non-arbitrable issues. [72]

Where before filing the suit, dispute relating to escalation was referred by the plaintiffs themselves to arbitration but was subsequently not pursued by them, it was held that merely for the reason that the dispute relating to compensation on account of delay in completion of the work was not arbitrable, it cannot be said that the arbitrator ceased to have jurisdiction even over the claim for escalation. [73]

11. PLEA OF ACCORD AND SATISFACTION

A party cannot be compelled to give a 'no-claim certificate' upon the demand of the other party to the contract. Practically, however, it is seen that on completion of works, the employer often insists that the contractor or vendor should give such a certificate. In such a situation, the party is in a dilemma – if it gives the certificate, it forfeits its right to make any further claims, however, if it does not do so, then the final payment is withheld. Faced with such a situation, contractors and vendors often give a 'no-claim certificate' as demanded by the employer. The law comes to the aid of such parties and it has been held that such certificates must be deemed to have been given under duress or coercion.

It is a well known and a notorious fact that unless a no claim certificate is issued by the contractor payment of final bill will not be made, but that will not prevent the contractor from raising its claim before an arbitrator. [74] It is a matter of fact that no contractor, on his own, would voluntarily agree to give a no-claim certificate. There has to be a reason for giving a no-claim certificate. Taking notice of this ground reality, the Supreme Court in *R.L. Kalathia & Co. v. State of Gujarat* [75], has held that a contractor would not be debarred from making a claim merely because he has given a no-claim certificate. If a party had to give a 'no-claim certificate' before finalising the bills and had received the payment under coercion, misrepresentation, mistake, duress etc., the said party has a right to raise the legitimate disputes and get the matter referred to the arbitrator for adjudication, but where the full and final payment was accepted voluntarily and unconditionally, then subsequent claims for further amounts in respect of the same work done is not an arbitrable dispute and it is only when the court, on facts, decides that the dispute is an arbitrable dispute, it would be referred to the arbitrator for adjudication. [76]

The question whether the final measurements were accepted under undue influence, pressure and misrepresentation and thus, not accepted at all has to be determined by arbitrators. [77] Where the 'no demand certificate' was obtained as a condition precedent for scrutiny of the bill, it cannot constitute accord and satisfaction and a cause for refusing to refer disputes for arbitration. [78] Merely because the petitioner has signed on a bill regarding measurements cannot be a ground to oust the arbitration clause since disputes and differences still remained as per the arbitration agreement between the parties. [79]

Where there was a specific bar in the agreement prohibiting arbitration once the final bill was paid to the contractor after giving a no-claim certificate and where the contractor accepted the final bill without reserving any right to submit claims, in that case, the contractor is prohibited from raising any further disputes. [80]

Merely because the contractor had signed a no claim certificate does not disentitle him from seeking arbitration because the question whether there is a no claim certificate or not, itself, is a dispute. [81] Acceptance under protest of payment in full satisfaction of amount due under contract is no accord or satisfaction in the sense of bilateral consensus of intention and does not discharge the contract. [82] The question whether there had been a full and final satisfaction of a claim under the contract was itself a dispute arising 'upon' or 'in relation to' or 'in connection with' the contract. [83] The question as to whether the claim of the contractor stood discharged by accord and satisfaction was a question of fact and a dispute well within the ambit of the arbitration clause. [84]

12. CHALLENGING VALIDITY OF AGREEMENT

6 Challenge to Jurisdiction of Arbitrator

A plea that there is no arbitration agreement between the parties has to be raised before the arbitral tribunal. [85] If one party to the alleged contract is contending that the contract is void *ab initio* , the arbitration clause cannot operate, for on this view, the clause itself also is void. [86] When a contract is invalid, every part of it, including the clause as to arbitration contained therein, must also be invalid. [87]

Where an arbitration clause has been incorporated in an agreement by a one-sided amendment of the contract, the arbitration clause would not be valid. [88] A party cannot be permitted to raise a plea that the family arrangement is not binding on him and, therefore, the arbitration clause is invalid. Such a plea is nothing but is a matter of presumption only. It is for the arbitral tribunal to adjudicate on the issue under section 16(1) (b). [89]

13. CHALLENGING EXISTENCE OF ARBITRATION AGREEMENT

Whether or not an arbitration clause exists between the parties can be adjudicated upon by the arbitral tribunal under section 16 of the 1996 Act. If such a dispute is agitated in an application seeking appointment of an arbitrator under section 11 of the Act, it is the bounden duty of the Chief Justice or his designate to first decide this issue before making a reference to arbitration.

It is incorrect to say that once an objection to the legality of an arbitration agreement is taken, the arbitrator loses jurisdiction to decide the dispute on merits. [90]It is within the competence of the arbitral tribunal to decide the question whether the arbitration clause was scored out before signing of the agreement. The arbitral tribunal may decide the question itself or may refer the matter to an expert as per *section 47 of the Evidence Act* and get the disputed signatures compared by an expert. [91] Dissolution of partnership by itself cannot nullify the arbitration clause contained in the partnership deed. [92] When an arbitration agreement is signed by only one of the partners and not by others, the arbitration agreement and the award will be vitiated in relation to the partnership firm, as all the partners did not sign the agreement. [93]

Where in an arbitration clause it was provided that any dispute or difference in respect of the construction, meaning or effect or as to the rights and liabilities of the parties thereunder shall be referred to arbitration, the validity of the contract itself could not be said to have arisen out of the contract and the validity or otherwise of the contract could not be said to be construction, meaning or effect or rights and liabilities thereunder. [94]

Under the arbitration clause between a Society and a contractor, the Society made a claim for loss suffered by its members on account of default of the contractor in not completing the work within the stipulated time, it was held that the claim could not be referred to arbitration because the contract was with the Society and not with members. [95] When the respondent's quotation was accepted by the Electricity Board and on dispute between the parties, the Board referred the matter to the arbitrator, the application seeking declaration that no arbitration agreement exists between the parties would be liable to be dismissed when there was an arbitration clause contained in the general instructions. [96]

14. AWARD ON INVALID REFERENCE

Where the parties are not *ad idem* about the dispute to be decided by the arbitrator, there is no valid arbitration agreement. If the agreement of reference is bad for indefiniteness and uncertainty as to the exact dispute referred to arbitration, the award is bad. [1]

15. PARTY CONTINUING UNDER PROTEST

If a party voluntarily takes part in the arbitration proceedings, it cannot be heard to say at a later point of time that the tribunal had no jurisdiction to proceed with the reference. If for some reason, a party genuinely feels that either the entire arbitral process is invalid or that certain disputes referred to the tribunal are beyond its jurisdiction, it should immediately protest in writing and request the arbitral tribunal to desist from proceeding with the matter. If, however, the arbitral tribunal rejects the request, the aggrieved party ought to record the fact that it is proceeding further with the arbitration matter only under protest and without prejudice to its contention that the arbitral tribunal lacks jurisdiction.

> Russell [2] states: If a party to a reference objects that the arbitrators are entering upon the consideration of a matter not referred to them and protests against it, and the arbitrators nevertheless go into the question and receive evidence on it, and the party, still under protest, continues to attend before arbitrators and cross-examines the witnesses on the point objected to, he does not thereby waive his objection, nor is he estopped from saying that the arbitrators have exceeded their authority by awarding on the matter.

The appearance of a party after objection taken and protest made does not give the arbitrators authority to make an award, nor estops the party from urging that the arbitrator had exceeded his authority. In such a case, no question of estoppel, acquiescence or waiver arises. [3]

In arbitrations where a protest is made against jurisdiction, the party protesting is not bound to retire; he may go through the whole case, subject to the protest he has made. [4] Continuing to take part in the proceedings after protest made does not amount to a consent. [5] Where a party filed a written statement under protest questioning the jurisdiction of the arbitrators, it did not confer jurisdiction on the arbitrators. [6]

16. WAIVER OF RIGHT TO OBJECT

A party to an arbitration agreement must not remain silent in case it entertains some justifiable doubts about the jurisdiction of the arbitral tribunal because failure to raise an objection at the proper time would amount to waiver of its right to object. When an objection is not taken at an appropriate stage of the proceedings under section 16, then it cannot later be taken before the court to assail the award under section 34 of the 1996 Act.

When no objection is taken as to the number of arbitrators before the arbitral tribunal being even, then such an objection cannot be allowed to be taken in the court if an application for setting aside the award is moved under section 34. [7] A party cannot be allowed to keep silent till the arbitration proceedings are over. If it is of the opinion that the arbitral tribunal is exceeding its jurisdiction, this shall be raised as soon as matter is allowed to be beyond the scope of the authority. [8]

An arbitrator was appointed for resolution of disputes between the parties. The appellant raised objection to the jurisdiction of arbitrator for the first time only after participating in arbitral proceedings for more than 1 years from the date of submission of statement of counter-claims and after conclusion of 32 arbitration hearings. In such a situation, it was held that since the objections had not been raised within the time allowed under section 16(2) or without causing undue delay, the appellant shall be deemed to have waived his right to object. [9]

Where no plea was raised with regard to the *constitution* of the arbitral tribunal either in the defence statement or in the counter claims nor such a plea was raised during the arbitration proceeding, it was held that the petitioner waived his right to challenge on the ground that the *constitution* of arbitral tribunal was void or that the arbitral tribunal had exceeded its jurisdiction in considering certain matters. [10]

If a party files objections to the award on the ground that the arbitrator continued to associate himself with the arbitration proceedings after a particular date when he was issued a charge sheet by the petitioner, such an objection cannot be allowed to be raised because the petitioner even after knowing the fact never raised any objection before the arbitrator not

to continue the proceedings nor had he filed any objection for change of arbitrator. [11]

Merely asking for an adjournment for filing reply to the statement of claims filed by the petitioner will not mean that respondent had submitted to the jurisdiction of the arbitrator or that there was any acquiescence on its part. The jurisdiction of the arbitrator having been challenged and the arbitrator himself being of the opinion that he had not formally been appointed, it was not proper on the part of the arbitrator to continue with the arbitration proceedings. [12]

There is probably no limit to the types of irregularity which can be waived. [13] The following may be taken as illustrative of the types of irregularity which may be waived, as well as the ways in which waiver may take place:

(1) Partiality on the part of the arbitrator [14]

(2) Arbitrator acting as advocate before disagreement. [15]

(3) Failing to examine witnesses on oath. [16]

(4) Choosing an umpire (now third arbitrator) by lot. [17]

(5) Proceeding without hearing evidence or argument. [18]

(6) Taking evidence in the absence of the other party. [19]

However, a distinction must be drawn between mere irregularities of procedure and matters affecting the jurisdiction of the arbitrator. Irregularities of procedure can be waived; but the jurisdiction of the arbitrator must always depend on an agreement by the parties to abide by his award. [20]

There are, however, a number of apparent exceptions to this general statement of principle of which the following may be noted:

(a) Where there is already an arbitration agreement in existence, the doctrine of estoppel may operate so as to prevent a party from asserting that a requirement essential to the jurisdiction of the arbitrator has not been satisfied. [21] Thus a party who appoints an unqualified arbitrator cannot afterwards complain that the arbitrator had no authority. [22]

(b) A party who relies on an arbitration agreement to have an action stayed and the claim referred to arbitration cannot later assert that the claim is outside the scope of the agreement. [23]

(c) A party who takes a benefit under an award, by seeking to enforce it through courts or otherwise, cannot later assert that it was made without authority. [24]

(d) The arbitration agreement need not be between parties of full capacity, if the party against whom the award is to be enforced agreed to arbitrate with knowledge of the other party's incapacity. [25]

(e) Where the existence of an agreement to arbitrate is not in question, a party who invokes the arbitration agreement in respect of a particular dispute is precluded from later asserting that the dispute was not within the scope of the agreement. [26]

17. CLAIMS AND COUNTER CLAIMS

Non consideration of counter claims of a party is judicial misconduct and the award has to remitted back to the arbitrator for reconsideration. [27] When the arbitrator is adjudicating the claims he must also entertain the counter claims, if any. Counter claims need not be separately referred to the arbitrator to give him jurisdiction to entertain them. [28] If the arbitration clause

provides for reference of all claims to the arbitrator, then the arbitrator does not exceed his jurisdiction by entertaining the counter claims of a party. [29] An arbitrator is competent to pass a separate award if the counter claim is the subject-matter of a separate reference. [30] Where the arbitrator did not at all consider the counter claim and kept the same for consideration subsequently while making award in respect of the claims filed by a party, such an award is not sustainable in law. [31]

The arbitrator would be justified in refusing to adjudicate upon the counter claims filed by a party, especially if they are filed after the arguments on the claims are nearing completion [32] or if the counter-claims were raised years after the reference. [33]

If the conditions of the contract provide that counter claims shall not be entertained by the arbitrators if the claimant does not give his consent, then the counter claims cannot be considered without obtaining the consent of the claimant. [34] It is no misconduct on the part of the arbitrator if he does not choose to deal with counterclaims which, as per terms of the contract, fall within the excepted matters and outside the purview of arbitration. [35]

When a party was fully aware from the very beginning that counter-claim of the other party was being adjudicated upon by the arbitrator inasmuch it made statement in reply with regard to the merits of the counter claims and even allowed the framing of issue with respect to that, besides allowing evidence to be led in support thereof without raising the plea of want of jurisdiction, then the party cannot be allowed to raise objection that the arbitrator had no jurisdiction to make the award on counter claims. [36]

18. CLAIM FOR ADDITIONAL WORK

The arbitrator has jurisdiction to decide matters regarding the additional work, as in deciding those matters, disputes and questions arising out of the contract, may have to be considered and decided by him. [37] When the arbitrator on the interpretation of the agreement and the tender items, considered the nature of the work and found there is extra work not covered in the tender items, it is not possible for the court to interfere with the same. However, if the rate awarded was unreasonable, the case would be different. [38] Where an entire dispute has been referred to the arbitrator, it is open to him to allow claims for additional works. [39]

An arbitrator has the power to determine the rates relating to extra items in respect of which the decision of an officer has not been made final by the contract itself. [40]

The appellant had awarded a contract to the respondent for the construction of a Power House. Before undertaking the work, the appellant directed the respondent to shift the site of power house site by 55 meters. The respondent claimed extra amount for excavation of the pit. The appellant pleaded that the item of excavation was fully covered and provided for in the contract. Held that the arbitrator was justified in rejecting the claim of the respondent. [41]

Where the dispute arose regarding the enhanced rate of wooden planks on the ground that the contractor had used new wooden planks each time for the work on the insistence of the Authority whereas such planks should have been allowed to be used four or five times for shoring work, it was held that by insisting on use of new planks every time, the Authority altered the terms and conditions of contract and, as such, extra rate was admissible. [42]

In view of the provisions of the arbitration clause, the arbitrator has jurisdiction to decide the dispute in regard to the additional work done by the contractor as part of the main contract notwithstanding the *non obstante* clause ‘except as otherwise provided’. [43]

Where due to leakage in the hyperbolic-like roof structure, there was seepage of water on the surface of concrete, the execution of water proofing treatment required at the instance of the respondent would certainly be deemed to be an extra

item, for which the contractor has to be paid on the basis of rates worked out as per terms of the contract. [44]

19. APPEAL AGAINST INTERIM ORDER OF ARBITRAL TRIBUNAL

The intention of the Legislature not to allow any party to have any recourse against the decision of the arbitral tribunal rejecting a challenge, is made amply clear from the wording of section 16(5). In addition, the Legislature by deliberately leaving out the provisions of sections 13(3) and 16(3) of the Model Law, as enacted by the UNCITRAL, has clearly held in favour of non-interference by the courts in the conduct of arbitral proceedings. Section 37(2) (a) does, however, provide for an appeal against a decision of the arbitral tribunal accepting a challenge made under section 16. If the arbitral tribunal accepts the challenge to its jurisdiction, the aggrieved party can have recourse to the provisions of section 37(2) (a) for filing an appeal, whereas, no appeal lies against the order of the arbitral tribunal rejecting the challenge to its jurisdiction.

An order of the arbitral tribunal that it has jurisdiction to decide upon the claims before them, cannot be termed as an interim award. 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. If 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, and thus, no appeal lies against such an order. [45]

From the Scheme of the Act, it is apparent that the Legislature did not provide an appeal against the order passed under section 16(5) where the arbitral tribunal takes a decision rejecting the plea that the arbitral tribunal has no jurisdiction. The intention appears to be that in such cases the arbitral tribunal shall continue with the arbitral proceedings and make an award as early as possible without being interfered in the arbitral process at any stage by the court in its supervisory role. [46]

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 the plea, it is duty-bound to continue the arbitral proceedings and make an arbitral award. 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. [47] The Legislature had consciously and clearly considered the decision on jurisdictional aspect to be not an ‘award’ but an ‘order’ or a ‘decision’. [48]

20. WRIT NOT MAINTAINABLE AGAINST ORDER OF ARBITRAL TRIBUNAL

In view of the provisions of sub-sections (5) and (6) of section 16 read with sections 13 and 37, it is clear that the arbitral tribunal has power to decide about its own jurisdiction and such decision is not amenable to writ jurisdiction. The aggrieved party has the right to challenge the order under section 34(6), but only after the arbitration proceedings are over and the arbitral award has been delivered. [49]

When an unsuccessful party cannot challenge the order of the arbitrator rejecting the challenge to his appointment even before a civil court till the award is made, a writ petition cannot also lie to challenge against that order when the award has yet to be made. Even if the arbitral tribunal has been invalidly constituted, the same will have to be decided by the court before which the validity of the award is to be challenged. [50] Merely because the question of jurisdiction of the arbitrator is required to be considered after the award is passed and not at any penultimate stage by the appropriate court, it cannot be a ground for submitting that such an order is not subject to any judicial scrutiny. [51]

As per scheme of the Act, arbitration has to proceed without any hindrance or obstructions of the courts. Sections 12, 13 and 16 are of the clear view that spokes should not be put in passing of award. Under section 34, the aggrieved party has an avenue for ventilating its grievances against the award, including any order that might have been passed by the tribunal under section 16. The object of minimising judicial intervention while the matter is under adjudication will certainly be

defeated if the High Court could be approached by writ petitions against every order by the arbitral tribunal. [52]

A certain piece of land for construction of national highway was acquired by the National Highways Authority. Aggrieved by the determination of the rate towards compensation for such acquisition, the owner of the land sought arbitration for redetermination of rates. An award was made by the arbitrator and not being satisfied with the re-determination of rates, the land owner filed a writ petition. Held that the writ petition was not the remedy against the award and the only remedy was to challenge the award under section 34. [53]

Where the petitioner sought directions from the court to the arbitral tribunal to follow a particular procedure, it was held that the court could not exercise its extraordinary jurisdiction to issue a mandamus or a direction to the arbitral tribunal to follow a particular procedure or to do any act, and that it was for the arbitral tribunal to follow a procedure which it thought was correct and proper. [54]

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1 Section 12(1).

2 Section 12(2).

3 Section 12(3)(b).

4 Section 13(2).

5 Section 16(3).

6 Section 16(1).

7 *Food Corp. of India v. Indian Council of Arbitration,* (2003) 6 SCC 564 [*LNIND 2003 SC 558*] : AIR 2003 SC 3011 : (2003) 2 Arb LR 692 : (2003) 2 RAJ 511; *Sita Holiday Resorts Ltd. v. Mohan Lal Harbans Lal Bhayana & Co.* , 2000 (1) RAJ 103 (Del); *Govt. of A.P v. P. Prabhakar Reddy,* 2004 (2) RAJ 99 (AP); *Hythro Power Corp. Ltd. v. Delhi Transco Ltd.,* (2003) 8 SCC 35 [*LNIND 2003 SC 598*] : AIR 2003 SC 4219 : (2003) 2 RAJ 617 : (2003) 3 Arb LR 1; *Karnataka State Road Transport Corp. v. M. Keshwa Raju,* AIR 2004 Kant 109 [*LNIND 2003 KANT 546*]: 2004 (1) Arb LR 507 (Kar) *; Vijaykumar Bhogilal Patel v. Karim Mohd. Marcdia,* 2004 (2) RAJ 186 (Bom); *Hindustan Electro Graphite Ltd. v. MPSEB,* 2004 (2) RAJ 191 (MP); *Angang Group Intnl. Trade Corp. v. Pipavav Railway Corp. Ltd.,* (2003) 10 SCC 51 : 2004 (2) Arb LR 44 : 2004 (1) RAJ 475.

8 *NTPC Ltd. v. Siemens Atiengesellschaft (SAG),* 2005 (2) RAJ 367 (Del).

9 *Ganesh Benzoplast Ltd. v. SAF Yeast Co. Ltd.,* 2008 (1) RAJ 686 : 2007 (4) Arb LR 385 (Bom) (DB).

10 *M.S. Commercial v. Calicut Engg. Works Ltd.,* (2004) 10 SCC 656 : 2005 (1) Arb LR 399 : 2005 (1) RAJ 405; *Union of India v. Maheshwari Builders,* AIR 2005 Raj 334 : 2005 (3) RAJ 150; *S.B.P. & Co. v. Patel Engg. Ltd.,* (2005) 6 SCC 288 [*LNIND 2005 SC 851*] : AIR 2006 SC 450 : 2005 (3) RAJ 388; *Harike Rice Mills v. State of Punjab* , 1997 (Supp) Arb LR 342 : 1998 (1) RAJ 223 (P&H); *Satish Chander Gupta & Sons v. Union of India,* 2003 (1) Arb LR 589 (P&H) (DB); *Assam Urban Water Supply & Sewerage Scheme v. Subhash Projects & Marketing Ltd.,* AIR 2003 Gau 146 : 2003 (2) Arb LR 301 : 2003 (3) Gau LT 124.

11 *Kitiku Imports Trade Pvt. Ltd. v. Savitri Metals Ltd* ., 1999 (2) Arb LR 405 : 2000 (1) RAJ 56 (Bom).

12 *Ibid; Karnataka Road Transport Corp. v. M. Keshwa Raju,* 2004 (1) Arb LR 507 (Kant) (DB); *Saraswati Vidhya Mandir Sr. Sec. School v. Madhukar Lal Nagar,* 2004 (1) RAJ 407 (All) .

13 *BASF Styrenics Pvt. Ltd. v. Offshore Ind. Const. Pvt. Ltd* ., AIR 2002 Bom 289 [*LNIND 2002 BOM 169*]: 2002 (3) Arb LR 14 (DB); *Lexicon Finance Ltd. v. Union of India* , 2002 (3) Arb LR 60 (Kant) (DB).

14 *Ibid.*

15 Section 34(2) (a)(iv).

16 *Krishna Kumar Mundhra v. Narendra Kumar Anchalia,* 2004 (2) Arb LR 469 (Cal); *ONGC v. Oil Field Instrumentation,* 2004 (3) Arb LR 362 (Bom); *Karnataka State Road Transport Corp. v. M. Keshava Raju,* AIR 2004 Kant 109 [*LNIND 2003 KANT 546*]; *P. Dhandapani v. Motor & General Finance Ltd.,* 2006 (2) RAJ 199 (Del); *Union of India v. Niraj Kumar Bohra,* AIR 2008 NOC 31 (Cal).

17 *Municipal Corp. of Greater Mumbai v. PWT Projects Ltd.,* AIR 2005 Bom 195 [*LNIND 2005 BOM 128*]: 2005 (2) Arb LR 507 : 2005 (2) RAJ 530.

18 *Board of Trustees of Paradeep Port v. Natwar Iron and Steel Works,* : 1994 (1) Arb LR 54*; New India Assurance Co. Ltd. v. Dalmia Iron and Steel Ltd* ., AIR 1965 Cal 42 [*LNIND 1964 CAL 91*]*; Chowdhri Murtaza Hossain v. Bibi Bechunnissa* , 3 Ind App 209 : 3 Sar 663 : 26 South WR 10 (PC); *Union of India v. K.P. Mandal,* (DB); *N. Jayalaxmi v. R. Veeraswamy,* 2003 (3) RAJ 357 (AP); *Oxame Const. Ltd. v. Union of India,* 2004 (2) Arb LR 110 (Del).

19 *Travancore Devaswom Board v. Panchamy Pack (P) Ltd.,* (2004) 13 SCC 510 : (2006) 2 RAJ 429 : 2005 Supp Arb LR 1.

20 *Secur Industries Ltd. v. Godrej & Boyce Mfg. Co. Ltd.,* (2004) 3 SCC 447 [*LNIND 2004 SC 270*] : AIR 2004 SC 1766 : 2004 (1) Arb LR 425; *Ruchi Strips & Alloys Ltd. v. Tata South East Asia Ltd.,* (2004) 13 SCC 470 : 2005 (Supp) Arb LR 28; *Raghubir Singh v. Delhi Metro Rail Corp. Ltd.,* 2007 (2) RAJ 408 (Del).

21 *NEPA Ltd. v. Manoj Kumar Agrawal* , 1999 (2) RAJ 246 (MP); *Chief Engineer, Central Zone Telecommunication Civil, Lucknow v. Dayal Construction Co.,* 2005 (2) RAJ 475 (Utt).

22 *Ruchi Strips & Alloys Ltd. v. Tata South East Asia Ltd.,* (2004) 13 SCC 470 : (2006) 2 RAJ 406 : 2005 Supp Arb LR 28; *Premlaxmi and Co. v. Trafalgar House Const. India Ltd.* , 1 0999 (2) RAJ 314 (Bom); *Jansatta Shakari Awas Samiti Ltd. v. Organic India,* 2006 (1) RAJ 124 (Del); *Superintending Engineer v. D.G. Deivasigamani,* 2008 (1) Arb LR 380 (Mad).

23 *M.N. Arora v. Delhi Development Authority* , 1988 (1) Arb LR 348 : (1988) 94 Pun LR (D) 52 (Del); *V.P. Mehta v. Union of India* , 1987 (2) Arb LR 259 (Del).

24 *Executive Engineer, Prachi Division v. Gangaram Chhapolia,* (Ori); *State of Orissa v. Gokulachandra Kanungo,* : (1979) 48 Cut LT 505 (DB).

25 *Choudhury and Gulzar Singh v. Frick India Ltd.,* : ILR (1978) 2 Del 753 .

26 *Russell on Arbitration* , 20th Ed., p. 268.

27 *Oil & Natural Gas Commission v. Offshore Enterprises Inc.* , (1995) 1 Arb LR 432 : 1995 AIHC 731 (Bom) (DB).

28 *Ruby General Insurance Co. Ltd. v. Pearey Lal Kumar, AIR* 1952 SC 119 : [1952] SCR 501 [*LNIND 1952 SC 9*] ; *Union of India v. Salween Timber and Construction Co. (India), AIR* 1969 SC 488 : [1969] 2 SCR 224 [*LNIND 1968 SC 290*] ; *Heyman v. Darwins Ltd.,* *1942 AC 356*; *A.M. Mair & Co. v. Gordhandas Sagarmull, AIR* 1951 SC 9 : [1950] SCR 792 [*LNIND 1950 SC 46*] ; *Bindra Builders v. Delhi Development Authority,* : 1986 (1) Arb LR 1.

29 *Ram Lal Jagan Nath v. Punjab State* , AIR 1966 P&H 436 : (1966) 68 Pun LR 522 (FB); *Khardah Co. Ltd. v. Raymon & Co. (India) Pvt. Ltd* ., AIR 1962 SC 1810 : [1963] 3 SCR 183 [*LNIND 1962 SC 235*].

30 *Union of India v. D.P. Wadia & Sons,* (DB).

31 *Lalchand Dharamchand v. Alliance Jute Mills Co.Ltd.,*.

32 *Gauri Shankar & Sons v. Union of India,* (DB).

33 *Bengal Jute Mills Co.Ltd. v. Lalchand Dugar,* (DB).

34 *Gangaram Rattanlal v. Simplex Mills Co. Ltd.,* : (1981) 83 Bom LR 307.

35 *Russell on Arbitration* , 20th Ed., pp. 252-253.

36 *Russell on Arbitration* , 22nd Ed., para 5.075, pp. 179-180.

37 *S.B.P. & Co. v. Patel Engg. Ltd.,* (2005) 8 SCC 618 [*LNIND 2005 SC 851*] : AIR 2006 SC 450 : (2005) 128 Comp Cas 465 : 2005 (3) RAJ 388.

38 *Navbharat Dal Mills v. Food Corp. of India,* : 1993 (1) Arb LR 298 (DB); *Bharat Heavy Electricals Ltd. v. Amar Nath Bhan Prakash,* (1982) 1 SCC 625; *Jai Chand Bhasin v. Union of India,* : 1983 Arb LR 191 (DB); *Ved Prakash Mithal v. Union of India,* : 1985 Arb LR 443 (FB).

39 *State of West Bengal v. A. Mondal,* : 1985 Arb LR 42 (DB).

40 (2009) 1 SCC 267 [*LNIND 2008 SC 1869*] : AIR 2009 SC 170 : (2008) 4 RAJ 557 : (2008) 3 Arb LR 633; *Chawla Techno Const Ltd. v. Embassy of Italy* , 1999 (3) RAJ 104 (Del).

41 *IVRCL Infrastructures & Projects Ltd. v. Bhanu Construction,* AIR 2008 NOC 25 (AP) .

42 *DHV BV v. Tahal Consulting Engineers Ltd.,* (2007) 8 SCC 321 [*LNINDORD 2007 SC 3*] : AIR 2007 SC 3113 : 2007 (4) Arb LR 428*; N. Sreenivasa v. Kuttukaram Machines Tools Ltd.,* 2007 (3) RAJ 559 (Kant).

43 *State of Orissa v. G.C. Kanungo,* : (1979) 48 Cut LT 505 ; *Wazir Chand Mahajan v. Union of India, AIR* 1967 SC 990 : [1967] 1 SCR 303 [*LNIND 1966 SC 178*] ; *Hindustan Steel Works Construction Ltd. v. Mansha Singh & Co.* , 1985 Arb LR 338 (Cal)(DB) *; Mohd. Usman v. Union of India, AIR* 1969 SC 474 : [1969] 2 SCR 232 [*LNIND 1968 SC 292*] ; *V.G.Ghawda Pvt. Ltd. v. Union of India,* ; *Vulcan Insurance Co. v. Maharaj Singh,* (1976) 1 SCC 943 [*LNIND 1975 SC 380*] : AIR 1976 SC 287; *State of M.P. v. Continental Construction (P) Ltd* ., AIR 1978 NOC 134 (MP); *Jiwnani Engineering Works (P) Ltd. v. Union of India,* ; *Union of India v. Bimal Kumar,* ; *Gokul Chandra Kanungo v. State of Orissa,* (Ori) : 1983 Arb LR 78.

44 *Secretary to Govt. of Orissa v. Raghunath Mohapatra,* : (1985) 59 Cut LT 133; *Eastern Medikit Ltd. v. R.S. Sales Corp.,* 2007 (2) RAJ 408 (Del).

45 *Steel Authority of India v. J.C. Budharaja,* (1999) 8 SCC 122 [*LNIND 1999 SC 770*] : AIR 1999 SC 3275 : 1999 (3) Arb LR 335.

46 *State of U.P. v. Ram Nath International Const. Pvt. Ltd.,* (1996) 1 SCC 18 [*LNIND 1995 SC 1093*] : AIR 1996 SC 782 : (1995) 2 Arb LR 577.

47 *Godhu Mal v. Ganga Hasso Mal Idnani,* ; *Bindra Builders v. Delhi Development Authority,* : 1986 (1) Arb LR 1.

48 *Anjani Lal and Sanjay v. Food Corporation of India* , 1987 (2) Arb LR 77 (Del).

49 *A.V. Industries v. Tripathi Chitra Mandir* , 1987 (1) Arb LR 30 (Del).

50 *Sukh Darshan Singh v. Dehra Auto Financiers* , 1986 (1) Arb LR 359 (All).

51 *Champal Singh v. Union of India* , 1986 (2) Arb LR 342 (Del); *Asia Engg. Co. v. L.I.C of India,* : (1984) 1 Kant LT 458 (DB).

52 *Manmohan Singh Harmohinder Singh v. Hotel Corp. of India,* (Del) : 1987 (1) Arb LR 212.

53 *Renusagar Power Co. Ltd. v. General Electric Co. Ltd.,* (1984) 4 SCC 679 [*LNIND 1984 SC 384*] : AIR 1985 SC 1156 : 1984 Arb LR 240; *M.V. 'Baltic Confidence' v. S.T.C.,* (2001) 7 SCC 473 : AIR 2001 SC 3381.

54 *Principal, Regional Engineering College v. S.N. Bambroo* , AIR 1978 J&K 19 : 1977 J&K LR 342; *State of Orissa v. B.C. Pasayat,* : (1983) 55 Cut LT 67.

55 *Mohan Construction Co. v. Delhi Development Authority* , 1998 (1) Arb LR 548 (Del).

56 *Union of India v. Salween Timber and Construction Co., AIR* 1969 SC 488 : [1969] 2 SCR 224 [*LNIND 1968 SC 290*].

57 *Kashmiri Lal Gupta v. Union of India* , AIR 1965 J&K 114 : 1965 Kash LJ 280.

58 *Shahadara (Delhi) Saharanpur Light Railway Co. v. Union of India,*.

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61 *Continental Construction Co. Ltd. v. State of Madhya Pradesh,* (1988) 3 SCC 82 [*LNIND 1988 SC 150*] : AIR 1988 SC 1166 : 1988 (1) Arb LR 400; *Associated Engg. Co. v. Govt. of Andhra Pradesh,* (1991) 4 SCC 93 [*LNIND 1991 SC 299*] : AIR 1992 SC 232 : 1991 (2) Arb LR 180; *State of Kerala v. V.P. Jolly,* : 1992 (1) Arb LR 313 (FB); *State of Kerala v. Poulose* , 1988 (2) Arb LR 15 (Ker) (DB).

62 *Gujarat Water Supply and Sewerage Board v. Unique Erectors (Gujarat) (P) Ltd.,* (1989) 1 SCC 532 [*LNIND 1989 SC 45*] : AIR 1989 SC 973 : 1990 (1) Arb LR 299.

63 *K.R. Anand v. Delhi Development Authority* , 1997 (2) Arb LR 109 (Del) : (1997) 68 DLT 143.

64 *Vishwanath Sood v. Union of India,* (1989) 1 SCC 657 [*LNIND 1989 SC 48*] : AIR 1989 SC 952 : 1989 (1) Arb LR 357; *Hans Construction Co. v. Delhi Development Authority* , 1996 (Suppl) Arb LR 420 (Del); *Union of India v. S. Kumar,* 2004 (4) RAJ 219 (Del) (DB); *Puran Chand Nangia v. Delhi Development Authority,* 2006 (2) Arb LR 456 (Del): (2006) 88 DRJ 207 [*LNIND 2006 DEL 316*]; *Union of India v. Arctic India,* 2008 (1) RAJ 481 (Bom); *National Building Construction Corporation v. R.C. Bhatia,* 2006 (3) RAJ 596 : 2006 (2) Arb LR 52 (Del); *Subhash & Co. v. DDA,* 2006 (3) RAJ 618 (Del).

65 (2011) 5 SCC 758 [*LNIND 2011 SC 464*].

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67 *A.R.K. Murthy v. Sr. Divisional Engineer,* 2007 (1) RAJ 117 (AP); *Harsha Const. v. Union of India,* AIR 2006 NOC 231 : 2006 (1) Arb LR 308 : (2005) 5 Andh LT 728 (AP) (DB); *Union of India v. Ajit Mehta and Associates,* : 1990 (1) Arb LR 166 [*LNIND 1989 BOM 285*] : (1989) 3 Bom CR 535 [*LNIND 1989 BOM 285*] (DB).

68 *Indian Oil Corporation Ltd. v. Artson Engg. Ltd.,* 2007 (2) RAJ 187 (Bom) : 2006 (6) Bom CR 465 [*LNIND 2006 BOM 1303*].

69 *Ennore Port Ltd. v. Skanska Cementation India Ltd.,* 2008 (2) Arb LR 598 (Mad).

70 *Prabartak Commercial Corporation v. Chief Administrator, Dandakaranya Project,* (1991) 1 SCC 498 : AIR 1991 SC 957 : 1991 (1) Arb LR 282; *State of Orissa v. Damodar Das,* (1996) 2 SCC 216 [*LNIND 1995 SC 1426*] : AIR 1996 SC 942 : 1996 (1) Arb LR 221; *Prabhubhai Jadhavji Rathod v. Union of India,* 2008 (3) Arb LR 204 (Bom) : (2008) 110 Bom LR 852.

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72 *Union of India v. Chawla Interbild Const. Co. Pvt. Ltd.,* 2003 (3) Arb LR 461 : (2003) 2 All MR 596 (Bom) : (2003) 3 MHLJ 889 [*LNIND 2002 BOM 1026*].

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7 Challenge to Qualifications and Impartiality of Arbitrator

PC Markanda: Arbitration Step by Step

P C Markanda

7 Challenge to Qualifications and Impartiality of Arbitrator

1. INTRODUCTION

Under the 1940 Act, there was no stipulation as to take into consideration the qualification of an arbitrator. Whenever a party filed an application in the court for appointment of arbitrator, the court invariably used to appoint a retired judge irrespective of the fact whether the disputes pertained to technical or legal matters. Now, the position is very clear that if the parties have stipulated in the agreement that persons with certain qualifications shall be considered for appointment as arbitrator, the courts will have due regard to the stipulation of the arbitration agreement. In some cases, where the Chief Justice made the appointment of arbitrator in disregard of the qualifications prescribed in the arbitration agreement, the Supreme Court set aside the appointment and appointed an arbitrator having the prescribed qualification. Section 11(8) of the Act dealing with the qualifications of the arbitrator states that:

> ***Section 11(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.*

2. QUALIFICATION OF ARBITRATOR

It is for the parties to determine at the time of entering into an arbitration agreement as to whether, in case of disputes arising between them in future, the arbitrator to be appointed should possess certain qualifications. For example, in case disputes arise out of a contract requiring specialised knowledge, appointment of an arbitrator other than the one from that particular field, may not be just and proper since the said arbitrator would not be able to appreciate either the intricacies or the magnitude of the disputes. When parties approach the Chief Justice or his designate for appointment of an arbitrator, the first consideration should be to appoint a person who has that specialised knowledge of the field to which the dispute relates.

Sub-section (8) of section 11 provides that if the appointment procedure agreed upon by the parties cannot be given effect to, then the Chief Justice or the person or institution designated by him shall have due regard to any qualification required of the arbitrator by the agreement of the parties. Thus, if the parties desire an arbitrator with particular qualifications, then such a qualification must be mentioned in the arbitration agreement itself. When the appointment procedure cannot be followed for any reason, then the Chief Justice must know clearly the intention of the parties. For instance, if there be a dispute with regard to a construction contract, and the arbitration agreement provides that the Superintending Engineer or Chief Engineer shall be the arbitrator, the intention of the parties is absolutely clear that they want the disputes to be resolved by a technical person, and as such, the Chief Justice or his designate ought to appoint a technical person as arbitrator to resolve such disputes.

The Chief Justice cannot appoint an arbitrator in utter disregard of the qualifications required by the agreement of the parties. Thus, while appointing an arbitrator, the Chief Justice or his nominee shall keep in view, that the person to be appointed as an arbitrator:

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(1) must possess the qualifications which the arbitration agreement prescribes and must have none of the disqualifications which the arbitration agreement prohibits; and

(2) must not have any interest in the subject-matter or closeness with the parties as would make him or appear to make him incapable of acting in an impartial manner.

The Chief Justice or the designate Judge would be entitled to seek the opinion of an institution in the matter of nominating a qualified arbitrator in terms of subsection (8) of section 11 if the need arises, but the order appointing the arbitrator could only be that of the Chief Justice or the designate Judge. [1]

While appointing an arbitrator, the Chief Justice or the person designated by him is required to give due regard to any qualification which may be required of the arbitrator as per the agreement of the parties and further may have due regard for other considerations for securing the appointment of an independent and impartial arbitrator. [2]

In the matter of settlement of disputes by arbitration, the agreement executed by the parties has to be given great importance and an agreed procedure for appointing the arbitrators has been placed on high pedestal and has to be given preference to any other mode for securing appointment of an arbitrator. It is for this reason that in sub-section 8(a) of section 11, it is specifically provided that the Chief Justice or the person or the institution designated by him, in appointing an arbitrator, shall have due regard to any qualifications, required of the arbitrator by the agreement of the parties. [3]

Where the contract condition specifically provided that two gazetted officers of the Railways were to act as arbitrators, the order of the High Court appointing a retired judge as the arbitrator was set aside. [4]

A man who had formerly been a solicitor, but was for many years a full-time maritime arbitrator, was held to be within the class of person to whom the parties to a charter party were referring when using the expression'Commercial men'. What mattered was the'arbitrator's practical commercial experience.' [5]

Where the appointed arbitrator does not possess the required qualifications, his appointment is nugatory and any award which he may make is void. Unlike the position where the complaint is of incapacity or bias, the court has no discretion to uphold an appointment or award where the arbitrator lacks the qualifications stipulated in the contract. Subject to waiver, it has no choice but to treat the proceedings and the award as void. [6] Plea of lack of qualification is irrelevant when the agreement itself names the person to be appointed as the arbitrator. [7]

3. ARBITRATOR MUST POSSESS REQUISITE QUALIFICATIONS

Section 12(3)(b) of the Act states that an arbitrator may be challenged only if he does not possess the qualifications agreed to by the parties. At the time the parties sign the arbitration agreement they are conscious of the fact that if certain disputes emanate between them, the adjudication of such disputes should be left to be determined by a person possessing a particular qualification. They know that their interests would be well served if adjudication of disputes is done by such a qualified arbitrator. Even if a party fails to appoint the arbitrator as required under the arbitration agreement within the period allowed by law, the courts are obliged to appoint an arbitrator possessing the qualification agreed to between the parties.

The arbitration agreement may provide that the member of the tribunal must possess a certain qualification like being a Fellow of the Institution of Engineers or Fellow of the Institution of Architects. It is then a ground of objection to the jurisdiction of the arbitral tribunal that one or more of its members does not possess the stipulated qualification. However, if knowingly, the parties do not raise any objection during the course of arbitral proceedings, the parties would be deemed to have waived the objection. [8]

Special qualification of the arbitrator may either expressly be provided in the arbitration agreement, or indirectly by the words of rules incorporated in the arbitration agreement. It is always the endeavour of the courts to give effect to the

stipulations contained in the arbitration agreement *qua* appointment and jurisdiction of the arbitral tribunal unless the deviation from the qualification is not clearly established. In *Pan Atlantic Group Inc. v. Hassneh Insurance Co. of Israel Ltd.* , [9] the arbitration agreement provided:'The arbitrators shall be disinterested executive officials of insurance or reinsurance companies.' At the time of his appointment one of the members of the arbitral tribunal was an executive official of the insurance company. Subsequently, he retired from that position, and one of the parties challenged his right to continue as an arbitrator. The court of Appeal dismissed the challenge. The purpose of the condition was to ensure the right sort of people familiar with the practice at the time of their appointment sat as arbitrators, not to oblige arbitrators to remain in full-time appointment so as to be allowed to continue to sit on a tribunal.
The effect of a successful challenge to an arbitrator on the ground that he does not have a special qualification required by the arbitration agreement is that the appointment, and all proceedings which follow, including the award, are void, because the arbitrator lacks jurisdiction. [10] However, it is submitted that the right to object may be lost if it is not exercised in a timely manner.

> Russell [11] states: The first duties of the arbitrator arise on the receipt of his appointment. He should then see that his appointment is in order, and in case it is not, should have it put in order before he proceeds with the arbitration. He should also observe whether the submission (together with the agreement, if any, under which it is made) require him to possess any special qualifications; and if it does, he should make sure that either he complies with the requirement or his failure to comply is known to both parties.

A person approached for being appointed as arbitrator must inform the party wishing to appoint him, as also the other party, that he lacks the qualification which has been made mandatory by the parties. Despite full knowledge that the arbitrator lacks the requisite qualification or if after having become aware subsequently that the arbitrator does not possess the qualification as agreed to between the contesting parties, objection in writing stating reasons must be lodged within 15 days after becoming aware of the *constitution* of the arbitral tribunal or within 15 days after becoming aware of any circumstances, like justifiable doubts as to his independence or impartiality, or lack of qualifications agreed to by the parties. If knowingly, a party desists from raising a written protest, that party is deemed to have waived the right to object in terms of section 4.

4. BIAS – GROUND TO CHALLENGE ARBITRAL TRIBUNAL

If an arbitral tribunal does not have an open mind, it cannot be expected to be fair and just. The very purpose of choosing a domestic forum, in preference to taking recourse to civil courts, would be defeated if the arbitral tribunal, chosen by the parties does not show impartiality and independence. Bias in favour of one party, or against the other party, would lead to grave injustice. This is not what the parties had bargained for.

Bias of the arbitral tribunal may not be known to a party immediately after the tribunal enters upon the reference. It may come to the notice of a party much later and, may be when the matter is ripe for award. The party, in possession of sufficient material to prove bias, has to so state it, within 15 days of the *constitution* of the arbitral tribunal or immediately after becoming aware of the facts leading to the challenge. There is no bar to challenge the tribunal, on the ground of bias, beyond 15 days of the *constitution* of the arbitrator or becoming aware of the facts leading to the challenge, provided the party challenging can establish beyond doubt that the information received by him could not have been obtained earlier even with due diligence.

Section 12 of the 1996 Act provides the following grounds to challenge an arbitral tribunal:

> ***Section 12. Grounds for challenge.—***
>
> (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.*
>
> (2) *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.*

(3) *An arbitrator may be challenged only if—*

(a) *circumstances exist 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.*

(4) *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.*

Section 12 of the Act of 1996 casts a solemn duty on an arbitrator to disclose to the parties his interest, [12] which is likely to give rise to a reasonable doubt about his independence in the minds of the parties. [13]Where a circumstance exists which tends to produce bias in the mind of the arbitrator, he should not act as an arbitrator in the matter concerned. [14] If the arbitrator fails to disclose such circumstances at the time of his appointment and it is discovered subsequently, then the award made by him would be liable to be set aside. [15]

An arbitrator must not be guilty of any act which can possibly be construed as indicative of partiality or unfairness. The purity of administration requires that the party to the proceedings should not have apprehension that the authority is biased and is likely to decide against the party. [16] Where a person is appointed by two parties to exercise judicial duties, there should be *ubberrima fidae* on the part of all parties concerned in relation to his selection and appointment. [17]

The legislative concern manifested in section 12 requiring a prospective arbitrator to disclose any circumstances likely to give rise to justifiable doubts as to his independence and impartiality coupled with the obligation of the appointed arbitrator to give such disclosure even during the arbitral proceedings proclaims the unambiguous legislative disapproval of the appointment or continuance of a person against whom circumstances exist giving rise to justifiable doubts as to his independence and impartiality. [18]

5. BIAS – MEANING OF

The principles governing the'doctrine of bias' vis--vis Judicial Tribunals are well settled and they are: (i) no man shall be a Judge in his own cause; (ii) justice should not only be done but manifestly and undoubtedly seem to be done. The two maxims yield the result that if a member of a judicial body is'subject to a bias (whether financial or other) in favour of, or against, any party to a dispute, or is in such a position that a bias must be assumed to exist, he ought not to take part in the decision or sit on the Tribunal; and that any direct pecuniary interest, however small, in the subject-matter of inquiry will disqualify a Judge, and any interest, though not pecuniary, will have the same effect, if it be sufficiently substantial to create a reasonable suspicion of bias.' [19]

Bias is an inclination to decide for one side. It is a condition of mind, which sways judgment and renders a judge unable to exercise his functions impartially in a particular case. [20] The word'bias' in popular English parlance stands included within the attributes and purview of the word'malice' which in common acceptation means and implies'spite' or ill-will. [21]

Russell [22] states: A distinction is made between actual bias and apparent bias. Actual bias is rarely established but clearly provides grounds for removal. More often there is a suspicion of bias which has been variously described as apparent or unconcious or imputed bias. In such majority of cases, it is often emphasized that the challenger does not go so far as to suggest the arbitrator is actually biased, rather that some form of objective apprehension of bias exists.

There is an automatic disqualification for an arbitrator who has a direct pecuniary interest in one of the parties or is otherwise so closely connected with the party that can truly be said to be a judge in his own cause.

6. ARBITRATOR MUST BE UNBIASED AND DISINTERESTED

There must be purity in the administration of justice as well as in administration of quasi-justice as are involved in the adjudicatory process before the arbitrators. Once the arbitrators enter in an arbitration, they must not be guilty of any act which can possibly be construed as indicative of partiality or unfairness. [23] Where a circumstance exists which tends to produce a bias in the mind of the arbitrator, he should not act as an arbitrator in the matter concerned. [24]

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There are two well recognised principles of natural justice which must be adhered to by the arbitrators, *viz* :

(i) that a Judge or an arbitrator who is entrusted with the duty to decide a dispute should be disinterested and unbiased (*nemo judex in cause sua*); and

(ii) that the parties to dispute should be given adequate notice and opportunity to be heard by the authority (*audi alteram partem*). [25]

If an arbitrator has an interest in the subject-matter of the dispute which he is going to decide, he is not a fit person to decide the dispute. [26] If, however, his interest is insignificant and unknown to himself so that it is impossible that it could have influenced his award in any way, the court would not be disposed to set aside the award. [27]

Arbitrators should scrupulously avoid any course of action which even remotely bears the complexion of their having put themselves into a position where it might be said that they have received a pecuniary inducement which might have had some effect on their determination of the matters submitted to their adjudication. [28]A party may be released from the bargain if he can show that the selected arbitrator is likely to show bias or by sufficient reason to suspect that he will act unfairly or that he has been guilty of continued unreasonable conduct. [29]

A concealment or deception, however slight, will vitiate the contract. Where the arbitration clause merely mentioned the name of the arbitrator, but the fact that he was the Chartered Accountant of a party was concealed even while appointing him, such an arbitrator should not be allowed to continue. [30]

While making the appointment of an arbitrator, it is presumed that the Chief Justice or his designate must have taken due care to nominate an independent and impartial arbitrator but a party in a given case may have justifiable doubts about the arbitrator's independence or impartiality. In that event, it would be open to that party to challenge the arbitrator adopting the procedure under section 13. [31]

After the award has been made, the party challenging the appointment of the arbitrator can make an application for setting aside the said award in accordance with the section 34. If a plea of bias is not raised as per section 13, then the party cannot raise it later on while challenging the award under section 34. If a challenge is rejected and an arbitral award is passed against that party then it can challenge the award under section 34. [32]

7. ARBITRATOR – WHEN LIABLE TO BE DISQUALIFIED

An arbitrator may be disqualified to continue as such if:

(1) The relationship of the arbitrator to one of the parties was unknown to the other party. [33]

(2) The arbitrator sought the legal opinion of a Government lawyer without referring the matter to the parties themselves. [34]

(3) The arbitrator is in fraudulent collusion with the opposite party. [35]

(4) One of the arbitrators was found to be indebted to one of the parties. [36]

(5) The arbitrator was acting as *mukhtiar* of one of the parties without remuneration. [37]

(6) The arbitrator lacks stipulated qualifications. [38]

(7) A person who is related to one of the parties as his first cousin is disqualified from sitting as an arbitrator. [39]

(8) Where the arbitrators had been putting up at the house of one of the parties, which enabled them to enter into a private conference with that party to the exclusion of the other. [40]

(9) The fact that the arbitrator is related to one of the parties does afford a real likelihood of an operative prejudice on his part, and the existence of such relationship, if not made known to the other party, disqualifies the arbitrator from acting as such. [41]

(10) Where the arbitrator is influenced in his decisions by others. [42]

(11) An officer who had dealt with the matter directly as an officer and has even entered into correspondence with the other party cannot be expected to be fair. [43]

(12) If the arbitrator grants adjournment to one party behind the back of the other party. [44]

(13) If an arbitrator takes evidence in the absence of and without notice to one of the parties. [45]

8. ARBITRATOR – WHEN NOT LIABLE TO BE DISQUALIFIED

In the following instances, bias was not attributable to the arbitrator:

(1) If the interest is known to the parties at or before the time of appointment of the arbitrator, no complaint can be made by a party who had agreed to appoint such an arbitrator with full knowledge of the arbitrator's interest either in the parties or in the subject-matter of the arbitration. [46]

(2) Where a party fails to challenge an arbitrator after becoming aware of his bias and takes part in the arbitration proceedings. [47]

(3) When both the arbitrators are pleaders, the mere fact that one of them has appeared for the other in various cases without charging fees does not show that the latter was under the former's obligation and would, therefore, not take a fair view of the matter under arbitration. [48]

(4) A gentleman engaged in the legal profession does not become incompetent to act as arbitrator merely because on some occasions he was engaged by one of the parties as his pleader. [49] However, if an arbitrator is a retained lawyer of a party, and that fact was not known to the other party, it amounts to misconduct on the part of the arbitrator. [50]

(5) The administrative head of a department cannot be said to carry an official bias because there is no reason to suppose that if any of his subordinates or the auditors appointed by him were found to be connected with the fraud, he would not put the responsibility where it should lie. [51]

(6) A party knowing fully well that the arbitrator is the Managing Director of the respondent firm cannot later on change his stand and find fault with the integrity or competency of the arbitrator. [52] It is not the duty of Judges to approach such curiously coloured contracts with a desire to upset them or to emancipate one of the parties from the burden of such a stipulation. [53]

(7) The successor of an officer against whom bias is alleged cannot be said to be disqualified on the apprehension that being the subordinate to the said retired officer he would also be biased against the plaintiff. [54]

(8) An arbitrator is not precluded from either fixing the fees or receiving it beforehand. [55] An award would not be vitiated on the ground that the arbitrator accepted fees from one of the parties on the refusal of the other to pay the same. [56] Refusal of an arbitrator to reduce his fees on the request of one party does not give rise to a suspicion of bias. [57]

(9) If parties continue to take part in arbitration proceedings before an arbitrator even after his retirement, the arbitrator cannot be said to have a vested interest in continuing with the arbitration proceedings. [58]

(10) Merely because the person appointed as the arbitrator also signed the agreement as a witness is no ground for holding that he is biased or that he is inclined in favour of one of the parties. [59]

(11) The mere fact that the arbitrator appointed by the respondent was on the panel of arbitrators of respondent's department and had been an arbitrator for the respondent on earlier occasions, [60] or that he had worked as the

Head of Law Department of the sister concern of one of the parties to the arbitration agreement, [61] or that he had been offered some assignments by one of the parties, [62] or that the advocate of the claimant was a junior to the arbitrator [63] is no ground for seeking removal of the arbitrator on the grounds of bias.

(12) Where a pleader of a party appoints himself as arbitrator without any special authority and that party joins in the reference, neither such reference nor the pleader's conduct is objectionable. [64]

(13) Merely because the person nominated as arbitrator is also acting as arbitrator in some other matter of the respondent corporation will not by itself make a valid ground for seeking revocation of the authority of the arbitrator. [65]

(14) A mere allegation, unsupported by any proof, that the arbitrator was regularly appearing for one of the parties and assisting it in preparation of cases cannot be countenanced. [66]

(15) Length of arguments in arbitration proceedings does not depend upon magnitude of claim. This is not a ground showing bias. [67]

(16) Merely because the arbitrator asked the contractor to provide stamp papers, does not amount to bias. [68]

(17) Bias will not be seen in the action of the arbitrator in refusing to allow a party to examine witnesses, especially where he has given a speaking order for refusal. [69]

9. TESTS FOR DETERMINING BIAS

It is not every suspicion felt by a party which must lead to the conclusion that the authority hearing the proceedings is biased. The apprehension must be judged from a healthy, reasonable and average point of view and not a mere apprehension of any whimsical person. [70] Mere imagination of a ground or reason cannot be an excuse for apprehending bias in the mind of the named arbitration. [71] There must be cogent evidence available on record to come to the conclusion as to whether in fact there was existing bias which resulted in miscarriage of justice. [72]

Actual bias would lead to an automatic disqualification where the decision-maker is shown to have an interest in the outcome of the case. Actual bias denotes an arbitrator who allows a decision to be influenced by partiality and prejudice and thereby deprives the litigant of the fundamental right to a fair trial by an impartial arbitral tribunal. [73] Personal bias is one of the three major limbs of bias, namely, pecuniary bias, personal bias and official bias. [74]

At times, there is no evidence of actual bias but there is a suspicion of bias, and, in a series of cases, the courts have reviewed this'imputed bias'. The court considers all the circumstances. The test used to be whether the possibility existed that the arbitrator's mind might have been biased. [75] In such cases, the test is not whether in fact a bias has affected the judgment; the test always is and must be whether a litigant could reasonably apprehend that a bias attributable to a member of the tribunal might have operated against him in the final decision of the tribunal. [76] The test of real likelihood of bias is whether a reasonable person, in possession of relevant information, would have thought that bias was likely. [77] What is relevant is the reasonableness of the apprehension in that regard in the mind of the party. The proper approach for the Judge is not to look at his own mind and ask himself, however, honestly,'Am I biased?'; but to look at the mind of the party before him. [78]

If there is a well founded apprehension of bias on the part of an arbitrator, because of his knowledge of special facts, or the role that he has played in any negotiations pending the litigation, that would certainly constitute a legitimate justification for challenge. [79]

10. APPOINTMENT OF ADVOCATE OF ONE PARTY AS ARBITRATOR

An advocate performs professional duties. During the course of his legal practice, he handles thousands of cases, or even more. He cannot be expected to have a personal relationship with all his clients. After the matter entrusted to him is decided by the court or the tribunal, as the case may be, he ceases to have any connection with the clients. If such advocate is appointed as an arbitrator, there can be no objection to such appointment on the ground

that he had handled the matter of one of the parties at an earlier date. However, the objection would be valid if the said advocate had appeared in the same matter before the court.

If an arbitrator was a retained lawyer of a party, and that fact was not known to the other party, it amounts to misconduct on the part of the arbitrator. [80] However, if the arbitrator is an advocate and it is known to both the parties that he appears for clients in arbitration cases, he is not disqualified to accept an appointment from a client merely because either party had agreed to appoint him as an arbitrator. [81]

If one of the arbitrators had been an advocate of a party before the Supreme Court for a case other than the subject-matter, to which the other party raised no objection either before the arbitrators or before the court, inasmuch as he took part in all the proceedings before the arbitrator and made oral and written submission and invited adjudication on the reference, such an award cannot be set aside on the plea that the arbitrator had acted as a lawyer for one party in another matter. [82]

Merely because the person nominated as arbitrator is also acting as arbitrator in some other matter of the respondent corporation will not by itself make a valid ground for seeking revocation of the authority of the arbitrator. Further, the mere fact that the arbitrator so appointed had on an earlier occasion given legal opinion to the respondent corporation will not disqualify him from acting as an arbitrator. [83] For seeking revocation of the authority of the appointed arbitrator, such ground which would cast reasonable doubts in the mind of a common man has to be shown when seeking removal of an arbitrator.

A mere allegation, unsupported by any proof, that the arbitrator was regularly appearing for one of the parties and assisting it in preparation of cases cannot be countenanced. [84]

11. ARBITRATOR CANNOT BE COMPELLED TO ARBITRATE

It is one of the essential principles of the law of arbitration that adjudication of disputes by arbitration should be the result of the free consent of the arbitrator. [85] Where an appointed arbitrator refused to work as such but ultimately under the directions of his employer [86] or the court [87] had to perform the duties of arbitrator against his wish, the award made by him has to be set aside being invalid. However, if the arbitrator after offering his resignation withdraws the same voluntarily, an award passed by him later would be valid. [88]The act of an arbitrator in refusing to act further till his fees was paid in advance, amounts to a refusal to act. [89]

12. BIAS – PROCEDURE TO CHALLENGE

Section 13 of the Arbitration and Conciliation Act, 1996 provides the procedure whereby a party can challenge the appointed arbitrator(s) and the same reads as follows:

Section 13. Challenge procedure.—

(1) *Subject to sub-section (4), the parties are free to agree on a procedure for challenging an arbitrator.*

(2) *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.*

(3) *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.*

(4) *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.*

(5) *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.*

(6) *Where 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 parties, as per the provisions of sub-section (1) of section 13, may agree between themselves as to the grounds on which the authority of an arbitrator may be challenged. This challenge *ipso facto* does not mean that the arbitrator is obliged to vacate the office. In case the arbitral tribunal finds that the grounds on which the parties are *ad idem* are not those which justify the challenge, the arbitral tribunal shall reject the same and then proceed with the matter. This sub-section confines its scope to the procedure for challenging an arbitrator but not all the arbitrators constituting the arbitral tribunal.

If the parties have not consented to the procedure for challenging the arbitrator, then any of the parties to the arbitration agreement, desirous of challenging the authority of an arbitrator, shall do so:

(1) within 15 days after becoming aware of the *constitution* of the arbitral tribunal; or

(2) after becoming aware of the circumstances which may give rise to justifiable doubts as to his independence or impartiality, or lack of qualifications agreed to by the parties.

The challenge has to be made in the form of a written statement which should include averments justifying the grounds of apprehension or of facts. Failure to do so, shall amount to waiver.

> After a party learns about the relationship of the arbitrator with one party after the reference has been made, he should immediately apprise the arbitrator and ask him not to proceed with the reference. [90]

13. BOTH PARTIES CAN AGREE TO CHALLENGE

The arbitral tribunal is of the choosing of the parties and must enjoy their confidence. If one party challenges an arbitrator and seeks his withdrawal from office on account of justifiable reasons and the arbitrator thereafter withdraws from office, the parties shall follow the same procedure for appointment of another arbitrator in accordance with which the appointment had been initially made. However, if the other party does not consent to the grounds on which the challenge had been made, then the arbitral tribunal shall proceed to hear the party challenging the jurisdiction and give a decision thereon.

> 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. [91] Even after making of an award, the parties can consent before the court for appointment of another arbitrator. Such an order of the court constitutes permission and the conduct of the parties itself amounts to revocation of the authority of the arbitrator. [92] 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. [93]

14. ARBITRAL TRIBUNAL TO PROCEED IF CHALLENGE FAILS

If a challenge under any procedure agreed upon by the parties or under the procedure under sub-section (2) of section 13 is not successful, the arbitral tribunal shall continue the arbitral proceedings and make an arbitral award. Where an arbitral award is made, the party challenging the arbitrator may make an application for setting aside such an arbitral award in accordance with section 34.

Under Article 12(3) of the UNCITRAL Model Law, an unsuccessful party was allowed resort to the court to challenge the appointment at that stage itself. However, sub-sections 13(4) and 13(5) make a distinct departure in this regard, inasmuch as with a view to prevent dilatory tactics the Parliament has not allowed the unsuccessful party to challenge the appointment immediately when its challenge had been unsuccessful before the arbitrator and requires such a party to wait till an award has been made. [1]

An arbitrator is required to be a fair person and if he finds that there is substance in the allegations, the 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. Mere absence of a provision regarding the removal of an arbitrator during the arbitral proceedings does not render the relevant provision of the statute *ultra vires* of the *Constitution*. [2]

A party whose challenge under sections 12 and 13 of the Act is rejected by the arbitrator has to wait till the passing of the final award before it can re-agitate these grounds before the court. The Legislature, with a view to prevent dilatory tactics, made a distinct departure from the Model law and did not allow recourse to courts at the stage of passing of an order by the arbitrator under sections 12 and 13 of the Act. [3]

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 the court and the aggrieved party has to to challenge the same under section 34. [4]

15. WRIT CANNOT BE FILED TO CHALLENGE ORDER OF TRIBUNAL

Orders passed by the arbitral tribunal during the course of arbitral proceedings cannot be challenged in a writ petition. The aggrieved party can avail of the provisions of section 34 after the award has been filed. Once the arbitration has commenced, parties have to wait until the award has been pronounced unless, of course, a right of appeal is available to them under section 37 even at an earlier stage. [5] The object of minimising judicial intervention while the matter is in the process of being adjudicated upon will certainly be defeated if the High Court could be approached under Article 226 or *Article 227 of the Constitution* against every order made by the arbitral tribunal. [6]

16. COURT MAY REFUSE TO TERMINATE MANDATE OF ARBITRATOR

The scheme evolved by sections 12, 13 and 16 of the Act is totally different from what was provided under the *Arbitration Act*, 1940. The departure is made in the 1996 Act clearly with a view that spokes should not be put in passing the award by raising such pleas. There is no provision like section 5 of the 1940 Act in the 1996 Act. Further, sections 12, 13 and 16 fall in Part-I and section 5 of 1996 Act mandates that no judicial authority shall intervene except where so provided by that Part. [7]

If the question as to bias is not raised before the arbitral tribunal, it cannot be raised for the first time before court for setting aside the award. [8] If the interest is known to the parties at or before the time of the appointment of the arbitrator, no complaint can be made by a party who had agreed to appoint such an arbitrator with full knowledge of arbitrator's interest either in the parties or in the subjectmatter of the arbitration. [9]

17. CHALLENGE OF AWARD

When the award has been made by the arbitral tribunal, the party or the parties, as the case may be, shall have an opportunity of re-agitating the grounds in respect of which the challenge had been unsuccessful before the arbitral tribunal. The procedure to be followed in such a case would be the one which is incorporated in section 34.

Before a party can be permitted to challenge the arbitral award under section 34, it has to get a verdict from the arbitral tribunal rejecting the plea of lack of jurisdiction. If the question as to jurisdiction is not raised before the arbitral tribunal, it

cannot be raised for the first time before court for setting aside the award. [10] If a party takes part in the arbitration proceedings without protest, he cannot later on challenge the award on that ground. [11] The court will not interfere if a party participates in the arbitration proceedings, allows an award to be made and if it suits its purpose, attacks the proceedings thereafter on the ground of irregularity. [12]

Having agreed to the nomination of an arbitrator, fully knowing that he is the Managing Director of the respondent firm, the plaintiff cannot later on change his stand and find fault with the integrity or competency of the arbitrator to adjudicate on the disputes. [13] Where the parties continued to take part in the arbitration proceedings before an arbitrator even after his retirement, the arbitrator cannot be said to have a vested interest in continuing with the arbitration proceedings. [14]

18. WHETHER FEE PAYABLE WHEN AWARD SET ASIDE?

In case an arbitrator has not been paid his fees and he makes the award which, on being challenged by a party, is set aside, then the question arises whether he should be paid for the labour he had put in, for making the award. An award can be set aside on various grounds but if an award is set aside because the arbitrator was not fair and just or that he was biased against one party, then it is highly doubtful if the court shall order payment of fee to such an arbitrator. However, if the award is set aside on legal grounds, then he may be allowed payment of fee for his labour. Whether or not, an arbitrator whose award has been set aside, should be paid the fee, would depend on the facts and circumstances of each case.

Where an arbitral award is set aside on an application made under sub-section (5) of section 13, the court may decide as to whether the arbitrator who is challenged is entitled to any fees. [15] When an award is set aside on the basis of misconduct, the arbitrator would, it is conceived, be liable to an action for the return of the fee which had been paid to him, as money paid for a consideration which has failed. [16]

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55 *M. Narsimhulu Chetty & Co. v. P.S. Subramania Aiyar,* ; *Union of India v. J.P. Sharma, AIR* 1982 Raj 245 : 1982 RAJ LR 804 (DB).

56 *National Electric Supply and Trading Corp. Pvt. Ltd. v. Punjab State* , AIR 1963 P&H 56 : ILR (1962) 2 Punj 789 (DB).

57 *Varsha Manharlal Mehta v. Industrial Distributors,* : 1992 (2) Arb LR 356.

58 *Mohinder Pal Mohindra v. Delhi Administration,* : 1989 (1) Arb LR 326.

59 *Pukh Raj v. Magh Raj,* 2005 (2) RAJ 141 : AIR 2005 Raj 135 : (2005) 2 Arb LR 602 (Raj).

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73 *Bihar State Mineral Dev. Corp. v. Encon Builders (I) (P) Ltd.,* AIR 2003 SC 3688 : (2003) 7 SCC 418 [*LNIND 2003 SC 691*] : (2003) 3 Arb LR 133; *Kumaon Mandal Vikas Nigam Ltd. v. Girja Shankar Pant,* (2001) 1 SCC 182 [*LNIND 2000 SC 1362*] : AIR 2001 SC 24.

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75 *Bihar State Mineral Development Corpn. v. Encon Builders,* (2003) 7 SCC 418 [*LNIND 2003 SC 691*] : AIR 2003 SC 3688 : (2003) 3 Arb LR 133*; Maltin v. Donne (J.) Holdings Ltd.,* (1980) 15 BLR 61; *Dobson v. Groves,* (1844) 14 LJQB 17 : *(1844) 6 QB 637* .

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8 Rights and Duties of Arbitral Tribunal

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8 Rights and Duties of Arbitral Tribunal

1. STATUS OF ARBITRAL TRIBUNAL

When an arbitral tribunal enters upon reference, it assumes the role of a judge. It has to administer justice without fear or favour. It has to keep the scales even. It must conduct the proceedings in such a manner that both parties develop confidence in the institution of arbitration which, of late, has lost its sheen because of reasons not far to seek. It is not necessary that an arbitral tribunal must know the law and its intricacies. All that is required of an arbitral tribunal is to act fairly, honestly and impartially. Broadly speaking, an arbitral tribunal has a duty to apply the rules of natural justice.

> An arbitral tribunal is not constituted by law but it is constituted by the parties and the power to decide the dispute between the parties who appointed it is derived by it from the agreement of the parties and from no other source. An arbitral tribunal is not a 'tribunal' as defined by law since the State has not vested it with its inherent judicial power and the power of adjudication which it exercises is derived by it from the agreement of the parties. Similarly, it cannot be called a 'court' since its appointment once made by the parties is recognized by the Act and its appointment is clothed with certain powers and has thus, no doubt, some of the trappings of a court but that does not mean that the power of adjudication which it is exercising is derived from the State. [1]

2. COMPOSITION OF ARBITRAL TRIBUNAL

Parties are free to determine the number of arbitrators, provided that such number shall not be an even number. Failing a determination by the parties on the number of arbitrators to be appointed, an arbitral tribunal shall consist of a sole arbitrator. Unless the arbitration agreement so requires, no particular form is required for appointment of an arbitrator. As a general rule, however, an arbitrator is duly 'appointed' only when (a) he is told of his nomination and is asked whether he is willing to act, (b) he consents to act as an arbitrator, and (c) his name and appointment are conveyed to the other side.

> If there be an arbitration agreement providing for an even number of arbitrators, it is not valid. Under the scheme of 1996 Act, the number of arbitrators cannot be even. [2] However, if the arbitration agreement specifies even number of arbitrators, it is no ground for rendering the arbitration agreement invalid. [3] The provision in respect of the number of arbitrators must be deemed to be a separable part of contract. [4] A conjoint reading of sections 10 and 16 shows that an objection to the composition of the arbitral tribunal is a matter which is derogable. Thus, if a party chooses not to object there will be a deemed waiver under section 4. [5]

> Where the Chief Justice, in an application under section 11, appointed two arbitrators with a direction that they should appoint the presiding arbitrator but without complying with the directions, the two arbitrators proceeded with the arbitration, then the *constitution* of the arbitral tribunal not being as per Act, the two arbitrators would be said to have acted illegally in proceeding with the arbitration matter. [6]

3. DUTIES OF ARBITRAL TRIBUNAL

Broadly speaking, the *Arbitration and Conciliation Act, 1996*, casts the following duties on the arbitral tribunal:

(1)	To arrange for administrative assistance	S.6
(2)	To appoint third arbitrator	S.11(3)
(3)	To disclose circumstances likely to give justifiable doubts as to his impartiality etc.	S.12(1)
(4)	To disclose any fresh circumstances during proceedings on matters likely to raise doubts about his impartiality etc.	S.12(2)
(5)	To possess qualifications as agreed between parties	S.12(3)(b)
(6)	To act fairly and impartially	S.14(1)(a)
(7)	To rule on its own jurisdiction	S.16(1)
(8)	To give ruling about the existence or validity of an arbitration agreement.	S.16(1)
(9)	To afford opportunity to the parties to argue on challenge to the arbitral tribunal	S.16(1)
(10)	To order interim measures of protection	S.17(1)
(11)	To order tendering of security by a party in whose favour order for interim measure of protection is given	S.17(2)
(12)	To treat parties with equality	S.18
(13)	To give full opportunity to the parties to present their case	S.18
(14)	To conduct the proceedings in a proper manner	S.19(3)
(15)	To determine the venue for arbitration hearings	S.20(2)
(16)	To prescribe language for conducting documentary evidence	S.20(3)
(17)	To direct translation in language determined for conducting proceedings.	S.22(2)
(18)	To fix time schedule for completing pleadings	S.23(1)
(19)	To permit amendment or supplementing of claim/defence by concerned party	S.23(3)
(20)	To decide whether to hold oral hearings or oral arguments	S.24(1)

8 Rights and Duties of Arbitral Tribunal

(21)	To give sufficient notice for holding meetings	S.24(2)
(22)	To give sufficient notice for inspection of documents, goods or other property	S.24(1)
(23)	To appoint one or more experts for reporting on specific issues	S.26(1)(a)
(24)	To direct a party to give the expert relevant information and inspection of documents, goods or property	S.26(1)(b)
(25)	To permit parties to put questions to experts on the points at issue	S.26(2)
(26)	To apply to court for taking assistance in taking evidence	S.27(1)
(27)	To decide dispute in accordance with substantive law	S.28(1)(a)
(28)	To conduct proceedings fairly and justly	S.28(2)
(29)	To decide dispute according to terms of contract and usage of trade	S.28(3)
(30)	To act jointly with arbitrators and abide by majority decision	S.29(1)
(31)	Third arbitrator to devise procedure for conducting arbitration hearing	S.29(2)
(32)	To encourage settlement of disputes and use mediation, conciliation or other procedures	S.30(1)
(33)	To terminate proceedings on settlement	S.30(2)
(34)	To record settlement between parties in the form of an award	S.30(3)
(35)	To sign arbitral award	S.31(1)
(36)	To assign reasons in support of arbitral award	S.31(3)
(37)	To deliver signed copy of the award to each party	S.31(5)
(38)	To pass interim award	S.31(6)
(39)	To determine rate of pre-suit and pendente lite interest	S.31(7)(a)
(40)	To allow future interest on award @ 18% p.a.	S.31(7)(b)
(41)	To determine costs of arbitration and its apportionment	S.31(8)
(42)	To terminate proceedings when claimant withdraws claim or parties agree or when continuation would be futile	S.32(2)

(43)	To correct computation, clerical or typographical errors in the award within 30 days on request by a party or on own initiative	S.33(1)(a) & S.33(2), S.33(3)
(44)	To give interpretation of a specific point or part of award	S.33(1)(b)
(45)	To make additional award on such claims which were skipped in the award	S.33(5)
(46)	To extend time beyond 30 days for effecting corrections, or giving interpretation, or additional award etc.	S.33(6)
(47)	To fix amount of deposits in respect of claims and counter claims	S.38(1)
(48)	To suspend proceedings in respect of claim or counter claim where concerned party does not pay	S.38(2)
(49)	To render accounts on deposits received and return unexpended balance	S.38(3)
(50)	To deliver copy of award if directed by court on payment of costs demanded	S.39(2)

4. DETERMINATION OF PROCEDURE FOR CONDUCTING ARBITRAL HEARINGS

Where the parties cannot agree on the procedure to be followed in the arbitral proceedings, it is left to the arbitral tribunal to devise a procedure according to their discretion. However, this discretion cannot be exercised in an arbitrary and whimsical manner. Once the procedure is decided, the parties are to be informed. Thereafter, the question of departure from the decided procedure does not arise and if the arbitral tribunal decides to deviate from the agreed procedure, the award will be voidable and courts will be constrained to set aside the award. But the position would be different if the arbitral tribunal departs from the agreed procedure and the parties waive the right to object. In that event, it is doubtful, if the court would set aside the award when neither party had raised any objection against deviation from the agreed procedure when the proceedings were going on. Failure to object by the parties against deviation from the agreed procedure, in such a case, could be said to be as a result of implied agreement of the parties.

There is very little choice, and in fact none, if the parties have agreed in the arbitration agreement itself to be bound by the Rules of a particular arbitral institution. In such a case, even the arbitral tribunal has to follow what the parties have stipulated in the arbitration agreement. The position would be altogether different, if during the course of arbitral proceedings, parties to the agreement jointly agree to make a departure from the Rules of the agreed arbitral institution. The only point for determination would be whether the arbitral tribunal which had been constituted in accordance with the Rules of such an agreed arbitral institution, would agree to follow the dictates of the parties. It is submitted that there is no doubt that an arbitral tribunal derives its powers from the reference made by the arbitral institution and, therefore, is bound to follow the Rules leading to its appointment. But it is also a settled law that the decision of the parties is supreme and thus the will of the parties shall prevail.

Section 24 of the Act deals with ‘Hearings and written proceedings’ and the same reads as under:

24. Hearings and written proceedings.—

8 Rights and Duties of Arbitral Tribunal

(1) *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.

(2) *The 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.*

(3) *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.*

A perusal of the foregoing stipulation leaves no manner of doubt that an arbitral tribunal is vested with the power to decide the disputes on the basis of material placed on its record. The arbitral tribunal is not obliged to hold oral hearings. However, if a party or both the parties make a request to the arbitral tribunal to present their case by leading oral arguments, the arbitral tribunal shall be obliged to accede to the request made. But if the arbitral tribunal after receiving the request from one party or both the parties, declines to hear oral arguments, then the arbitral tribunal shall be doing so at the peril of its award being set aside.

The Act does not confer any express power on the arbitral tribunal to order discovery or disclosure, or inspection or production of documents. The arbitral tribunal is not bound to follow provisions of the *Civil Procedure Code* under which the courts have power to order discovery or production of documents as also to order disclosure or inspection of documents.

In order to do justice between the parties, it goes without saying that each party must have access to the documents in possession of the other party. In case a party is able to have access to the documents as desired by him and the same are relied upon in the course of oral arguments as desired by him, it will help the arbitral tribunal to arrive at the truth.

Section 19(3) of the Act provides that '... the arbitral tribunal may, subject to this Part, conduct the proceedings in the manner as it considers.' This section vests power in the arbitral tribunal to do everything which he may consider fit in conducting arbitral proceedings. Allowing one party to have access to the documents in possession of the other party is one such act which will be in consonance with the principles of natural justice.

> An arbitral tribunal has the discretion to entertain an application of a party keeping in view the fact situation of the matter before it. Where an application for discovery of documents was moved by a party and the arbitrator rejected the same on the ground that it was not sustainable in law, but still the court did not intervene since the application was general and vague. It was also held that the application had been moved too belatedly and in any case the documents which were sought to be discovered had already been filed by the party alongwith the amended claims. [7]

If an arbitral tribunal is approached with an application for production or discovery of documents and/or for inspection of documents, such an application must be moved at the initial stages of arbitral proceedings and certainly not when the proceedings are coming to a close. The application should be specific and not general. It should state proper particulars and must not be vague.

It is imperative that an arbitral tribunal must give due and proper opportunity to the parties to present their respective case. A party cannot be cut short to present his case unless it is abusing the process of law. So long as the party is pursuing its matter with due diligence and is not beating around the bush, he cannot be asked to close his case. But still, if the arbitral tribunal decides to close the case with undue haste, he will be involved in defending himself.

The minimum requirement of a proper hearing should include:

(1) Parties must have notice of the date, time and place where the hearing is to take place;

(2) Parties must have a reasonable opportunity to be present throughout the hearing;

(3) Reasonable opportunity to present statements, documents, evidence and arguments must be afforded to both parties;

(4) Statements, documents and evidence adduced by one party must be disclosed to the other side;

(5) Each party must have a reasonable opportunity to cross-examine his opponent's witnesses and reply to the arguments advanced in support of his opponent's case.

It is expected of an arbitral tribunal that it should ensure that the date of hearing is not so close that the case cannot be properly prepared. Equally, an arbitral tribunal, while fixing the date of hearing, should try to accommodate any party who is placed in difficulty by his absence due to unavoidable circumstances such as illness or compelling engagement of himself elsewhere etc.

Section 18 speaks of equal treatment of parties and states: ‘The parties shall be treated with equality and each party shall be given a full opportunity to present his case.’ The first part presents no difficulty because an honest and impartial arbitrator will have no love for one party and no hatred for the other. Insofar as second part of the section is concerned, it is often misused under the garb of ‘full opportunity’. No doubt ‘full opportunity’ means nothing less than 100% opportunity but this does not mean that a party has the right to endlessly delay the arbitration proceedings. An arbitral tribunal, in such a case, cannot be blamed for cutting short the arguments of the parties.

5. DEFAULT OF PARTIES IN SUBMISSION OF PLEADINGS

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 the 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.

> If section 25 (a) and 32(2)(c) are read conjointly, it would show that in the former case the arbitrator can terminate the proceedings if the claimant fails to communicate his statement of claim, while in the latter case the arbitrator can terminate the proceedings when he finds that the continuation of the proceedings has for any reason become unnecessary or impossible. Thus, in both the cases, the arbitration proceedings come to an end not on account of making of the award by the arbitrator but on account of factors unconnected with the adjudicatory process culminating into an award. Termination of proceedings by the arbitrator under sections 25(a) and 32(2)(c) is not by virtue of an award but by an order of the arbitral tribunal. [8]

6. ARBITRATOR MAY EXTEND TIME FOR COMPLETION OF PLEADINGS

> An arbitral tribunal shall have to terminate the proceedings if the claimant fails to communicate his statement of claims within the stipulated period, unless he shows sufficient cause for not doing so. When the claimant advances grounds which are sufficient to condone delay, the arbitral tribunal will have power to condone delay and entertain the claim statement within such further time as the arbitral tribunal may allow. [9]

> It is axiomatic that in the conduct of proceedings, the arbitral tribunal has to follow the procedure contemplated under the statute and it should also act having regard to the principles of fairness and natural justice. In every arbitration, there are implied rules of procedure. An arbitrator should be impartial and give a reasonable opportunity to each party to present his case. Even in the matter of imposing limits as to time, the arbitrator is competent to allow some gratitude to the party

havingregard to the principles of fairness. [10]

If during the conduct of reference, the arbitral tribunal extends time suo motu either for filing pleadings, or for leading further evidence, or for filing counter claim, the same cannot be held to be contrary to substantive law. However, if the arbitral tribunal does not extend time despite sufficient cause having been shown for not submitting the claim/defence statement within the agreed or allowed time, the award would be set aside being violative of section 28(2) which lays down that the arbitral tribunal shall decide *ex aequo et bono* or as *amiable compositeur* only if the parties have expressly authorised it to do so. The phrase *ex aequo et bono* connotes that the issues in the arbitral proceedings can be decided on the basis of what is fair and right. An arbitrator has to act as *amiable compositeur* and unite the parties together, though he cannot ignore the rules of substantive law as applicable to decide the dispute. If the parties consent for arbitration and reference is conducted, the principles of fairness cannot be forgotten. [11]

The provisions with regard to termination of arbitral proceedings contained in section 32 are not mandatory in nature. If the arbitrator extends time for filing of claim/defence statement, that is no ground for challenging the award since such a ground is not covered by the principles of fundamental policy of Indian Law nor runs counter to the interest of India or justice or morality. [12]

7. ALL ARBITRATORS MUST ACT TOGETHER

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. However, if authorised by the parties or all the members of the arbitral tribunal, questions of procedure may be decided by the presiding arbitrator.

Witnesses and the parties must be examined in the presence of all the arbitrators for the parties are entitled to have recourse to the arguments and judgment of each arbitrator at every stage of the proceedings, so that by conference they shall mutually assist each other in arriving at a decision. [13] If there had been absence of some of the arbitrators from the arbitration meetings, an award given by the majority is not valid. [14] However, if a party does not raise objection to the absence of one of the arbitrators at some of the meetings, it is not open to such a party to contend subsequently that such absence rendered the award ineffective. [15] The mere fact that some of the depositions are not signed by all the arbitrators does not lead to the necessary conclusion that the non-signing arbitrator did not take part in the proceedings. [16]

The intention in appointing a multi-member tribunal is that all must act together and if only a few of them participate, the award rendered by them would not be valid. [17] A conference and deliberation in the presence of all the arbitrators is the very essence of arbitration, and the sole reason why the award is made binding. [18] All the members of the arbitral tribunal must also be present at the final deliberations though all may not agree as to the final conclusion. [19]

If the dispute is referred to three named arbitrators in accordance with the arbitration agreement and one of the arbitrators dies before the award, it is open to the parties to waive the condition and adopt a new condition that the award may be passed by the remaining two arbitrators. [20] The parties can also agree that if one of the arbitrators resigns, a unanimous award rendered by the other two arbitrators would be binding on them. [21]

8. PROCEDURE MUST ACCORD WITH PRINCIPLES OF NATURAL JUSTICE

Every act of the arbitral tribunal should be transparent. Nothing should be done at the back of either party. There should be no scope for doubting the fairness, independence and impartiality of the arbitral tribunal. While fixing hearings, the arbitral tribunal is bound to give sufficient notice to both the parties so as to ensure that both parties have reasonable opportunity to be present at the hearings. The arbitral tribunal must not receive evidence, oral or

documentary, from any party at the back of the other. The following cardinal rules ought to be followed by arbitral tribunals in order to ensure fairness in conducting arbitration proceedings:

(1) Full opportunity (and not just adequate opportunity) should be granted to each party to present its case.

(2) Each party must be aware of its opponent's case and must be given full opportunity to test and rebut it.

(3) Parties must be treated alike.

Each party is entitled to know any statements, documents, evidence or information collected by the arbitral tribunal itself which are adverse to his interest, if they are not contested. The arbitral tribunal is neither to hear evidence nor arguments of any party in the absence of other party, unless despite opportunity, the other party chooses to remain absent. So also, the arbitral tribunal is not to hear evidence in the absence of both the parties unless both the parties choose to remain absent despite proper notice. Each party to arbitration reference is entitled to advance notice of any hearing and of any meeting of the arbitral tribunal. [22]

No doubt arbitrator is not bound by technical rules of procedure but he cannot ignore rules of natural justice. Thread of natural justice should run through the entire arbitration proceedings and the principles of natural justice require that the person who is to be prejudiced by the evidence ought to be present to hear it taken, to suggest cross-examination, or himself to cross-examine and be able to find evidence, if he can, that shall meet and answer it; in short to deal with it in an ordinary course of legal proceedings. [23] An arbitrator ought not to hear or receive evidence from one side in the absence of the other side, without giving the other side affected by such evidence the opportunity of meeting and answering it. [24]

Where the arbitrator refuses to consider the contentions of the contractor and refuses permission to produce evidence inasmuch as directions were not given to the government to produce the record which had been withheld on the ground of privilege, without even indirectly or incidentally mentioning the nature and volume of the record held privileged, it was held that these lacunas are the violations of the principles of natural justice and denial of opportunity to the contractor to press and prove his case. [25]

Where oral hearings were granted by the tribunal at the premises of one the parties without notice to the other, inspections were carried out without notice to both the parties, and even notes of inspections were not given to the parties, it violates the fair procedure in arbitration. Hearing of one party in the absence of the other violates the fundamental principles of natural justice. [26]

Where the plaintiff found the arbitrator closeted with the witness and a special pleader who was acting for the defendants, the three persons being engaged in considering the papers and plans connected with the arbitration. Held that as there had been an opportunity for the mind of the arbitrator to have been biased by information given on behalf of one side without the other having had an opportunity of meeting it, the awards eventually made by the arbitrator must be set aside. [27]

If the sole arbitrator interviews the plaintiff and the defendant separately and records their statements separately, ending with a request to the arbitrator to look into the plaint and the written statement and make the award on that basis, neither party desiring to adduce evidence, the arbitrator cannot be said to have recorded evidence from one party behind the back of the other or even recorded information from one party, which the other party had no opportunity of meeting. [28]

9. FULL OPPORTUNITY OF HEARING MUST BE GIVEN

There are two fundamental essentials of justice in deciding matters between contesting parties. The first and the foremost, is that the arbitral tribunal must be unbiased and totally disinterested in the subject matter of dispute. The second, is that the arbitral tribunal must give to every party full opportunity not only to present his case but also to answer the points raised by his opponent.

The conduct of the arbitral tribunal should be such as to show, without a shadow of doubt, that it is impartial. It often happens in practice that much heat is generated during the course of arguments inasmuch as a stage reaches where it is difficult to continue the proceedings. Here comes the role of the arbitral tribunal to pacify the parties without taking sides. The arbitral tribunal must act calmly and must not loose its temper.

The arbitral tribunal must ensure that it has the same depth of relations with both the parties. It must not give that preference to one party which it cannot give to the other. It must not enter into conversation with one party at the back of the other party, howsoever casual the conversation may be. Most of the time, such exchange of conversation is likely to be twisted. In fact, avoidance of such a situation should be a rule than an exception.

8 Rights and Duties of Arbitral Tribunal

Section 13 of the 1996 Act provides that the arbitral tribunal shall not only treat the parties with equality but the parties shall be given full opportunity to present their respective cases, while as per section 33(1) (a) of the English *Arbitration Act*, the tribunal shall 'act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent'. Thus while the Indian law speaks of 'full opportunity', the English law speaks of 'reasonable opportunity'. The phrase 'full opportunity' means that the parties must be given an opportunity to explain the arguments to the tribunal and to adduce evidence in support of their respective cases. The phrase 'full opportunity' is absolute in nature while the phrase 'reasonable opportunity' is subjective. In case of 'reasonable opportunity', the arbitral tribunal has a right to exercise its discretion judiciously while in cases relating to 'full opportunity', the element of discretion is missing. If the arbitral does not afford 'full opportunity' to the parties or one of the parties, the award can be set aside under section 34(2) (a)(iii) since it will be a case covered by the phrase 'or was otherwise unable to present his case'.

The phrases 'full opportunity' and 'reasonable opportunity' operate within reasonable and justifiable limits. Parties cannot be allowed to argue on their respective cases to such limits which may not be relevant and may lead to wastage of time and money.

> Russell [29]states: The first principle is that the arbitrator must act fairly to both parties, and in the proceedings throughout the reference he must not favour one party more than another, or do anything for one party which he does not do or offer to do for the other. He must observe in this the ordinary well understood rules of the administration of justice.

An arbitrator's duty is to decide the matter which is submitted to him in accordance with the agreement under which he was appointed and he also has a duty to act fairly between the parties. [30] However informal an arbitration may be, the fundamental rules underlying the administration of all justice must always be applied. [31] Both sides must be heard, each in the presence of the other. The arbitrator must not permit one side to use means of influencing the conduct and decision of the arbitrator, which means are not known to the other side. [32]

An inquiry before the arbitrator should be assimilated as near as possible to proceedings in a trial in a court of law, and, therefore, a party to the arbitration must not only have notice of the time and place of the meeting, but he should be allowed reasonable opportunity of proving his case either by evidence or by arguments or both, and of being fully heard. The notice must be sufficiently long in order to give the party reasonable opportunity if he wants to be heard. If sufficient notice is not given, there cannot be a proper hearing nor a valid award, it being a well recognised rule of natural justice that a man's legal rights cannot be determined without giving him an opportunity of being heard. [33]

Where the parties based their cases only on documentary evidence and did not pray for adduction of oral evidence and during arbitration proceedings and immediately thereafter no objection was taken by the respondent that a particular clause did not constitute an arbitration agreement or that the Superintending Engineer mentioned in the agreement was not the arbitrator and no objection was taken, it cannot be said that sufficient opportunity to lead evidence was not given to the respondent. [34]

An arbitrator issued a circular to all the parties concerned to remain present on a particular date and time at a particular place. Receipt of the letter was not disputed by the petitioner nor did the petitioner plead that the date fixed by the arbitrator did not suit him. The arbitrator had also sent the telegram to him *ex abundanti cautela* . The plaintiff simply sought an adjournment without assigning any reason whatsoever. In such circumstances, it cannot be said that the arbitrator had refused full opportunity of participation in arbitration proceedings. [35]

10. ARBITRATOR MUST ACQUAINT HIMSELF WITH FACTS

In order to hold effective hearings and to appreciate the arguments being led by the parties, it is imperative that the arbitral tribunal must broadly be conversant with the facts of the case. This will help them not only to understand and have a grasp over the dispute between the parties but will also save on time. An arbitrator should take an active part in the proceedings even during the stage of arguments. In case the arbitral tribunal keeps silent during arguments, the parties would not know which points need to be elaborated further. The arbitral hearings can be effective only when the party arguing and the arbitral tribunal are at the same wave length insofar as facts are concerned. After hearing the parties on all the issues raised by them, an arbitral tribunal ought to call upon either or both parties to elucidate on any point of importance upon which it has some query or on which it requires further clarifications.

11. DEFECTIVE PROCEDURE – AWARD LIABLE TO BE SET ASIDE

In order to prevent any chance of an award being set aside, the arbitral tribunals ought to ensure that the procedure followed by them is in accordance with law. The following lapses of procedure have led to setting aside of award passed by the arbitral tribunal:

(1) If there has been a mishandling of the arbitration proceedings or serious neglect of the duties on the part of the arbitrator, which leads to substantial miscarriage of justice, the court would be justified in setting aside the award. [36]

(2) Any irregularity of action which is not consonant with general principles of equity and good conscience which ought to govern the conduct of the arbitrator, amounts to misconduct. [37]

(3) When an arbitrator makes a remark that ‘this case has become very notorious in department’, his act amounts to misconduct. [38]

(4) If a material piece of evidence is tendered and rejected, it may amount to misconduct entitling the party to have the award set aside. [39]

(5) Where an arbitrator accepts the claim of one party and makes the award without affording notice of that claim and opportunity of hearing to the other party, it would amount to judicial misconduct. [40]

(6) Where the claim for recovery of amount from the contractor was based on the report of the technical examiner and the arbitrator did not order production of such a record though specifically requested by the contractor to do so, it amounts to misconduct of the arbitration proceedings. [41]

(7) If arbitrator makes an enquiry behind the back of the parties, [42] or when he takes evidence on the spot without notice and in the absence of the plaintiff and thereafter makes enquiries regarding prices of machineries and their parts without notice to either party, it amounts to misconduct. [43]

12. FRAMING OF ISSUES

As per section 19(1) of the Act, an arbitral tribunal is not bound by the *Code of Civil Procedure* and, therefore, it is not bound to frame issues. However, if both the parties insist on framing of the issues, the arbitral tribunal may frame the points for determination. It is not expected of an arbitral tribunal which is not well-versed in law to frame issues. In any case, it is not a requirement of law that the arbitral tribunal should make an award issue-wise.

> If at the time of making of the award, the arbitrator corrected certain issues, which did not in any manner prejudice the cause of either party and more so, when the parties have fought the case before the arbitrator on the basis of the amended claim, it cannot be said that he was guilty of misconduct because of having amended the issue behind the back of the parties. [44]

> It is not obligatory on the part of the arbitrator to frame issues because he is not bound to follow procedure laid down in *Code of Civil Procedure*. [45] Technicalities of settling issues as required under Order 14, Rule 1 of the *CPC* need not be

followed by the arbitrator. [46] The arbitrator is not bound to deal with each claim or dispute separately nor need an award formally express the decision of the arbitrator on each matter of difference. [47] It is not obligatory on the part of the arbitrator to frame issues because he is not bound to follow the procedure laid down in the *CPC*. [48]

In Fiza Developers and Inter-Trade v. AMCI (India) Pvt. Ltd., [49] the Supreme Court has held that even in court proceedings wherein an award is challenged, it is no longer a requirement of law that the court should frame issues.

13. ARBITRAL TRIBUNAL NOT BOUND BY CODE OF CIVIL PROCEDURE

An arbitrator is not bound by the technical rules of procedure which a court must follow. The omission to mention details of the calculation in the award or to give separate and distinct findings as regards rival contentions of parties does not invalidate the award. [50] It is not obligatory on the part of the arbitrator to frame issues because he is not bound to follow the procedure laid down in the *Code of Civil Procedure*. [51]

The provisions of the *Code of Civil Procedure* would be the guiding principles in arbitration proceedings. [52] The courts have considered the applicability of a number of provisions of the *Code of Civil Procedure* in arbitration matters:

Section 10	:	Does not apply for determining existence or validity of the arbitration agreement. [53]
Section 11	:	No revision lies, against an order of a Single Judge of a High court relating to an arbitration matter. [54]
Section 20	:	Agreement that one of the courts having jurisdiction alone shall try dispute is not contrary to public policy and does not contravene section 28 of the Contract Act. [55]
Section 24	:	Proceedings can be transferred from one court to the other as per section 24 of the Code. [56]
Section 80	:	Does not apply to an application to file an agreement in court, [57] or for issue of injunction for the purpose of or in relation to arbitration proceedings. [58]
Sections 96, 100 and 104	:	Apart from the provisions of the Act, appeals will lie under sections 96, 100 and 104. [59]
Section 114	:	Review against orders passed in arbitration proceedings is admissible, provided the order is appealable. [60]
Section 115	:	There is nothing in the Act, which in any way takes away the powers of the High Court to entertain a petition for revision under *section 115 of the Code of Civil Procedure*. [61]
Section 141	:	Order 23 Rule 3 is not applicable since a proceeding arising out of objections to

		an award, is not an original proceeding. [62]
Section 151	:	The civil court cannot independently act under section 151 by bypassing provisions of the Act. [63] The court can recall its orders if it has been improperly informed about the facts of the case. [64]
Order 1 R 10	:	Not applicable in a proceeding under the Act. [65]
Order 2 R 2	:	Second application for referring some more disputes under the same contract to arbitration while the first reference made by court is pending is barred. [66]
Order 3 R 5	:	Service of notice to the parties is complied with when notice is served upon a counsel of a party. [67]
Order 4 R 30	:	Applicable to stay of proceedings without bringing legal representatives on record. [68]
Order 5 R 21A	:	Process can be served by registered post. [69]
Order 6 R 17	:	Applicable at any stage before reference is made, [70] but cannot apply to amendment of objections after expiry of period of limitation. [71]
Order 7 R 11	:	Where an order is not passed under the Act, but is an order of rejection of plaint passed under Order 7 Rule 11, then appeal, and not revision, lies. [72]
Order 13 R 9	:	Applicable for returning award to arbitrator for registration. [73]
Order 14 R 1	:	Technicalities like framing of issues need not be followed by arbitrator. [74]
Order 17 R 3	:	If trial court passes an order on merits, no application for restoration lies. [75]
Order 20 R 11	:	Not applicable to arbitration proceedings. [76]
Order 22	:	Cannot be applied to arbitration proceedings. [77]
Order 23 R 1&3	:	Does not include award which is registered as suit, [78] but is otherwise applicable to arbitration proceedings. [79]
Order 26 R 10(2)	:	Cannot be invoked to examine a Commissioner in open court [80]
Order 38 R 5	:	Are applicable to arbitration matters also. [81]

Order 39 R 1&2	:	Are applicable for seeking injunction. [82]
Order 40 R 1	:	Vests power in court to appoint Receiver. [83]
Order 41 R 5	:	Provision that an appeal shall not operate as a stay shall equally apply to arbitration proceedings. [84]
Order 41 R 33	:	Applies to arbitration matters when reference itself was vitiated. [85]
Order 47 R 1	:	Review of orders passed in arbitration case permissible. [86]

14. ARBITRATION PROCEEDINGS NOT GOVERNED BY EVIDENCE ACT

Informal forums, such as arbitral tribunals, chosen by the parties to the exclusion of the courts are required to function in an informal manner. The very purpose of arbitration is expedition. If court procedures were intended to be adopted by arbitral tribunals then there was nothing which precluded the parties from seeking redressal of their grievances through court proceedings. In a large number of arbitrations, especially where judges are appointed as arbitrators, lawyers, who represent the parties, tend to conduct the proceedings as per court procedures. Whereas, in cases where technical persons are arbitrators, only principles of natural justice are followed without strict adherence to court procedures as prescribed by the *Civil Procedure Code* and the *Evidence Act*. The mandate of the 1996 Act is clear and evident. Section 19(1) states: 'The arbitral tribunal shall not be bound by the *Code of Civil Procedure, 1908* (5 of 1908) or the *Indian Evidence Act, 1872*.' Thus, an arbitrator is not bound to follow the technical provisions of the *Evidence Act* or the *Code of Civil Procedure*, and his decision cannot be challenged on the ground that he relied upon a document not admissible under the Act.

> The only limitations on the powers of an arbitrator are that he should not violate the principles of natural justice, he should give a hearing to the parties, and should give a reasonable time and opportunity to them to substantiate their respective claims. [87] An arbitrator may take into consideration unproved documents and statements made by witnesses without oath or cross-examination. [88] He can rely upon documentary evidence filed before him especially when the same have not been denied by either party. [89]

(A) Refusal to Examine Witnesses

Some arbitrators conduct arbitrations in utter ignorance of the law and in a manner totally opposed to natural justice. If the parties want to lead evidence, such a request cannot be refused. It is their right to prove their respective case – by oral as well as documentary evidence. Disallowing oral evidence is likely to lead to setting aside of the award. However, the position would be different if while devising the procedure for conducting arbitration or during arbitration proceedings, the parties agree that no oral evidence shall be adduced by them.

> If it is left to the discretion of the arbitrator to take or not to take evidence, the award cannot be challenged on the ground that one of the directions to the arbitrator was to proceed with or without taking any evidence. [90] In order to make out a case for impeaching an award on the ground that the witnesses were not examined by the arbitrators, there must be evidence to show that witnesses were distinctly tendered to them. [91]

> Where the arbitrators held their sittings for 15 months and every opportunity was given to the parties to place their case before the arbitrators and to adduce their evidence, then it can be said that the arbitrators were not guilty of misconduct in giving time to a party to produce witnesses. [92] When the right to a hearing is waived, either expressly or by implication, the proceedings are as regular and the award is as valid as though full opportunity of being heard had been given. [93]

Where there was unqualified refusal on the part of the arbitrator to record any oral evidence whatsoever in a case in which it was not intended that he should decide the matter without taking all relevant evidence as either party wished to produce, he is guilty of misconduct. [94]

Some rambling cross-examination was directed against the witnesses not having substantial bearing on the matter in dispute. The arbitrator, in exercise of his discretion as a tribunal, left out certain questions which he considered were not relevant to the matter, his decision on such a matter is final. [95]

> Russell [96] states: The principles of universal justice require that the person who is to be prejudiced by the evidence ought to be present to hear it taken, to suggest cross-examination or himself to cross-examine, and to be able to find evidence, if he can, that shall meet and answer it; in short, to deal with it in the ordinary course of legal proceedings.

At yet another place, the learned author states:

> It is certainly not the law that a judge or any person in a judicial position, such as an arbitrator, has any power himself to call a witness to fact against the will of either of the parties. There may in some cases be a person whom it would be desirable to have before the court; but neither party wishes to take the responsibility of vouching his personal credibility or admitting that he is fit to be called as a witness. In such a case, the judge may relieve the parties by letting him go into the witness box as a witness of neither party; and, of course, if the answers are immaterial, he may refuse to allow cross-examination.

When the witness speaks of material facts and is examined by the arbitrators *suo motu* , there must be an opportunity given to the parties to cross-examine him. Consequently, the arbitrators are guilty of misconduct in examining a witness without the consent of the parties and refusing to permit the parties to cross-examine him. [1] If no evidence is recorded by the arbitrator and the whole proceedings are finished in five minutes, it is a defect fatal to the award. [2]

To succeed in impeaching the award, the witness must be distinctly tendered to the arbitrator for hearing. It is not enough to put an abstract proposition to an arbitrator, and upon his answer to decline to give evidence or prefer a claim. The party should tender a specific case and specific evidence. [3]

(B) Reception of Evidence

An arbitral tribunal's conduct must be above board. It must act in a most independent and impartial manner. It must not do an act for one party which it cannot do for the other. It needs to be noted that the arbitral tribunal's interaction with one party, at the back of the other, is likely to cause grave prejudice to the party not present. Whatever a party wishes to convey to the arbitral tribunal, it should do so when the opposite party is present. When parties have reposed confidence in an arbitral tribunal, it is concurrently the duty of the tribunal to come up to their expectations.

The basic principle seems to be that where there has been an opportunity afforded to one side to get advantage with the arbitrator over the other, either by lack of notice or by the absence of the other side, the proceedings are vitiated by the breach of the principles of natural justice. [4] When a document of vital importance is not shown to one of the parties by the arbitrator, the arbitrator is guilty of misconduct. [5]

If the arbitrators took evidence at the spot without notice and in the absence of the plaintiff and also made enquiries regarding prices of machineries and their parts without notice to, and in the absence of, either party, their act amounted to misconducting the proceedings. [6]

Where the arbitrators examined the account books, which were disputed by a party, at his back, the award based thereon was liable to be set aside. [7] Every irregularity in the matter of hearing evidence behind the back of the party does not vitiate

the award. It is only when the evidence was material, relevant and has gone to affect the award, that the award will be vitiated. [8] If an award is made without proper enquiry and without allowing a party, if he so desires, to adduce evidence in support of its contentions, it amounts to judicial misconduct. [9]

(C) Arbitrator's Power to Appreciate Evidence – Whether Final

Section 19(4) of the Act stipulates that the arbitral tribunal has the power to determine the admissibility, relevance, materiality and weight of any evidence tendered before it. It is an equally well-settled rule of law that the arbitrator's power to appreciate evidence led by the parties before it is final and courts shall not interfere with such findings while hearing objections against an award. While such wide powers have been conferred on arbitral tribunals, however, they are still expected to proceed in a fair and impartial manner while appreciating the evidence led before them. A tribunal cannot admit or rely upon evidence which is inadmissible in law. Similarly, the tribunal cannot interpret evidence in a manner contrary to the facts on record.

The allegation of the respondent that the witness for the petitioner suppressed certain matters and thereby perpetrated a fraud on the arbitrator, as a consequence of which he arrived at the patently erroneous finding cannot be entertained since it was for the arbitrator to look to the adequacy or inadequacy of the evidence brought before him. [10]

Mental process of an arbitrator about sufficiency or adequacy of evidence cannot be probed in an application under section 34. Insufficiency of evidence cannot nullify an award because it is within the domain and province of the arbitrator to determine the admissibility, relevance, materiality and weight of any evidence. [11]

Whether a particular document is material or not and whether it should be produced before the arbitrator, is essentially a matter for the arbitrator to decide and whatever decision is taken by the arbitrator, it is binding on the parties. The court cannot make a roving enquiry as to which document is material and which should or should not be accepted. [12] The matter of proof of document is a matter for the arbitrator and this cannot be a ground for interference with the award. [13] An award cannot be challenged on the ground of inadequacy or inadmissibility or impropriety of evidence. However, total absence of evidence or failure to consider material documents or admission of parties in arriving at the findings are good grounds of challenge. [14]

(D) Arbitrator Himself cannot Call Witness

An arbitrator has no power to call a witness against the will of either of the parties. The will of the parties may be expressed during the proceedings or in the submission, but unless express consent of both parties is taken, an arbitrator has no right to call a witness at his own initiative. It is for the parties to prove their respective case in any manner they may like. They may choose to rely upon documentary evidence or they may choose to adduce oral evidence. The choice of the manner in which a case is to be proved or disproved is to be left to the parties and the arbitrator should not interfere in the said process or himself suggest the manner in which the case is to be proved or disproved.

The arbitrator would be guilty of a breach of duty if, contrary to the will of the parties, he called a witness of fact. The will of the parties may be expressed during the proceedings or in the submission but unless with the consent of the parties, an arbitrator has no right to call a witness himself. [15]

(E) Power to Administer Oath

Under *section 13 (a) of Arbitration Act*, 1940, it was incumbent upon the arbitrator to administer oath to the parties and the witnesses appearing. It is no longer obligatory on the part of the arbitrator to do so under the 1996 Act. However, there is no bar under the new Act to administer oath either to the parties or the witnesses appearing and it has been left to the sole discretion of the arbitral tribunal to do so.

The failure or omission of the arbitrator to administrator oath cannot invalidate the statements of the witnesses. [16] An arbitrator can administer oath both to witnesses and to the parties and a party can agree before him to be bound by the

oath of the opposite party or witness. [17]

The tribunal has a discretion as to whether any party or witness is to be examined on oath or affirmation and has power to administer the oath or affirmation itself. This is subject to agreement otherwise by the parties. If no objection is taken to witness giving unsworn evidence then the objection may have been waived. [18]

(F) Arbitrator can Approach Court for Taking Evidence

The fact that under private arbitrations under the Indian *Arbitration Act*, 1899 the court had no power to summon witnesses, was a grave defect in law. So the Legislature changed the law while it was enacting the 1940 Act. [19]Under section 27 of the 1996 Act also, if an arbitrator wishes for a witness or documents to be produced before him, he can approach the court and the court can, under this section, issue summonses or commissions for the production of the same. This section, therefore, greatly empowers the arbitrators in facilitating production of recalcitrant witnesses and for production of documents which are not being made readily available by the parties or some other person or authority.

Under the provision of section 43 of the 1940 Act, the arbitrator could have taken the assistance of the court in having the summons issued to the parties or their witnesses, but now the provision goes a step further when it enables recording of evidence through court rather than by the arbitrator himself. It seems that recourse to this new provision may be necessitated in case of such arbitral proceedings where highly complicated questions of law arise before the arbitral tribunal. To obviate any charge of misconduct or bias in allowing or disallowing a particular piece of evidence, oral or documentary, the safe course is to approach the court for recording of the deposition by the witness and the parties.

The assistance of the court for recording of evidence can be availed of in arbitral proceedings when:

(1) the arbitral tribunal desires so; or

(2) a party wishes so and the request is acceded to by the arbitral tribunal.

15. ARBITRATOR'S POWER TO PROCEED EX PARTE

Where a party deliberately abstains from appearing before an arbitral tribunal, it is not expected that the tribunal should wait indefinitely before proceeding with the case. On the very first failure of a party to appear on the date and time duly fixed for hearing, the arbitral tribunal must not proceed *ex parte* but should give the defaulting party another opportunity of being present. While granting this opportunity, the arbitral tribunal should make clear its intention to proceed further with the case on the next date of hearing even in the absence of the said party. It should also be ensured that the notice wherein such an intention is manifested is sent to the said party in the manner prescribed under section 3 of the 1996 Act. Thus, the arbitral tribunal should not proceed *ex parte* without (a) putting the other party to notice of its intent to proceed in its absence; and (b) ensuring that the said notice is communicated to the said party. If, after ensuring the above, the arbitral tribunal finds that the said party has still failed to attend the hearing without showing sufficient cause, it ought to proceed *ex parte* against the said party.

Once an arbitrator makes known his intentions to proceed *ex parte* and it is duly noted by the parties, the act of a party in not putting up an appearance on the next date fixed, would empower the arbitrator to proceed *ex parte* and such an act of the arbitrator does not amount to misconduct. [20] Where however, a party simply fails to attend one of the hearings fixed, it does not give the arbitrator the power to proceed *ex parte* without furnishing the other party with a notice, clearly stating the arbitrator's intention to proceed *ex parte* . [21]

The Calcutta High Court [22] has very succinctly laid down the following principles which an arbitrator must follow before proceeding *ex parte* :

1 If a party to an arbitration agreement fails to appear at one of the sittings, the arbitrator cannot or, at least, ought not to, proceed *ex parte* against him at that sitting.

2 If, on the other hand, it appears that the defaulting party had absented himself with a view to preventing justice or defeating the object of the reference, the arbitrator should issue a notice that he intends at a specified time and place to proceed with the reference and that if the party concerned does not attend, he will proceed in his absence.

3 If he issues a similar notice and the party concerned does not appear, an award made *ex parte* , will be in order. But if he does not issue such a notice on the second occasion, but nevertheless proceeds *ex parte* , the award will be liable to be set aside in spite of a notice of a peremptory hearing having been given in respect of the earlier date.

4 If it appears from the circumstances of the case that a particular party is determined not to appear before the arbitrators in any event, as when he has openly repudiated either the reference itself or the particular arbitrators and has shown no desire to recant, the arbitrators are not required to issue a notice of an intention to proceed *ex parte* against such a recusant person.

5 Where the question arises after an *ex parte* award has, in fact, been made and it appears that no notice of an intention to proceed *ex parte* had been given, the principle to be applied is that the award will not be upheld, unless it is shown or it appears that the omission to give a notice has not caused any prejudice to the party against whom the *ex parte* award was made, because he had made it abundantly clear that he would not appear before the arbitrators in any circumstances.

There is no statutory rule that where an arbitrator proceeds *ex parte* without giving an *ex parte* notice, the award must be set aside. The question of giving a notice is simply a rule of prudence and convenience. Thus, where despite various notices a party does not attend, then failure of the arbitrator to issue a final peremptory notice is not necessary, especially if it is clear from the circumstances that the recalcitrant party had no intention of appearing inspite of a notice. [23]

If one of the parties, after having been duly summoned, neglects to attend before the arbitrator and the latter is of opinion, from the circumstances which are brought to his notice, that the party is absenting himself with a view to prevent justice and defeat the object of the reference, it is the arbitrator's duty to give due notice to the absenting party that he intends, at a specified time and place, to proceed with the reference, whether the said party shall attend or not. [24]

Where the objector to the award appeared before the arbitrator on all effective days of hearing and only absented himself on one day, then the arbitrator would not be justified in proceeding *ex parte* against such a party on that day itself, without giving him a pre-emptory notice of his intention to proceed *ex parte* . Closing of hearings on that day itself shows the *mala fide* intention of the arbitrator. [25]

If a party says ‘I will not attend because you (the arbitrator) are receiving illegal evidence, and no award which you can make will be good, ‘the arbitrator may go on with the reference in his absence; and it seems that it is not necessary in such a case to give the recusant any notice of the subsequent meetings. But, though it may not always be necessary, it is certainly advisable that notice of every meeting should be given to the party who absents himself, so that he may have the opportunity of changing his mind, and of being present if he pleases. [26]

When a party made it amply clear that no date be fixed prior to the date mentioned in the communication because he would be out of station, fixing of two dates by the arbitrator before the date so communicated by the party would be of no consequence and hence, an *ex parte* award made in these circumstances is liable to be set aside. [27] If the arbitrator did not allow adjournment of just one day, as the counsel of the party was busy in another arbitration proceedings and proceeded to pass an *ex parte* award, without giving notice of his intention to do so, the award would be invalid. [28]

16. ARBITRATOR TO DECIDE VENUE IF PARTIES DISAGREE

Section 20 of the Act stipulates matters relating to determining the venue for holding arbitration hearings. It reads:

Section 20. Place of arbitration.—

(1) *The parties are free to agree on the place of arbitration.*

(2) *Failing any agreement referred to in sub-section (1), 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.*

(3) *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.*

Section 20(1) leaves no choice with the arbitral tribunal in fixing the place for holdingarbitration hearings and it has been left exclusively to the parties to determine for themselves as to where they would like to meet for furtherance of the cause of arbitration. However, if the parties fail to reach an agreement on the choice of venue, then and only then the matter goes to the arbitral tribunal for determining the place for holding arbitration meetings and that too not arbitrarily but having regard to the circumstances of the case, including the convenience of the parties.

Notwithstanding an agreement between the parties with regard to the choice of the venue, the arbitral tribunal has been given a wide discretion to decide when and where part of the proceedings shall take place, subject to an agreement, in writing, between the parties for holding discussions amongst themselves, or for hearing witnesses, or experts, or the parties, or for inspection of documents, goods, or other property. This discretion has been given to the arbitral tribunal subject to the condition that there is no bar placed on the arbitral tribunal not to meet at a place other than the one fixed by the agreement.

There being no stipulation in the *Arbitration Act*, 1940 as to the manner in which the venue for arbitration meeting was to be fixed, there had been a stalemate in some cases, each party insisting on its own stand and consequently leading to protracted litigation.

Section 20 authorises the parties to fix a venue of their choice, failing which the arbitral tribunal, keeping in view the convenience of the parties, may fix the place where arbitration hearings shall take place. However, if the parties have not been able to agree on the issue of venue, the arbitral tribunal may assemble at a place of their choice for consultation amongst themselves with regard to the matters set out in sub-section (3) of section 20.

Insofar as possible, the venue should be convenient to all. It is the prerogative of the parties to fix the venue of the arbitral meetings. However, if the parties cannot arrive at any mutually acceptable venue, then the place of arbitration shall be decided by the arbitral tribunal. Even the arbitral tribunal cannot decide the venue whimsically. It must give due consideration to the circumstances of the case, including the convenience of the parties. The arbitral tribunal shall consider the convenience of those who are appearing as witnesses, or experts, or the parties, or for that matter for those who are appearing for inspection of documents, goods or other property. (See section 20). However, there is no bar for the arbitral tribunal to hold internal meetings at the place convenient to them.

> Russell [29] states: In fixing the place of trial the arbitrator should take all the circumstances into consideration and decide according to the balance of convenience. The chief circumstances to be taken into consideration are the place where most of the witnesses reside; the situation of the subject-matter of the dispute, and the balance of convenience and expense.

Where the parties have constituted an arbitral tribunal, but have not designated the seat of the tribunal, the arbitral tribunal may itself designate the seat. Of course, it also has the authority to designate the seat if the parties have designated the

seat in too unclear a manner, for example, if they have agreed that the ‘arbitral tribunal shall have its seat in Switzerland’. In such a case, the arbitral tribunal shall be free to choose the seat themselves anywhere within Switzerland. [30]

It is not open to the arbitrator to fix the venue of arbitration of his choice regardless of the convenience of the parties. When there is no condition in the arbitration agreement empowering the arbitrator to fix the venue of arbitration as he thought fit, the arbitrator in fixing the venue of the meeting must take into account all material circumstances including the residence of the parties and their witnesses, the subject matter of the reference and the balance of convenience. [31]

17. ARBITRATOR TO DECIDE LANGUAGE WHEN PARTIES DISAGREE

The choice of language or languages in which the arbitral proceedings are to be conducted can be decided by an agreement between the parties. In the absence of such an agreement, the arbitral tribunal shall have the discretion to choose the language in which the proceedings would be conducted. The said language, shall thereafter, be used for communicating all decisions or other orders which may, during the course of arbitral hearing, become necessary.

18. DUTY OF ARBITRATOR AS TO MEETINGS AND ADJOURNMENTS

An arbitrator is not bound to postpone the hearing whenever one of the parties announces his intention of questioning his appointment. He is, however, bound to allow a party reasonable opportunity of proving his case. Where an arbitrator did not allow adjournment of just one day as the counsel of the party was busy in another arbitration proceedings and proceeded to pass the award *ex parte* , without giving notice of his intention to do so, the award would be invalid on account of misconduct and also for violation of the principles of natural justice. [32]

Unless otherwise provided by the submission, the time and place of hearing, and the fixing of adjournments from time to time, rest with the arbitrator who, in making appointments, exercises a discretion vested in him, and (provided he exercises it in good faith and in accordance with the principles of natural justice) his award will not be impeachable on the ground that he has used it mistakenly. [33]

If either party finds that he is unable to attend an appointment, it is his duty to notify the other side and the arbitrator, so that the arbitrator may in his discretion put off the meeting and fix another day. [34] An arbitrator, having fixed a date for the hearing, refused to change the date, although an important witness for one of the parties had arranged to leave England a day or two before that date for a long stay. Held that his action was no ground for his removal. [35] Where an arbitrator refused to wait for the return of an alleged material witness, absent on a voyage to China, and made his award, the court declined to interfere with the exercise of his discretion. [36]

If a party is surprised by an unexpected case set up by his opponent and asks for time to inquire into the matter, it is proper for the arbitrator to comply with his request, and to give reasonable opportunity for investigating the matter. [37]

R, a party to reference to arbitration, had no notice of a meeting, at which, however, no business was transacted beyond adjourning to another date. R attended this later meeting but raised no protest on the ground of want of notice of the former meeting. Held, he was not prejudiced by the want of notice, and that there was no ground for the setting aside of the award. [38]

19. ARBITRATOR MUST GRANT ORAL HEARING

Where there is to be a full oral hearing, the following conditions must be observed:

1. Each party must have notice that the hearing is to take place.
2. Each party must have a reasonable opportunity to be present at the hearing together with his advisers and witnesses.
3. Each party must have the opportunity to be present throughout the hearing.
4. Each party must have a reasonable opportunity to present evidence and arguments in support of his own case.
5. Each party must have a reasonable opportunity to test his opponent's case by cross-examining his witnesses, presenting rebutting evidence and addressing oral arguments.
6. The hearing must, unless the contrary is expressly agreed, be the occasion on which the parties present the whole of their evidence and arguments. [39]

An arbitral tribunal is obliged to grant oral hearing, at an appropriate stage of the proceedings, if a request is made by either of the parties, unless the parties had agreed that no oral hearing shall be held. If the arbitral tribunal rejects the request of the petitioner for allowing oral hearing on the ground that it can be allowed only if agreed to by the other party, then award made by the arbitral tribunal would be set aside. [40]

In the absence of agreement between the parties, it is for the arbitral tribunal to decide whether oral hearings should be conducted or not. But, once it is decided to hold oral hearings, parties should be given sufficient notice of the hearing and of any meeting of the tribunal for the purpose of inspection of documents, books or other property. This section makes it compulsory that all statements and other information supplied to the arbitral tribunal by one party shall be communicated to the other party. Hearing of one party in the absence of the other, violates the principles of natural justice. [41]

Proviso to section 24(1) provides that if the parties before the arbitral award seek to lead oral evidence it must be granted as the expression is ‘shall hold oral hearing’ at the request of the parties. It may be that even in the expression ‘shall’ in a limited number of cases wherein in fact no evidence is required to be led, the tribunal can reject such an application. If a party expresses the need for examining the witness, the tribunal cannot deny an opportunity to that party to examine the witness. Failure to allow a party to present its case before the arbitral tribunal results in miscarriage of justice and in such a case the award made is liable to be set aside. [42]

20. DISPOSAL OF INTERLOCUTORY APPLICATIONS

The proceedings before the arbitrator are not just like a court. It is not necessary that the arbitrator must decide all the applications. He can take them into consideration at the time of the decision on merits. Even otherwise, leaving some applications undecided does not amount to misconduct on his part. [43] It is not necessary for the arbitrator to record a long reasoned order on the preliminary objections. [44]

21. ARBITRATOR MUST VISIT SITE IN PRESENCE OF PARTIES

There is no provision in the Act that an arbitral tribunal must visit the site on the request of the parties or one of them. However, it is desirable that the tribunal should visit the site since that would afford it a better opportunity to appreciate the matter in its true perspective.

> If an arbitrator to whom an action for not repairing a house has been referred, makes his award on a view of the premises without calling the parties before him, the court will set aside the award, for though the premises may almost tell their own tale, yet there may be other facts which ought to be inquired into, such as, payments by the party, or excuses for not repairing. [45]

> An arbitrator must not, unless so authorised by the parties, decide upon a view or inspection of premises or goods at which they have had no opportunity to be present. But it would seem that in the case of arbitrators authorised to decide upon their own expert knowledge, such further authority might be presumed by the court. [46]

22. ARBITRATOR HAS AUTHORITY TO APPOINT EXPERT

In the absence of an agreement between the parties on part or whole of the subject-matter of the dispute, the arbitral tribunal:

(1) may appoint one or more experts;

(2) may ask such expert/experts to determine specific issues; and

(3) shall deliberate upon such specific issues.

Furthermore, the arbitral tribunal in order to facilitate the task of the expert/experts, may direct a party

(a) to give the expert any relevant information; or

(b) to produce, or to provide access to, any relevant documents, goods or other property, for its inspection.

23. ARBITRATOR CAN SEEK 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. [47]

> It is open to the arbitrators to have ministerial and other works performed by a third person. [48] Thus, where in an arbitration for partition, the measurements were made and the maps prepared by someone else, it cannot be said that partition was made by an outsider and not by the arbitrator. [49] 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. [50]

> If the parties to the reference took upon themselves to help the arbitrator in preparing comparative statements, one party cannot take exception to the statement prepared by the other party. [51] Where the arbitrator sent for the plaintiff for the purpose of getting the desired records sorted out and certain exhibits traced, such conduct cannot be a ground for setting aside the award. [52]

24. ARBITRATOR'S POWER TO ORDER INTERIM MEASURE OF PROTECTION

Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order a party to take any interim measures of protection as the arbitral tribunal may consider necessary in respect of the subject-matter of the dispute. The arbitral tribunal may require a party to provide appropriate security in connection with a measure ordered under sub-section (1) of section 17.

Under the 1996 Act, unlike the predecessor Act of 1940, the arbitral tribunal is empowered to make orders amounting to interim measures of protection. This section would operate only during the existence of the arbitral tribunal. 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 insofar 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. [53]

If a final order is passed in the proceedings, the life of the interim order comes to an end. Thus, where the arbitrator passed an interim order which was set aside by the court, and the arbitrator passed the final award thereafter, the Revision petition filed against the same became infructuous. [54]

The power of the arbitrator under section 17 is a limited one. An arbitrator cannot issue any direction which goes beyond the reference or the arbitration agreement. The interim order must relate to the protection of subject-matter of dispute and the order must be addressed only to a party to arbitration. It cannot be addressed to other parties. Under section 17, no power is conferred upon the arbitrator to enforce its order nor does it provide for judicial enforcement thereof. [55]

Law does not prohibit the arbitral tribunal from granting specific performance of any part of a contract altogether. In a given situation, depending upon the interpretation of the contract, facts and equities of the case, conduct of the parties, severability of consideration for different obligations under the contract etc., the arbitrator may even grant specific performance of part of contract. [56] If the plea regarding impossibility of performance is not taken up before the arbitrator and he orders specific performance of the contract, the award cannot be interfered with. [57]An agreement which is of determinable nature is not specifically enforceable as per *section 14(1) (c) of the Specific Relief Act* and an arbitrator should not pass any order of specific performance thereupon.[58]

An arbitrator can grant specific performance of a contract relating to immovable property under an award [59]. The Supreme Court in *Olympus Superstructures Pvt. Ltd. v. Meena Vijay Khetan* [60] relied upon the observations contained in *Halsbury's Laws of England* which state : '503. *Nature of the dispute or difference* :- The dispute or difference which the parties to an arbitration agreement agree to refer must consist of a justiciable issue triable civilly. A fair test of this is whether the difference can be compromised lawfully by way of accord and satisfaction'. The Supreme Court also noted the decisions contained in *Keer v. Leeman* [61], where it was held that if in respect of facts relating to a criminal matter, say, physical injury, if there is a right to damages for personal injury, then, such a dispute can be referred to arbitration.

An arbitral tribunal can injunct or restrain a partner from causing hindrances in the running of the firm. [62] While granting injunction against invocation of bank guarantee, an arbitral tribunal has to enquire into the allegations and also find out whether the party would suffer irreparable loss. [63]

25. ARBITRATOR TO DECIDE DISPUTES IN ACCORDANCE WITH LAW

Section *section 28 of the Arbitration and Conciliation Act, 1996* enjoins upon arbitral tribunals to adjudicate upon the disputes in accordance with the substantive law for the time being in force in India. Thus, the arbitral tribunal has

not been given the authority to decide the matters on equitable or compassionate grounds or in an arbitrary or capricious manner or on grounds which it thinks are reasonable and just.

Before the enactment of 1996 Act, it had been well settled that an arbitrator was not a conciliator but an adjudicator and he was to decide the controversy in accordance with law. Thus, law would not accept the parties vesting authority in the arbitrator to decide *ex aequo et bono or amiable compositeur* or otherwise free from the constraints of law. However, under the 1996 Act, section 28(2) stipulates that the arbitral tribunal shall decide *ex acquo et bono or as amiable compositeur* if the parties have expressly authorised it to do so, in which event the parties will have no right whatsoever to challenge the verdict of the arbitral tribunal under section 34 of the Act. However, an arbitral tribunal, which in the absence of any mandate from the parties to decide the dispute fairly and honestly, irrespective of stipulations contained in substantive law, does so at the peril of the award being set aside under section 34 of the Act.

> If on taking into consideration contractual terms, the award on the face of it is erroneous and in violation of the terms of the contract, then it would be in violation of sub-section (3) of section 28. When the award is erroneous on the basis of record with regard to the proposition of law or its application, the court will have jurisdiction to interfere with the award. If the award is contrary to the substantive provisions of law or the provisions of the Act or of the terms of the contract, it would be patently illegal, which could be interfered with. However, such failure of procedure should be patent affecting the rights of the parties. [64]

> The duty of the arbitrator is to decide the questions submitted to him according to the legal rights of the parties, and not according to what he may consider fair and reasonable. [65] It cannot make a new contract for the parties [66], but it must give effect to the usages of the trade applicable to the transaction if so required by the law which governs the contract. [67]

> An arbitration clause in an agreement provided that the arbitrators were relieved from all judicial formalities and might abstain from following the strict rules of law and that they should settle any dispute under the agreement according to an equitable rather than by applying a strict legal interpretation and that their decision should be final and not subject to an appeal. It was held that the arbitrator must in general apply a fixed and recognisable system of law which primarily and ordinarily means the Indian law. If the parties choose to provide that their rights and obligations shall not be determined in accordance with law, there is no contract as the parties do not intend to alter their legal relations. [68]

> An arbitrator cannot award any amount he likes, either on grounds of mercy, kindness or otherwise. If he is permitted to do so, the very sanctity of contract disappears. [69] If the award is a fair and honest settlement of a doubtful claim based both on legal and moral grounds, it should not be interfered with. [70]

> An arbitrator misconducts the proceedings when (i) there is a defect in the procedure followed by him; (ii) commits breach and neglect of duty and responsibility; (iii) acts contrary to the principles of equity and good conscience; (iv) acts without jurisdiction or exceeds it; (v) acts beyond the reference; (vi) proceeds on extraneous circumstances; (vii) ignores material documents; (viii) bases the award on no evidence. [71] The arbitrator is a tribunal selected by the parties to decide their disputes according to law and so is bound to follow and apply the law, and if he does not, he can be set right by the court provided his error appears on the face of the award. [72]

> If the parties have referred a specific question of law for decision by the arbitrator, the decision of the arbitrator is binding on the parties, howsoever erroneous the decision may be. But if the arbitrator decides a question of law which has incidentally arisen during the course of arbitral proceedings, it has no binding effect on the parties. Any decision contrary to the law of limitation would amount to an error of law on the face of the award. [73]

26. ARBITRATOR MUST FOLLOW TERMS OF CONTRACT

Section 28(3) of the Act specifically provides that the arbitral tribunal shall decide the matter before it in accordance with the terms of the contract. An arbitrator cannot do what he thinks is just and right. As per section 28 (2), an arbitral tribunal is required to decide ex aequo et bono (according to what is just and good) only if the parties have expressly so authorised it to do so. An arbitral tribunal is the creature of the agreement, and hence, must abide by the terms thereof.

An arbitrator cannot act arbitrarily, irrationally, capriciously or independently of the contract. His sole function is to arbitrate in terms of the contract. He has no power apart from what the parties have given him under the contract. If he has travelled outside the bounds of the contract, he has acted without jurisdiction. A conscious disregard of the law or the provisions of the contract from which he has derived his authority vitiates the award. [74]

An award must be in accordance with the terms and conditions of the contract. For a proper construction of the contract the intention of the parties is to be gathered from the words used in the agreement itself, moreso, where the agreement has been drafted by experts. Therefore, where the parties have expressly agreed that recovery from the contractor for breach of the contract is pre-estimated genuine liquidated damages and not by way of penalty, there could be no justifiable reason for the arbitral tribunal to arrive at a conclusion that still the purchaser should prove loss suffered by it because of delay in supply of goods. [75]

An arbitrator cannot wander outside the contract and thus the claims, which are prohibited under the contract, cannot be awarded. Where there had been an increase in royalty labour charges during the currency of the contract and the relevant clause in the agreement showed in no uncertain terms that such an eventuality was contemplated, it was not open to the arbitrator to travel beyond the contract and award claims contrary to the terms of the contract. [76]

27. ARBITRATOR BOUND TO APPLY LAW

An arbitrator is not entitled to ignore the law or misapply it and cannot also act arbitrarily, irrationally, capriciously or independent of the contract. When on the face of award it is shown to be based upon a proposition of law which is unsound or so unreasonable and irrational that no reasonable or right thinking person or authority could have reasonably come to such a conclusion on the basis of the materials on record or the governing position of law, then such an award shall be set aside. [77]

It is sometimes said that the arbitrators must decide in accordance with a fixed set of legal rules. The arbitrator has a duty ‘to decide the questions submitted to him according to the legal rights of the parties and not according to what he may consider fair and reasonable under the circumstances’. [78] In the absence of express provisions in the submission to the contrary effect, this must undoubtedly be so. The arbitral tribunal is bound to follow the substantive law unless the parties have authorised it to decide the matter in controversy *ex aequo et bono* or as *amiable compositeur* . Failure to follow the substantive law would make the award bad in law. [79]

An arbitral tribunal is under a legal obligation to follow the law and to give reasons in support of the award. However, parties by mutual consent may dispense with this requirement otherwise an award passed in violation of the substantive law is liable to be set aside as being arbitrary, contrary to law and against public policy of India. [80]

28. ARBITRATOR CAN DECIDE DISPUTES *EX AEQUO ET BONO* – WHEN

This is a phrase derived from the civil law, meaning, in justice and fairness; according to what is just and good; according to equity and good conscience. [81]

Russell [82] states that the following considerations appear material for concluding whether or not the parties could expressly agree that the arbitrator should decide *ex aequo et bono* :

(a) Judges themselves are not limited to a fixed set of rules for it is commonplace that when they are faced with a gap in the law they can choose for themselves how to fill it. However, it is only fair to recognise that a power is claimed for arbitrators to choose for themselves (if that power is given to them in the agreement) even when there is no gap in the law. But there appears to be no doubt that arbitrators can be given power to decide in accordance with any fixed foreign system of law. It would appear to be curious if parties could indirectly cast about to find a foreign law in which the point in dispute fell into a gap in the law, so that the arbitrators were forced (as are English judges in a similar situation) to decide *ex aequo et bono* , whilst they could not be directly empowered to act in this way.

(b) If an arbitrator could decide on private notions of fairness, no court could supervise his decision (though his conduct of the reference could still be supervised) for it would have no basis on which to do so. But it by no means follows that if supervision of the award is not mandatory, an award not susceptible to supervision could not or should not, if duly made, be enforced.

(c) Even under the old law the power to state a case, whilst not directly oustable, could be indirectly ousted by suitable choice of a law which did not provide for the stated case, and now, in English law, rights of appeal to the courts can be directly and legitimately ousted. Since it is accordingly possible to oust review by the courts of the legal basis of the arbitration award, it would no longer appear to be an argument that the duty to decide in accordance with law rests on an implication arising from control by the courts. It was for this reason that the point was made above that the duty to decide in accordance with law truly rests on agreement only, and if that be so it could be altered by agreement.

(d) Even on the old strict view, a distinction was drawn between general rules and law and rules of practice of the courts, such as rules laying down when interest will be given upon a sum of money due to a claimant. Such rules as these were always recognised as within the discretion of an arbitrator to disregard.

(e) Further, in the past, there have been decisions suggesting that it might be proper for an arbitrator to disregard strict legal rights in the interests of justice (e.g. by giving relief against a claim which worked hardship but against which there was no legal defence).

(f) Whilst cases such as this last may have gone too far in not paying sufficient attention to the implied agreements of the parties, it would seem unchallengeable that an arbitrator can be given far wider discretion to decide *ex aequo et bono* than merely in respect to rules of procedure, for it has been recognised for many years that an arbitrator can, whereas a court cannot, make a contract for the parties; and it hardly needs to be pointed out that this may result in a decision governed by no known system of law and wholly unsupervisable by any court. But the practice is clear.

(g) However, such powers need to be conferred expressly, and in the absence of such express conferral, there can be no doubt whatever that the arbitrator must decide in accordance with the proper law.

29. ARBITRATOR CAN DECIDE DISPUTES *AMIABLE COMPOSITEUR* – WHEN

Where the parties vest in the arbitrator an authority to decide the matter according to equity and good conscience or to take a decision as per trade practice and usage or to give effect to the intentions of the parties as gathered from surrounding circumstances in preference to giving literal meaning to the words incorporated in the contract, then the arbitrator is not bound to ‘decide the dispute submitted to arbitration in accordance with the substantive law for the time being in force in India’ as stipulated in section 28(1) (a). In other words, parameters laid down by the parties for the resolution of the controversy between them shall be the guiding factor for the arbitrator to decide the matter in preference to rigid application of the substantive law for the time being in force. Thus, the arbitrators can decide the

matter in accordance with such clauses and then the court is precluded from setting aside the award on the plea that the arbitrator had not applied the substantive law of the land.

Sometimes, arbitration clauses in international commercial contracts and in some domestic contracts contain a provision that the arbitrators need not apply the law, or a particular system of law. They may provide that the arbitrator is 'to act as *amiable compositeur* ', or is to decide 'according to equity and good conscience'; or 'according to customs and usages of the trade' or 'so as to interpret this Reinsurance as an honourable agreement, and with a view to effecting the general purpose in a reasonable manner rather than in accordance with the literal interpretation of the language'.

> The term *'amiable compositeur'* is the same as amicable compounders. In Louisiana Law and Practice, amicable compounders are arbitrators authorised to abate something of the strictness of law in favour of national equity. [83]

> According to Canadian law, the expression '*amiable compositeur* ' means that the arbitrators 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 so doing by the terms of the submission, or unless they have been appointed as *amiable compositeurs* . That is to say, if they are *amiable compositeurs* , they are to be exempt at all events from the strictness of the obligations expressed in the previous words. [84]

30. ARBITRAL TRIBUNAL MAY ENCOURAGE SETTLEMENT THROUGH MEDIATION

The position of the arbitrator under the 1940 Act was that an arbitrator is not a conciliator and cannot ignore 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 disputes according to law and so is bound to follow and apply the law; and if he does not, he can be set right by the court provided his error appears on the face of the award. Section 30 of the Act of 1996, on the other hand, specifically states that arbitrators should endeavour to settle disputes by mediation or conciliation during the arbitral proceedings.

As per the dictionary meaning, mediation means 'the act of mediating; deep thought; serious contemplation', whereas conciliation means 'to gain, or win over; to reconcile'. Conciliation also means 'bringing of opposite parties or individuals into harmony to settle the dispute'.

31. ARBITRATOR TO CLOSE CASE WITH CONSENT OF PARTIES

When the arbitral proceedings come to an end, the arbitral tribunal should record that both the parties have completed their respective arguments and that they have nothing further to state. This may be done in the form of minutes of meeting issued at a later point of time or alternatively, the parties may be requested to append their signatures on the notings made by the arbitral tribunal to the effect that the case is closed for making the award; or, the parties may be asked to give in their own handwriting a note to the effect that they have had full opportunity to present their case and that they have nothing further to add.

> Where the party desired the arbitrator to defer making his award until he should satisfy him as to some things which the arbitrator took to be against him, and as this was within two or three days before the time for making the award was out, the arbitrator refused his request, and made his award, and it seemed that there was a just ground for the plaintiff's desire to be heard, though it did not appear that he was ready to be heard within the time, the court set aside the award. [85]

> If though there has been some needless delay, an arbitrator does not give the party who has caused it proper opportunity to go into his case, but makes his award too hastily, without giving due notice of his intention to do so, the court will set aside

the award. [86]

32. ARBITRATOR CAN TERMINATE PROCEEDINGS – WHEN

The matter referred by the party or the parties, as the case may be, for adjudication by the arbitral tribunal, shall be terminated by:

(1) the final arbitral award; or

(2) by an order of the arbitral tribunal when:

(a) the claimant withdraws his claim;

(b) the respondent does not object to the withdrawal of the claim by the claimant;

(c) both the claimant and the respondent mutually agree between themselves that the proceedings should come to a close; or

(d) the arbitral tribunal considers that any more continuation of the proceedings would be an exercise in futility or when it is impossible to proceed with the arbitral matter.

The proceedings would not stand terminated because of withdrawal of the claim by the claimants; the withdrawal must have the concurrence of the respondent. When the move of the claimant to withdraw the claim is opposed by the respondent, the arbitral tribunal shall determine whether there is a legitimate interest on the part of the respondent in obtaining a final settlement of the dispute. Such a decision by the arbitral tribunal shall be final and binding on the parties and no appeal lies against such an order.

There is no provision in the Act which can throw light on the issue as to when the arbitral proceedings shall be deemed to have been terminated but *section 32 of the Arbitration and Conciliation Act, 1996* provides that the arbitral proceedings shall be terminated by the final arbitral award or by an order of the arbitral tribunal. Thus, it can safely be said that arbitral proceedings stand terminated by the final arbitral award. [87]

An order for termination of arbitral proceedings may be issued where the arbitral tribunal finds that continuation of proceedings had become unnecessary or impossible. If the arbitral tribunal had *suo motu* extended time, that would be no ground for setting aside the award. [88] 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 matters of termination of proceedings. [89]

If section 25 (a) and 32(2)(c) are read conjointly, it would lead to the irresistible conclusion that in the former case the arbitrator can terminate the proceedings if the claimant fails to communicate his statement of claim, while in the latter case the arbitrator can terminate the proceedings when he finds that the continuation of the proceedings has for any reason become unnecessary or impossible. Thus, in both the cases the arbitration proceedings come to an end not on account of making of the award by the arbitrator but on account of factors unconnected with the adjudicatory process culminating into an award. [90]

Having regard to the objects and reasons for which the 1940 Act was repealed and 1996 Act was enacted, the phrase '...the arbitral tribunal shall terminate the proceedings', should be read as 'the arbitral tribunal may terminate the proceedings'. Such interpretation shall also be in accordance with the principles of harmonious construction. If section 25 (a) is read as mandatory, the same would defeat sections 18, 19, 23(1) and 32(2). [91]

If sufficient cause is not shown for the default on the part of the claimant to submit the claim statement within the time allowed, the arbitral tribunal is not under any compulsion to terminate the proceedings. In such a case, the arbitral tribunal can call upon the other party to submit its pleadings in support of its case. It is permissible in law to terminate the

proceedings in respect of one of the claimants or counter-claimants and to continue proceedings in respect of the other claimant or counter-claimant, as the case may be. [92]

33. ARBITRATOR CAN RECALL ORDER OF TERMINATION

An arbitral tribunal terminated its proceedings when the contractor failed to submit the claim statement on the ground that his request for appointment of an independent arbitrator was pending in the court, it was held that failure to submit claim statement on the part of the contractor could not be attributed to negligence, inaction or want of *bona fide* . It was further held that petitioner-contractor had shown sufficient cause within the meaning of section 25 (a) for not communicating the claim statement and in such like cases the arbitral tribunal can recall its earlier order terminating the proceedings. [93]

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9 Form, Contents and Finality of Arbitral Awards

1. 'AWARD' – MEANING OF

The term 'award' has not been defined in the *Arbitration and Conciliation Act, 1996*, except that in section 2(1) (c) it is stated that an award includes an interim award. In principle, an award is the final determination of a particular issue or claim in arbitration either on merits or by settlement arrived at between the parties.

> An award may be contrasted with orders and directions which address the procedural mechanisms to be adopted in the reference. [1] The expression arbitral award must mean a final decision on merits of any of the claims which are before the arbitrator. [2] The 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. [3]

2. 'ORDER' AND 'AWARD' – DISTINCTION

An award may be contrasted with orders and directions which address the procedural mechanisms to be adopted in the reference. [4]Only decisions/orders which satisfy the requirements of section 31 of the Act can be labeled as awards. All others are orders and decisions in the course of the proceedings deciding procedural and jurisdictional issues. [5]

Judicial pronouncements on what constitutes orders and awards are as under:

(1) Questions concerning the time table for the reference or disclosure of documents are procedural in nature and are determined by the issue of an order or direction and not by an award. [6]

(2) A decision on the venue of arbitration is not a decision of dispute relating to the agreement and cannot be called an award or an interim award. [7]

(3) An order on jurisdiction under section 16 of the Act is also only an interim order and not an interim award. [8]

(4) An interim order of injunction is not an interim award. [9]

(5) Orders whereby proceedings are terminated unless it is an award would not be construed to mean an award. [10]

(6) An order stating that the majority of the shareholders do not want division of properties cannot be said to be an interim award. [11]

(7) An order rejecting an application under section 27 is neither a decision nor an order and in no case can it be taken to be an interim award. [12]

3. PRE-REQUISITES OF AWARD

Section 31 of the 1996 Act does not prescribe any particular form or manner of passing an award. An arbitral award should be made in writing and signed by the members of the arbitral tribunal. The award must be passed after a

judicial inquiry, the object of which is to hear the parties and decide the matter upon evidence. The pre-requisites for making an award are as under:

(1) An award is made when it is written and signed by the arbitrator(s) who have authored it.

(2) An award is not made in law till it is made known to the parties or at least till some step is taken with regard to it which makes it impossible for the arbitrator to make any alteration therein, whether by communicating the contents of the award to the parties or filing in court or in some other way.

An award is an expression of an adjudication of a dispute between the parties and as long as the manifestation of the decision on the dispute raised is clear and unambiguous, it will not be correct to hold an award to be invalid merely because it does not subscribe to any particular format. [13]The Act does not contemplate an oral award since it is required to be signed. [14]

Just as a court cannot be blamed if it alters a rough draft, similarly an arbitrator cannot be condemned for altering what he had not finally decided and pronounced. [15] Until an award is communicated, there is nothing to prevent an arbitrator changing his mind. [16] If the arbitrator makes an alteration in the typed portion of the award and duly signs it, it cannot be said that the arbitrators have acted improperly and without application of their mind. [17]

4. POWER TO MAKE INTERIM AWARD

In practice, the terms ‘interim award’ and ‘partial award’ are used interchangeably. The effect of an interim award is that it can be enforced even if it decides only some of the issues while others remain outstanding before the tribunal.

The arbitral tribunal may, at any time during the arbitral proceedings, make an interim arbitral award on any matter with respect to which it may make a final arbitral award. [18] An interim award is also an award and has to be made in the same manner as an award. [19]

The same arbitration agreement may give rise to interim awards, supplemental awards and successive awards. [20] There is no rule of law that a partial award is invalid, [21] but the question has to be decided on the intention of the parties as to whether they allowed the arbitrators to give awards in piecemeal. [22]

An interim award can be made in respect of those matters on which a final award can be made. An award like a decree is the final determination of the proceedings. [23] In order to treat an order as an interim award, it should fulfil the requisites of an award and must decide a part of the claim or an issue of liability. [24]

The question whether an interim award is final to the extent it goes or has effect till the final award is delivered will depend upon the form of the award. [25] An interim/partial award is ‘final’ with respect to the issues which it has decided. It is binding on the parties and persons claiming upon them and is enforceable, as if it were a decree of the court. It is, however, not final with respect to other issues because such issues in the reference remain outstanding before the Arbitral Tribunal. [26] Even in the case of interim awards, the arbitrator can grant interest, if the same is not barred by any of the clauses of the contract. [27]

5. SIGNATURE MUST BE APPENDED TO AWARD

There can be no finality in the award except when it is signed. Making and delivery of the award are different stages of an arbitration proceeding. An award is made when it is authenticated by the person who makes it. The word ‘made’ suggests the mind of the arbitrator being declared and it is validly deemed to be pronounced as soon as the arbitrator has signed it.

[28] Signing of the award is not a mere formality. [29]

Signing means writing one's name on some document or paper. So long as the signature of the arbitrator appears on the copy of the award filed in court and it shows that the person signing authenticated the accuracy or correctness of the copy, the document would be a signed copy of award and it would be immaterial whether the arbitrator puts down the words 'certified to be true copy' above his signatures. [30]It is also not mandatory under the Act that an arbitrator must put the date under his signature. [31] If the award is not signed, the court can extend the time for making the award and direct curing of the formal defect in the award. [32]

6. RECEIPT OF SIGNED COPY OF AWARD

After the arbitral award is made, a signed copy shall be delivered to each party. The wording of section 31(5) of the 1996 Act obliges the arbitral tribunal not only to give a copy of the award to the parties but to also ensure that it is signed. Till such time as a signed copy of the award is delivered to a party, the time for challenging the award will not start running.

Receipt of signed copy of the arbitral award is an important event in the arbitration proceedings. [33] The delivery of the arbitral award to the party, to be effective, has to be 'received' by the party. This delivery by the arbitral tribunal and receipt by the party of the award sets in motion several periods of limitation. As this delivery of the copy of the award has the effect of conferring certain rights on the party as also bringing to an end the right to exercise those rights on expiry of the prescribed period of limitation which would be calculated from that date, the delivery of the copy of the award by the tribunal and the receipt thereof by each party constitutes an important stage in the arbitral proceedings. [34]

If a photocopy of the award is given to the parties without the signatures of all the arbitrators, then it will not be a signed copy within the meaning of sub-section (5) of section 31 of the Act. It is only from the date when a signed copy is made available that the limitation period would be counted. [35]

Signatures of the parties are obtained on the award merely in token of their acknowledging its declaration and that they have notice of it and does not mean that they agreed to the terms of the award. [36]

7. AWARD TO BE SIGNED BY MAJORITY

For purposes of section 31(1) of the Act, in arbitral proceedings with more than one arbitrator, the signatures of the majority of the members of the arbitral tribunal shall be sufficient so long as the reason for any omitted signature is stated. If one of the members of an arbitral tribunal does not agree with the majority, he ought to make and publish his own award. In such an event, the majority is not obliged to await receipt of the minority award. They can straight-away take steps to publish the majority award after stating therein that one of the members did not agree with their verdict. The period of limitation for filing objections accrues to a party on the date on which he receives a signed copy of the majority award and not the date when the minority award is delivered to him.

An award to be binding and enforceable must be signed by the arbitrators concurring. [37] The award is not invalidated on account of refusal of one of the arbitrators to take part in the preparation of the award or to sign the award of the majority of the arbitrators at the instance of one of the parties. [38]

An undated award by the majority which does not give out any reason for the omitted signature of the third arbitrator would be invalid in view of the provisions of section 31(2) and (4). [39] An award signed by only one of the arbitrators and not all, cannot be entertained by the courts. [40] All arbitrators should execute their award at the same time and place. An award

signed by several arbitrators at different dates is invalid. [41] However, according to the Bombay and Calcutta High Courts, it does not make any difference if the award is signed by arbitrators on different dates. [42]

Although an award should be the result of a joint deliberation of all the arbitrators, [43] where a party to arbitration proceeding does not raise objection to the absence of one of the arbitrators at some of the meetings, it is not open to such party to contend subsequently that such absence rendered the award invalid. [44]

8. STATING OF REASONS OBLIGATORY

Every party to a dispute has a right to know as to why his contention was favoured or rejected. *Section 31(3) of the Arbitration and Conciliation Act, 1996* obliges an arbitral tribunal to state the reasons upon which its award is based, unless (a) the parties have agreed that no reasons are to be given, or (b) the award is an arbitral award on agreed terms under section 30.

An award which is not supported by reasons is an invalid award. [45] However, law does not prohibit the parties from relieving the arbitral tribunal from giving reasons in support of the award. [46]

All that is required of an arbitrator is to state as to how he has come to the finding arrived at by him. The arbitrator is also not expected to record at great length the communications exchanged or submissions made by the parties nor is he expected to analyse the law and the authorities. [47] To satisfy the requirement of reasons in an award, it is necessary that these should have nexus with the pleadings and not independent of it. [48] An award cannot be said to be reasoned if the arbitrator simply states that the claimant or the respondent is or is not entitled to the amount. [49] Any and every observation in the award by the arbitrator cannot be construed as the reason for the award. [50] A mere statement to the effect that 'the records are perused, various documents are taken into consideration by the partiesand I accordingly award' does not satisfy the requirement of giving reasons. [51]

Reasons are nothing but intellectual faculty by which conclusions are drawn from premises, reaching conclusions by connected thought. Reason could be said to be:

(1) A faculty of the mind by which it distinguishes truth from falsehood, good from evil, and which enables the possessor to deduce inference from facts or from proposition.

(2) Recording of reasons require coherent logical thinking and drawing inference from conclusions by systematic analysis from facts known. [52]

(3) The link between material on which certain conclusions are based and the actual conclusions. They disclose how the mind is applied and the subjectmatter for decision. [53]

Recording of reasons would:

(a) Guarantee consideration by the authorities;

(b) Introduce quality in the decision; and

(c) Minimise chances of arbitrariness in decision making. [54]

Omission to give the details of calculations or to give his findings as regards the rival contentions of the parties in respect of the interpretation of the conditions of the contract does not invalidate the award. [55] An arbitrator is not bound to decide the case on the basis of the issues framed by him. [56] However, an arbitral tribunal is bound to give reasons on consideration of relevant materials. [57]

9. STAMP DUTY ON AWARD

An unstamped arbitration award contravenes Article 12 of the Stamp Act, but that by itself would merely make the award defective and not invalid. [58] The Stamp Act is a fiscal measure enacted to secure revenue for the State on certain classes of instruments. It is not enacted to arm a litigant with a weapon of technicality to meet the case of his opponents. [59] Stamp duty engrossed on a copy of the award would be treated as intended to serve as payment of stamp duty and penalty so as to enable original award to be admitted in evidence. [60]The court has no jurisdiction to reject the award under O.7 R.11 of the *Civil Procedure Code* if the necessary duty and penalty has not been paid thereupon.[61] In such a case, the court should send the award to the Collector for recovering the proper duty on the award. [62]

10. REGISTRATION OF AWARD

A question whether an award requires stamping and registration is within the ambit of *section 47 of Civil Procedure Code* and not covered by section 34 of the Act.[63] An award given under the *Arbitration Act* requires registration under *section 17(1) (b) of the Registration Act*, if the award purports or operates to create or declare, assign, limit or extinguish, whether in present or in future any right, title or interest whether vested or contingent of the value of Rs. 100/- and upwards to or in immovable property. [64] An unregistered award creating rights in immovable property cannot be enforced. [65] However, the award is admissible in evidence for the collateral purpose of proving (i) nature of property; (ii) nature of possession of the parties. [66]

If the award does not declare or create a mortgage of immovable property but simply refers to an equitable mortgage [67] or debts obtained on lands [68] or indicates the shares of the parties in the joint properties [69] or records an earlier family settlement [70] or distributes the assets of the partnership firm among partners [71], it does not require registration. The word ‘declare’ in *section 17 of the Registration Act* has to be read *ejusdem generis* with the words ‘create’, ‘assign’ or ‘limit’, which imply a definite change of legal relation to a property. [72] If an unregistered award has been acted upon by the parties such an award can be read in evidence. [73]

Where the unregistered award is filed, its subsequent registration is not invalid. [74] If due to an injunction order, the arbitrators were prevented from taking steps for registration of the award, the entire period during which the award remained in the custody of the court has to be excluded for the purposes of computation of the period for getting the award registered. [75]Registration of an award is an act subsequent to the making of the award and it cannot be said that since the arbitrator has become *functus officio* , he cannot register the document. [76]

11. FILING OF AWARD IN COURT

The filing of an award is a purely ministerial act and can be legally performed by any one of the arbitrators appointed. [77] A party to the arbitration agreement [78] or its counsel [79] with the authority of the arbitrator [80] may cause the award to be filed in court.

A photocopy of the award can be filed when the main award is lost, especially when the photocopy contains the arbitrator's signature and also that of the parties. [81] Where the arbitrator after making and signing of the award dies, the filing of the award by his assistant [82] or on directions obtained from the court in an application under *section 151 of the Code of Civil Procedure* is proper. [83]

12. FILING OF DEPOSITIONS AND DOCUMENTS IN COURT

The arbitrators shall cause to be filed the award together with any depositions and documents which may have been taken and proved before them [1] but if such depositions and documents are not forwarded, the award would not lose validity. [2] Pencil or pen notes of evidence, when there are formal minutes of the evidence and proceedings before the arbitrator, are not required to be filed. [3] The arbitrators are under no legal obligation to record the deposition of witnesses in writing. [4]

13. COURT WITHIN WHOSE JURISDICTION AWARD CAN BE FILED

The arbitral award shall state its date and the place of arbitration as determined in accordance with section 20 of the Act and the award shall be deemed to have been made at that place. [5] Where award had been signed by one arbitrator in Bombay and by other at Delhi, the filing of award in Bombay court is proper since the agreement was signed at Bombay. [6] If two courts have concurrent jurisdiction, then the court which is approached first in point of time would have jurisdiction. [7]

The question of jurisdiction of court is dependent on the provisions of *section 20 of the Civil Procedure Code*.[8] An award can be filed only in that court in which suit would lie with regard to subject-matter of reference. [9] Where the State carries on business, the suit can be instituted at the place where the cause of action arises wholly or in part. [10]An agreement between the parties to file it in a different court would be against the statute and cannot be given effect to. [11]

The trial court of one district has no jurisdiction to deal with awards arising out of work done outside its territorial jurisdiction. [12] The question of jurisdiction of the court depends on numerous factors including the competency of the petitioner. If the petitioner has no cause of action in his personal capacity, the court may not have jurisdiction to entertain the petition. [13]

14. POWER OF ARBITRATOR TO AWARD INTEREST

Section 31(7) vests power in the parties to agree to make an agreement on the matter of interest. In the absence of any such agreement, the arbitral tribunal shall have power to award interest on the amount at a rate which it may consider to be reasonable. The arbitral tribunal has power to award interest on the whole amount or any part thereof and also for any part or whole of the period between the cause of action and the date of award. He has also got the power to award interest from the date of award to the date of realisation.

Unless there is a prohibition in the agreement, the arbitrator will have power to award interest. [14] It is within the sole discretion of the arbitrator to award interest as deemed fit under the facts and circumstances of each case but the rate of interest must not be abnormally excessive. [15]

Failure to bring to the notice of the arbitrator that charging of interest was prohibited by the terms of the agreement would be prejudicial to the interests of the employer. If the employer even fails to take this objection before the trial court and the High Court, it cannot be allowed to be taken before the Supreme Court for the first time. The award of interest by the arbitrator would be justified when the parties understood it as placing no bar. [16] Non-awarding of interest on the amount adjudged by the arbitrator cannot be construed to be an obvious error because it is a discretionary relief which was open to the arbitrator to grant or not to grant. [17]

15. POWER TO AWARD PRE-SUIT AND *PENDENTE LITE* INTEREST

Unless otherwise agreed by the parties, where and in so far as an arbitral award is for the payment of money, the arbitral tribunal may include in the sum for which the award is made interest, at such rate as it deems reasonable, on the whole or any part of the money, for the whole or any part of the period between the date on which the cause of action arose and the date on which the award is made. [18]

An arbitral tribunal has the power to award interest for the pre-reference period even for cases which arose prior to the enactment of the *Interest Act, 1978*,[19] in absence of any specific stipulation or prohibition in the contract to claim or grant any such interest. [20] An arbitrator has power to award interest, both *pendente lite* as well as for period prior to entering upon reference. The fact that the arbitrator took into consideration the date of notice while granting pre-suit interest would not make his award bad. [21]

An arbitrator also has the power to award interest during *pendente lite* period [22] where a party makes a claim for the same and it is referred to the arbitrator, [23] provided there is no prohibition in the agreement to award of interest. [24] Grant of *pendente lite* interest has to be presumed to be an implied term of the agreement. [25] Interest can now be awarded at all the stages i.e. from the date of cause of action to the date of arbitrator entering upon reference, *pendente lite* period and from the date of the award to the date of payment. [26]

Where numerous arbitrators were appointed over a period of time by the courts *pendente lite* interest would be payable from the date when the first arbitrator was appointed [27], provided the claim for interest was referred. [28]

The arbitrator is a court and he has powers to grant interest. [29] The power to award interest is a discretionary power [30] and is unrestricted and unlimited. [31] The mere existence of power by itself is not a justification for grant of interest. The entitlement of a party to receive a definite sum of money is an important factor. [32] Non-awarding of interest on the amount adjudged cannot be construed to be an error since it is a discretionary relief. [33] Merely because the *Interest Act* is not applicable to the State of Jammu & Kashmir, it will not exclude the authority of the arbitrator to grant interest if the transaction is of a commercial nature. [34]

Interest can be awarded as compensation for loss suffered due to withholding of payment. [35] An arbitrator is not debarred from granting interest on equitable ground where fiduciary relationship exists between the depositor and the depositee. [36] An arbitrator does not have the power to award interest on an unascertained amount from the date of the award till the date of the payment. [37]

If the delay in proceedings is due to the uncooperative attitude of one of the arbitrators, the aggrieved party is entitled to interest for the said period. [38]

16. ARBITRATOR'S POWER TO AWARD FUTURE INTEREST

Section 31(7)(b) of the Act drastically curtails the discretion of the arbitral tribunal in matters of grant of future interest. The section provides that the award must carry future interest though discretion has been given to the arbitral tribunal to grant interest at a rate lower than eighteen per centum per annum from the date of award to the date of payment. In the absence of any determination on the claim of interest by the arbitral tribunal, the award ‘shall’ ‘carry interest at the rate of eighteen per centum per annum from the date of the award to the date of payment’. It can thus be said that the Act provides for an in-built machinery for payment of future interest on the amount of award at eighteen per centum per annum ‘unless the award otherwise directs.’ The object of the clause

seems to be to compel the unscrupulous disputants from adopting delaying tactics in the matter of payment of the award alongwith interest.

In *Nityananda Samantray v. State of Orissa* [39], it was held that 'Award of future interest from the date of decree puts a lead and tension on the other party to pay off the sum promptly since otherwise payment of the sum may be delayed indefinitely. The very purpose of resorting to an arbitration is a prompt disposal of the claim and unless future interest is granted, the whole purpose of arbitration may be frustrated. The award of future interest thus should be the normal rule unless there are very strong reasons to depart from it. [40]

If the award states that interest would be payable till the date of payment or decree whichever is earlier, it would not disentitle the petitioner to payment of interest on the ground that as per the Act of 1996 the date of decree is the date of award. [41]

17. PROHIBITION ON AWARD OF INTEREST IN CONTRACT

Prohibition to grant interest must be incorporated in the arbitration clause itself. [42] A clause purportedly debarring award of interest has to be strictly construed. [43] Hence, a clause debarring certain officers or the department [44] or the Government [45] from entertaining a claim of interest cannot be construed to prohibit the arbitrators from awarding interest. If a clause prohibits award of interest only on 'amounts payable to the contractor under the contract', it would not debar payment of interest on sums unreasonably detained [46] or for detention of amounts beyond the stipulated period of contract. [47] Courts have no jurisdiction to allow interest for pre-reference, *pendente lite* [48] and future interest because interest for these stages being within the domain and province of the arbitrator can only be awarded by him. [49]

Failure to bring to the notice of the arbitrator that charging of interest was prohibited by the terms of the agreement would be prejudicial to the interests of the employer. [50]

18. RATE OF INTEREST

The 1996 Act vests complete power in an arbitral tribunal to award interest at the rate it deems fit. However, sound principles should be followed while determining the rate of interest payable to a party. The arbitral tribunal can determine the rate of interest on the basis of (a) the prime lending rate of banks; (b) the contract, i.e. the rate charged on advances paid or payable on delayed payments; (c) actual basis – the party may lead evidence of actual payment of interest by it to third parties/banks; or (d) trade usage.

It is within the sole discretion of the arbitrator to award interest as deemed fit under the facts and circumstances of each case [51] but rate of interest must not be abnormally excessive [52] or in excess of the prevalent market rate. [53] While awarding interest at a particular rate, the arbitrator has to keep in mind the nature of the claim and the conduct of the parties. [54] The arbitrator can rely upon proof of rate of interest paid by a party to arrive at his finding. [55] The arbitrator cannot make enquiries about the rate of interest from a third source behind the back of the parties. [56]

If the parties have agreed to a certain rate of interest then the arbitrator or the court have no power either to increase or to decrease the rate [57] unless the particular facts and circumstances of the case compel grant of a different rate. [58] If the rate of interest awarded by the arbitrator is the same as earlier awarded and accepted by the opposite party, it cannot challenge the rate. [59]

Once the court comes to the conclusion that a party is entitled to interest, [60] it would not be proper for it to modify the rate of interest which the arbitrator has granted in exercise of discretion vested in him. [61] Grant of interest by the arbitrator is discretionary [62] and hence correctness of the rate of interest fixed by the arbitrator cannot be considered in proceedings

under the Act[63], because it is within the exclusive jurisdiction of the arbitrator to determine the same. [64] However, interference by the courts may be justified if the rate of interest allowed in the award is unconscionable and against the trade practice. [65]

An award granting interest @ 18% p.a. cannot be held to be exorbitant since section 31(7) (b) of the Act provides for grant of interest at the said rate. [66]If the arbitrator does not mention the rate of interest payable for future interest, then, as per the Act, it would be taken to be 18% p.a. [67]

19. INTEREST CANNOT BE GRANTED UNLESS CLAIMED

Where no demand for interest is made in the correspondence, an award granting interest for the period prior to arbitration is not valid. [68] However, if a notice is given, an arbitrator would be justified in awarding interest. [69]

For the *pendente lite* period, the court can award interest under *section 34, C.P.C.*, even if it is not specifically claimed. On the same analogy, an arbitrator can award interest in arbitration proceedings even if it has not been specifically claimed.[70]

20. AWARD OF COMPOUND INTEREST

Section 34 of the Code of Civil Procedure uses the expression 'principal sum adjudged' upon which a court can award interest, whereas section 31(7) of the Act empowers arbitrators to award pre-reference interest on the 'whole or any part of the money' i.e. even on the sum of money awarded by way of interest. [71] From the date of the passing of the decree, future interest is not to be calculated merely on the amount of the claims upheld by the arbitrator/court but also on the amount of interest awarded by the arbitrator or the court. [72] It cannot be said that award of interest on interest, i.e. compound interest is against the public policy of India. [73]

An arbitrator has power to grant interest on the amount of interest which may be termed as interest on damages or compensation for delayed payments which would also become a part of the principal sum adjudged. [74]

21. SUCCESSIVE AWARDS

One arbitration agreement can produce one or more awards. [75] Successive references of various disputes arising from time to time between the parties can be referred to arbitration and be made the subject-matter of successive awards. [76] However, the same dispute cannot be decided over and over again by different awards. [77]

22. POWER TO AWARD COSTS

A party, which succeeds in an arbitration deserves to be compensated not just by payment of its claims but also for the costs incurred by it in pursuing the arbitration. Unless otherwise agreed by the parties, the costs of arbitration shall be fixed by the arbitral tribunal. The arbitral tribunal, while determining the costs, must specify (i) the party entitled to costs, (ii) the party who shall pay the costs, (iii) the amount of costs, (iv) the method of determining that amount, and (v) the manner in which the costs shall be paid. While making the above determination, the arbitral

tribunal should take into consideration the fact that in addition to the fees paid to it, costs were also incurred for engaging lawyers, preparation of the case, ministerial expenses, costs of arranging venues, travel expenses etc. A determination of the above costs should be made and, as a general principle, the party which is successful should be reimbursed the actual expenses.

Power to award cost of reference is a discretionary power vested in the arbitrator [78] and merely because an arbitrator has awarded costs does not lead to the inference that he was biased in favour of a party. [79] Court will not interfere with the arbitrator's exercise of his discretion [80] and even a lump sum award of costs by an arbitrator cannot be held to be erroneous. [81]While exercising the discretion, the arbitrator must not act capriciously [82] or improperly exercise his powers. [83]

For the purpose of section 31(8) (a), 'costs' means reasonable costs relating to (i) the fees and expenses of the arbitrators and witnesses, (ii) legal fees and expenses, (iii) any administration fees of the institution supervising the arbitration, and (iv) any other expenses incurred in connection with the arbitral proceedings and the arbitral award. [84] The term 'costs of the arbitration' is a wide and general term and there is no justification for limiting it to such costs as might be represented by travelling expenses and summoning of witnesses. [85] It can include arbitrator's fee [86] and costs to be paid as between legal practitioner and client. [87] If a party misuses the legal process and delays the proceedings, he ought to be burdened with costs. [88]*Section 35 of the Code of Civil Procedure* prescribes that cost should follow the event and as such, actual costs and not just nominal costs ought to be awarded. [89]

If the arbitrators ultimately find that substantial part of the claim is liable to be rejected, then that claimant is not entitled to costs. [90] When claims are inflated out of all proportions, not only heavy cost should be awarded to the other party but the party making such inflated claims should be deprived of costs. [91] An arbitral tribunal is not vested with the jurisdiction to award costs which a party incurred in respect of proceedings other than one before the arbitral tribunal. [92] Cost incurred by a party to keep bank guarantees alive pursuant to an agreement between the parties cannot be included in costs. [93]

In the absence of any provisions in the award in the matter of costs, it is open to the court, seized of the proceedings, to make an order as to costs. [94] If, however, there is no valid reference to arbitration, there could be no justification for the court to pass an order as to costs of the award. [95]

23. TRIBUNAL NOT *FUNCTUS OFFICIO* AFTER MAKING AWARD

Unlike the position under the Arbiration Act, 1940, the arbitral tribunal under the 1996 Act, does not become *functus officio* on the making and publishing of the award. The arbitral tribunal can now, of its own motion or on the application of any party to the arbitration agreement, correct any computation, clerical or typographical errors or any other errors of a similar nature occurring in the award, within a period of thirty days from the receipt of a signed copy of the arbitral award, unless another period has been agreed to between the parties. Likewise, a request can also be made to the arbitral tribunal to give an interpretation of a specific point or part of the award. On all these points, the arbitral tribunal is required to give its decision within thirty days of the receipt of the written request of a party. The arbitral tribunal would become *functus officio* , i.e. its authority to act ceases and the reference terminates if no written request is received on any of the aforementioned points within thirty days of the receipt of the arbitral award, and, in the alternative, if a written request is received within time the arbitral tribunal, after giving its interpretation or award, as the case may be, becomes *functus officio* . There is no provision in the Act for eliciting clarifications or corrections from the arbitral tribunal on a second occasion.

24. POWER OF ARBITRATOR TO CORRECT ERRORS AND TO MAKE ADDITIONAL AWARD

Section 33, dealing with correction and interpretation of award as also for making additional award, reads as under:

Section 33. Correction and interpretation of award; additional award. —

(1) *Within thirty days from the receipt of the arbitral award, unless another period of time has been agreed upon by the parties—*

(a) *a party, with notice to the other party, may request the arbitral tribunal to correct any computation errors, any clerical or typographical errors or any other errors of a similar nature occurring in the award;*

(b) *if so agreed by the parties, a party, with notice to the other party, may request the arbitral tribunal to give an interpretation of a specific point or part of the award.*

(2) *If the arbitral tribunal considers the request made under sub-section (1) to be justified, it shall make the correction or give the interpretation within thirty days from the receipt of the request and the interpretation shall form part of the arbitral award.*

(3) *The arbitral tribunal may correct any error of the type referred to in clause (a) of sub-section (1), on its own initiative, within thirty days from the date of the arbitral award.*

(4) *Unless otherwise agreed by the parties, a party with notice to the other party, may request, within thirty days from the receipt of the arbitral award, the arbitral tribunal to make an additional arbitral award as to claims presented in the arbitral proceedings but omitted from the arbitral award.*

(5) *If the arbitral tribunal considers the request made under sub-section (4) to be justified, it shall make the additional arbitral award within sixty days from the receipt of such request.*

(6) *The arbitral tribunal may extend, if necessary, the period of time within which it shall make a correction, give an interpretation or make an additional arbitral award under sub-section (2) or sub-section (5).*

(7) *Section 31 shall apply to a correction or interpretation of the arbitral award or to an additional arbitral award made under this section.*

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. However, when it comes to seeking interpretation of a specific point or part of the award, then it is incumbent upon the party seeking interpretation to obtain the consent of the other party. In other words, no party can approach the arbitral tribunal to give interpretation of a specific point or on part of the award unless the opposite party had given its consent.

The following are the pre-requisites for making an application seeking corrections in an arbitral award:

(1) Application has to be filed within a period of 30 days from the receipt of the award unless another period of time had been agreed upon between the parties;

(2) The party invoking the application may request the arbitral tribunal to correct any computation errors, any clerical or any 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* ; and

(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.

It shall be notified from the stipulations of section 33 that the party seeking interpretation of a specific point or part of the award or seeking an additional award must obtain consent of the other party, otherwise the arbitral tribunal will have no power to give such an interpretation or an additional award. Furthermore, if the party invokes the provisions of section 33, it has to do so within the period prescribed under this section. The arbitral tribunal has no power to condone the delay.

25. CORRECTION OF CLERICAL OR TYPOGRAPHICAL ERRORS

Under sub-section 33(1)(a) of the Act, an arbitrator can make corrections in the award which relate to:

(1) computation errors;

(2) clerical errors;

(3) typographical errors; or

(4) any other errors of similar nature.

The party making a request to the arbitral tribunal to make corrections of errors in the award cannot do it at the back of the other party and a notice of the request made to the arbitral tribunal must also be given to the other party. It is submitted that the sub-section does not empower the arbitral tribunal to change or review the award *suo motu* .

The arbitral tribunal may, on its own initiative, correct any error in the award of the nature spelt out in sub-section (1), provided that it is done within a period of thirty days from the date of the arbitral award. Obviously, any correction made, after the period of thirty days from the date of arbitral award had run out, would not have any legal sanction.

By virtue of section 33(1), a party can seek certain correction in computational errors or clerical or typographical errors occurring in the award with 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. [1] A clerical error is 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 of clerical omissions; but certainly such omissions as would demand judicial consideration or determination are beyond the scope of that term. [2]

Having regard to the meanings of the words ‘error’ and ‘mistake’, a 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 a mistake or error relating to a peripheral matter and not to the substance or the content. [3] 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 of clerical omissions. [4] Omission to stamp an award cannot be termed to be a clerical error. [5]

Where the arbitrator supplied the missing page of the award to a party by just forwarding that page to him, it was held that no doubt the arbitrator could have supplied the missing page in view of the provisions of section 33, but that could not have been done by merely forwarding that page to the parties and the only way of doing so was to take up proceedings under this section for that purpose. [6]

26. ARBITRATOR CAN CORRECT ERRORS WITHIN STIPULATED PERIOD

On receipt of a request from a party for making an additional arbitral award on any claim pending before the arbitral tribunal and inadvertently omitted from being incorporated in the arbitral award, the arbitral tribunal, if it considers such request to be justified shall, within a period of sixty days from the date when the arbitral award was made,

make an additional arbitral award. However, the period of sixty days may be extended by the arbitral tribunal if it is not possible to make corrections concerning computation, clerical, typographical errors etc. or to give an interpretation of a specific point or part of the award or when called upon to give an additional arbitral award within the said period.

Section 33 enables a party to seek for correction and/or interpretation of the award, with notice to the other party, from the arbitral tribunal regarding any computation errors, any clerical or typographical errors or error of any other similar nature occurring in the award. The same section also provides that a party, with notice to the other party and if so agreed by the parties, may request the arbitral tribunal to give an interpretation of a specific point or part of the award, whereupon the arbitral tribunal shall give interpretation if the request is found to be justified. Failure to approach the arbitral tribunal would mean that the award has assumed finality and not even the court shall have power to make any correction, howsoever glaring it may be. [7]

27. POWER TO MAKE ADDITIONAL AWARD

Whereas under the *Arbitration Act*, 1940, the arbitral tribunal had no power whatsoever to add to the award (except correction of clerical errors), under the 1996 Act, the arbitral tribunal has power to make an additional award. However, the power is limited to matters which had been submitted to the arbitral tribunal, but through oversight were omitted from the award. The provision is not intended to give an opportunity to a party to introduce such claims which have arisen subsequent to the reference. The arbitral tribunal has to restrict itself in making an award on such claims which formed a matter for adjudication and on which both the parties had finally led arguments but the arbitral tribunal inadvertently skipped to make award in respect of those claims. In other words, the provision of additional award cannot provide a means of raising new points, which had not been the subject matter of the earlier reference.

The arbitrator is empowered to make an additional award in respect of any item of claim on which the arbitrator had omitted to consider and give his decision in the original award. Where no specific amount was awarded by the arbitrator against a claim, he can make an additional award on the same. [8]

28. LIMITATION FOR SEEKING CORRECTION/ADDITIONAL AWARD

If the arbitral tribunal considers the request made under section 33(4) to be justified, it shall make the additional arbitral award within sixty days from the receipt of such request. [9] The arbitral tribunal may extend, if necessary, the period of time within which it shall make a correction, give an interpretation or make an additional arbitral award under section 33(2) or section 33(5). [10]Section 31 shall apply to a correction or interpretation of the arbitral award or to an additional arbitral award made under this section. [11] Failure to approach the arbitral tribunal would mean that the award has assumed finality and the court cannot assume jurisdiction to interpret the award or correct the mistake or error. [12]However, the view of the Bombay High Court is that the provisions of section 33 do not curtail the power of the court to allow correction of mistakes of the nature provided in *section 152* or *153* of the *Civil Procedure Code*.[13]

29. FINALITY OF AWARD

Subject to Part I of the Act, an arbitral award shall be final and binding on the parties and persons claiming under them respectively. [14] When the award becomes final, it puts an end to all the controversies between the parties and the points which were taken, either in attack or in defence, cannot be re-agitated. [15] An award of the arbitrators is as binding on the parties to the reference as if it were a decree of the court, [16] unless possibly the parties have intended that the award shall

not be final and conclusive. [17]

The award is a final adjudication of a court of the parties' own choice, and until impeached upon sufficient grounds in appropriate proceedings, an award, which is on the face of it regular, is conclusive on the merits of the controversy submitted. As between the parties and their privies, an award is entitled to that respect which is due to a judgment of a court of last resort. [18] A valid award operates to extinguish all claims which were the subject-matter of the reference to arbitration and the award alone furnishes the basis by which the right of the parties can be determined. [19]

The words 'award shall be final and binding on the parties and persons claiming under them respectively' have to be construed as subject to any right of appeal, which might be provided for either by the contract itself, or by any bye-laws governing the parties. [20] It is the award by the appellate tribunal, if an appeal is preferred, which becomes the final award that governs the parties. [21]

30. AWARD OPERATES AS RES JUDICATA

Though Order 2, Rule 2, *CPC* does not in terms apply to proceedings under the Act but the principles thereof would be applicable to arbitration proceedings. [22] An award, if valid, is a final adjudication by a competent forum chosen by the parties themselves. It will, therefore, operate as *res judicata* in subsequent proceedings between the parties either in court or before the arbitrators. [23] A valid award operates to merge and extinguish all claims embraced in the submission. [24] A valid award will create an estoppel with regard to the matters with which it deals. [25] To the extent that if a cause of action has been decided by the award, a party will be prevented from asserting or denying, as against the other party, its existence or nonexistence in subsequent proceedings. Any attempt to do so may be met by a plea of *res judicata* . When one or more issues have previously been determined, *albeit* that the cause of action is different, a party will again be prevented from seeking to contradict the earlier findings on those issues, on the basis of 'issue estoppel'. [26]

31. ENFORCEMENT OF AWARD

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* (5 of 1908) in the same manner as if it were a decree of the court.[27] The words 'as if' as used in section 36 demonstrate that an award and a decree or order are two different things. The legal fiction created is for the limited purpose of enforcement as a decree. The fiction is not intended to make a decree for all purposes under the statute, whether State or Central. [28] If an award is not challenged within the stipulated time or if the objections are dismissed, then the award becomes final as a decree of the court. [29]

An award under the Act becomes an executable decree by fiction, in terms of section 36, only when it is not challenged by either of the parties by filing a section 34 application or a section 34 application is rejected. Once a section 34 application is filed, the activation of the fiction contemplated in section 36 stops, and hence the award does not become an executable decree at all. [30] There is no discretion left with the court to pass any interlocutory order for enforcement of such award till such time as the objections are dismissed. [31]

An application for execution can be filed only after the period specified in the Act for challenging the award expires. If an execution application is filed earlier to the expiry of 3 months, it would be premature. [32] An application to execute an award, which has been amicably settled is not be maintainable. [33]

A part of an award, which is not under challenge, becomes final and is enforceable under section 36, irrespective of the pendency of the application under section 34 challenging the other parts of the award. [34]

32. EXECUTION OF DECREE

Once an arbitration award has been made, it has to be executed in accordance with the statutory provisions. [35]Section 17 of 1940 Act provided for a decree to be drawn by the court concerned but section 36 of 1996 Act provides that the award shall be considered as a decree and shall be enforced under the *Code of Civil Procedure* in the same manner as if it were a decree of the court. The executing court is duty bound to accept the execution petition with a certified copy of the award. [36] The executing court is bound to execute the award, except in cases where either the court remits the award back to the arbitrator for re-consideration or sets it aside. [37]

The fact that an award is enforceable as a decree would attract to itself the applicability of provisions regarding the execution of decrees. [38] The holder of an award is entitled to execute the award although he may have transferred his rights under it to a transferee unless and until such transferee comes to the court and applies under Order XXI, Rule 16, *CPC*[39] Where applications were filed by the petitioner in respect of two awards in the same arbitration case, it was held that provisions of Order XXI Rules *18* and *19*, *CPC* were not applicable. [40] The provisions of *CPC*, relating to adjustment of decrees are equally applicable to awards. [41]

A question whether an award requires stamping and registration is within the ambit of *section 47 of the Civil Procedure Code* and not covered by section 34 of the Act[42], but if a party accepts the award, he waives all objections with regard to nonregistration of the award. [43]

Where the award provided that on the happening of certain events, the vendor would be entitled to take back possession of the property, it does not make the award declaratory so as to make it incapable of execution. [44] To make the award executable, it is incumbent upon the arbitrator to give clear directions to make payment for a certain sum of money. [45]

A decree based upon an award can be enforced only in that court which has jurisdiction to entertain it. The proper court for enforcement of a decree is one which can entertain applications under section 34. [46] A decree cannot be executed at a place different from the court which has dismissed the objections. [47]

33. EXECUTING COURT CANNOT INTERPRET DECREE

An executing court cannot go behind the decree based on the award. [48] However, it is open to the executing court to declare the award invalid if it was passed without jurisdiction. [49] The principles of waiver, acquiescence and estoppel cannot be applied to take away the legal right of the judgment-debtor under *section 47 of the CPC*. [50]Section 34 enumerates specific grounds on which an award may be set aside and hence, such grounds cannot be allowed to be taken in execution proceedings. [51] The objection that the agreement did not contain an arbitration agreement cannot be entertained in execution proceedings, moreso when the respondent failed to file objections within time under section 34 of the Act. [52]The executing court cannot refuse to execute a decree on the ground that it is against law or contravenes the provisions of any law. [53] Until it is set aside by an appropriate proceeding in appeal or revision, a decree even if it be erroneous is still binding between the parties. [54]

In view of the specific provisions contained in *section 33 of the Arbitration and Conciliation Act, 1996* giving power to the arbitral tribunal to give interpretation on the award and/or to correct any computation error, any clerical or typographical

errors or any other errors of a similar nature occurring in the award, the executing court cannot assume the power and jurisdiction to interpret the award or correct any mistake or error occurring therein. [55] It is equally impermissible for the executing court to take notice of any irregularities in the award. [56] However, where an arbitrator wrongly mentions the number of the property awarded in favour of a party, that party cannot take advantage of the mistake and seek execution in respect of the said property. [57]

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1 *NTPC Ltd. v. Siemens Atiengesellschaft* , 2005 (2) RAJ 367 (Del).

2 *United India Assurance Co. Ltd. v. Kumar Texturisers* , 1999 (2) RAJ 255 (Bom).

3 *Halsbury's Laws of England,* 4th Ed., Vol 2, para 610; *Chief Administrator, Dandakaranya Project v. Prabartak Commercial Corporation Ltd.,* : 1975 Jab LJ 612 (DB)

4 *NTPC Ltd. v. Siemens Atiengesallschaft* , 2005 (2) RAJ 367 (Del).

5 *Harinarayan G. Bajaj v. Sharedeal Financial Consultants Pvt. Ltd.,* AIR 2003 Bom 296 [*LNIND 2002 BOM 1059*]: 2003 (2) Arb LR 359 : 2003 (4) Bom CR 139 [*LNIND 2002 BOM 1059*] : 2003 (2) Mah LJ 598 [*LNIND 2002 BOM 1059*].

6 *Liberty Shoes Ltd. v. Harish Kumar Gupta,* 2006 (4) Arb LR 225 (P&H).

7 *Sanshin Chemicals Industry v. Orient Carbons & Chemicals Ltd., AIR* 2001 SC 1219 : (2001) 3 SCC 341 [*LNIND 2001 SC 432*] : (2001) 1 RAJ 247 : (2001) 1 Arb LR 521.

8 *Union of India v. East Coast Boat Builders & Engineers Ltd* ., 1998 (2) Arb LR 702 : 1999 (2) RAJ 221 (Del); *Indian Oil Corp. v. Industrial Gases Ltd.* , 1989 (1) Cal LJ 507.

9 *Jammu Forest Co. v. State of J&K* , AIR 1968 J&K 86 : 1968 Kash LJ 134.

10 *United India Assurance Co. Ltd. v. Kumar Texturisers* , 1999 (2) RAJ 255 (Bom); *Uttam Singh Duggal v. Hindustan Steel Ltd.,* : 1982 MPLJ 598 [*LNIND 1981 MP 101*] (DB); *Anand Prakash v. Assistant Registrar Co-op. Societies,* : 1967 All LJ 457.

11 *Deepak Mitra v. District Judge , Allahabad,* : 1999 AWC 2721.

12 *Harinarayan G. Bajaj v. Sharedeal Financial Consultants Pvt. Ltd.,* AIR 2003 Bom 296 [*LNIND 2002 BOM 1059*]: 2003 (2) Arb LR 359.

13 *Subhash Projects and Marketing Ltd. v. Assam Water Supply and Sewerage Board,* AIR 2003 Gau 158 : 2004 (1) RAJ 6 : 2003 (4) Civ LJ 362 : 2003 (2) Gau LT 259 : 2003 (2) Gau LR 449 : 2003 (48) SEBI & CL Gau 473 : 2004 (1) RAJ 6 (DB).

14 *Satya Pal v. Ved Prakash,* ; *O.P. Verma v. Lala Gehrilal, AIR* 1962 Raj 231 : ILR (1961) 11 Raj 103 (DB).

15 *Har Charan Singh v. Mohan Singh,* : 158 IC 379 (DB).

16 *Babu Lal Pradhan v. Badri Lal Pradhan,* : 49 IC 522 (DB); *Harphool Singh v. Prabhu Dayal,* : (1950) 52 Pun LR 128.

17 *Durgapur Projects Ltd. v. Graphite India Ltd.,* (Cal).

18 Section 31(6) *, Arbitration and Conciliation Act, 1996; ONGC v. Anil Const. Co.,* ; *Union of India v. Khan Chand Bhagat Ram Jain and Sons* , (1970) 72 Pun LR (D) 298.

19 *Anand Prakash v. Assistant Registrar, Co-op. Societies,* : 1967 All LJ 454 ; *Pradeep Saith v. S.K. Mehta,* 2005 (3) RAJ 444 : 2005 (3) Arb LR 222 (Del).

20 *Pushraj Puranmull v. Clive Mills Co. Ltd.,* ; *Mohanlal v. Kaluram Sitaram,* (MB)(DB); *Harinarayan G. Bajaj v. Sharedeal Financial Consultants (P) Ltd.,* AIR 2003 Bom 296 [*LNIND 2002 BOM 1059*]: 2003 (2) Arb LR 359 : 2003 (4) Bom CR 139 [*LNIND 2002 BOM 1059*] : 2003 (2) Mah LJ 598 [*LNIND 2002 BOM 1059*].

21 *Allagu Pillai v. Veluchami alias Mayilappa Pillai,* : 32 MLT 369 (DB).

22 *Prabartak Commercial Corporation v. Ramsahaimull More Ltd.,* ; *Ganga Dhar v. Indar Singh,* (DB).

23 *Anuptech Equipments (P) Ltd. v. Ganpati Co-op. Group Housing Society Ltd.,* ; *Deepak Mitra v. District Judge , Allahabad,*.

24 *Asian Electronics Ltd. v. M.P. State Electricity Board,* 2008 (3) RAJ 603 (MP).

25 *Satwant Singh Sodhi v. State of Punjab,* (1999) 3 SCC 487 [*LNIND 1999 SC 311*] : 1999 (2) Arb LR 1 : 1999 (2) RAJ 1.

26 *NTPC Ltd. v. Siemens Atiengesallschaft* , 2005 (2) RAJ 367 (Del); *Kashinathsa Yamosa Kabadi v. Narsingsa Bhaskarsa Kabadi, AIR* 1961 SC 1077 : [1961] 3 SCR 792 [*LNIND 1961 SC 54*] ; *Harinarayan G. Bajaj v. Sharedeal Financial Consultants Pvt. Ltd.,* AIR 2003 Bom 296 [*LNIND 2002 BOM 1059*]: 2003 (2) Arb LR 359.

27 *Gujrat Industrial Development Corp. Ltd. v. S.R. Parmar & Co.* , 1995 (1) Arb LR 394 : 1995 AIHC 933 (Guj) (DB).

28 *Satwant Singh Sodhi v. State of Punjab,* (1999) 3 SCC 487 [*LNIND 1999 SC 311*] : 1999 (2) Arb LR 1 : 1999 (2) RAJ 1; *Ramdas Sahu v. Judagi Lohar,* : 107 IC 532.

29 *Sri Keempegowda v. National Highway Authority of India,* 2008 (1) RAJ 155 (Kant); *Laljee Jaisingh v. S.P. Tiwari, AIR* 1924 Rang 319 (DB); *Laljee Jaising v. S.P. Tiwari,* (DB); *Fateh Mohammad v. Amar Nath,* : 35 Pun LR 211.

30 *Hindustan Construction Co. Ltd. v. Union of India, AIR* 1967 SC 526 : [1967] 1 SCR 843 [*LNIND 1966 SC 255*] (67 Pun LR 501 reversed) (*Rambilas Mahto v. Babu Durga Bijai Prasad Singh,* (DB) no longer good law).

31 *Banwarilal Garodia v. Joylal Hargolal,*.

32 *State of West Bengal v. Sree Sree MA Engineering, AIR* 1987 SC 2229 : 1987 (2) Arb LR 194 : (1987) 4 SCC 452 [*LNIND 1987 SC 636*].

33 *Reshma Constructions v. State of Goa* , 2000 (1) RAJ 552 (Bom); *Indurthi Venkata Srinivasa Rao v. Indurthi Narasimha Rao,* : (1963) 1 Andh WR 45 (DB).

34 *Union of India v. Tecco Trichy Engineers & Contractors,* (2005) 4 SCC 239 [*LNIND 2005 SC 275*] : AIR 2005 SC 1832 : 2005 (1) Arb LR 409 : 2005 (1) RAJ 506 (SC).

35 *Ramesh Pratap Singh v. Vimala Singh,* 2004 (2) Arb LR 147 (MP).

36 *Satya Pal v. Ved Prakash,* ; *Kanhaiya Lal Dubey v. Awinash Talwar,* : 1972 All LJ 92.

37 *Ayyaswami Mudaliar v. Appandai Nynan,* : 38 MLJ 145 : 54 IC 912 (DB).

38 *Amar Nath v. Uggar Sen,* : ILR (1949) All 720 (DB); *Kazee Syed Nasser Ali v. Tinoo Dossia* , (1866) 6 WR 95; *Ram Narain Ram v. Pati Ram Tewari,* (DB); *Ramtaran Das v. Adhar Chandra Das,* (DB); *R. Dasaratha Rao v. K. Ramaswamy Iyengar,* (DB); *Johara Bibi v. Mohammad Sadak Thambi Marakayur,* (DB); *Deo Narain Singh v. Siabar Singh,*.

39 *MTNL v. Siemens Public Communications Network Ltd.,* 2005 (1) Arb LR 369 (Del).

40 *Nemi Chand Sowcar v. Kesarimull Sowcar,* : 56 MLJ 35.

41 *Bhagwan Das v. Shiv Dial,* : 22 IC 811 : 1914 Pun LR 109 (DB).

42 *Parshottamdas Narrottamdas Patel v. Kekhushru Bapuji,* : 35 Bom LR 1101 : 149 IC 324 (DB); *Mukundalal Pakrashi v. Prokash Chandra Parkrashi,* : 70 Cal LJ 43 (DB).

43 *Rudramuni Devaru v. Niranjan Jagadguru,* AIR 2005 Kant 313 [*LNIND 2005 KANT 161*] (DB) : (2005) 2 Arb LJ 342 : (2005) 2 KCCR 1051 [*LNIND 2005 KANT 161*].

44 *Bajjuri Ramakistam v. Bhoopati Somalingam,* : (1962) 2 Andh WR 469 (DB); *Lakshmamma v. Appadu,* ; *Laxmibai v. Manek Patel,* : 45 Bom LR 416; *Ramnath Misra v. Ramranjan Misra,* : 67 Ind Cas 866; *Gunuwa U v. Pyinnayadipa, AIR* 1923 Rang 187 : ILR 1 Rang 15; *U Po Hlaing v. Daw Ngwe, AIR* 1941 Rang 22 : 192 Ind Cas 801.

45 *Abhijeet Saraswat v. Nalamaty Doraiah,* 2004 (2) Arb LR 138 (Bom); *Union of India v. Pioneer Const.* , 2004 (2) RAJ 39 (Cal); *Union of India v. Raymus Porta Bldgs. Ltd.,* AIR 2007 NOC 2007 1606 (H.P.).

46 *State Bank of India v. Ram Das* , 1999 (1) RAJ 27 (AP)(DB); *Muta International v. Nandnandan Silk Mills Pvt. Ltd.,* 2008 (1) RAJ 32 (Bom).

47 *Ircon International Ltd. v. Arvind Const. Co. Ltd* ., 2000 (1) Arb LR 105 : 2000 (1) RAJ 111 (Del); *Govt. of NCT of Delhi v. Ved Prakash Mehta,* 2006 (1) RAJ 168 (Del); *Saroj Bala v. Rajive Stock Brokers Ltd.,* 2005 (1) RAJ 637 (Del); *P.C. Sharma & Co. v. DDA,* 2006 (1) RAJ 521 (Del); *DDA v. Bhagat Const. Co.,* 2004 (3) Arb LR 481 : 2004 (4) RAJ 452 (Del).

48 *Delhi Development Authority v. Manohar Lal,* 2006 (1) RAJ 352 (Del); *Batliboi & Co. Ltd. v. Board of Trustees for the Port of Calcutta,* AIR 2009 NOC 635 (Cal)(DB).

49 *Vijay Kumar Garg Contractor (P) Ltd. v. IOC Ltd.,* 2006 (1) RAJ 568 (Del).

50 *State Bank of India v. Ram Das* , 1999 (1) RAJ 27 (AP)(DB).

51 *Ibid; T.N. Electricity Board v. Bridge Tunnel Constructions,* (1997) 4 SCC 121 : 1997 (1) Arb LR 1 : AIR 1997 SC 1376.

52 *State Bank ofindia v. Ram Das* , 1999 (1) RAJ 27 (AP)(DB); *College of Vocational Studies v. S.S. Jaitley,* : 1987 (1) Arb LR 315 (DB).

53 *Union of India v. Mohan Lal Capoor, AIR* 1974 SC 87 : (1973) 2 SCC 836 [*LNIND 1973 SC 292*] ; *Wool Combers of India Ltd. v. Wool Combers Workers' Union, AIR* 1973 SC 2758 : (1974) 4 SCC 318; *Saroj Bala v. Rajiv Stock Brokers*

Ltd., 2005 (1) RAJ 637 (Del); *Amin Merchant v. Bipin M. Gandhi,* 2005 (Supp) Arb LR 337 (Bom) : 2005 (2) Bom CR 38 [*LNIND 2004 BOM 1154*] ; *Jagmohan Singh Gujral v. Satish Ashok Sabnis,* 2004 (2) RAJ 67 : 2004 (1) Arb LR 212 (Bom); *Fixopan Engineers (P) Ltd. v. Union of India,* 2006 (1) RAJ 143 (Del).

54 *S.N. Mukherjee v. Union of India, AIR* 1990 SC 1984 : 1990 (4) SCC 594 [*LNIND 1990 SC 986*].

55 *State of Orissa v. P.C. Chanda,* (DB); *Nanak Chand v. Pannal Lal Durga Prasad,* (DB).

56 *Rash Behari Sen v. Anand Sarup Bhargava* , AIR 1962 P&H 51 : 63 Pun LR 887.

57 *Jagmohan Singh Gujral v. Satish Ashok Sabnis,* 2004 (2) RAJ 67 (Bom).

58 *Pradip Trading Co. v. State of Bihar,* : 1974 Pat LJR 235 (DB); *Gujrals Co. v. M.A. Morris* , AIR 1962 P&H 167.

59 *Hindustan Steel Ltd. v. Dilip Construction Co., AIR* 1969 SC 1238 : (1969) 1 SCC 597 [*LNIND 1969 SC 509*].

60 *M. Venkatiratnam v. M. Chellamayya,* : (1966) 2 Andh WR 361 : (1966) 2 Andh LT 300 (FB); *Bahadur Singh v. Fuleshwar Singh,* (DB).

61 *Tharpal v. Arjunsingh,* (DB).

62 *Wilson & Co. Pvt. Ltd. v. K.S. Lakavinayagam,* : 1992 (2) Arb LR 214 : (1991) 2 Mad LW 65 [*LNIND 1991 MAD 26*] ; *Ramchand Gurdasmal v. Gobindram Gurdasmal, AIR* 1918 Sind 13 ; *Shivlal Prasad v. Union of India,* : 1974 MPLJ 795 (DB); *Babo Ghulam Fatima v. Ghulam Mohd. Khan,* : 39 IC 912 : 1917 Pun LR 125 (DB).

63 *M. Ansuya Devi v. M. Manik Reddy,* (2003) 8 SCC 565 [*LNIND 2003 SC 899*] : (2003) 3 RAJ 500.

64 *Satish Kumar v. Surinder Kumar, AIR* 1970 SC 833 : [1969] 2 SCR 244 [*LNIND 1968 SC 300*] ; *Lachhman Das v. Ram Lal, AIR* 1989 SC 1923 : 1989 (2) Arb LR 165 : (1989) 3 SCC 99 [*LNIND 1989 SC 193*] ; *Sardar Singh v. Krishna Devi, AIR* 1995 SC 491 : (1995-1) 109 Pun LR 393; *Ratan Lal Sharma v. Purshottam Harit, AIR* 1974 SC 1066 : (1974) 1 SCC 671 [*LNIND 1974 SC 9*] ; *M. Venkataratnam v. M. Chelamayya,* : (1966) 2 Andh WR 361 : (1966) 2 Andh LT 300 (FB); *Aditya Kumar De Chowdhury v. Narayandas De Chowdhury,* : 75 CWN 439 (DB); *Iccharam Damodardas v. Kantilal Nathubhai,* : (1963) 4 Guj LR 242 ; *Dewaram v. Harinarain,* : ILR 26 Pat 437; *Yanadamma v. Venkateswarlu,* : 1964-2 Mad LJ 345 ; *Akbar Ali v. Mumtaz Hussain,* : 1987 (1) Arb LR 113; *V. Sanjeevamma v. Yerram Purnamma,* : 1983 Arb LR 228 [*LNIND 1983 AP 123*] (DB); *Hirday Narain Tandon v. Kashi Prasad Tandon,* ; *Bal Kishan Gupta v. Ajay Kumar* , 1987 (2) Arb LR 231 (Del); *Ch. Kodandampani v. Kadidela Rajamouli,* AIR 2003 AP 237 [*LNIND 2003 AP 34*]: (2003) 3 Arb LR 67 : (2003) 4 ALT 84.

65 *Kodandapani v. Kadidela Rajamouli,* : (2003) 3 Arb LR 67 : (2003) 4 ALT 84.

66 *Roshan Singh v. Zile Singh, AIR* 1988 SC 881; *K. Ramulu v. K. Narsimulu,* : (1999) 1 ALT 569; *S. Lakshmiah v. S. Peddamallaiah,* ; *M. Venkatasubbaiah v. M. Subamma,* ; *S.B. Taramma v. D. Narsaiah,* (1977) 1 APLJ 1 (3) (NRC).

67 *Lachhman Das v. Ram Lal, AIR* 1989 SC 1923 : 1989 (2) Arb LR 165 : (1989) 3 SCC 99 [*LNIND 1989 SC 193*] ; *Mohinder Kaur Kochhar v. Punjab National Bank Ltd* ., AIR 1981 Del 106 [*LNIND 1980 DEL 245*] (DB); *Ashok Kshyap v. Sudha Vasisht, AIR* 1987 SC 841 : (1987) 1 SCC 717 [*LNIND 1987 SC 128*] : 1987 (1) Arb LR 190.

68 *Nawab Usman Ali Khan v. Sagar Mal, AIR* 1965 SC 1798 : (1966) 1 SCA 138.

69 *Tehni P. Sidhwa v. Shib Banerjee & Sons Pvt. Ltd* ., AIR 1974 SC 1912 : (1972) 2 SCC 624; *Anurag Mehta v. Tata Finance Ltd.,* 2005 (3) Arb LR 591 (Del) : (2006) 126 DLT 114 [*LNIND 2005 DEL 1500*] ; *Nitya Ranjan Chatterjee v. Chitta Ranjan Chatterjee,* : 1990 (2) Arb LR 280 (DB); *M. Parasmull Charida v. Mahendra Dadha,* : 1992 (2) Arb LR 102; *Sardar Singh v. Krishna Devi, AIR* 1995 SC 491 : (1995-1) 109 Pun LR 393 : (1994) 4 SCC 18.

70 *Swaminathan v. Koonavalli,* : (1981) 2 Mad LJ 399.

71 *N. Khadervali Saheb v. N. Gudu Saheb* , 2003 (1) Arb LR 647 (SC) : AIR 2003 SC 1524 : (2003) 3 SCC 229 [*LNIND 2003 SC 1166*].

72 *Mohinder Kaur Kochhar v. Punjab National Bank Ltd* ., AIR 1981 Del 106 [*LNIND 1980 DEL 245*] (DB) .

73 *Ramavtar v. Ramgopal* , 2003 (2) Arb LR 87 (MP) : AIR 2003 SC 29 : (2002) 5 MPHT 133.

74 *Champalal v. Samrathbai, AIR* 1960 SC 629 : [1960] 2 SCR 810 [*LNIND 1960 SC 16*] ; *Balu Mal v. J.P. Chandani, AIR* 1977 Raj 14 : 1976 RLW 416 [*LNIND 1976 RAJ 44*] ; *R. Dasaratha Rao v. K. Ramaswamy Iyengar,* (DB).

75 *Raj Kumar v. Tarapada Dey, AIR* 1987 SC 2195 : 1988 (2) Arb LR 151; *Madhukar Goel v. M.S.Goel* , 1998 (1) Arb LR 522 (Del).

76 *Puthiyapurvil Pocker v. V. Khalid,* : 1973 Ker LT 540 : ILR (1974) 2 Ker 10 (DB); *Balu Mal v. J.P. Chandani, AIR* 1977 Raj 14 : 1976 RLW 416 [*LNIND 1976 RAJ 44*] ; *Hemraj v. Surajmal, AIR* 1972 Raj 151 : 1971 RLW 462 [*LNIND 1971 RAJ 118*].

77 *State of Madhya Pradesh v. Saith and Skelton (P) Ltd., AIR* 1972 SC 1507 : (1972) 1 SCC 702 [*LNIND 1972 SC 726*] ; *Shamdas Teumal v. Khimanmal Chandumal, AIR* 1914 Sind 90 ; *R.K. Mishra v. Kundanlal Shahni,* : ILR (1949) Nag 272; *Shah Hansraj Veljee v. Shah Maganlal Veljee,* : 1979 Mah LJ 530 [*LNIND 1979 BOM 20*] ; *John B. Peas v. Soomar, AIR* 1943 Sind 33.

78 *Banarsi Dass v. Om Parkash* , AIR 1957 P&H 301.

79 *Food Corporation of India v. E.Kuttappan, AIR* 1993 SC 2629 : 1993 (2) Arb LR 266 : (1993) 3 SCC 445 [*LNIND 1993 SC 490*].

80 *Shriram Haracharandas v. President, Cotton Seed Forward Delivery Managing Association Ltd* ., AIR 1954 Nag 236 (DB); *Umraosingh and Co. v. State of Madhya Pradesh,* : 1976 MPLJ 91 (DB); *Kanhaiya Lal Dubey v. Awinash Talwar,* : 1972 All LJ 92 ; *Ram Lakhan Mahto v. Mukhdeo Mahto,* : 1982 BLJR 30 (DB); *Kumbha Mawji v. Dominion of India, AIR* 1953 SC 313 : [1953] SCR 878 [*LNIND 1953 SC 50*] ; *Binod Bihari Singh v. Union of India, AIR* 1993 SC 1245 : (1993) 1 SCC 572 : 1993 (1) Arb LR 313; *Amod Kumar Verma v. Hari Prasad Burman,* (DB); *Lachmi Prasad v. Gobardhan Das,* ; *Hoora v. Abdul Karim, AIR* 1970 Raj 22 : 1969 RLW 363.

81 *Om Prakash v. Dev Raj* , 1996 (2) Arb LR 177 (P&H).

82 *Enkay Construction Co. v. Delhi Development Authority* , 1987 (2) Arb LR 86 : (1988) 94 Pun LR (D) 22; *Director of Industries, Punjab v. Raj Kumar* , (1964) 66 Pun LR 87.

83 *Panchaman Dey v. Union of India,* : 63 CWN 382 (DB); *Virender Singh v. Delhi Development Authority,* : 1988 (2) Arb LR 252.

1 *Ramtaran Das v. Adhar Chandra Das,* (DB); also see *Brijendra Nath Srivastava v. Mayank Srivastava, AIR* 1994 SC 2562 : 1994 (2) Arb LR 277 : (1994) 6 SCC 117 [*LNIND 1994 SC 704*].

2 *Makhan Lal Lodh v. Union of India,* ; *Andhra Pradesh State Trading Corp. v. S.G. Sambandan & Co.,* 2006 (2) RAJ 320 (AP)(DB); *Union of India v. Sohan Singh Sethi and Colonel R.K.Saldhi* , 1996 (1) Arb LR 504 (Del).

3 *Natha Subramanayam Chetty v. Menta Subramaniah,* (DB); *Haji Ebrahim Kassam Cochinwala v. Northern Indian Oil Industries Ltd.,*.

4 *Sampat v. Kisan,*.

5 Section 31(4) , *Arbitration and Conciliation Act, 1996*.

6 *Food Corp. of India v. Great Eastern Shipping Co. Ltd* ., AIR 1988 SC 1198 : 1988 (1) Arb LR 392 : (1988) 3 SCC 291 [*LNIND 1988 SC 192*].

7 *Raman Lamba v. D.M. Harish,* : 1991 (2) Arb LR 196; *Union of India v. Aradhana Trading Co., AIR* 2002 SC 1626 : (2002) 4 SCC 447 [*LNIND 2002 SC 248*].

8 *Union of India v. Bakhtawar Singh Bal Kishan* , 1985 Arb LR 67 (Del)(DB); *Union of India v. Shiboo Mal and Sons* , AIR 1989 P&H 205 : 1989 (1) Arb LR 372.

9 *Syko Bag Industries v. ICDS ltd.,* 2007 (4) RAJ 42 : 2007 (4) Arb LR 452 (Kant)(DB).

10 *Gupta Sanitary Stores v. Union of India,* : 1987 (1) Arb LR 296 (FB).

11 *Vissamseth Chandra Narsimhan v. Ramdayal Rameshwarlal,*.

12 *K.C. Mehra v. Union of India,*.

13 *T.S. Narayanaswamy v. Shyam Sewa Co-op. Group Housing Society* , 1998 (3) RAJ 368 (Del).

14 *BHEL v. Globe Hi-Fabs Ltd.,* 2004 (3) RAJ 245 (Del); *Union of India v. Bakshi Steel Ltd.,* 2005 (2) RAJ 508 (Bom)(DB); *Union of India v. Pam Developments Pvt. Ltd.,* 2005 (3) Arb LR 548 (Cal)(DB); *Amar Industries v. Union of India,* 2006 (2) RAJ 102 (Del); *Goyal Buitumins India v. Jaipur Development Authority,* AIR 2007 NOC 1001 (Raj); *Union of India v. Pawan Das Pvt. Ltd.,* AIR 2007 NOC 1183 (Cal)(DB).

15 *G.S. Kalra v. New Delhi Municipal Committee,* : (1999) 80 DLT 551 [*LNIND 1999 DEL 455*] ; *Secretary, Irrigation Deptt., Govt. of Orissa v. G.C. Roy,* (1992) 1 SCC 508 [*LNIND 1991 SC 689*] : AIR 1992 SC 732 : 1992 (1) Arb LR 145, (upholding *Secretary , Govt. of Orissa v. Raghunath Mohapatra,* AIR 1985 Ori 182 [*LNIND 1984 ORI 83*]: (1985) 59 Cut LT 133) ; *Executive Engineer, Rural Engineering Division v. Surendranath Kanungo,* : 48 Cut LT 491.

16 *State of Rajasthan v. Nav Bharat Const* . Co., (2002) 1 SCC 659 [*LNIND 2001 SC 3172*] : AIR 2002 SC 258 : (2001) 3 Arb LR 561; *Sarkar Enterprises v. Garden Reach Shipbuilders,*.

17 *DRD Agency v. Hari Ram,* AIR 2008 NOC 1448 (Raj).

18 Section 31(7) *(a), Arbitration and Conciliation Act, 1996*; *BHEL v. Globe Hi-Fabs Ltd.,* 2004 (3) RAJ 245 (Del); *Union of India v. Bakshi Steel Ltd.,* 2005 (2) RAJ 508 (Bom)(DB); *Union of India v. Pam Developments Pvt. Ltd.,* 2005 (3) Arb LR 548 (Cal)(DB); *Amar Industries v. Union of India,* 2006 (2) RAJ 102 (Del); *Goyal Buitumins India v. Jaipur Development Authority,* AIR 2007 NOC 1001 *(Raj); Union of India v. Pawan Das Pvt. Ltd.,* AIR 2007 NOC 1183 (Cal)(DB); *Sujant Singh v. Seth Mohinder Paul,* [The earlier view was that an arbitrator could not grant *pendentelite* interest in his award. See – *Gujarat Water Supply & Sewerage Board v. Unique Erectors (Guj) Pvt. Ltd., AIR* 1989 SC 973 : 1990 (1) Arb LR 299 : (1989) 1 SCC 532 [*LNIND 1989 SC 45*] ; *State of Orissa v. Dandasi Sahu, AIR* 1988 SC 1791 : 1988 (2) Arb LR 384 : (1988) 4 SCC 12 [*LNIND 1988 SC 337*] ; *Food Corporation of India v. Surendra Devendra and Mohendra*

Transport Co., AIR 1988 SC 734 : 1988 (1) Arb LR 367 : (1988) 1 JT 57; *Executive Engineer, Irrigation v. Abnaduta Jena, AIR* 1988 SC 1520 : 1988 (2) Arb LR 356 : (1987) 5 JT 8 : (1988) 1 SCC 418 [*LNIND 1987 SC 665*].]

19 *Executive Engineer, Dhenkanal Minor Irrigation Division v. N.C. Budharaj, AIR* 2001 SC 626 : (2001) 2 SCC 721 [*LNIND 2001 SC 103*] : (2001) 1 Arb LR 346; [*Executive Engineer (Irrigation), Balimela v. Abhaduta Jena,* (1988) 1 SCC 418 [*LNIND 1987 SC 665*] overruled. Also see *H.P. State Electricity Board v. R.J. Shah,* (1994) 4 SCC 214; *State of Orissa v. B.N. Agarwalla, AIR* 1997 SC 925 : (1997) 2 SCC 469 [*LNIND 1997 SC 1676*] ; *Sudhir Bros. v. Delhi Development Authority,* (1996) 1 SCC 32 [*LNIND 1995 SC 1127*] : 1996 (1) Arb LR 92; *Gujarat Water Supply & Sewerage Board v. Unique Erectors (Guj) Pvt. Ltd* ., AIR 1989 SC 973 : 1990 (1) Arb LR 299 : (1989) 1 SCC 532 [*LNIND 1989 SC 45*] ; *State of Karnataka v. R.N. Shetty & Co.,* : 1991 (1) Arb LR 334 (DB) *; S. Lal & Co. v. Delhi Development Authority,* : 1996 (63) DLT 858 : 1996 (2) Arb LR 470; *M.K. Shah Engineers and Contractors v. State of Madhya Pradesh, AIR* 1999 SC 950 : (1999) 2 SCC 594 [*LNIND 1999 SC 108*] : 1999 (1) Arb LR 646 : 1999 (1) RAJ 437; *M.L. Mahajan v. Delhi Development Authority* , 1999 (2) RAJ 376 (Del)] Pre-reference interest is also payable on establishing a trade usage empowering award of the same - *Manjit Johl v. Dewan Modern Brewaries Ltd* ., AIR 1994 J&K 56 : 1994 (2) Arb LR 166 (DB); *Himalaya Const. Co. v. Executive Engineer* , 1999 (1) Arb LR 515 : 1999 (3) RAJ 51 (J&K)(DB).

20 *T.N. State Const. Corp. Ltd. v. Gardner Landscape,* AIR 2005 Mad 236 [*LNIND 2005 MAD 34*]; *Modern Food Ind. v. Int'l Engineers,* 2008 (1) RAJ 464 (Del); *Union of India v. Noria Ram Gian Chand,* AIR 2007 NOC 1145 (Cal)(DB); *S.A. Builders v. Delhi Development Authority* , 1999 (2) RAJ 357 (Del); *Executive Engieer, Dhenkanal Minor Irrigation Division v. J.C. Budharai,* (Ori).

21 *Tekno Trading Co. v. Union of India* , 2000 (3) Arb LR 476 (J&K); *Sree Gopikishan Engg. (P) Ltd. v. United India Insurance Co. Ltd* ., 1995 (2) Arb LR 188 (Cal); *Jagan Nath Ashok Kumar v. Delhi Development Authority,*.

22 *Secretary, Irrigation Deptt., Govt. of Orissa v. G.C. Roy, AIR* 1992 SC 732 : 1992 (1) Arb LR 145 : (1992) 1 SCC 508 [*LNIND 1991 SC 689*] : 1992 AIR SCW 389 [Overruling *Executive Engineer, Irrigation v. Abnaduta Jena, AIR* 1988 SC 1520 : [1988] 1 SCR 253 [*LNIND 1987 SC 665*] ; *State of Orissa v. C.P. Ghosh, AIR* 1991 SC 426 : 1991 (1) Arb LR 226; *Food Corporation of India v. Surendra, Devendra and Mohendra Transport Co., AIR* 1988 SC 734 : 1988 (1) Arb LR 367 : (1988) 1 JT 57; *Gujarat Water Supply and Sewerage Board v. Unique Erectors (Guj) Pvt. Ltd., AIR* 1989 SC 973 : 1990 (1) Arb LR 299 : (1989) 1 SCC 532 [*LNIND 1989 SC 45*] ; *Jagdish Chander v. Hindustan Vegetable Oils Corp.,* : 1989 (2) Arb LR 189; *State of Andhra Pradesh v. Associated Engg. Enterprises Ltd* ., AIR 1990 AP 294 [*LNIND 1989 AP 127*]: 1990 (2) Arb LR 375 : (1989) 2 Andh LT 372 [*LNIND 1989 AP 127*] (DB)].

23 *Steel Authority of India Ltd. v. R.N. Datta,* ; *Hans Construction Co. v. Delhi Development Authority,* (Del); *State of U.P. v. Harish Chandra & Co* ., 1995 (2) Arb LR 178 (All)(DB); *Rajasthan State Electricity Board v. G.E.C. Alestham (India) Ltd.* , 1996 (Suppl) Arb LR 42 (Raj); *R.K. Aneja v. Delhi Development Authority* , 1999 (1) RAJ 344 (Del); *ONGC v. Anil Const. Co.,* (DB); *Kuldip Kumar Suri v. Delhi Development Authority,* : 1994 (2) Arb LR 235; *State of Rajasthan v. Puri Const. Co.,* (1994) 6 SCC 485 [*LNIND 1994 SC 1454*] : 1995 (1) Arb LR 1; *S.K. Samanta & Co. v. Central Coalfield Ltd.,* ; *Em and Em Asso. v. Delhi Development Authority,* (DB); *Jugal Kishore Prabhatilal Sharma v. Vijayendra Prabhatilal Sharma, AIR* 1993 SC 864 : 1993 (1) Arb LR 488 : (1993) 1 SCC 114 [*LNIND 1992 SC 762*].

24 *Jiwani Engineering Works (P) Ltd. v. Union of India,* ; *Thawardas Pherumall v. Union of India, AIR* 1955 SC 468 : [1955] 2 SCR 48 [*LNIND 1955 SC 29*] ; *Union of India v. Bungo Steel Furniture (P) Ltd., AIR* 1967 SC 1032 : [1967] 1 SCR 324 [*LNIND 1966 SC 183*] ; *State of Madhya Pradesh v. Saith & Skelton (P) Ltd., AIR* 1972 SC 1507 : (1972) 1 SCC 702 [*LNIND 1972 SC 726*] ; *N. Meenakshisundaram v. South India Corp. (P) Ltd.,* (Mad), *Manjit Johl v. Dewan Modern Brewaries Ltd.* , AIR 1994 J&K 56 : 1994 (2) Arb LR 166 (DB); *Gujarat Industrial Development Corporation v. S.R. Parmar and Co.* , 1995 (1) Arb LR 394 : 1995 AIHC 933 (DB) (Guj); *Sree Gopikishan Engg. (P) Ltd. v. United India Insurance Co. Ltd* ., 1995 (2) Arb LR 188 (Cal).

25 *D. Khosla & Co. v. Y.N. Rao* , 1994 (2) Arb LR 315 : 1995 AIHC 2571 (Del).

26 *T.P. George v. State of Kerala, AIR* 2001 SC 816.

27 *Santokh Singh Arora v. Union of India, AIR* 1992 SC 1809 : 1992 (1) Arb LR 168 : (1992) 1 SCC 492, followed in *State of Rajasthan v. Puri Construction Co.,* (1994) 6 SCC 485 [*LNIND 1994 SC 1454*] : 1995 (1) Arb LR 1*; Ansal Properties & Industries Ltd. v. Himachal Pradesh State Electricity Board* , 1999 (3) Arb LR 547 (HP); *Union of India v. Jai Forgings and Stamping Pvt. Ltd.,* 2004 (3) Arb LR 132 (MP)(DB).

28 *Marson's Electricals Ltd. v. Union of India,* 2005 (3) RAJ 685 (Del).

29 *Ram Bahadur Thakur and Co. v. R.B. Shreeram Durgaprasad (P) Ltd.,* : 69 Bom LR 250 (DB).

30 *Union of India v. Pam Developments Pvt. Ltd.,* AIR 2004 NOC 353 (Cal); *Rajesh Dhar v. Chief Engineer* , R&B Public Works, AIR 2000 J&K 100; *Continental Const. Ltd. v. Food Corp. of India,*.

31 *H.P. Construction Co. v. Union of India* , 1995 (2) Arb LR 327 : 1995 AIHC 3916 (J&K); *Union of India v. Suchita Steels,* 2006 (1) Arb LR 83 (Del)(DB); *Poonam Investment Co. Pvt.Ltd. v. Oil & Natural Gas Commission* , 1998 (1) Arb LR 28 (Bom)(DB).

32 *Nuiri Solvextract Pvt. Ltd. v. S.L.S. Ahmed,* 2005 (1) Arb LR 141 (AP) : (2004) 5 ALT 555 : (2005) I ACC 857.

33 *DRD Agency v. Hari Ram,* AIR 2008 NOC 1448 (Raj); *C. L. Gupta v. D.D.A.,* 2006 (1) Arb LR 576 (Del) 129 (2006) DLT 126; *State of Tripura v. Sabitri Salt Suppliers,* 2007 (3) Arb LR 519 : 2008 (1) RAJ 586 (Gau)(DB) [For a contra opinion see - *Mohinder Pal Singh v. Northern Railways,* 2007 (4) RAJ 666 : 2008 (1) Arb LR 363 (Del)].

34 *Vishnu Kumar Gupta v. Union of India* , 1999 (3) RAJ 1 (J&K).

35 *Andhra Civil Construction Co. v. State of Orissa,*.

36 *L.M. Das v. State of West Bengal,*.

37 *State of Punjab v. Chahal Engineering Co* ., AIR 1991 P&H 258 : 1991 (2) Arb LR 330; *Nuiri Solvextract Pvt. Ltd. v. S.L.S. Ahmed,* 2005 (1) Arb LR 141 (AP) [See *Susaka Pvt. Ltd. Vs Union of India,* AIR 2005 Bom 257 [*LNIND 2005 BOM 148*]: 2005 (2) RAJ 508 (Bom)(DB) wherein it has been opined that interest can be awarded on the amount of damages prior to the date of award].

38 *State of Rajasthan v. Larsen & Toubro Ltd* ., 1996 (Suppl) Arb LR 25 (Del)(DB).

39 AIR 1987 Ori 132 [*LNIND 1986 ORI 194*]: (1986) 2 OLR 197; *Mangla Builders v. Union of India* , 1998 (2) Arb LR 481 : 1999 (1) RAJ 9 (Del); *Vaish Bros. v. Union of India* , 1999 (1) RAJ 314 (Del); *State of Bihar v. Rameshwar Prasad* , 1998 (2) Arb LR 357 : 1999 (1) RAJ 169 (Pat).

40 AIR 1987 Ori 132 [*LNIND 1986 ORI 194*]: (1986) 2 OLR 197; *Mangla Builders v. Union of India* , 1998 (2) Arb LR 481 : 1999 (1) RAJ 9 (Del); *Vaish Bros. v. Union of India* , 1999 (1) RAJ 314 (Del); *State of Bihar v. Rameshwar Prasad* , 1998 (2) Arb LR 357 : 1999 (1) RAJ 169 (Pat).

41 *Shankar Const. Co. v. N.B.C.C Ltd.,* AIR 2003 Del 374 [*LNIND 2003 DEL 372*]: 2003 CLC 1304 : 2003 (3) Arb LR 373.

42 *Saraswat Trading Agency v. Union of India,* 2007 (4) RAJ 429 : 2007 (2) Arb LR 529 (Cal)(DB); *Union of India v. Pam Developments Pvt. Ltd.,* 2005 (4) RAJ 24 : 2004 (2) Arb LR 480 (Cal)(DB); *Board of Trustees for the Port of Calcutta v. Mahalakshmi Constructions* , 2002 (4) RAJ 1 (Cal)(DB).

43 *Board of Trustees for the Port of Calcutta v. Engineers-De-Space-Age,* (1996) 1 SCC 516 [*LNIND 1995 SC 1270*].

44 *Ram Nath International Construction Pvt. Ltd. v. State of U.P., AIR* 1998 SC 367 : 1997 (2) Arb LR 589; *Santhan v. R. Chaudravelu* , 1999 (3) RAJ 133 (Mad); *Hydel Const. Ltd. v. H.P. State Electricity Board,* : 1999 (3) Arb LR 28 (DB); *C. Srinivasa Rao v. P. Ramakunty,* : 2000 (1) RAJ 473.

45 *State of UP v. Harish Chandra,* (1999) 1 SCC 63 [*LNIND 1998 SC 1007*] : (1998) 3 RAJ 543 : (1998) 2 Arb LR 716; *D. Shivshankar v. Union of India,* 2007 (4) Arb LR 23 : 2008 (1) RAJ 281 (Mad).

46 *Union of India v. Pradeep Vinod Const. Co.,* 2006 (1) RAJ 258 (Del); *Hindustan Construction Company Limited v. Taiml Nadu Electricity Board,* 2005 (1) Arb LR 41 (Mad)(DB).

47 *Hyderabad Municipal Corp. v. M. Krishnaswamy Mudaliar,* AIR 1985 SC 607 : (1985) 2 SCC 9 : 1985 Cur Civ LJ (SC) 289 : 1985 UJ (SC) 602 : 1985 Srinagar LJ 25; *Food Corp. of India v. Niaz Ahmed,* AIR 2008 NOC 1158 (Raj).

48 *Naresh Kumar v. Union of India* , 1999 (1) Arb LR 469 : 1999 (3) RAJ 39 (Del).

49 *Jagdish Rai & Bros. v. Union of India, AIR* 1999 SC 1258 : (1999) 3 SCC 257 [*LNIND 1999 SC 278*] : 1999 (3) RAJ 111; *Superintending Engineer v. P. Radhakrishna Murthy* , 1996 (3) Andh LT 1137 (DB).

50 *State of Rajasthan v. Nav Bharat Const* . Co., AIR 2002 SC 258 : (2002) 1 SCC 659 [*LNIND 2001 SC 3172*] ; *Sarkar Enterprises v. Garden Reach Shipbuilders,*.

51 *Manalal Prabhudayal v. Oriental Insurance Co. Ltd.,* AIR 2006 SC 3026 : 2006 (3) RAJ 235 : 2006 (3) Arb LR 364 (SC).

52 *G.S. Kalra v. New Delhi Municipal Committee,* ; *Secretary, Irrigation Deptt., Govt. of Orissa v. G.C. Roy, AIR* 1992 SC 732 : 1992 (1) Arb LR 145 : (1992) 1 SCC 508 [*LNIND 1991 SC 689*], (upholding *Secretary* , *Govt. of Orissa v. Raghunath Mohapatra,* AIR 1985 Ori 182 [*LNIND 1984 ORI 83*]: (1985) 59 Cut LT 133) ; *Executive Engineer, Rural Engineering Division v. Surendranath Kanungo,* : 48 Cut LT 491.

53 *Indian Oil Corporation v. Llyod Steel Industries Ltd.,* 2008 (1) RAJ 170 (Del); *Muta International v. Nandnandan Silk Mills Pvt. Ltd.,* 2008 (1) RAJ 32 (Bom).

54 *Ram Bahadur Thakur v. Bry Air (India) Pvt. Ltd* ., 1998 (1) Arb LR 610 (Del); *BHEL v. Globe Hi-Fabs Ltd.,* 2004 (3) RAJ 245 : (2004-3) 138 Pun LR 22 (Del).

55 *Govt. of Karnataka v. A. Prabhakar Reddy* , 1999 (2) RAJ 258 (Ker)(DB); *Dakshina Kannada Sahakari Sakkare Karane Limited, Brahmavara v. N. Narayana Shetty,* 2004 (3) Arb LR 5 (Kant)(DB); *M.C. Katoch v. Union of India,* 2005 (1) RAJ 158 (Del).

56 *N.B.C.C. Ltd. v. Dcor India Pvt. Ltd.,* 2004 (2) Arb LR 1 (Del); *Krishna Bhagaya Jal Nigam Ltd. v. G. Harishchander Reddy,* (2007) 2 SCC 720 [*LNIND 2007 SC 34*] : AIR 2007 SC 817; *Food Corp. of India v. Niaz Ahmed,* (Raj); *Union of India v. Ajabul Biswas,* AIR 2008 NOC 591 (HP); *BSNL v. Narasinghal Aggrawal,* AIR 2006 Ori 148 : 2006 (4) Arb LR 93.

57 *Bhagwati Oxygen Ltd. v. Hindustan Copper Ltd.,* AIR 2005 SC 2071 : (2005) 6 SCC 462 [*LNIND 2005 SC 337*] : 2005 (1) RAJ 585; *Channa Bros & Co. v. Union of India* , 2003 (1) Arb LR 157 (SC); *Oil & Natural Gas Commission of India v. Western Co. of North America,* : 1990 (2) Arb LR 289 : (1989) 2 Bom CR 332 [*LNIND 1989 BOM 120*] (DB); *Govt. of Karnataka v. Shetty Constructions Co. Pvt. Ltd.,* AIR 2006 NOC 994 : 2006 (2) RAJ 34; *Bishwanath Agarwala v. State of Jharkhand,* AIR 2005 Jhar 69 [*LNIND 2005 JHAR 79*]; *ONGC Ltd. v. Western Co. of North America,* AIR 1990 Bom 276 [*LNIND 1989 BOM 120*]: 1990 (2) Arb LR 289 : (1989) 2 Bom CR 332 [*LNIND 1989 BOM 120*] (DB); *Luda Ram Ved Parkash v. Maharani of India,* : 1988 (2) Arb LR 393; *Satluj Jal Vidyut Nigam Ltd. v. Hydro Power Corp. Ltd.,* AIR 2008 NOC 591 (HP).

58 *Gautam Constructions and Fisheries Ltd. v. National Bank for Agriculture & Rural Development,* (2000) 6 SCC 519 [*LNIND 2000 SC 1020*] : (2000) 2 RAJ 434 : (2000) 2 Arb LR 672; *Steeman Ltd. v. State of H.P.,* (1997) 9 SCC 252 [*LNIND 1997 SC 2034*] : (1997) 1 Arb LR 419; *Channa Bros. & Co. v. Union of India,* 2003 (1) Arb LR 157 : (2009) 17 SCC 402 : (2002) 2 RAJ 396.

59 *N. Meenakshisundaram v. South India Corp.(P) Ltd.,* AIR 1992 NOC 20 (Mad).

60 *State of M.P. v. Gourishankar Rawat & Co* ., 1995 (2) Arb LR 195 (MP)(DB); *Superintending Engineer v. Kahan Singh* , 1994 (2) Arb LR 148 (AP)(DB); *Agarwal Steels v. Grasim Industries Ltd.,* AIR 2005 MP 125 : 2005 (3) RAJ 34 (DB); *Union of India v. Arctic (India),* 2005 (1) Arb LR 314 (Bom).

61 *Anurodh Const. v. DDA,* 2005 (3) RAJ 252 (Del)(DB); *EM & EM Associates v. DDA,* 2002 (2) Arb LR 222 : 2002 (4) RAJ 692 (Del)(DB); *Sat Pal v. Delhi Development Authority* , 1999 (1) RAJ 577 (Del); *Bina Rani Dey v. State of Tripura,* : 1999 (1) Arb LR 142 : 1999 (1) RAJ 405 (DB); *K.Venkateswara Rao v. T.Seshachalapathi* , 1998 (1) Arb LR 540 (DB) (AP); *V.C.Brahmanna v. State of A.P* ., 1996 (5) ALT 951 (DB); *Bihar Sponge Iron Ltd. v. RITES,* AIR 2006 NOC 29 (Del)(DB); *Superintending Engineer, TNU DP Circle v. A.V. Rangaraju,* : 1994 (2) Arb LR 173; *Anil Kumar Banerjee v. Indian Oil Corp.,* 2005 (3) Arb LR 155 (Cal); *Charkop Priya Co-op. Housing Society Ltd. v. Trade Well Constructions* , 1999 (3) RAJ 455 (Bom); *State of Goa v. Manohar D. Harmalkar,* AIR 2007 NOC 1663 : 2007 (3) AIR Bom R 623 (Bom).

62 *Numaligarh Refinery Ltd. v. Daelim Industrial Co. Ltd.,* (2007) 8 SCC 466 [*LNIND 2007 SC 1040*] : 2007 (4) RAJ 257 (SC) : (2007) 3 Arb LR 378.

63 *Ansal Properties and Industries Ltd. v. Himachal Pradesh State Electricity Board* , 1999 (3) RAJ 547 (HP); *Alim & Co. v. State of Rajasthan* , 1998 (Suppl.) Arb LR 67 (Raj); *Superintending Engineer, N.S.C. Circle v. B. Subba Reddy* , 1999 (1) Arb LR 472 (AP).

64 *State of J&K v. Devi Dutt Pandit, AIR* 1999 SC 3196 : (1999) 7 SCC 339 [*LNIND 1999 SC 756*] : 1999 (3) RAJ 250.

65 *Ibid; Modern Food Ind. v. Int'l Engineers,* 2008 (1) RAJ 464 (Del) .

66 *Union of India v. Arctic (India),* 2005 (1) Arb LR 314 (Bom); *Shipping Corp. of India v. Oyster Marine Inc.,* 2004 (4) RAJ 184 (Bom).

67 *Godrej Properties & Investments Ltd. v. Tripura Const.,* 2003 (2) Arb LR195 (Bom); *Shankar Const. Co. v. N.B.C.C Ltd.,* AIR 2003 Del 374 [*LNIND 2003 DEL 372*]: 2003 CLC 1304 : 2003 (3) Arb LR 373; *Kataria Builders v. State of H.P.,* 2004 (3) RAJ 489 (HP).

68 *M. Parmasivam v. Food Corporation of India,* : 1989 (1) Arb LR 166 : (1988) 2 Andh LT 712 [*LNIND 1988 AP 73*] ; *Swaran Singh v. University of Delhi,* : 1994 (1) Arb LR 388.

69 *Simplex Conc. Piles (India) Pvt. Ltd. v. Union of India,* 2007 (4) RAJ 508 : 2007 (3) Arb LR 394 (Del).

70 *Lala Gobind Ram Kapoor v. Prem Prakash Kapoor* , AIR 1984 J&K 48 : 1983 Arb LR 159 : 1984 Kash LJ 217 (DB); *State of Punjab v. Ajit Singh* , AIR 1979 P&H 179 : (1979) 81 Pun LR 448 : ILR (1979) 2 Punj 77 (FB); *Union of India v. Ramdas Oil Mills,* (DB); *Gujarat Water Supply & Sewerage Board v. Unique Erectors (Guj) Pvt. Ltd.,* : 1989 (1) Arb LR 126 : (1988) 29 Guj LR 1192 (DB); *Delhi Development Authority v. Wee Aar Constructive Builders,* (DB) [For a contra view see – *S.A. Builders v. Delhi Development Authority* , 1998 (2) Arb LR 472 (Del)].

71 *Angel Infin Pvt. Ltd. v. Echjay Industries Ltd.,* AIR 2008 NOC 586 : 2008 (1) RAJ 109 : 2007 (3) Arb LR 110 (Bom).

72 *Saraswati Const. Co. v. DDA,* 2004 (2) RAJ 686 (Del) affirmed in *Delhi Development Authority v. Saraswati Construction Co.,* 2004 (3) Arb LR 276 (Del)(DB); *Union of India v. Roshni Devi,* 2005 (1) Arb LR 363 (J&K) [For a contrary view see – *Tarapore & Co. v. Union of India* , 2000 (1) Arb LR 126 (Del); *Anant Raj Agencies P. Ltd. v. Delhi Development Authority* , 1994 (1) Arb LR 89 (Del); *Executive Engineer, Rural Construction Division v. Biswanath Agarwalla,*].

73 *Renusagar Power Co. Ltd. v. General Electric Co* ., AIR 1994 SC 860 : 1994 (2) Arb LR 405 : (1994) Supp (1) SCC 644 ; *A.M.K.C.T. Muthukaruppan Chettyar v. Annamalai Chettyar, AIR* 1936 Rang 141 (DB).

74 *Oil & Natural Gas Commission v. Mc Clelland Engineers SA, AIR* 1999 SC 1614 : (1999) 3 SCC 327 : 1999 (2) RAJ 149; *Union of India v. Harbans Singh Tuli & Sons* , AIR 2000 P&H 313.

75 *Gulzarilal Kanoria and Co. v. Busi and Stephenson Ltd.,*.

76 *International Airport Authority of India v. Mohinder Singh,* : 1996 (1) Arb LR 664.

77 *Pushraj Puranmal v. Clive Mills Co. Ltd* ., AIR 1960 Cal 180 [*LNIND 1959 CAL 181*].

78 *R.S. Builders v. Delhi Development Authority,* ; *Smeaton Hanscomb & Co. Ltd. v. Sassoon I Shetty Son & Co.,* (No. 2) [1953]1 W.L.R. 1481; *Eastern and North East Frontier Railway Co-op. Bank Ltd. v. B. Guha and Co* ., AIR 1986 Cal 146 [*LNIND 1985 CAL 52*]: 1985 Arb LR 253 : (1985) 89 CWN 804; *State of Punjab v. Surinder Nath Goel,* (DB); *National Fire and General Insurance Co. v. Union of India,*.

79 *Upper Jamuna Valley Electricity Supply Co. Ltd. v. Municipal Corp. of Delhi* , (1971) 73 Pun LR (D) 95 ; *Madhya Pradesh Electricity Board v. Central India Electric Supply Undertaking,* : 1972 MPLJ 192 (DB).

80 *Kishan Chand v. Union of India* , 1999 (1) RAJ 510 (Del) *; R.K. Aneja v. Delhi Development Authority* , 1998 (2) Arb LR 341 : 1999 (1) RAJ 344 (Del); *Upper Jamuna Valley Electric Supply Co.Ltd. v. Municipal Corporation of Delhi* , 1971 (73) Pun LR (D) 95; *M.P.State Electricity Board v. C.I. Electric Supply Co* ., AIR 1972 MP 47 : 1972 MPLJ 199; *Koch Navigation Inc. v. Hindustan Petroleum Corp. Ltd.,* AIR 1989 SC 2198 : (1989) 4 SCC 259 [*LNIND 1989 SC 834*].

81 *Steel Authority of India v. Jagadananda Paul,* (Cal).

82 *Lewis v. Haverfordwest Rural District Council* , *[1953] 1 WLR 1486* : 97 SJ 877 : *[1953] 2 All ER 1599* : 52 LGR 44.

83 *Kapila Textiles Mills Ltd. v. Madhava and Co.,* ; *State of U.P. v. Hindustan Construction Co. Ltd* ., 1996 AIHC 1431 (All)(DB).

84 Section 31(8) *, Arbitration and Conciliation Act, 1996*.

85 *Mohammed Haneef v. Emperor,* AIR 1934 Nag 198 .

86 *Takhitram Tulsidas v. Kishinchand Chhangomal, AIR* 1940 Sind 190.

87 *State of Orissa v. S.B. Joshi,* : (1983) 55 Cut LT 184.

88 *B.L. Gupta Construction Ltd. v. Bharat Cooperative Group Housing Society,* AIR 2008 SC 1517 : (2008) 11 SCC 209 [*LNIND 2008 SC 461*] : (2008) 1 Arb LR 463 : (2008) 2 RAJ 97.

89 *Salem Advocates Bar Association v. Union of India,* (2005) 6 SCC 344 [*LNIND 2005 SC 573*] : AIR 2005 SC 3353; *Oriental Insurance Co. Ltd. v. Amira Foods (India) Ltd.,* 2010 (4) RAJ 499 (Del); *Austin Nichols and Co. v. Arvind Behl,* 2005 (4) RAJ 329 (Del).

90 *Steel Authority of India Ltd. v. Shyam Sunder Choudhury,* 2005 (3) RAJ 572 (Cal); *Bhandari Builders Pvt. Ltd. v. cINTERNATIONAL Airport Authority of India,* (Del).

91 *State of J&K v. Devi Dutt Pandit, AIR* 1999 SC 3196 : (1999) 7 SCC 339 [*LNIND 1999 SC 756*] : 1999 (3) RAJ 250 (SC).

92 *Skanska Cementation India Ltd. v. Bajaranglal Agarwal,* 2004 (2) Arb LR 67 (Bom) [See *Vulso v. Kulukutty,* : 1958 Ker LJ 965 (DB) wherein it was held that there is a distinction between costs of the cause, costs of reference and costs of award. In case costs of a cause are to be awarded, then all the costs incurred in the cause upto the time of the submission, the costs of the order of reference and the costs of the proceedings in the cause, if any, after the award can be paid].

93 *Indian Oil Corp. Ltd. vs. Artson Engg. Ltd.,* 2007 (2) RAJ 187 (Bom) : 2006 (6) Bom CR 465 [*LNIND 2006 BOM 1303*] [For a contrary view see – *Delhi Development Authority v. Wee Aar Constructive Builders,* AIR 2005 Del 140 [*LNIND 2004 DEL 850*] (DB); *G.D. Tewari & Co. v. D.D.A.,* 2005 (2) Arb LR 422 (Del)].

94 *Ram Charan v. Jasoda,* (DB); *State of Bihar v. Prasad Constructions,* : 1978 BLJR 433 (DB); *Thadomal v. Menghraj, AIR* 1930 Sind 190 (DB).

95 *Arunachala Iyah v. Louis Dreyfuss & Co* ., AIR 1928 Mad 370 [*LNIND 1927 MAD 399*].

1 *State of Arunachal Pradesh v. Damani Construction,* (2007) 10 SCC 742 [*LNIND 2007 SC 264*] : 2007 (2) RAJ 208 : (2007) 1 Arb LR 399.

2 *Bangaru Reddy v. The State,* AIR 1959 AP 95 [*LNIND 1957 AP 31*]: 1959 Cr LJ 166.

3 *Instrumentation Ltd. v. E. Kuttappan* , (1992) 1 Ker LJ 24 : 1992 (1) Arb LR 284.

4 *Bangaru Reddy v. The State,* AIR 1959 AP 95 [*LNIND 1957 AP 31*]: 1959 Cr LJ 166.

5 *Rikhabdass v. Ballabhdas, AIR* 1962 SC 551 : [1962] Supp (1) SCR 475.

6 *Mahavir Prasad Mansinghka v. Mahendrakumar Mansinghka,* 2005 (3) RAJ 143 (Bom).

7 *Global Co. v. National Fertilizers Ltd* ., 1999 AIHC 3644 : 1999 (3) RAJ 573 (Del).

8 *Union of India v. Nav Bharat Nirman Co.,* 2003 (3) RAJ 549 : 2003 (3) Arb LR 309 [*LNIND 2003 DEL 855*] (Del).

9 Section 33(5) *, Arbitration and Conciliation Act, 1996*.

10 Section 33(6) *, Arbitration and Conciliation Act, 1996*.

11 Section 33(7) , *Arbitration and Conciliation Act, 1996*.

12 *Global Co. v. National Fertilizers Ltd* ., 1999 AIHC 3644 : 1999 (3) RAJ 573 (Del).

13 *Manmohan Exims Pvt. Ltd. v. Sarju International,* 2005 (Supp) Arb LR 206 (Bom) : 2005 (6) Bom CR 249 [*LNIND 2005 BOM 895*].

14 Section 35*, Arbitration and Conciliation Act, 1996.*

15 *Municipal Committee v. Harda Electric Supply Co. (Pvt.) Ltd.,* : 1964 MPLJ 579 (DB); *M.S. Ramaiah v. State of Mysore,* : (1972) 2 Mys LJ 119; *Lahoriram Prashar v. State of West Bengal,* (DB); *Shripad Baji Garware v. Dattatraya Vithal Garware,*.

16 *Kolavakolanu Seetanna v. Poddri Narayanamurti Somayajulu,* (DB).

17 *Bhajahari Saha Banikya v. Behary Lal Bhasak* , (1909) ILR 33 Cal 881.

18 *Satish Kumar v. Surinder Kumar, AIR* 1970 SC 833 : [1969] 2 SCR 244 [*LNIND 1968 SC 300*].

19 *Gouri Shanker Prasad Sinha v. State of Bihar,* : 1973 Pat LJR 65 (DB).

20 *M.A and Sons v. Madras Oil and Seeds Exchange Ltd.,*.

21 *Ibid; Centrotrade Minerals & Metal Inc. v. Hindustan Copper Ltd.,* (2006) 11 SCC 245 [*LNIND 2006 SC 375*] : 2006 (2) RAJ 531 : (2006) 2 Arb LR 547.

22 *Jiwnani Engineering Works (P) Ltd. v. Union of India,*.

23 *P.C. Ray and Co. (India) Pvt. Ltd. v. Union of India,* (DB); *Rochanbai Udhomal v. Motumal Shewaram, AIR* 1937 Sind 110 (DB); *Sibnath Saha v. Mohesh Chandra Saha,* ; *M.S. Ramaiah v. State of Mysore,* : (1972) 2 Mys LJ 119; *Satish Kumar v. Surinder Kumar, AIR* 1970 SC 833 : [1969] 2 SCR. 244.

24 *Ramaswami v. Venkiah,* (Mad).

25 *Fidelitas Shipping Co. Ltd. v. V/O Exportchleb* , [1965]1 Llyod's Rep. 223, *C. A'Siporex Trade S.A. v. Caodel Commodities Ltd* ., [1986]2 Llyods Rep. 428.

26 *Henderson v. Henderson* , (1843) 3 Hare 100; *Yat Tung Investment Co. v. Dao Heng Bank Ltd.* , *[1975] A.C. 581*; *Fidelitas Shipping Co. Ltd.v. V/O Exportchleb,* [1965] 1 Llyod's Rep. 223 *; Mohammed Fazal v. Abdul Gafur* , Nov. 18, 1992, C.A.

27 Section 36*, Arbitration and Conciliation Act, 1996*.

28 *Paramjeet Singh Patheja v. ICDS Ltd.,* (2006) 13 SCC 322 [*LNIND 2006 SC 897*] : AIR 2007 SC 168 : JT 2006 (10) SC 41 [*LNIND 2006 SC 897*]: 2007 (1) RAJ 29 (SC); *Maharashtra Industries Development Corporation v. Governdhan Constructions Co.,* 2007 (3) RAJ 520 (Bom)(DB).

29 *Bulk Trading S.A. v. Dalmia Cement (Bharat) Ltd.,* 2006 (1) RAJ 54 (Del); *Adiya Fuels Ltd. v. BILT Chemicals Ltd.,* AIR 2007 Guj 140 [*LNIND 2007 GUJ 32*]: 2007 (4) RAJ 91 : 2007 (4) Arb LR 110 (Guj).

30 *Damodar Valley Corp. v. C.E.S.C. Ltd.,* AIR 2005 Cal 67 [*LNIND 2004 CAL 99*]: (2005) 1 Arb LR 520.

31 *National Aluminium Co. Ltd. v. Pressteel & Fabrications Pvt. Ltd.,* (2004) 1 SCC 540 [*LNIND 2003 SC 1115*] : 2004 (1) CTC 141 [*LNIND 2003 SC 1115*] : 2004 (1) Arb LR 67; *Superintending Engineer v. D.G. Deivasigamani,* 2005 (1) Arb LR 149 (Mad) (DB).

32 *Vindhya Telelinks Ltd. v. B.S.N.L.,* 2003 (3) Arb LR 284 (Del); *Ghai Rice Mills v. Punjab State Civil Supplies Corporation,* AIR 2009 NOC 1436 (P&H).

33 *Narayan Prasad Lohia v. Nikunj Kumar Lohia,* AIR 2009 SC 1531 : (2009) 17 SCC 359 [*LNIND 2008 SC 2296*].

34 *N.B.C.C Ltd. v. Llyod Insulations (India) Ltd.,* AIR 2004 Del 235 [*LNIND 2004 DEL 111*]: 2004 (1) Arb LR 306 : 2004 (109) DLT 906 [*LNIND 2004 DEL 111*] : 2004 (73) DRJ 142 [*LNIND 2004 DEL 111*] (DB).

35 *Gajendra Behera v. Secretary, Balasore Bhadrak Central Cooperative Bank Ltd.,* 2007 (4) RAJ 35 : 2007 (2) Arb LR 463 (Ori)(DB).

36 *Ramaswamy v. Principal Subordinate Judge* , 1998 (Supp) Arb LR 234 (Ker).

37 *Mangairmal Tekchand v. Akbarali and Co* ., AIR 1929 Sind 28 ; *Gladstone Wyllie and Co. v. Joosub Peer Mohammad and Co.,* ; *Sital Prasad v. Clements Robson and Co.,* : 43 All 394; *Louis Dreyfus and Co. v. Purusottum Das Narain Das* , 47 Cal 29 : 56 I.C. 325; *Belvedere Jute Mills Ltd. v. Hardivwarimull and Co* ., AIR 1927 Cal 853 (DB).

38 *Adamji Jaffarji and Co. v. Shamsudin Imamdin, AIR* 1925 Sind 293 ; *Pokardas Jashiomal v. Forbes, Forbes, Campbell & Co.* , 6 SLR 127 : 19 I.C. 363 (DB).

39 *Anath Nath Bose v. Manmotha Nath Bose,*.

40 *N.R. Constructions Pvt. Ltd. v. Sri Ram Badan Singh,* (2007) 11 SCC 19 [*LNIND 2007 SC 1181*] : (2007) 59 AIC 72 : 2008 (1) RAJ 1 (SC).

41 *Official Receiver v. Tirathdas Mewaram, AIR* 1927 Sind 66.

42 *M. Ansuya Devi v. M. Manik Reddy,* (2003) 8 SCC 565 [*LNIND 2003 SC 899*] : (2003) 3 RAJ 500; *D.M. Jawahar Merican v. Engineer India Ltd.,* AIR 2009 Del 41 [*LNIND 2008 DEL 2360*].

43 *Krishan Lal Kacker v. Ram Chander,* 2006 (4) Arb LR 419 (P&H) : 2005 (139) Pun LR 269.

44 *Parkash Chand Khurana v. Harnam Singh, AIR* 1973 SC 2065 : (1973) 2 SCC 484 [*LNIND 1973 SC 101*].

45 *Commissioner, Kohlapur Municipal Corporation v. Fairdeal Constructions,* 2008 (1) Arb LR 312 (Bom) : 2008 (1) Bom CR 403 [*LNIND 2007 BOM 1459*].

46 *I.C.D.S. Ltd. v. Mangla Builders Pvt. Ltd,* ; *C.K. Murlimohan v. Asok Finance Corporation,* AIR 2008 NOC 2715 (Ker).

47 *Computer Science Corp. India Pvt. Ltd. v. Harishchandra Lodwal,* AIR 2006 MP 34 [*LNIND 2005 MP 405*]: 2005 (Suppl.) Arb LR 121 : 2006 (1) RAJ 698.

48 *Har Prasad v. Raghubar Dayal,* (DB); *Ahmad Yar v. Co-op. Credit Society,*.

49 *Bhawarlal Bhandari v. Universal Heavy Mechanical Lifting Enterprises, AIR* 1999 SC 246 : 1999 (1) Arb LR 355 : (1999) 1 SCC 558; *Union of India v. Jagat Ram Trehan and Sons,* : 1996 (1) Arb LR 566 (DB); *Velayuda Mudali v. Co-op. Rural Credit Society,*.

50 *Saraswat Trading Agency v. Union of India,* 2004 (3) Arb LR 492 (Cal).

51 *Subhash Projects and Marketing Ltd. v. Assam Water Supply and Sewerage Board,* AIR 2003 Gau 158 : 2004 (1) RAJ 6 : 2003 (4) Civ LJ 362 : 2003 (2) Gau LT 259 : 2003 (2) Gau LR 449 : 2003 (48) SEBI & CL Gau 473 : 2004 (1) RAJ 6 (DB).

52 *Malikarjun v. Gulbarga University,* AIR 2004 SC 716 : (2004) 1 SCC 372; *Morgan Securities & Credits Pvt. Ltd. v. Morepen Lab. Ltd.,* AIR 2007 NOC 3 : 132 (2006) DLT 588 (Del).

53 *Gudapati Madhav Reddy v. Srimpuram Raja Ram,*.

54 *Vasudev Dhanjibhai Modi v. Rajabhai Abdul Rehman,* (1970) 1 SCC 670 [*LNIND 1970 SC 148*] : [1971] 1 SCR 66 [*LNIND 1970 SC 148*] ; *International Security & Intelligence Agency Ltd. v. Municipal Corporation of Delhi* , 2002 (2) Arb LR 7 (Del).

55 *Global Co. v. National Fertilizers Ltd.,* 1999 (3) RAJ 573 (Del).

56 *Naresh Kumar v. Nanak Chand,* AIR 2008 NOC 328 (P&H) : 2007 (4) Pun LR 509.

57 *Bhola Nath v. Monika,* (2007) 14 SCC 302 [*LNIND 2007 SC 1122*] : (2007) 4 CHN 44 (SC) : 2007 (4) RAJ 359 (SC).

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10 Termination of Mandate of Arbitral Tribunal

PC Markanda: Arbitration Step by Step

P C Markanda

10 Termination of Mandate of Arbitral Tribunal

1. TERMINATION OF MANDATE OF ARBITRAL TRIBUNAL

The mandate of an arbitrator shall terminate if (a) he becomes de jure or de facto unable to perform his functions or for other reasons fails to act without undue delay; and (b) he withdraws from his office or the parties agree to the termination of his mandate. If a controversy remains concerning any of the grounds referred to in clause (a) of sub-section (1) of section 14, a party may, unless otherwise agreed by the parties, apply to the court to decide on the termination of the mandate. If, under section 14 or sub-section (3) of section 13, an arbitrator withdraws from his office or a party agrees to the termination of the mandate of an arbitrator, it shall not imply acceptance of the validity of any ground referred to in section 14 or sub-section (3) of section 12. In addition to the circumstances referred to in section 13 or section 14, 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.

Under the 1996 Act, there are three sections which basically confer power on the court to intervene in arbitrations. 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 including an interim award. Section 37(2) provides for appeal against an order of the arbitral tribunal under section 16(2) and (3) or granting or refusing to grant interim measure under section 17. A court can also intervene on an application under section 14(2). Thus, the court can intervene only in cases covered by sections 14, 34 and 37. [1]

The following are the circumstances in which the mandate of the arbitrator would stand terminated:

(i) Automatic termination;

(ii) By the arbitrator himself;

(iii) By the parties;

(iv) By arbitral tribunal;

(v) By court's order;

(vi) On death of arbitrator; and

(vii) Arbitrator's physical incapacity to proceed with the mandate. [2]

In certain cases, there may be no scope at all for the parties to get into a controversy with regard to the automatic termination of the mandate of the arbitrator, such as, where he is declared to have became insolvent or insane, or where he may have suffered from such debilitating diseases or ailment which robs him of his mental faculties. However, where a controversy arises, the same is to be resolved by the court by virtue of section 14(2). [3]The court while intervening under this section should bear in mind the avowed object of the Act, i.e. minimisation of the court's role in the arbitral process. The purpose of expeditious disposal would be the first casualty in case judicial intervention at the preliminary stage is allowed by the court in every case on the ground of *de jure* termination of the mandate of the arbitrator. [4]

An application for removing an arbitrator may be made to the court in whose jurisdiction the contract was executed or subject matter of the work was performed or within whose jurisdiction the office of the arbitrator was situated. [5] An application under section 11(6) can be moved before the Chief Justice for appointment of an arbitrator but a petition that the

arbitrator has failed to act can be filed only in the court. Thus, a joint application under sections 11(6) and 14 for appointment of third arbitrator is not maintainable because the forum for both sections is different. [6]

2. REMEDY UNDER SERCTIONS 12 AND 13

There is no inconsistency between the remedies available to a party under sections 12 and 13 on the one hand and section 14 on the other and the invocation of a remedy by a party does not restrict that party from invoking the other remedy as well. [7] Even if a party has failed to raise a challenge to the independence and impartiality of an arbitrator under section 13(2), he would not be debarred from invoking section 14 contending that the arbitrator had become *de jure* unable to perform his functions. [8] Of the two remedies available i.e. one under section 13 and the other under section 14, the one before the challenged arbitrator under section 13 would invariably be more expeditious. [9]

3. *'DE JURE'* AND *'DE FACTO'* UNABLE TO ACT

The *de jure* impossibility referred to in section 14(1) (a) is an impossibility which occurs due to factors personal to the arbitrator and *de facto* occurs due to the factors beyond the control of the arbitrator. [10] The expression *'de jure'* is amply wide. It would cover a situation where the terms of the agreement are not followed in entirety. Not making the award within the prescribed period would render the arbitrator *'de jure'* unable to continue with the proceedings and has the effect of termination of the mandate of the arbitrator. [11] If the tribunal is constituted contrary to section 10, the arbitrator *de jure* will not be able to perform those functions. In that event the parties can move the court for decision to decide whether the mandate has terminated or not. [12]

An arbitrator's mandate can be terminated if:

(1) In case it is alleged that the arbitrator was biased then the allegation is personal to the arbitrator and emerges because of his own voluntary or involuntary participation in the facts constituting it. It contemplates a situation in which the arbitrator enters a state that renders him incapable of adjudicating the dispute either generally or *qua* that dispute. [13]

(2) If the *persona designata* cancels the appointment of a validly appointedcarbitrator and himself enters upon reference. [14]

(3) Where one of the arbitrators declared that the mandate of all the other arbitrators stood terminated and thereafter wrongly assumed jurisdiction as sole arbitrator. [15]

(4) If an arbitrator suppresses material facts. [16]

(5) The word 'died' is normally associated with a living person. Where the post with reference to which an arbitrator was to be appointed ceased to exist, it must be deemed that either the arbitrator had become incapable of acting or had died. [17]

(6) The court can appoint an arbitrator if the already appointed arbitrator is incapable of acting or dies. [18]

(7) If the arbitrator lacks the requisite qualifications. [19]

(8) If an agreement provides that an arbitrator can act so long as he is in service, then on his retirement his mandate comes to an end. The court has no power to extend the time for making an award in such a case. [20]

(9) If the *persona designata* appoints an arbitrator from a far off place just to harass the petitioner and frustrate the adjudication. [21]

The power to remove an appointed arbitrator is discretionary and under proper circumstances, the court may refuse to remove the arbitrator. The discretion has to be used judiciously and sparingly. [22] Instances where the court refused to terminate the mandate of the arbitrator are as follows:

(a) Where the allegation is that though the award was signed by three arbitrators but arbitration proceedings were generally conducted by two of them and sometimes even by one, section 14(1) (a) would not be attracted. [23]

(b) Lack of authority to start arbitration proceedings cannot be questioned under section 14. [24]

(c) If the parties participate in the proceedings before a successor arbitrator, they cannot seek his removal from the court. [25]

(d) Where the petitioner does not produce material in support of the misconduct of the arbitrator or of his partiality, the court will not remove the arbitrator. [26]

(e) When a specific challenge is provided and the forum which has to decide the challenges is also provided, it would not be open to the court to decide and consider that the mandate of the arbitrator has been terminated under section 14. [27]

(f) If an arbitrator had earlier appeared for one of the parties to the dispute in a different arbitration case. [28]

(g) Where the petitioner did not challenge the authority of the arbitrator at the earliest stage and allowed the reference to continue, a belated challenge cannot be entertained. [29]

4. ‘FAILS TO ACT WITHOUT UNDUE DELAY’

In case of undue delay on the part of the arbitrator in the conduct of arbitration proceedings, either of the parties may apply to the court to decide on the termination of the mandate. [30]Where the named arbitrator does not act for a number of months despite repeated reminders, his mandate shall be deemed to have been terminated. [31] An arbitrator who fixes hearings and then cancels them unilaterally, clearly demonstrated that he was not taking the arbitration matter seriously. [32] An arbitrator who allows long adjournments repeatedly and has no control over the proceedings has to be removed. [33] Where an arbitrator does not proceed with expedition despite an order of the High Court, his mandate deserves to be terminated. [34]

The main purpose and object of the Act is to have speedy disposal of the proceedings. Where the arbitrator holds as many as 135 hearings and even then the matter is not concluded, it is a fit case for his removal as arbitrator. [35]

If the parties stipulate that in case the arbitrator does not complete the arbitral proceedings on or before a particular date, his mandate shall stand terminated, in such circumstances the mandate automatically terminates on the date fixed. [36] The court has power to extend the period of time only if the arbitrator is appointed by it but where the arbitrator is appointed under a contract, the court has no power to extend the time for making the award. [37] However, if the parties continue to appear before the arbitrator beyond the time fixed, they cannot later contend that the arbitrator did not proceed with expedition. [38]

Where the expression used is ‘neglects or refuses’, the word ‘neglect’ is meant to cover all cases other than those of positive refusal, and is not confined to cases of negligence alone. [39] When a number of arbitrators were appointed, one after the another, by the *persona designata* , and the arbitration matter made no headway at all, despite a period of ten years having passed by, in such circumstances, the court can appoint an independent and impartial arbitrator. [40]

5. APPOINTMENT OF SUBSTITUTE ARBITRATOR ON TERMINATION OF MANDATE

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. [41] Where the arbitration clause does not contemplate any other means for securing appointment of a substitute arbitrator (when appointed arbitrator resigns) except for making the initial appointment of the sole arbitrator by the *persona designata* , it was held that a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced. [42]

After resignation of the earlier arbitrator, the remaining members of the arbitral tribunal cannot proceed without the substitute arbitrator being appointed and an award cannot be made. [43] When the mandate of 'A' arbitrator is terminated, his substitute is to be appointed by following the same procedure which was followed while appointing the arbitrator whose mandate was terminated, and the Chief Justice or his nominee under section 11(5) gets power to appoint an arbitrator on the failure of the parties to appoint an arbitrator. Under these provisions only an arbitrator is substituted, the jurisdiction of the arbitrator is not enhanced or reduced by the court. [44]

If the substitution of one arbitrator for another by consent of the parties was an integral part of the arbitration agreement, then the court cannot be vested with the power to do so. [45]

Where the *persona designata* created such conditions, which forced the arbitrator to resign and thereafter he immediately appointed a new arbitrator on whose conduct the petitioner raised several questions, it can be said that even though the *persona designata* had the authority to supply vacancy but the manner in which the earlier arbitrator was made to resign and a new arbitrator was appointed, had raised doubts in the mind of the court and hence the court appointed another arbitrator. [46]

If 'A' resigns as an arbitrator, a party is entitled to appoint a substitute arbitrator as its nominee, but it would have no right to terminate the appointment of 'B' as long as he is ready and willing to continue to perform the duties of an arbitrator. [47]

6. NOMINATION OF SUCCESSOR

The parties can agree in advance, in the arbitration agreement itself, as to how a vacancy is to be supplied and there is nothing wrong if an arbitration agreement provides that the named arbitrator may appoint another arbitrator in case he is unable or unwilling to act. [48] If an arbitration agreement names a person to act as an arbitrator and also empowers him to appoint another in his place, such a person retains the right to appoint an arbitrator on the resignation of the earlier arbitrator named by him. [49]

7. PROCEEDINGS CONDUCTED BY EARLIER ARBITRATOR

Unless otherwise agreed by the parties, where an arbitrator is replaced, any hearings previously held may be repeated at the discretion of the arbitral tribunal. [50] Unless otherwise agreed by the parties, an order or ruling of the arbitral tribunal made prior to the replacement of an arbitrator under section 14 shall not be invalid solely because there has been a change in the composition of the arbitral tribunal. [51] Question of mode of proof is a question of procedure and is capable of being waived and, therefore, evidence taken in a previous judicial proceeding can be made admissible in a subsequent

proceeding by the consent of parties. [52]

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1 *United India Insurance Co. Ltd. v. Kumar Texturisers,* : 1992 (2) RAJ 255.

2 *Shyam Telecom Ltd. v. Arm Ltd.,* 2004 (3) RAJ 459 : 2004 (3) Arb LR 146 (Del).

3 *Alcove Industries Ltd. v. Oriental Structural Engineers Ltd.,* 2008 (1) Arb LR 393 (Del).

4 *Pinki Dass Gupta v. Publics (India) Communications,* 2005 (Supp) Arb LR 251 (Del).

5 *Sarkar & Sarkar v. State of West Bengal,* : 1993 (1) Arb LR 169.

6 *Grid Corp. of Orissa Ltd. v. A.E.S. Clorp., AIR* 2002 SC 3435 : [2002] 8 SCC 736.

7 *Alcove Industries Ltd. v. Oriental Structural Engineers Ltd.,* 2008 (1) Arb LR 393 (Del).

8 *State of Arunachal Pradesh v. Subhash Projects & Marketing Ltd.,* 2007 (1) Arb LR 564 [*LNIND 2006 GAU 125*] (Gau) : 2006 (3) GLR 939 (DB).

9 *Alcove Industries Ltd. v. Oriental Structural Engineers Ltd.,* 2008 (1) Arb LR 393 (Del).

10 *Shyam Telecom Ltd. v. Arm Ltd.,* 2004 (3) RAJ 459 : 2004 (3) Arb LR 146 (Del).

11 *Shyam Telecom Ltd. v. Arm Ltd.,* 2004 (3) RAJ 459 : 2004 (3) Arb LR 146 (Del).

12 *Ashalata S. Lahoti v. Hiralal L. Lilladhar* , 1999 (2) RAJ 384 (Bom); *K. Narayana Raju v. Union of India,* 2006 (2) RAJ 305 (AP).

13 *Vikas Laxmanrao Kaware v. Ganesh Builders,* 2005 (Supp) Arb LR 364 (Bom); *Jyoti Sarup Mittal v. Water & Power Consultancy Services (India) Ltd.,* 2006 (4) Arb LR 284 (Del) : 131 [2006] DLT 503; *OPBK Construction P. Ltd. v. Punjab Small Industries & Export Corporation Ltd.,* 2008 (3) Arb LR 189 (P&H); *State of Arunachal Pradesh v. Subhash Projects & Marketing Ltd.,* 2007 (1) Arb LR 564 [*LNIND 2006 GAU 125*] (Gau); *State of U.P. v. Sardul Singh Kulwant Singh,* : 1985 Arb LR 189 (DB).

14 *Sushil Kumar Raut v. Hotel Marina,* 2005 (Supp) Arb LR 237 (Del) : 121 [2005] DLT 433 (DB).

15 *Jayesh M. Gandhi v. Yogendra N. Thakkar,* 2006 (1) Arb LR 524 : 2006 (1) RAJ 684 (Bom) : 2006 (1) Bom CR 636 [*LNIND 2005 BOM 1096*].

16 *Alcove Industries Ltd. v. Oriental Structural Engineers Ltd.,* 2008 (1) Arb LR 393 (Del).

17 *Union of India v. Om Parkash,* : 1987 (1) Arb LR 310.

18 *Himmatlal Chaturdas Choksi v. Keshavlal Chaturdas Choksi* , 1994 (1) Arb LR 59 (Guj); *S. Krishna Reddy v. Govt. of Andhra Pradesh,* : 1994 (2) Arb LR 154.

19 *Anuptech Equipments Pvt. Ltd. v. Ganpati Co-op. Housing Society Ltd* ., AIR 1999 Bom 219 [*LNIND 1999 BOM 86*].

20 *Union of India v. Girdhari Lal, AIR* 1999 Raj 106.

21 *Interstate Const. v. NPCC Ltd.,* 2004 (3) RAJ 672 : 2004 (3) Arb LR 421 (Del).

22 *Gopalji v. Morarji Jeram* , ILR [1919] 43 Bom 809 : AIR 1919 Bom 24 : 50 IC 411.

23 *Krishna Kumar Mundhra v. Narendra Kumar Anchalia,* 2004 (2) Arb LR 469 (Cal).

24 *Shyam Telecom Ltd. v. Arm Ltd.,* 2004 (3) RAJ 459 : 2004 (3) Arb LR 146 (Del).

25 *Punjab State v. Pritam Singh & Son* , AIR 1999 P&H 347 : [1999] 12 PLR 352.

26 *Jamna Auto Industries v. Union of India,* : 1983 Arb LR 364.

27 *Hasmukhlal H. Doshi v. Justice M.L. Pendse* , 2001 (1) Arb LR 187 (Bom).

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29 *Amstar Investment Pvt. Ltd. v. Shree Iswar Satyanarayanjee,* AIR 2007 NOC 1708 (Cal).

30 *Sai Priya Const. Co. v. K. Anantha Kumari Satya Raju,* 2006 (1) Arb LR 569 (AP) : 2006 (2) RAJ 127 : 2006 (2) ALT 70 (DB).

31 *Deepa Galvanising Engg. Industries Pvt. Ltd. v. Govt. of India* , 1998 (1) ICC 410 (AP); *Gopal v. State of Uttar Pradesh,* ; *K.G.S. Venkatanarayanayya v. K.G.S V.R. Lakshmidevamma* , [1947] 2 Mad LJ 520 Rel. on, and *Nandram Hanutram v. Raghunath & Sons,* : 93 Cal LJ 92, distinguished; *Manohar Singh Sahay & Co. v. Joginder Singh Kalra,* : 1985 Pat

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34 *Decon India Pvt. Ltd. v. Union of India,* 2005 (2) Arb LR 361 : 2005 (2) RAJ 584 (Cal); *Skabeo (P) Ltd. v. State of West Bengal,* : (1975) 1 Cal LJ 200.

35 *Jiwan Kumar Lohia v. Durga Dutt Lohia* , 1987 (2) Arb LR 100 (Cal).

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37 *Union of India v. Girdhari Lal, AIR* 1999 Raj 106.

38 *T.K. Aggarwal v. Tara Chand Jain,* AIR 2006 NOC 474 : 2005 (Suppl) Arb LR 93 : [2005] 119 DLT 470 (Del).

39 *Keshavsingh Dwarkadas v. Indian Engg. Co.,* AIR 1969 Bom 227 [*LNIND 1968 BOM 115*].

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41 Section 15(2) *, Arbitration and Concilition Act, 1996; Earthtech Enterprises Ltd. v. NAFED,* 2008 (2) Arb LR 267 (Del); *Kiffyatullah Haji Gulam Rasool v. Bilkish Ismail* , 2000 (1) Arb LR 10 (Bom).

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47 *Y. Jaya Venkata Rao v. Union of India* , 2002 (3) Arb LR 48 (AP).

48 *R.D. Gupta v. Union of India,*.

49 *Surendranath Paul v. Union of India,* (DB).

50 Section 15(3) *, Arbitration and Concilition Act, 1996* .

51 Section 15(4) *, Arbitration and Concilition Act, 1996* .

52 *Kalyan Peoples' Co-op. Bank Ltd. v. Dulhanbibi Aqual Aminsaheb Patil, AIR* 1966 SC 1072 : [1963] 2 SCR 348 [*LNIND 1962 SC 184*] : [1963] 2 SCJ 176.

11 Recourse Against Arbitral Award

PC Markanda: Arbitration Step by Step

P C Markanda

11 Recourse Against Arbitral Award

1. JURISDICTION OF COURT TO SET ASIDE AWARD

Section 34 of the Act deals with the setting aside of an arbitral award on the grounds mentioned therein. The section reads as under:

34. Application for setting aside arbitral award. *—*

(1) *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).*

(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*

(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.*

Explanation .*—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.*

(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 the said period of three months it may entertain the application within a further period of thirty days, but not thereafter.*

(4) *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.*

Section 34 states in clear terms that an award can be set aside 'only' on the grounds enumerated therein. The courts have enlarged the scope of challenge by stating that an award can be set aside if, in addition, to the grounds stated in section 34, an arbitrator violates the terms of (a) section 28; (b) sections 12 and 13; (c) section 16; or (d) if he does not act in terms of the contract. The intention of the Legislature, while enacting the *Arbitration and Conciliation Act, 1996*, was to minimise the supervisory role of the courts in arbitration matters. Keeping the said intention in mind, the courts ought to approach an arbitral awad with a view to support the same and not to set it aside.

Recourse to a court against an arbitral award may be made only by an application for setting aside such award in accordance with section 34(2) and section 34(3). [1]Section 34 is based on Article 34 of the UNCITRAL Model Law. [2]The intention of the legislature in repealing the 1940 Act and substituting it by the 1996 Act was primarily to attach finality to arbitration proceedings and interference by the courts was intended to be curtailed drastically. [3] When parties constitute an arbitrator as a final judge of any dispute between them, they bind themselves as a rule to accept the award as final and conclusive. [4]An award can be set aside only if any of the five grounds as contained in section 34(2) (a) or any of the two grounds as contained in section 34(2) (b) of the Act exist. [5] If a party fails to establish his case within the four corners of section 34, the award cannot be set aside. [6]

2. APPLICATION FOR SETTING ASIDE AWARD

Section 34 is titled as 'Application for setting aside arbitral award'. A written application is the only recognised mode for challenging an arbitral award. The application has to be comprehensive in nature, indicating all points on which a party is aggrieved with the findings of the arbitral tribunal. The objecting party should draw the attention of the court to specific findings of the arbitral tribunal, which, in its view, are not in accordance with the facts or the law. Vague and generalised objections are not taken notice of by the courts.

A challenge to an award can be made through an application under the Act [7] and not by means of a suit [8] or writ petition. [9]A court cannot act *suo motu* against an award without an application from the aggrieved party. [10]

An application for setting aside an award should satisfy the requirements of section 34(2) as well as section 34(3). Merely because the application satisfies the provisions of one of the said two sub-sections, it cannot be said to be a valid and a lawful application under section 34(1). [11] There is no special form prescribed for making an application for setting aside an award. [12] An objection petition in the form an unverified written statement can be treated as an application. [13] The court should be more concerned with the substance of the application rather than its form. [14] A party filing an application for setting aside an award should ordinarily make specific averments setting in detail the grounds for setting aside an award. [15] The facts should be specifically pleaded. [16]

3. PROCEDURE TO BE FOLLOWED BY COURT HEARING OBJECTIONS

On receipt of an application praying for setting aside of an arbitral award, the court, if it is satisfied prima facie that the objecting party has made out a good case to challenge the award, would issue a notice of the objections to the opposite party and the arbitral tribunal. The members of the arbitral tribunal are generally arrayed as parties in the objection petition since it is their award which is under challenge. However, they are normally treated as performa parties and not as necessary parties to the dispute, unless, of course, there are objections of a personal nature against any member of the tribunal. The onus of defending the award invariably falls upon the party in whose favour it is made. On receipt of summons from the court, the said party appears and files a written statement wherein, while repudiating the objections, it supports the findings of the arbitral tribunal. As per the latest verdict of the Supreme Court, after completion of pleadings, the court need not frame issues and it can proceed straight-away to arguments, unless, a party specifically seeks to lead evidence on any issue.

It is the duty of the court to see that the objections are disposed off expeditiously so that the party in whose favour the award has been passed gets the benefit of the arbitration clause. [17]The *Civil Procedure Code* would be applicable to proceedings before the court.[18] While deciding the objection petition, it is not essential for the court to frame issues. [19] For expeditious disposal of cases, it is imperative that arbitration cases should be decided on the basis of affidavits and other relevant documents and without oral evidence, except in a few exceptional cases. [20]

The right to file an application under section 34 is unconditional and the court cannot impose conditions for filing the same. [21] An order on the objections to an arbitration award should comply with the provisions of Order 20, Rule 5, *CPC*[22], and the court should state its finding on decision with the reasons therefor upon each separate issue. [23] The trial court should endeavour not to dispose off the petition on a preliminary point. [24]

4. BURDEN OF PROOF

It is a cardinal principle of law that a party alleging a fact has to prove the same. Therefore, the burden to prove that the award suffers from grave errors of law or fact lies upon the party which is challenging the same. In order to succeed in getting the award set aside, the applicant has to place before the court such material as to satisfy it that the arbitral tribunal did not appreciate the facts or it misinterpreted the contract or misapplied the law. Since the grounds for setting aside an award are limited, the applicant has to confine his challenge strictly within the prescribed parameters.

Any party wishing to have the award set aside undertakes the burden of satisfying the court that this is what really happened. [25] The onus of proving the irregularities in procedure is on the person alleging the same. [26] Criticism alone cannot take the place of proof. [27] When the court allows time to a party to lead evidence in support of the objections filed against the award but the party fails to do so, the court should refuse to interfere with the award. [28]

5. WHO CAN FILE OBJECTIONS TO AWARD

The expression ‘party’ employed in section 34(2) means a party to the agreement. [29] An application for setting aside an award by a person who is not a party to the arbitration agreement or does not claim under such a party, cannot be entertained [30], even if directions have been made in the award in favour of the third party. [31] If the party to the agreement is the Chief Engineer but the arbitrator sends a signed copy of the award to the Secretary, then the period for challenging the award shall be counted from the date when the Secretary sends the award to the concerned Chief Engineer. [32]

An award passed without joining a necessary party is bad in law. [33] An award cannot be set aside at the instance of a party who has not suffered any injury by the error. [34]

No person can be legally bound by an agreement not to raise objections to an award. [35] Such a stipulation is void under section 28 of the Contract Act [36] and being a contract in derogation of statutory provisions, is *ultra vires* . [37]

6. POWER OF COURT TO SET ASIDE AWARD—LIMITED

The *Arbitration and Conciliation Act, 1996* limits the scope of enquiry that a court can exercise while hearing an application for setting aside an award to the grounds set out therein. A court cannot enlarge its jurisdiction beyond what has been stipulated in the Act. Judgments of the Apex Court and various High Courts reveal that the endeavour is to uphold arbitral awards and not to set them aside. The courts have laid down for themselves the following principles while deciding applications seeking to set aside an award:

(A) Presumption in Favour of Award

The court should approach an award with a desire to support it, if it is reasonably possible to do so, rather than to destroy it by calling it illegal. [38] It should be the endeavour of those who are interested in the administration of justice to help settlement by arbitration. [39] The award should be read as a whole. [40] In appreciating an award, the court must bear in mind that the arbitrators are laymen not familiar with the technical significance of legal expressions. [41] Unless the contrary is proved, the court will presume that the award disposes of finally all the matters in difference and that the award is complete. [42]

The competence of courts is restricted in order not to make the arbitration process the beginning of litigation instead of its end. [43] However, it is not a rule of law that courts should be slow in setting aside an award even if the conclusions arrived at by the arbitral tribunal are perverse and even when the very basis of the award is wrong. [44]

(B) Findings of Fact Cannot be Set Aside

An arbitrator is the final judge of facts. His findings on the facts of a case cannot be set aside by the courts unless they are perverse. In any litigation, both parties have their own divergent views upon the same set of facts. If an arbitrator decides to adopt one view rather than the other, and that view is a possible view, the courts would not step in to set aside the award on the ground that the arbitrator ought to have adopted the other view.

It is not open to the court to set aside a finding of fact arrived at by arbitrators [45], unless they are unsupported by evidence. [46] The award is not open to challenge on the ground that the arbitrator has reached a wrong conclusion or has failed to appreciate facts. [47] A court cannot interfere with the award of the arbitrator even if its opinion would be different on facts from that of the arbitrator [48], unless the findings of the arbitrator are perverse. [49]

Arbitrators are judges of fact as well as law [50] and have jurisdiction and authority to decide wrong as well as right, [51] and thus, if they reach a decision fairly after hearing both sides, their award cannot be attacked. [52] Mixed questions of law and fact are within the domain of the arbitrator and a decision rendered by him cannot be challenged. [53]

Valuation of property [54] or materials [55] made by an arbitrator cannot be interfered with. The finding of the arbitrator that a certain party has committed default is a finding of fact. [56] Procedure evolved by the arbitrator for arriving at the correct measurement cannot be re-appreciated by the court. [57] If the award amount is quite high, it does not *per se* vitiate the award of the arbitrator. [58]

(C) Court Cannot Look into Merits of Award

A court has no jurisdiction to sit in appeal [59] and examine the correctness of the award on merits. [60] The court cannot examine the findings of the arbitrator [61] or enquire into why he has awarded certain claims. [62] The mere fact that the arbitrator has ignored certain legal principles in awarding compensation will not be sufficient to attract the jurisdiction of the court. [63]

Even if the arbitrator has allowed the claim at a higher rate than the agreed rate, it cannot be said that the award is erroneous on that ground. [64] The court would decline to set aside an award at the instance of a party who has not suffered any injury by the error. [65] A party who is not prejudiced by an erroneous award and who, on the contrary, has gained an advantage by it cannot move to set aside the award. [66]

(D) Reasonableness of Reasons Cannot be Examined

As per the 1996 Act, it is obligatory for the arbitrators to give reasons in support of their findings. Once reasons are to be disclosed, it becomes very difficult for an arbitrator to decide and act in a whimsical and arbitrary manner. Even though it is not obligatory for arbitrators to record lengthy judgments as is done by courts, however, the reasons given by them have to be cogent, having a rationale with the facts and evidence on record.

Reasonableness of reasons given by an arbitrator cannot be challenged in court. [67] The court should not sit as a court of appeal [68] and review the reasons given in an award. [69] Reasons are not deficient merely because every process of reasoning is not set out [70] or because they are brief and not detailed. [71] The court cannot set aside an award because the reasoning of the arbitrator, is not immaculate or flawless. [72]

On the assumption that the arbitrator must have arrived at his conclusions by a certain process of reasoning, the court cannot proceed to determine whether the conclusion is right or wrong. [73] Simply because on interpretation of a contract the view of the court might have been different from that of the arbitrator, is no ground to set aside the award. [74]

If an award is not supported by any reason, it is liable to be set aside. [75] If the reasons are erroneous and contrary to the materials available before the court [76] or where it is demonstrated that the view taken by the arbitrator could not possibly be sustained on any view of the matter, then the challenge to the award must succeed. [77] However, the mere fact that the arbitrator has given some reasons and not all the reasons which may have influenced him, would not make the award illegal. [78]

(E) Evidence Led before Arbitrator Cannot be Re-appraised

The court should not re-appraise [79] or re-appreciate [80] the evidence led before the arbitrator. The courts cannot go into sufficiency of evidence led before the arbitrator. [81] It is within the domain and province of the arbitrator to determine the admissibility, relevance, materiality and weight of any evidence. [82] The matter of proof of document produced before an arbitrator cannot be a ground for interference with the award. [83]

An award cannot be set aside if it is based on evidence. [84] It may be possible that on the same evidence the court might arrive at a different conclusion than the arbitrator, but that by itself is not a ground for setting aside the award. [85]

Though an arbitrator is not bound by technical rules of evidence, [86]but he cannot act contrary to the principles of natural justice and disregard the rules of evidence which are founded on the fundamental principles of justice and public policy. [87] What is expected from the arbitral tribunal is that it should follow the principles of natural justice. [88] Where the arbitrator disallows certain irrelevant questions during the course of cross examination of a witness, that is no ground for setting aside the award. [89] Mere failure of a party to produce log books would not warrant interference with the award. [90]

(F) Arbitrator's Decision on Interpretation of Contract – Final

Parties, while drafting the arbitration agreement, normally provide for arbitrators who are experts in the field to which the dispute or contract relates. It is expected that such arbitrators would be conversant with the contract conditions and practices of the trade. As such, the courts have consistently held that an interpretation placed on contractual conditions by such arbitrators, if it be a plausible view, cannot be assailed in law even if the court itself, by a process of reasoning, was to come to a different interpretation. However, if the view taken by the arbitrator is perverse or implausible, then the courts would definitely set aside such an erroneous award.

Interpretation of a contract is a matter for the arbitrator on which a court cannot substitute its own decision. [91] A court by purporting to construe the contract cannot take upon itself the burden of saying that the finding of the arbitrator was contrary to the contract. [1] Even presuming that there was an error of construction of the agreement, such error is not an error which is amenable to correction. [2] An arbitrator may commit an error in exercising his jurisdiction. [3] However, if he commits an error as to his jurisdiction, the award is liable to be set aside. Such jurisdictional error needs to be proven by evidence extrinsic to the award. [4] An arbitrator's jurisdiction is confined to the four corners of the contract. He cannot ignore the provisions of the contract, otherwise he would be acting without jurisdiction. [5]

If the interpretation placed by an arbitrator on a clause of a contract is a plausible one, the same has to be respected [6] and the court will interfere only if the interpretation is perverse [7] or contrary to law. [8] However, an arbitral award contrary to the specific terms of the agreement can be interfered with. [9] While interpreting the law [10] or the contract [11] if two views are possible, the court's view cannot be substituted with the view taken by the arbitrator.

(G) Award of Expert Should be Honoured

In technical matters, views of an expert arbitrator are given the highest possible weightage. The courts are slow to interfere with the views of such expert arbitrators on claims, which pertain exclusively to their filed of specialisation. However, if on a plain reading of a clause or the evidence on record, it is evident that the reasoning adopted by the expert arbitrator is erroneous, then the courts would be justified in setting aside the award.

When a commercial man in his capacity as an arbitrator gives an award, his award has to be construed liberally since he has had no legal training. [12] The court's endeavour should be to uphold awards of skilled persons [13] whom the parties themselves have selected to decide the questions at issue between them. [14] The court is not technically equipped to determine matters considered by an expert arbitrator. [15] Even if the arbitrator is a technical and experienced person, there is no universal rule that such an arbitrator cannot faulter or commit errors and the court can scrutinise the award where such errors are apparent. [16]

(H) Award to be Upheld when Arbitrator Acts Fairly

When the parties, on their free will, have chosen the forum of arbitration to the exclusion of normal civil remedies, the court should be slow in setting aside the award. [17] The court will not infer any misconduct on the part of an arbitrator if he judges in accordance with the ordinary principles of fair play. [18] Wrong or right the decision is binding, if it be reached fairly after giving adequate opportunity to the parties to place their grievances in the manner provided by the agreement. [19] If an arbitrator omits to perform an impossible task which he had undertaken to perform, that is no ground to set aside the award. [20] Procedural defect or defects akin thereto which have not resulted in failure of justice are of no significance. [21]

An arbitral tribunal is under no obligation to award the amount which the petitioner had not even claimed before it. [22] Where the arbitrator reached his conclusion by giving the ‘business efficacy’ to a contract, the award cannot be set aside. [23]

An award of an arbitrator cannot be set aside merely because the amount awarded is high [24], except where the award is perverse [25] or when the awarded amount exceeded the claimed amount. [26]

(I) Arbitrator Neither Required to give Arithmetical Calculations Nor Distinguish Authorities

Even if there is no detailed break-up justifying the amounts allowed [27] and arithmetical calculations are not given, an award

cannot be set aside. [28] It is enough if the arbitrators give reasons either for allowing or disallowing the objections raised to the respective claims of the parties [29] and it is not incumbent on the part of the arbitrator to set out the actual calculations made to reach the final figure. [30] Amount payable on account of escalation cannot be worked out by the arbitrator with mathematical exactitude particularly in a case where the contract is executed over a long period of time. [31]

An arbitrator is not required to distinguish and analyse the authorities cited before him. [32]

(J) No Challenge to Award if Objection not Taken Before Arbitrator

An objection that the claims are barred by limitation, if not raised before the arbitrator, cannot be allowed to be taken in court. [33] Having failed to raise an objection before the arbitrator, the respondent must be deemed to have waived its right to object. [34] A party having raised no objection to the procedure during arbitration is precluded from raising the said objection before the court. [35]

Failure to bring to the notice of the arbitrator that a particular claim is barred by the contract would be prejudicial to the interests of the employer. [36]Under the 1996 Act, a party desirous of challenging the jurisdiction of the arbitral tribunal must do so at the earliest opportunity under section 16. Failure to challenge the authority of the arbitrator would deprive the party of its right to raise objections to the award under section 34. [37] Where no challenge was made to the appointment or jurisdiction of the arbitral tribunal, it cannot later on be assailed under section 34. [38]

A party who had lost on a preliminary ground before the arbitrator and eventually suffered an order is not precluded from taking such a ground as a ground to set aside the award in proceedings under section 34. [39]

(K) Specific Question of Law

Where a specific question of law is submitted to the arbitrator, who answers it, the decision, howsoever erroneous, will bind the parties. [40] Where an arbitrator is called upon to decide the effect of the agreement, he has really to decide a question of law, i.e. of interpreting the agreement, and hence, his decision is not open to challenge. [41] However, if facts clearly show that no specific question of law was referred notwithstanding the statement by the arbitrator, the award made cannot be sustained. [42] Similarly, if the arbitrator decides a question of law which has incidentally arisen during the course of arbitral proceedings, it has no binding effect on the parties. [43]

7. GROUNDS JUSTIFYING SETTING ASIDE OF ARBITRAL AWARD

An award can be set aside if the following conditions are satisfied:

(A) Incapacity of Party

An arbitral award may be set aside by the court if the party making the application furnishes proof that a party was under some incapacity. [44] An award which is invalid under the law governing minors ought to be set aside. [45]

(B) Invalid Arbitration Agreement

An arbitral award may be set aside 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. [46] If the consideration for entering into an agreement to refer is illegal, the whole agreement and reference is illegal and void. [47] If the existence of an arbitration agreement can be found from the correspondence, the court should look into

the same to determine the existence of an arbitration agreement. [48]

(C) Composition of Arbitral Tribunal not in Accordance with the Agreement

An arbitral award may be set aside if the party making the application furnishes proof that it was not given proper notice of the appointment of an arbitrator. [49] After the award is made, a party challenging the appointment of the arbitrator can make an application for setting aside the award in accordance with the provisions of section 34. [50]

Appointment made contrary to the terms of the agreement [51] or the directions of the court [52] would vitiate the award. Subsequent realisation of a mistake or attempts to rectify matters by one party cannot clothe the tribunal with jurisdiction. [53] An appointment made by a person different from the *persona designata* would vitiate the proceedings. [54]Assumption of jurisdiction by a sole arbitrator instead of a panel of arbitrator would render the award illegal. [55] An award made by an arbitrator appointed while an application under section 11 is pending in the court, is bad in law. [56] If *constitution* of a tribunal is in contravention of section 10 of the 1996 Act, an award cannot be legally made by them. [57]

When a party objects to the jurisdiction of the arbitrator and participates under protest, any award made by the tribunal would be void once the court holds that the protest of the party was factually correct. [58]

If the defect is one of mere irregularity and not of want of jurisdiction, the arbitration proceedings are not vitiated. [59] If a party allowed an arbitrator to proceed with the reference without objecting to his jurisdiction or competence, it cannot be subsequently heard to say that the award should be set aside on that ground. [60]An award cannot be challenged, if the composition of the arbitral tribunal is in accordance with the agreement, even though the composition is in conflict with Part I. Again, if the composition or procedure is contrary to the agreement but in accordance with the Act, the award cannot be challenged. [61]

If the arbitral tribunal does not possess the requisite qualifications prescribed by the agreement, the award is liable to be set aside.

(D) Party Unable to Present its Case

There are numerous situations where a party can allege that it was ‘unable to present its case’. If an arbitrator does not inform one of the parties of the date of hearing and then proceeds ex parte against him, or if he does not allow him to be represented through his authorised representative or lawyer, or if he disallows filing of evidence, or if he does not call for a document or other evidence from the opposite party even though it be extremely relevant, or if he does not allow a party to produce its witness, or cross-examine a witness of the other side, or if he does not allow a party to lead oral arguments, then it must be held that the objecting party did not get adequate opportunity to present its case. An award passed by the arbitrator in violation of the priniciples of natural justice and without affording full opportunity to a party to present its case, is liable to be set aside.

An arbitral award may be set aside if the party making the application furnishes proof that it was unable to present its case. [62] An arbitrator must not be guilty of any act which can be construed as indicative of partiality or unfairness. [63] He must not show undue haste in making an award. [64] Where a party introduces new claims before the arbitrator and the opposite party is not given a chance to meet them, the award is liable to be set aside. [65]

It is the duty of the arbitrator to inform the party that he intends to proceed with the reference at a specified time and place, whether that party attends or not. [66] If despite such notice, a party does not attend, then the arbitrator would be within his jurisdiction to proceed *ex-parte* . [67] When a party abstains from the proceedings, the arbitrator is not bound to issue further notices [68] or summon its records or consider such party's counter-claims. [69]

Hearing of one party in the absence of the other violates the fundamental principles of natural justice. [70] An arbitrator must not receive information from one side, which is not disclosed to the other, whether the information is given orally or in the

form of documents. [71] The principle of universal justice requires that the person who is to be prejudiced by the evidence ought to be present to hear it taken, to suggest crossexamination or himself to cross-examine, and to be able to find evidence, if he can, that shall meet and answer it; in short, to deal with it as in the ordinary course of legal proceedings. [72]

An arbitrator cannot decide the points in controversy on personal knowledge, unless so authorised by the terms of the arbitration agreement. [73] Arbitrators cannot depart from the rule that no enquiry into the case should be undertaken behind the back of a party. [74] Where the submission gives the arbitrators an option either to take evidence or to decide the case upon their own personal knowledge, they would be entitled to import into the consideration of the case their own personal knowledge. [75] Arbitrators who are experts in the trade can decide matters which are within their expert knowledge without evidence. [76]

Refusal of the arbitrator to give opportunity for adducing evidence to a party would vitiate the award. [77] In order to make out a case for impeaching an award on the ground that the witnesses were not examined by the arbitrators, there must be evidence to show that witnesses were distinctly tendered to them. [78] When the witness speaks of material facts and is examined by the arbitrators *suo motu* , there must be an opportunity given to the parties to cross-examine him. [79]

An award by an arbitrator who is biased is liable to be set aside. An award would also be liable to be set aside if there is a serious infirmity in the conduct of proceedings by the arbitrator. An award by an arbitrator who has been compelled to arbitrate, cannot be upheld.

(E) Failure to Consider Vital Documents

An arbitrator must arrive at his findings on the basis of the whole record placed before him by the parties. He may give any meaning to the evidence or the documents placed before him but he has no authority to ignore any document or evidence which throws light on the controversy. A finding arrived at without considering a vital piece of evidence is vitiated and is liable to be set aside on judicial review.

Whether a particular document is material or not and whether it should be produced before the arbitrator, is essentially a matter for the arbitrator to decide. [80] However, failure to consider material documents [81] or admission of parties in arriving at the findings is a good ground to challenge an award. [82]

If relevant and necessary documents are not before the arbitrator, the award can be described as one with no evidence and is liable to be set aside. [83] Even if a party does not produce a vital document, it is incumbent upon the arbitrator to get hold of the said document. [84] An award made without seeking production of a report on which the claim was based would result in setting aside of the award. [85] Making of an award without the basic documents, namely, the arbitration agreement is not permissible. [86]

(F) Award Based on no Evidence

When the finding of the arbitrator is based on no evidence, [87] then the court would set aside the award as being perverse. [88] Where there is no legal evidence, an award cannot be granted. [89] An award based on guesswork [90] or suppositions [91], is liable to be set aside. However, if the standard of proof sought by the minority arbitrator is higher than the standard of proof considered adequate by the majority, that would not be a ground for upsetting the award. [92] When the arbitrator makes an award by completely ignoring vital documents which throw abundant light on the controversy, [93] it amounts to violation of the principles of natural justice and is violative of the public policy of India. [94]

Every award must not only be supported by reasons but it should also be supported by cogent and reliable evidence. It is for the arbitrator to appreciate the evidence led before him. Materiality, weight and sufficiency of evidence is to be determined by the arbitrator. However, if an award is not supported by worthwhile and concrete evidence, it shall be a case of no evidence and any award based on no evidence is liable to be set aside. A mere tabulated statement, unsupported by any other evidence on record, cannot be made the basis of an award. [95]

(G) Arbitrator Act ing Beyond Submission

An arbitrator is the creation of the agreement, which the parties have entered into between themselves. It is obligatory and mandatory for the arbitrator to stick to the terms of the contract and the reference. An arbitrator cannot travel beyond the terms of the contract or the reference and enlarge the scope of his jurisdiction. If he does so, his award would be set aside by the court.

An arbitral award may be set aside if it 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. [1] The words 'term of the *submission* to arbitration' in section 34(2) (a)(iv) of the Act, refer to the terms of the arbitration clause. [2]

An arbitrator derives his authority from the reference [3] and the agreement. [4] When an order of reference is made by the court, then the adjudication of the claims is restricted only to such a reference, and the arbitrator cannot enlarge the scope of reference and entertain fresh claims without a further order of reference. [5] An arbitrator cannot decide disputes not submitted to him. [6]

Invalidity of reference would be a good ground for challenging the award passed by an arbitrator. [7] An award based on uncertain reference would be void. [8]

An arbitrator cannot give himself jurisdiction by a wrong decision as to the facts [9] and adjudicate upon a matter which is not the subject-matter of adjudication [10] No amount of concession can enlarge the scope of the powers conferred upon the arbitrator. [11] If an award deals with matters beyond the scope of the agreement, the party likely to be affected must raise the objection independently of section 16 as a ground to assail the award. [12] A party cannot, however, be permitted to raise the objection with regard to the reference for the first time at the stage of appeal. [13]

An arbitrator has no right to hear disputes arising out of separate contracts in one reference. [14] Separate disputes arising out of separate contracts between the same parties must be decided in separate references by the arbitrator appointed for determining a particular dispute. [15]

An arbitrator would be entitled to entertain enchanced claims made during arbitration [16] if a right to prefer such claims is set out in the notice invoking arbitration. [17] It is the duty of the arbitrator to consider both the claims and counter claims before making the award. [18] If in the course of pleadings, a plea is raised which originates from or relates to the subject-matter of the dispute, then such a plea could form part of the dispute for adjudication before the arbitrator. [19] Enhancement of monetary claims would not amount to enlarging the scope of the arbitration. [20] Where, an award has not been made, it is open to a claimant to ask for more disputes to be referred to arbitration. [21]

(H) Award in Ignorance of Terms of Contract

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. Its award has to be in terms of the contract and cannot be contrary to the law of the land. For example, if a clause in a contract prohibits award of damages or escalation on account of prolongation, the tribunal would not be justified in awarding any amount to the affected party on that account, even if it strongly believes that the employer was in breach of contract. It is the bounden duty of the arbitrators to enforce the terms of the contract and they cannot base their award on equitable or moral considerations.

An arbitrator's jurisdiction is confined to the four corners of the contract. He cannot ignore the provisions of the contract otherwise he would be acting without jurisdiction. [22]Section 28(3) of the Act specifically provides that the arbitral tribunal shall decide the matter before it in accordance with the terms of the contract. An arbitrator cannot do what he thinks is just and right contrary to the terms of the contract. [23]An arbitrator cannot act arbitrarily, irrationally, capriciously or independently of the contract. His sole function is to arbitrate in terms of the contract. He has no power apart from what the parties have given him under the contract. [24] If he has travelled outside the bounds of the contract, he has acted without jurisdiction. [25]

In order to determine whether the arbitrator has acted in excess of jurisdiction, what has to be seen is whether the claimants could raise a particular dispute or claim before the arbitrator. If the answer is in affirmative, then it is clear that the arbitrator would have the jurisdiction to deal with such a claim. [26] On the other hand, if the arbitration clause or a specific term in the contract or the law does not permit or give the arbitrator the power to decide or to adjudicate on a dispute raised by the claimant or there is a specific bar to the raising of a particular dispute or claim, then any decision given by the arbitrator in respect thereof would clearly be in excess of jurisdiction. [27]

Where the parties have expressly agreed to a sum by way of pre-estimated genuine liquidated damages, there could be no justifiable reason for the arbitral tribunal to arrive at a conclusion that still the purchaser should prove loss suffered by it because of delay in supply of goods. [28]

Claims, which are prohibited under the contract, cannot be awarded. [29] If a clause prohibits award of damages, [30] or extra rates [31] or royalty [32] or claims beyond those mentioned in the escalation clause [33] or claims based on difficulties encountered at site, [34] any award made by the arbitrator would be contrary to the said conditions. An arbitrator cannot introduce a new escalation formula, which is not contained in the contract. [35] An award based upon moral obligation of a party cannot be sustained. [36] An arbitrator cannot award on grounds of mercy, kindness or otherwise. [37]

An award made on properties not covered by the arbitration agreement would be bad in law. [38] Where there is no escalation clause in the agreement [39] or if payment of escalation is voluntarily given up, the arbitrator cannot assume jurisdiction to award increased rates for work done. [40]

(I) Award Contrary to Law or Substance of Dispute

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. [41]

Where the place of arbitration is situated in India, in international commercial arbitrations, (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 section 28 (ii) by the parties, the arbitral tribunal shall apply the rules of law it considers to be appropriate given all the circumstances surrounding the dispute. [42]

A court cannot review the award of the arbitrator and correct any mistake in his adjudication, unless objection to legality [43] or error of law [44] is apparent on the face of the award itself.

An arbitrator is not entitled to ignore the law or misapply it. An award which is not in accordance with the substantive law or the Act or the agreement, would be liable to be set aside. [45] When an award is based upon a proposition of law which is unsound or so unreasonable and irrational that no reasonable or right thinking person or authority could have reasonably come to such a conclusion on the basis of the materials on record or the governing position of law, then such an award shall be set aside. [46] A finding arrived at on an erroneous assumption of the existing law [47] or if decided on principles of construction that the law does not countenance [48] or an erroneous finding that the contract was novated [49] or on erroenous application of principles of valuation [50] to determine the value of the property [51] or if a sum is awarded on claims which had been given up [52] or if an award is made beyond the amounts claimed, [53] the same is liable to be set aside.

An award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court. Such an award is opposed to public policy and is required to be adjudged void. [54] In the event of arbitrariness or irrationality or a perverse understanding or misreading of the materials placed before the arbitrator, the award must be held to be in utter disregard of law. [55] An award contrary to substantive provision of law or provision of the *Arbitration and Conciliation Act, 1996* or against the terms of the contract would be patently illegal. [56] In ultimate analysis, it is a question of delicate

balancing between the permissible limit of error of law and fact and patently erroneous finding. [57]

The principles of *res judicata* and constructive *res judicata* are applicable to arbitration proceedings. [58] If a party fails to raise claims in the first claim petition, he is precluded from a seeking a second reference for the remaining issues. [59] The plaintiff cannot split the cause of action into parts so as to bring separate arbitrations in respect of those parts. [60] An arbitrator would be guilty of misapplying the law if he entertains a claim barred by *res judicata* . [61]

An arbitrator or the courts are not bound by what an arbitrator might have held in another arbitration proceeding unless it be that the said award operates as a bar between the parties barring either of them from raising a plea in that behalf. [62] Where a contract debarred price escalation, the mere fact that it was granted to some other firm by another department under a different contract, cannot be considered as ordinary usage of trade. [63]

The arbitral tribunal is bound to follow the substantive law unless the parties have authorised it to decide the matter in controversy *ex aequo et bono* or as *amiable compositeur* . [64] An award passed in violation of the substantive law [65] is liable to be set aside as being arbitrary, contrary to law and against public policy of India. [66]

(J) Inconsistent Findings in Award

The court will interfere if the arbitrator arrives at an inconsistent conclusion [67] or ignores very material documents. [68] An award allowing damages to the contractor on account of prolongation of contract period and also allowing risk and cost amount in favour of the department on account of incomplete work left behind by the contractor, cannot be upheld. [69] A finding disallowing a claim for liquidated damages and at the same time holding that the said claim was beyond jurisdiction, deserves to be set aside. [70] An award allowing extra rates while at the same time holding that the Government made payments at proper rate, is defective. [71] After coming to a finding that the delay was attributable to the respondent, the arbitrator's decision to disallow a claim for compensation was liable to be set aside. [72]

(K) Failure to Adjudicate

Where the arbitrators do not decide a vital matter themselves but leave it to the decision of another authority, the award given by them suffers from a serious infirmity. [73] Failure to give a decision on inter-linked question would materially affect the result of the case. [74] If the real dispute was about the applicability of the correct rate for the job done but the arbitrator awarded a lumpsum, the award would be invalid. [75]

(L) Award by Illegally Constituted Tribunal

An arbitral award may be set aside only if the party making the application furnishes proof that 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 Part I from which the parties cannot derogate, or, failing such agreement, was not in accordance with Part I of the Act. [76]

(M) Matter not Capable of Settlement

An arbitral award may be set aside if the court finds that the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force. [77]

(N) Award Contrary to Pubic Policy

An arbitral award may be set aside if the court finds that the arbitral award is in conflict with the public policy of India. Without prejudice to the generality of clause 34(ii)(b), 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. [78]An award against public policy cannot be enforced. A foreign award cannot be

recognised or enforced if it is contrary to: (1) fundamental policy of Indian law; or (2) the interests of India; or (3) justice or morality. [79]

The term 'Public Policy of India' is not defined in the Act, though it is used in sections 34(2)(b)(ii) and 48(2)(b) of the Act. The expression refers to the principles and standards constituting the general or fundamental policy of the State established by the *Constitution* and the existing laws of the country, and the principles of justice and morality. [80] Public policy can be confined to those heads which a writ court can entertain while exercising extraordinary jurisdiction under *Article 227 of the Constitution*. [81] An award which is in violation of the principles of natural justice is violative of public policy of India. [82] A plea of limitation would be a ground based on the public policy. [83]

Illegality in an award must go to the root of the matter and if the illegality is of a trivial nature, it cannot be held that the award is against the public policy. [84] An award can also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court. Such an award is opposed to public policy and is required to be adjudged void. [85] An award which is patently in violation of the statutory provision [86] cannot be said to be in public interest. [87] An award can be set aside on the ground of being against public policy if it is contrary to:

(i) fundamental policy of Indian law; or

(ii) the interest of India; or

(iii) justice or morality; or

(iv) in addition, if it is patently illegal. [88]

Where the arbitrator is directly interested in the subject-matter of the litigation, the award would be said to be improperly procured. [89] Corruption on the part of the arbitrator is a good ground for setting aside the award, but where corruption, fraud, partiality or wrong doing is charged against the arbitrators, it has got to be established beyond doubt. [90] Where the arbitrators stayed at the house of one of the parties, the court can refuse to accept the award. [91]

8. AWARD CAN BE SET ASIDE BY CONSENT OF PARTIES

The parties have the right to ask the court to set aside an award and substitute another arrangement. [92] Parties can modify the award as a result of compromise by altering, amending or adding to the award. [93]

9. PARTLY BAD AWARD TO BE SET ASIDE IF SEVERABLE

If the decision 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. [1] The assumption of jurisdiction not possessed by the arbitrator renders the award, to the extent to which it is beyond the arbitrator's jurisdiction, invalid [2] and if it is not possible to sever such invalid part from the other part of the award, the award must fail in its entirety. [3]

10. AWARD MADE PENDING APPLICATION FOR REMOVAL OF ARBITRATOR

An award made while an application is pending in the court for removal of an arbitrator is not bad. [4] However, if a party is unable to seek removal of an arbitrator in time, it can still, on the same grounds and with equal chance of success, get the

award set aside. [5]

11. NO CHALLENGE UNDER SERCTION 16 – AWARD CANNOT BE CHALLENGED

Under the 1996 Act, a party desirous of challenging the jurisdiction of the arbitral tribunal must do so at the earliest opportunity under section 16. Failure to challenge the authority of the arbitrator would deprive the party of its right to raise objections to the award under section 34. Thus, where no challenge was made to the appointment or jurisdiction of the arbitral tribunal by the petitioner, it cannot later on be assailed under this section. [6]

The *persona designata* appointed the arbitrator in terms of the arbitration clause and referred to him the disputes on the basis of which the claims were specifically made. The proceedings before the arbitrator continued without any challenge whatsoever and an award was made. Held that the petitioner by not objecting to the jurisdiction of the arbitrator under section 16 or even in the defence statements, could be deemed to have waived its right and, therefore, the award made by the arbitrator is not a nullity. [7]

Plea of lack of jurisdiction in an arbitral tribunal must be raised specifically. Where the District Judge upheld the objections of the respondent and held the award to be void for want of jurisdiction, it was held that the District Judge erred by not taking into consideration that while the arbitral proceedings were going on no objection was raised with regard to jurisdiction. Further held, that in the absence of a plea of want of jurisdiction of under section 16(2), the award could not have been declared void on the ground of section 16(5). However, a party is not precluded from raising such a plea merely because he has appointed or participated in the appointment of an arbitrator. [8]

12. LIMITATION FOR FILING OBJECTIONS

An application for setting aside may not be made after three months have elapsed from the date on which the party making the 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. [9]

Merely because an application is styled as one under section 33, the objector would not be entitled to the extension of limitation period under section 34(4), if the said application is not in terms of section 33. [10]If the application under section 33 is filed beyond the stipulated period of 30 days from the receipt of the award, the objector cannot take shelter of the said application and file objections to the award beyond the statutory period of limitation mentioned in the Act. [11]

The period of limitation would start running only from the date when the arbitrator supplied the certified copy of the award and not from any anterior date when a party is alleged to have notice of the contents of the award. [12] Whenever a time bound schedule is laid down by a statute, its terms must be strictly complied with before adverse orders can be passed. It is incumbent on the court to ensure that the aggrieved party had received a signed copy of the award. [13] If the copy of the award is not served on a party at its correct address, then the date on which the said party came to know about the award is to be taken as date of service of notice. [14] The word ‘party’ as referred to in section 34(3) of the Act has to be construed to be a person directly connected with and involved in the proceedings and who is in control of the proceedings before the arbitrator. [15]

The expression ‘three months’ in section 34(3) has to be construed as three calendar months from the date on which the signed copy of the award was given by the arbitrator to the party. [16] The day on which an award is received has to be

excluded while calculating the limitation period. [17]

It is only when the objection is formulated and placed before the court that the party can be regarded as having applied to the court. [18] If the registry of the court returns the application, and the same is re-filed after rectification, the petition must be considered to have been filed on the original date when it was filed in the registry and not on the date when it was re-filed after removing objections. [19]

13. POWER OF COURT TO CONDONE DELAY IN FILING OBJECTIONS

A period of three months, allowed under the Act, to challenge the award, can be availed of by the party desirous of challenging the award as a matter of right. But if there is a delay in framing the objection petition, for whatsoever reasons, it is not subject to condonation beyond a period of 30 days after the expiry of the period of three months, unless sufficient cause is shown in support of the same. Flimsy grounds cannot be taken to seek condonation of delay.

If the court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months, it may entertain the application within a further period of thirty days, but not thereafter. [20]Section 34(3) proviso has restricted the powers of the court to condone the delay to 30 days only. [21] Where no negligence, nor inaction, nor want of *bona fides* can be imputed to the applicant, a liberal construction has to be made in order to advance substantial justice. [22] The applicant has to show sufficient cause [23], within the meaning of section *Section 5 of the Limitation Act*[24], for not filing the application within time and must explain the delay made thereafter day by day till the actual date of the filing of the application. [25] Sufficient cause means a cause beyond the control of a party. A cause for delay which a party could have avoided by the exercise of the care and attention cannot be a sufficient cause. [26]

Delay in filing objections cannot be condoned for the reason that the file relating to the objections got lost in the other files in the office, [27] due to processing the files in government offices, [28] or that it was sent to a wrong lawyer. [29] Condonation sought on the ground that the petitioner was prevented from filing the application due to a strike by Government employees, was not found acceptable as the application did not even mention the date on which the alleged strike commenced and ended. [30] Delay on the part of the State is less difficult to understand though more difficult to approve, but the State represents collective cause of community and, therefore, a certain amount of latitude is permissible. [31] A party which refuses to receive a copy of the award sent by registered post, cannot thereafter, seek condonation of period of limitation. [32]

14. ‘BUT NOT THEREAFTER’ – MEANING OF

The expression ‘but not thereafter’ clearly shows the concern of the Legislature and its intention to ensure that delay is not condoned as a matter of course. The courts have no power to condone delay beyond the period of 30 days as mentioned in the Act and that too if the party which is seeking condonation, is able to satisfy the court that it could not file objections to the award within the stipulated period due to reasons which were beyond its control. The intention of the Legislature is, thus, to give finality to the awards as early as possible, and hence the courts should be slow in condoning delays and should definitely not condone delay beyond the period of 30 days prescribed in the Act.

The words ‘but not thereafter’ in section 34(3) amount to an express exclusion within the meaning of *section 29(2) of the Limitation Act*. Express exclusion can also be inferred from the history, scheme and objectives of the 1996 Act, whose one of main objective is to restrict judicial intervention in arbitral matters as much as possible. [33] The effect of sections 3 and 29(2) of the *Limitation Act* is that where any special or local law prescribes a period of limitation for a proceeding different from the provisions made in the *Limitation Act*, then the period prescribed by local or special law shall prevail. [34]

The prescribed period of three months (as contrasted from 90 days) is deemed to start from a specified date and would expire in the third month on the date corresponding to the date upon which the period starts. As a result, depending upon the months, it may mean 90 days or 91 days or 92 days or 89 days. If the award is received on 12-11-2007, for the purpose of calculating the three months period, he said date shall have to be excluded having regard to *section 12(1) of the Limitation Act, 1963* and section *Section 9 of the General Clauses Act, 1897*. Consequently, the three months should be calculated from 13-11-2007 and would expire on 12-2-2008. Thirty days from 12-2-2008 under the proviso should be calculated from 13-2-2008 and, having regard to the number of days in February, would expire on 13-3-2008.[35]

15. EXCLUSION OF TIME SPENT IN WRONG COURT UNDER SERCTION 14 OF LIMITATION ACT

If a party, for *bona fide* reasons, files objections in a wrong court, it can seek condonation of the period spent in the said court under section *Section 14 of the Limitation Act*. [36]*Section 14 of the Limitation Act* does not provide for a fresh period of limitation but only provides for exclusion of a certain period spent in a wrong court. [37]

The following conditions have to be satisfied before section *Section 14 of the Limitation Act* can be pressed into service: (1) Both the prior and subsequent proceedings must be prosecuted by the same parties; (2) Prior proceedings had been presented with due diligence and in good faith; (3) Failure of the prior proceedings was due to defect of jurisdiction or other cause of like nature; (4) Earlier proceedings and the later proceedings must relate to the same matter in issue; and (5) Both the proceedings are in court. [38] If there was no deliberate delay and the party had been prosecuting the case diligently, the time spent in pursuing a remedy before a wrong court would have to be excluded. [39] Advantage of section *Section 14 of the Limitation Act* cannot be taken if the proceedings before the wrong court are taken up in bad faith and for *mala fide* reasons [40] or if the objector is not diligent in pursuing the petition. [41]

16. ISSUE NOT RAISED IN OBJECTION PETITION CANNOT BE RAISED SUBSEQUENTLY

A petitioner challenging an award under the provisions of the 1996 Act, has to raise all grounds of challenge in his petition. The petitioner would not be permitted to canvass anything extraneous to the grounds enumerated in the petition. [42] If new objections are taken in the affidavit, it has to be seen whether the same was filed before the period of limitation expired. [43] A party cannot seek an amendment to the objections beyond the period of limitation. [44] It is impermissible to raise a new plea in appeal when the same has not been raised before the trial court. [45]

17. OPPORTUNITY TO ARBITRATOR TO REMOVE DEFECTS

On receipt of an application under section 34(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. [46]

The court can seek clarification from the arbitrator and in terms of sub-section (4) of section 34, the court is vested with the power to give an opportunity to the arbitral tribunal to eliminate the grounds for setting aside of the award. [47] The purpose of following the procedure under section 34(4) is to allow the arbitral tribunal to take action that would obviate a challenge to

the award on specific grounds. [48]

An award is final between the parties and it is only on very limited grounds that it can be remitted or set aside. [49] An award can be remitted to the arbitrator only for reconsideration. Reconsideration by the arbitrators necessarily imports fresh consideration of matters already considered by them. [50] The arbitrators have the authority to alter their original award as a result of their reconsideration. [51] It is entirely within the discretion of the court to remit an award. [52] The court may in exercise of its discretion, refuse to remit the award on the ground that substantial justice has been done or the error has not resulted in failure of justice. [53] The court has got the power either to remit the whole award or a portion of it. [54] If an award has not been signed by one of the arbitrators owing to illness, the award can be remitted back with the direction that all of them should join in the award. [55] An unregistered award may be returned to the arbitrator to enable him to get it registered. [56]

Under the Arbtiration Act, 1940, the court was empowered to remit the award for reconsideration on any of the following grounds:

(i) where the award has left undetermined any of the matters referred to arbitration [57]; or

(ii) where the arbitrator or umpire determines any matter not referred to arbitration which cannot be severed without affecting the determination of the matter referred [58]; or

(iii) where the award is so indefinite that it is impossible to execute [59]; or

(iv) where the legality of the award is questionable. [60]

18. PROCEEDINGS AFTER AWARD REMITTED

In case an award is remitted to the arbitrator for reconsideration, it is within the powers of the arbitrator to take evidence of the parties. [61] While reconsidering the award, the arbitrator can also give consequential and incidental directions for carrying out his decision into effect. [62] The arbitrator has also got power to provide for costs. [63] When an award originally made is remitted to the arbitrators for reconsideration, the award remains suspended until a fresh award is made by the arbitrators. The award originally made, alongwith the supplementary award, has to be read as one indivisible decision of the arbitrators. [64]

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12 Jurisdiction of Court in Arbitration Matters

1. 'COURT' – MEANING OF

A party to an arbitration agreement can move the court of competent jurisdiction for relief, as is admissible under the provisions of the Act and no departure whatsoever can be made by the courts in view of the stipulations of section 5 of the Act. Otherwise also, the 1996 Act is an amending and a consolidating Act, which means that it is a complete Code in itself and being exhaustive on the law of the subject matter. Such a stipulation carries with it a negative import that it shall not be permissible to do what is not permissible thereunder.

> Section 2(1)(e) of the Act has defined 'Court' as:
> ***Section 2(1)(e).—*** *'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.*

The definition of 'Court' in the 1996 Act is narrower than that given under section 2 (c) of the repealed 1940 Act. Under the old Act, it was every civil court, but now it is the principal civil court of original jurisdiction which is empowered to deal with the matters arising under the Act.

The principal Civil Court of original jurisdiction is the court of Additional District or the District Judge (except the High Courts in Delhi, Bombay, Calcutta, Madras, Himachal Pradesh, J&K, subject, of course, to the pecuniary limit). No court subordinate to the court of District Judge/Additional District Judge is empowered to entertain any application under the Act.

A reading of section 2(1) (e) reveals that the court which will have jurisdiction to try a petition under the Act is the court which has the jurisdiction to decide the questions forming the subject-matter of arbitration, if the same had been the subject matter of the suit.

2. JURISDICTION OF COURT – DETERMINATION OF

> Jurisdiction can be broadly classified into two types: (a) inherent jurisdiction; and (b) technical jurisdiction. Such classification arises from the nature of the factors which determine jurisdiction and such factors may relate to: (i) subject-matter; (ii) person; (iii) territorial limit; and (iv) pecuniary limit. In case of inherent lack of jurisdiction, which is based on factor (i) above, the decree becomes a nullity and consent or waiver and acquiescence by the Judgment Debtor does not render the decree valid or executable; in cases of technical jurisdiction, however, which is based on factors (ii), (iii) and (iv) above, the waiver by a party or consent by him, may attribute to the decree immunity from challenge on the ground of lack of jurisdiction. [1]

(A) Court Where Cause of Act ion Arose is Competent Court

> Where the contract was accepted at Lucknow, work carried out in Kanpur, the courts in Delhi would not get any jurisdiction simply because the arbitrator was appointed in Delhi and made his award there, or because the Union of India has its main office in Delhi. As no part of the cause of action arose at Delhi, therefore, the courts at Delhi had no jurisdiction. [2]

If an award was made in pursuance of an agreement which was entered into between the parties in Calcutta, then only the High Court at Calcutta has jurisdiction to entertain the proceedings. [3] The jurisdiction for challenging an award lies with the court in the area where the cause of action arises wholly or in part where the defendant actually and voluntarily resides. [4]

(B) Courts Having Pecuniary Jurisdiction

In cases of awards relating to money matters or moveables, it is important to find the value of the subject-matter of the reference for making an application to the proper court. The value is determined by the value of the subject-matter to which the reference relates and not by the amount actually awarded under the award. [5]

An award in which the value of the subject-matter exceeds Rs. 50,000/- can be filed in the Original side of the High Court of Calcutta. When the value does not exceed Rs. 50,000/-, then the award has to be filed in the Principal Civil Courts, Calcutta. [6] Now, the figure of Rs. 50,000/- has been revised to Rs. 10 lacs.

The claim of the respondent, including valuation of pre-suit interest, was in excess of Rs. 20 lacs both for purpose of computing court fee and for jurisdiction. However, objections were filed in the district court. It was held that such a suit could have been filed only before the High Court as the pecuniary jurisdiction of the District Court was only upto Rs. 20 lacs. [7]

(C) Jurisdiction of Court Depends on Subject Matter

There is no reference in section 2(1) (e) to the place where the parties reside, dwell or carry on business. The jurisdiction of the court is made dependent not on any of these factors, but solely on the subject-matter. The omission of reference to residence is presumably because in filing the award, there is no plaintiff and no defendant. It is only when the subject-matter of the dispute itself makes the jurisdiction to depend on residence that the place of residence becomes relevant. The emphasis is not on residence but on the subject-matter of the reference. [8]

To give a court jurisdiction over the dispute, it is not necessary that the court should have jurisdiction over the entire property forming subject-matter of the award. [9] It is also not necessary that the whole cause of action should arise within its jurisdiction. The court also has jurisdiction to determine the subject-matter of the dispute between the parties when the parties reside within its jurisdiction or a part of the cause of action arises there. [10] A court has been held to have jurisdiction to entertain an application to file an award based on a contract entered into outside its jurisdiction, if the goods purchased are examined and passed as to quality, weight etc. within its jurisdiction. [11]

Where the agreement was entered into at Patiala and the subject-matter of the agreement was also at Patiala, inasmuch as even the payments were made to the petitioner in Patiala, it was held that substantial as well as integral part of cause of action accrued at Patiala and thus, the courts at Delhi had no jurisdiction to entertain any application. It was further held that merely because certain documents were addressed by the respondent-bank in regard to execution of work, would not divest the court at Patiala of its jurisdiction. [12]

(D) Jurisdiction of Court when Property Situated Outside India

The award can be filed in any court of India for the portion of the property situated in India, provided the award is severable so far as the property is situated within the jurisdiction of India from that outside the jurisdiction of India. [13] Such an award can be filed in India provided the nature of the case permits a separation of the two parts without affecting the basis of the award and not otherwise. [14] If, however, the award deals with property which is wholly outside India, a court in India will have no jurisdiction to entertain the award. [15]

(E) Venue Whether Determines Jurisdiction of Court

Merely because the arbitrator chooses to hold the proceedings at a place, where admittedly no suit could be instituted, and chooses to make and publish an award at that place, it would not give the courts of that place territorial jurisdiction to decide the matters arising out of the Act. [16] If the clause in the agreement allowed the arbitrator to choose the venue of arbitration, such a clause could not be construed to confer jurisdiction on any court. [17]

Where parties to the agreement were not from Bangalore, and even the contract agreement and lease deed were not executed in Bangalore nor the contract work was done in Bangalore, then the Bangalore court had no jurisdiction to entertain the application. The mere fact that the parties had chosen Bangalore as place of arbitration was irrelevant. [18]

If the suit could be filed at the place where the parties had agreed to hold the arbitration proceedings, then the courts at such place would have jurisdiction. But if the suit could not be filed at a place where the parties had agreed to hold the arbitration proceedings, then the courts at such a place would not have jurisdiction. [19]

(F) Jurisdiction where Defendant Resides or Carries on Business

A court cannot come to the finding that it has jurisdiction because the plaintiff carries on business within its territory. Such a decision would turn *section 20 of the Code of Civil Procedure* on its head. [20] Where the defendants resided within the jurisdiction of a court, as also some property also came within its jurisdiction, the fact that some immovable properties of the firm were located outside its jurisdiction was held to be immaterial. [21]

There is no justification to split up the concept of principal place of business by seeking to sub-divide or identify the place of running of business by relating to each tender. Principal place of business must be a regular, fixed place independent of each tender. Accordingly, a suit can be filed at Delhi in respect of a contract entered into at Lucknow, being the headquarters of the railways in question, i.e. Northern Railways. [22]

(G) Place of Making of Contract

Where the agreement was signed in Bombay, a part of the cause of action could be said to have arisen there, therefore, the court at Bombay had jurisdiction. [23] Making of an offer at a particular place does not form the cause of action in a suit for damages for breach of contract. Ordinarily, acceptance of an offer and its intimation results in a contract and hence, a suit can be filed in a court within whose jurisdiction the acceptance was communicated. [24]

Tender documents had been issued to the intending bidders for construction of flats in Delhi. The petitioner submitted the tenders in the office of the respondent at Delhi and even the acceptance of the tender after negotiations had been at Delhi. It would be inevitable to infer that the offer made at Delhi and accepted at Delhi resulted into a binding contract and, therefore, a part of cause of action arose at Delhi. Merely because respondent has its registered office at Gurgaon, the fact that cause of action arises at Delhi cannot be negated nor can it be said that the jurisdiction shall only be at Gurgaon. [25]

Where the question was as to which court was competent to entertain an application when the quotation was accepted at Salem and the arbitration clause provided ‘any order placed against this quotation shall be deemed to be a contract made in Calcutta and any dispute arising therefrom shall be settled by an arbitrator to be jointly appointed by us’, it was held that the arbitration clause merely fixed the *situs* for the contract at Calcutta, and it did not amount to conferring an exclusive jurisdiction on the court at Calcutta. [26]

(H) Place of Payment of Money

When cheques as well as notices had been sent from Delhi and no cheque or demand draft had been personally handed over to the respondent at Delhi, it would not confer jurisdiction on Delhi courts to entertain any petition. [27]

Where the petitioner had his factory and registered office at Kota and 90% of the payment was made in Kota, the arbitrator was allowed to file his award at Kota. [28] If the payments of a contract entered into at ‘A’ are to be made at ‘A’, an award relating to disputes arising out of the contract can be filed at the courts at ‘A’. [29]

Where the payment of goods purchased was received by cheques which were drawn on petitioners’ bank at Delhi, the collection of payment through respondents’ bank at Kota would not make Kota the place of payment. Hence, courts at Delhi had jurisdiction. The collecting Bank merely acted as an agent for transmission of money. It is the bank on which the cheques are drawn which determines the place of payment. [30]

Where the petitioner alleged that formal acceptance of contract and payment under the contract had been made within the territory of a particular court and the averments were not controverted by the respondent in his affidavit in opposition, it would not be correct to say that the said court did not have territorial jurisdiction. [31]

(I) ‘All Subsequent Applications’

If an application under Part-I of the Act [32] is moved in a particular court, the parties by virtue of section 42 will be precluded from filing any subsequent application in any other court. [33] The rule of *forum conveniens* is expressly excluded by the provisions of section 42. [34] If two courts have concurrent jurisdiction, section 42 would come into play and all subsequent applications must be filed in the court which is approached first in point of time. [35] Different constituent companies of a consortium cannot be allowed to file separate applications arising out of the same transaction in different courts. [36]

An appellate court would not assume jurisdiction to entertain all subsequent applications since section 42 refers only to application and not appeals. [37] The High Court while exercising appellate jurisdiction under *section 96 of CPC* cannot be said to be exercising its original civil jurisdiction and, therefore, is not a 'court' under section 2(1) (e) of the Act. [38]An application as contemplated under section 42 would not cover an application under section 8 of the Act. [39]

If a party does not raise any objection with regard to jurisdiction when a petition under sections 12 and 13 of the Act is filed in a court, then it must be deemed to have waived its right and provisions of section 42 would apply and grant exclusive jurisdiction on that court. [40]

3. AGREEMENT REGARDING JURISDICTION

Where there may be two or more competent courts which can entertain a suit, and if the parties to the contract agree to vest jurisdiction in one such court to try the disputes which might arise between them, the agreement would be valid. [41] However, it is not open to the parties to confer by their agreement jurisdiction on a court which it does not possess under the Code. But where more than two courts have jurisdiction under the *Code of Civil Procedure* to try a suit or proceeding, an agreement between the parties that the dispute between them shall be tried in one of such courts, is not contrary to public policy. Such an agreement does not contravene section 28 of the Contract Act. [42]

Where the arbitration agreement contains a specific clause conferring jurisdiction on a particular court to decide the matter, the effect of the clause is that it automatically ousts the jurisdiction of any other court having concurrent jurisdiction over the subject-matter. [43]

An agreement between the parties for the construction of 'Himachal Bhawan' at Delhi provided that only the courts at Himachal Pradesh would have jurisdiction. This was deemed to be a valid agreement and the courts at Delhi had no jurisdiction. [44] Where the contract provided that the Civil courts at Durg would have jurisdiction, the fact that courts at Assansol also had jurisdiction would not override the express agreement between the parties. [45] An agreement between the parties that the court at Kanpur, where acceptance of tender was communicated, would have jurisdiction over the subject-matter of the disputes was a valid agreement and would thus, give the court at Kanpur jurisdiction. [46]

An award can be challenged in the Principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction. However, an exception was made in case of *Mcdermott International Inc. v. Burn Standard Co. Ltd* . [47] where while appointing an arbitrator, an order was passed by the Supreme Court that as and when award would be made, it would be filed in the Supreme Court only and that if any application was required to be made during or after the conclusion of arbitration proceedings, the same could be filed in the Supreme Court.

4. EXTENT OF JUDICIAL INTERVENTION

Under the 1940 Act, courts had been exercising judicial intervention at all stages of arbitral matters. Injunctions could be granted when the petitioner made out a *prima facie* case and the arbitral proceedings used to be discontinued for years together till the stay order was vacated. Getting wiser from that experience, the Legislature has now under the 1996 Act provided in section 5 that '**Extent of judicial intervention.** —Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part.' The important words are that 'no judicial authority shall intervene except where so provided' in Part 1.

A sea-change has been made in the law of arbitration after the passing of 1996 Act. [48]Section 5 clearly brings out the object of the new Act, namely, that of encouraging resolution of disputes expeditiously and less expensively with minimal intervention from the court. [49] The intervention of courts is restricted in order not to make the arbitration process the beginning of litigation instead of its end. [50]The object of the Act is to prevent the parties to an arbitration agitating questions relating to the arbitration in any manner other than that provided by the Act. [51]

The language used in section 5 of the Act is more stringent and unequivocal insofar as the bar to the jurisdiction of any judicial authority is concerned. Whereas in section 34 of the 1940 Act only civil suits were barred, section 5 of the 1996 Act debars every judicial authority from intervening in respect of a matter which is governed by Part-I of the Act. [52]

The courts should have regard to the stipulation of section 5 before granting the reliefs prayed for. [53]As per the scheme of the Act, an arbitration matter has to proceed without any hindrance or obstruction [54] and the courts have no power to over-step the stipulation. [55] If disputes arising out of an agreement are allowed to be entertained by the civil court, the very purpose of the Act would be frustrated. [56]

Where the arbitration proceedings are continuing before the arbitral forum, the court has no power to order removal of the arbitrator nor does it have any power to stay further proceedings before the arbitrator. [57] The validity of the proceedings before the arbitral tribunal cannot be enquired into by the courts. [58]

As the Act expressly excludes judicial interference it is not permissible to intervene under *section 151 of the Code of Civil Procedure* or for the court to exercise its *suo motu* or inherent powers. [59] The non-obstante clause in section 5 does not take away the powers of the court in applying the *Code of Civil Procedure*, while deciding the mattes arising out of the Act. Judicial intervention is permissible in mattes arising out of sections 9, 27, 34, 36 and 37 and provisions of the *Code of Civil Procedure* are applicable to such proceedings which are filed under section 34 for setting aside the award. [60]

5. DESIRABILITY OF RESTRICTING INTERVENTION BY COURTS

While interpreting a statute, the Statement of Objects and Reasons of the Act is required to be kept in mind. Object 4(v) provides for minimisation of the court's role in the arbitral process. The purpose of expeditious disposal, the avowed rationale behind the process of arbitration, would be the first casualty in case judicial intervention is allowed at any or all stages of the proceedings. When the 1940 Act was in vogue, it was a common experience that, in order to delay the proceedings, parties used to approach the courts on one ground or another. Getting wiser by the said experience, the Legislature deliberately, while retaining section 5, deleted the provisions in Article 13 and 16 of the UNCITRAL Model Law, which permitted a party to approach the court if an arbitrator held against them on a preliminary issue. Since the enactment of the 1996 Act, only negligible instances have surfaced, and that too under section 14 of the Act, where courts have intervened in ongoing arbitral proceedings.

Where the arbitration proceedings are continuing before the arbitral forum, the court has no power to order removal of the arbitrator nor does the court have any power to stay further proceedings before the arbitrator. Pending adjudication of points raised before the court, the Supreme Court ordered that proceedings before the arbitrator shall continue but the arbitrator shall not sign the award. [61]

Section 5 of the 1996 Act 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*. [62]

Section 5 seems to have been introduced by the Legislature because Part I of the Act primarily vests authority with the parties to mutually agree on various matters. It is only when the parties fail to mutually agree on any matter that the arbitral tribunal steps in to take decision. The section clearly recognises the policy of party autonomy underlying the intention of the Legislature. The purpose of the enactment is clear; the Legislature intended to limit and define the role of the court in arbitrations so as to give effect to the policy of party autonomy.

Under the Act of 1996, there are three sections which basically confer power on the court to intervene in the matter. The main section is section 34. 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 section 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). The next section which confers a power on the court to judicially intervene is section 37(2) under which 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 interim measure under section 17. The court can intervene also 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. [63]

A contract for supply of gas was entered into between the parties. Dispute arose as to whether there was any breach of obligation by either of them. It was held that the dispute would have to be decided only by the arbitrator and writ jurisdiction cannot be invoked in such matters. [64]

Parties had agreed to settle their disputes by arbitration. Therefore, the parties cannot be permitted to take recourse to any other remedy without first invoking the remedy by way of arbitration. The High Court will not normally exercise its

jurisdiction where number of complex nature of facts and disputes are involved, which may for their determination require evidence to be led in by the parties to the dispute. [65]

6. WRIT JURISDICTION CANNOT BE USED TO INTERFERE IN ARBITRATIONS

Section 5 of the Act does not affect the extra-ordinary jurisdiction of the court under *Article 226 of the Constitution*. [66]If the arbitrator is appointed under section 10 -A of the *Industrial Disputes Act*, in a proper case, a writ may lie against his award under Article 226.[67] However, it is a settled principle of law that where there is an arbitration clause, the High Court will not be justified in entertaining the writ petition [68] and the disputes ought to be decided in arbitration only. [69] Dispute arising out of breach of obligations entered into through a contract [70] or involving a number of issues of a complex nature, which may require evidence to be led in by the parties, ought to be decided by the arbitrator and writ jurisdiction cannot be invoked in such matters. [71]

A writ petition cannot be filed to seek implementation of the decisions of an adjudicator [72] or an arbitrator. [73] The courts exercising writ jurisdiction cannot exercise power *de hors* the provisions of the 1996 Act and restrain the arbitrator from proceeding with the arbitration matter. [74] Merely because an arbitrator is an employee of the Government does not make him liable to writ jurisdiction of the court. [75] Determination of a question whether there is a concluded contract cannot be decided under the writ jurisdiction. [76] Direction cannot be issued in writ jurisdiction for referring the matter to arbitration. [77] A writ court cannot appoint an arbitrator or determine a question pertaining to existence of an arbitration clause. [78]

7. COURT OBLIGED TO REFER PARTIES TO ARBITRATION

Section 8 of the Act deals with referring parties to arbitration where there is an arbitration agreement between the parties and reads as under:

Section 8. Power to refer parties to arbitration where there is an arbitration agreement. —

(1) *A judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration.*

(2) *The application referred to in sub-section (1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof.*

(3) *Notwithstanding that an application has been made under sub-section (1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made.*

Section 8 is peremptory in nature. Where an arbitration agreement exists, the court is under an obligation to refer the parties to arbitration in terms thereof. [79]Section 8 of the 1996 Act prevails over *section 9 of the Civil Procedure Code*. If the dispute is referable under section 8 of the Act, the judicial authority has no option but to refer the parties to arbitration.[80]

There is no discretion with the court under the Act to grant stay. The only power vested in the court is to refer the disputes to arbitration. The courts cannot refuse to refer the matter to arbitration merely on the ground that there are sufficient triable issues based on facts and law and as such the suit was maintainable. Absence of an arbitration clause in the performance guarantee does not matter as the said guarantee arose out of and was related to the dealership agreement and was not an independent contract. [81]

Once arbitration proceedings are pending and there is no dispute as to the existence and validity of the arbitration agreement, there would be no justification for the courts not to entertain the petition and refer the matter to arbitration. There is no legal ground for not referring the dispute to the arbitrator as there are no limitations to the pecuniary jurisdiction of an arbitrator. [82]

An application to refer disputes to arbitration was filed. The opposite party filed objections stating that the president of the Society had signed in his individual capacity and that the arbitration clause did not bind the Society. It was held that it was for the arbitrator to decide whether such an agreement was binding on the Society and that it was not obligatory on the part of the court to record any finding on such an issue while deciding an application under section 8 of the Act. [83]

(A) Conditions Essential for Invocation of Section 8

The reference to arbitration is dependant on the requirements of the section being satisfied by the parties. [1] The judicial authority is entitled to and is bound to decide the jurisdictional issue raised before it, before making or declining to make a reference under section 8. [2] What the court has to see is whether in given circumstances a particular party has *prima facie* made out a case seeking recourse to civil suit for appropriate relief or not. [3] The onus is on the plaintiff to show why he should not be bound by the agreement to refer. [4]
The conditions which are required to be satisfied under sections 8(1) and 8(2) before the court can exercise its power to refer parties to arbitration are:

(1) there is an arbitration agreement;

(2) a party to the arbitration agreement brings an action in the court against the other party;

(3) subject matter of the action is same as subject matter of the arbitration agreement; and,

(4) the other party moves the court for referring the parties to arbitration before he submits his first statement on the substance of the dispute. [5]

The application contemplated under section 8 is a written application and not an oral one. [6]

(B) Nature of Proceedings in Court

Proceedings before the court in an application for reference of the matter to arbitration are not in the nature of a suit [7] and the order on it is not a 'judgment, decree or final order'. [8] The court cannot, while passing an order on the application, direct that a person be made party to the arbitration proceedings. [9] In an international commercial arbitration, a party cannot take recourse under section 8 instead of section 45 because the scope of section 45 is not identical with that of section 8. [10]Arbitration contemplated under *section 89 of the Civil Procedure Code* is not akin to a reference under section 8 of the 1996 Act.[11]
An application under section 8 is in the nature of a summary procedure. [12] A court can, while deciding the application, look into the plaint [13], affidavits and counter affidavits [14]filed by the parties as well as correspondence that may have passed between the parties. The moment an application for reference of the matter to arbitration is filed in a pending suit, further progress thereof is automatically arrested and the power of the trial court to act under *Civil Procedure Code* is suspended till a decision is rendered on the application.[15] The court, while passing an order should indicate sufficient reasons for either granting or refusing to allow reference. [16] If the jurisdiction of the court itself is challenged, then it has to decide that question first. [17]The provisions of the Act do not take away the provisions of Order 23 of *CPC* from being applied to applications under section 8 of the Act. [18] The provisions of Order 30 Rule 4 of *CPC* are attracted to such an application. [19]

(C) Suits Which are Barred

A party to an arbitration agreement has been debarred from filing the following suits in the civil courts:

(1) Suit to challenge an agreement or award: An arbitration agreement or an award can neither be challenged [20]nor enforced by way of a suit. [21]

(2) Suit to affirm agreement or award: A suit for declaration that the arbitration agreement exists is barred. [22]

(3) Suit on disputes arising out of arbitration agreement: A party shall be debarred from filing a suit, the effect of which is to give a go-by to the arbitration agreement. [23] If there is a situation where there are disputes and differences in connection with the main agreement and also disputes in regard to 'other matters' 'connected' with the subject-matter of the main agreement, then all disputes can be referred to the arbitral tribunal. [24]

(4) Suit on matter already referred to arbitration: Where the claim is pending in an arbitration proceeding, a civil suit on the same claim is not maintainable. [25]

(5) Party falsely alleging undue influence: A party cannot be allowed to take advantage of an agreement for ten years and later seek to avoid it by saying that that it was induced by undue influence, unequal position etc. [26]

(6) Claims on account of consequential service or extra materials supplied on oral instructions, fall within the ambit of the arbitration clause, and it is for the arbitrator to decide upon these. [27]

(D) Suits Which are not Barred

Suits instituted on the following grounds are not barred despite the existence of an arbitration clause:

(1) *Stranger to a contract:* A stranger to the contract cannot be debarred from filing a suit for declaration that the reconstituted partnership firm was illegal. [28] A stranger to a contract can also challenge through a suit an award in which relief has been granted against him. [29] When the party against whom arbitration reference is sought is not to be a party to the arbitration agreement, the matter cannot be referred to arbitration. [30]

The word 'party' referred to in section 8 is a party which is entitled to maintain the application thereunder. [31] The right to seek a reference to arbitration vests in a party by virtue of the fact that he is a party to the arbitration agreement. [32] It is not at necessary for all the defendants to apply for reference to arbitration. It is sufficient if one of them does so, and wishes to take advantage of the submission. [33] An arbitration clause will bind a valid assignee, [34] but not an assignee of a debt arising out of the contract containing it. [35] A party cannot seek to avoid arbitration by adding to the reference a number of defendants against whom no relief is sought. [36]

(2) *Suits alleging fraud:* Where a *prima facie* case of fraud is made out, the court should not refer the matter to arbitration. [37]The court would be rightly exercising its discretion not to refer the matter where: (i) the dispute involves grave allegations of fraud or misrepresentation; (ii) the plaintiff alleges collusion and conspiracy among the defendants; (iii) the dispute involves determination of complicated questions of law which can be properly decided by a court; (iv) the arbitration agreement itself is disputed; and (v) there is good ground for apprehending that the arbitrators will not act fairly in the matter. [38]

Where the award was brought into existence for a fraudulent purpose, a suit is maintainable to enforce substantive rights. [39] In case there are charges of conspiracy and fraud, which are directly at issue between the parties, then such charges should be publicly investigated in the suit, [40] if so desired by the party charged. [41] Cases involving allegations of professional/occupational negligence, impropriety or dishonesty, shade into one another and the principles which are applicable to a case of fraud, equally apply to such cases. [42]

Where a party challenged the validity of the agreement on the ground that a fraud had been played upon him, the same can be gone into by the arbitrator under section 16. [43] Merely because the respondents have made allegation of fabrication of record against the petitioner, the dispute cannot be taken out of arbitration. [44]

(3) *Subject-matter of suit not arising out of arbitration agreement:* A party has a right to sue for reliefs independent of any right arising from the agreement. [45] If there is no nexus between the suit and the agreement, then the matter cannot be referred to arbtiration. [46] In an application under section 8(1) of the Act, the court is only concerned to see that the matter on which the suit is instituted is also the subject matter of an arbitration agreement. [47]

(4) *Suit for specific performance:* A dispute pertaining to specific performance of a contract has to be decided by an arbitral tribunal and not the court under section 8. [48]

(5) *Further relief:* A suit for a further relief not covered by the agreement is not barred. [49] The case would be the same when certain claims arise subsequent to the rights so declared in an award. [50]

(6) *Suit by minor:* A minor can sue to set aside an award against him on the ground that the reference to arbitration was made without leave of the court as required by Order 32 Rule 7, *CPC*. [51]

(7) Criminal proceedings: Merely because there is an arbitration clause in the agreement, that cannot prevent criminal prosecution against the accused if an act constituting a criminal offence is made out even *prima facie* . [52]

(8) Long pendency of disputes: If the arbitration agreement has not been invoked for 20 years, then the only remedy available would be by way of suit and not through arbitration. [53]

(9) To avoid multiplicity of litigation: A matter should not be referred to arbitraiton if there is bound to be multiplicity of legal proceedings. [54] A single claim against a party and a non party to an agreement, if it cannot be split up, should not be referred to arbitration. [55] Bifurcation of the subject-matter of the suit is not permitted. [56]

(10) Suits under Special enactments: The *Consumer Protection Act* of 1986 being a special enactment, section 8 of the 1996 Act does not have the effect of taking away such a remedy from the consumer.[57]Provisions of the 1996 Act do not override the provisions of the *Public Premises (Eviction of Unauthorised Occupants) Act, 1971*. [58]

(11) Does not apply to statutory arbitrations: The provisions of section 8 cannot be applied to statutory arbitrations [59]under the *Indian Telegraph Act*[60]and the *Displaced Persons (Debts Adjustment) Act* of 1951.[61]

(12) Settlement of disputes between Public Sector Undertaking: Disputes between two public sector undertakings (PSU), as per policy of the Government of India are referred to a High Power Committee for resolution. [62]

(E) Defendant Must Apply for Reference to Arbitration

The word 'party' referred in sub-section (1) of section 8 is the defendant against whom a suit has been instituted and not the plaintiff. [63] So long as the defendants have not chosen to file an application under section 8, the civil court is entitled to proceed to deal with the matters at issue in the suit, notwithstanding the existence of an arbitration clause in the contract. [64] The judicial authority may even *suo motu* ask the parties to take recourse to the provisions of section 8. [65] The defendant is not obliged to serve a notice of the application to the opposite party in advance. [66]

A right once waived by a party in respect of the course to be adopted for settlement of a dispute is lost for ever and cannot be reclaimed or re-agitated later on. [67] By waiving their objection to the suit, the parties must be deemed to have submitted to the jurisdiction of the civil court. [68]

(F) 'Not Later than when Submitting his First Statement'

The application referred to in section 8(1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof. [69] A party is disentitled from seeking a reference to arbitration only if it has filed its reply on merits. [70] An application seeking adjournment to file a written statement would not debar the defendant from filing an application under section 8. [71] By opposing the prayer for interim injunction, the restriction contained in section 8(1) is not attracted since supplemental and incidental proceedings are not part of the main proceeding. [72] Filing of a written statement after reserving the rights to challenge maintainability of the suit would not amount to surrendering to the jurisdiction of the court. [73]

An application for referring the matter to arbitration can be made simultaneously with filing of the first statement. If the application seeking reference and the written statement are filed simultaneously, it cannot be said that the application had not been filed at the proper stage. [74] If the written statement is filed without making any prayer for reference of dispute to arbitration, it would amount to waiver. [75] The defendant cannot be allowed to agitate the said plea after the suit has made substantial progress. [76]

If a party files an application seeking reference after submission of his first statement of defence, it can still be entertained if the party which has brought the action does not object. [77]

The phrase 'not later than when submitting his first statement on the substance of the dispute' as appearing in section 8(1), does not refer to suits instituted by the defendant. [78]

8. JURISDICTION OF COURT TO REFER PARTIES TO ARBITRATION UNDER SERCTION 89 OF CIVIL PROCEDURE CODE

Arbitration is not beyond the ken of the courts. Private Judge concept is giving way to concept of arbitrator as competent personal resolver of disputes. Merely because resort to procedures for dispute resolution under *section 89 of CPC* is not available, law cannot be held to be unfair, unjust and unreasonable, nor fanciful, whimsical or arbitrary. Further, it cannot be urged that such interpretation cannot pass the test of *Article 21 of the Constitution*. [79]

It is permissible on the part of the court to refer the matter to arbitration against the free-will, volition and the without consent of the parties even though Rule 1A and 1C do not speak about the same since Rules cannot be given undue importance. Reference to arbitration without the consent of the parties to the agreement is only after ascertaining whether there are elements of settlement and whether such elements may be acceptable to both the parties. It is also the bounden duty of the court to consider the peculiar nature of dispute as well as the nature of parties to the dispute. [80]

Section 89, C.P.C. cannot be resorted to for interpretation of section 8 of the Act as it stands on a different footing and it would be applicable even in cases where there is no arbitration agreement for referring the disputes for arbitration. The court has to apply its mind to the condition contemplated under *section 89, C.P.C.* and even if an application under section 8 of the Act is rejected, the court is required to follow the procedure prescribed under the said section.[81]

9. INTERIM MEASURES BY COURT

Section 9 of the Act which deals with interim measures etc. by court, is as under:

Section 9. Interim measures etc., by Court .— *A party may, before or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with section 36, apply to a court:-*

(i) *for the appointment of a guardian for a minor or person of unsound mind for the purposes of arbitral proceedings; or*

(ii) *for an interim measure of protection in respect of any of the following matters, namely:-*

(a) *the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;*

(b) *securing the amount in dispute in the arbitration;*

(c) *the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising any samples to be taken or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;*

(d) *interim injunction or the appointment of a receiver;*

(e) *such other interim measure of protection as may appear to the Court to be just and convenient,*

and the Court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it.'

Power to the court under section 9 is not unbridled. It is subject to certain limitations and restrictions such as, firstly, it can be exercised by the court to the same extent and in the same manner as it could for the purpose of or in relation to any proceeding before it and, secondly, the exercise of the power to make interim arrangements should not militate against any power which might be vested in an arbitral tribunal. The interim measures which a court might be requested by a party to take are detailed in section 9 (ii)(a to e). Similar measures were given in paragraphs 1 to 4 of the Second Schedule of the 1940 Act. The improvement now made is that an omnibus provision in the shape of sub-clause (e) has now been added providing that an application may be made to the court for such other interim measures of protection as may appear to the court to be just and convenient. The power conferred under section 9 is to be exercised by the court only in sparing circumstances. A party to the arbitration proceeding cannot be allowed to challenge normal and routine orders passed by the arbitral tribunal. [82]

The court while considering an application for interim protection under section 9 (ii)(d) is guided by equitable consideration and each case has to be considered in the light of its facts and circumstances. The interim protection order is granted by the court to protect the interest of the party seeking such order until the rights are finally adjudicated by the arbitral tribunal and to ensure that the award passed by the arbitral tribunal is capable of enforcement. [83]

Interim directions can be issued under section 9 only for the purpose of arbitration proceedings and with a view to protect the interest of the parties which otherwise cannot be protected or safeguarded by the arbitral tribunal. The power contemplated under this section is not intended to frustrate the arbitration proceedings. Power to pass orders with respect to interim measures cannot be exercised by a court if it would prejudice the powers vested in the arbitrator and renders him incapable to resolve the dispute between the parties. Where the impugned order does not affect or impinge upon, in any manner, the rights of any of the parties, no interim measure of protection is required to be made by the court. If a long rope is given to the parties to approach the court under this section, then in that event the proceedings before the arbitral tribunal will be throttled and it would become difficult for the arbitral tribunal to proceed further in the matter. [84]

Application for interim relief is maintainable pending arbitration proceedings. In case of breach of contract, if the aggrieved party makes serious efforts for conciliation in the first instance followed by appointment of its nominee arbitrator and the other party rejects the request for appointment of its nominee arbitrator and recourse to arbitration proceedings is taken thereafter, it will not preclude the arbitral tribunal to grant interim relief prayed for. [85]

Where there had been a contract between a Company and its purchasing agent, the application by one party to the court for restraining the other party from encashing the bank guarantee, as also for restraining the bank from paying the amount under the bank guarantee is not maintainable, because banks are not parties to the arbitration agreement and thus, the courts cannot restrain the banks in any manner. [86]

The reliefs which the court may allow to a party under clauses (i) and (ii) of section 9 flow from the power vesting in the court exercisable by reference to 'contemplated', 'pending' or 'completed' arbitral proceedings. The court is conferred with the same power for making the specified orders as it has for the purpose of and in relation to any other proceedings before it. [87]

In the absence of any substantive relief, the prayer for issuing any directions by way of interim measure cannot be entertained. [88] The courts cannot grant injunction to prevent such breach of contract, the performance of which cannot be specifically enforced. [89] Where an application had been filed seeking interim relief, it was held that relief sought can only be in aid of the claim for specific performance and if no clear cut and undisputed case on merits is made out by the petitioner, the courts shall refuse the application. [90]

10. POWER TO GRANT INTERIM RELIEFS UNDER SERCTIONS 9 AND 17

Under the 1996 Act, unlike the earlier 1940 Act, 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. [91]

A party can file an application for interim relief even during subsistence of arbitral proceedings, notwithstanding section 17. [1]Obviously, the court being higher in the hierarchy and being a judicial forum would have primacy insofar as overlapping orders are concerned. An order passed by the arbitral tribunal granting or refusing to grant an interim measure under section 17 is appealable under section 37(2) (b) of the Act. So, any order that may be passed by an arbitral tribunal is always subject to orders that may be passed by a court in an appeal preferred there against. [2] However, where the petitioner filed an application seeking interim measure without disclosing that a similar application had been filed before the arbitrator who had dismissed it and that order remained unchallenged, then the petitioner would not be entitled to the equitable relief sought. [3]

11. INTERIM ORDER SHOULD BE ISSUED TO FACILITATE ARBITRATION

An interim protection order is granted by the court to protect the interest of the party seeking such an order until its rights are finally adjudicated by the arbitral tribunal and to ensure that the award passed by the arbitral tribunal is capable of enforcement. [4]Provisions of the Act are designed to reduce to an acceptable minimum the interference of the courts with the conduct of arbitration. [5] A court cannot, under section 9, entertain any challenge to the appointment of the arbitral tribunal and as to the venue for holding arbitral proceedings. [6] The court while deciding upon such applications would refrain from expressing any opinion on merits so as not to influence the proceedings before the arbitrator. [7]

12. INTERIM MEASURES BEFORE, DURING OR AFTER ARBITRATION PROCEEDINGS

The time or the stage for invoking the jurisdiction of court under section 9 can be (i) before, or (ii) during arbitral proceedings, or (iii) at any time after the making of the arbitral award but before it is enforced in accordance with section 36 of the Act. [8]

An application for interim relief is maintainable even before the commencement of arbitration proceedings. [9] Arbitration proceedings cannot necessarily be held to commence only from the point of time when an arbitration proper is commenced with the appointment of the arbitrator. There are no words of limitation used in section 9 of the Act to deny the jurisdiction of the court to grant an interim relief till an arbitrator is appointed, but on the contrary, the phrase 'arbitration proceedings' is wide enough to justify the granting of interim relief even before the arbitrator is appointed. [10]

A submission that unless the validity of the agreement is not decided, the application under section 9 is not maintainable, cannot be accepted. [11]

If pending reference to arbitration, the plaintiff is likely to suffer irreparable loss in case injunction is refused, the court ought to grant *ad interim* injunction. [12] Even during the pendency of the arbitration proceedings, the court has jurisdiction to pass interim orders to safeguard and protect the interests of the parties. [13]

13. PARTY SEEKING INTERIM MEASURES MUST EXPEDITE ARBITRATION

Although section 9 permits the filing of an application before the commencement of the arbitral proceedings, but it does not give any indication of how much before. The word 'before' means ahead of; in presence or sight of; under the consideration or cognizance of'. The two events sought to be interconnected by use of the term 'before' must have proximity of relationship by reference to occurrence; the later event proximately following the preceding event as a foreseeable or 'within sight' certainty. The party invoking section 9 may not have actually commenced the arbitral proceedings but must be able to satisfy the court that the arbitral proceedings were actually contemplated or manifestly intended and were positively going to commence within a reasonable time. The distance of time must not be such as would destroy the proximity of relationship of the two events between which it exists and elapses. [14]

An applicant has a duty to commence arbitral proceedings as expeditiously as possible once he seeks the intervention of the court under section 9. But if there is complete inaction on the part of the applicant for as much as 8 months after obtaining an interim order, it can safely be inferred that the applicant has no intention to commence the arbitral proceedings [15] and that it was only interested in obtaining a stay order from the court without fulfilling its obligation for appointment of an arbitrator. [16]

In order to ensure that effective steps are taken to commence arbitration proceedings, the court while exercising jurisdiction can pass a conditional order to put the applicant to such terms as it deems fit with a view to see that effective steps are taken by the applicant for commencing the arbitral proceedings. [17]

14. INTERIM MEASURES WHICH MAY BE REFUSED

The following reliefs cannot be granted to a party in an application seeking interim measure of protection:

(1) It is not permissible for a party to move the court for securing the amount not in dispute in the arbitration. [18]

(2) The court should refrain from interfering with the rights which flow from the bank guarantees. [19] The fact that the encashment of the bank guarantee would entail financial hardship or would be onerous cannot be a ground to seek restraint on its encashment. [20]

(3) An application for restraining the Bank from encashing the Letter of Credit is not maintainable since they are not parties to the original agreement. [21]

(4) Sale of immovable property cannot be termed to be an interim measure of protection. It amounts to an all time or permanent protection. [22]

(5) A court cannot issue mandatory injunction and direct a party to pay the amount due under the contracts, especially where invocation of arbitration is limited only to payment of interest on the said amounts. [23]

(6) Injunction would not be granted where one of the parties would be irrevocably prejudiced by being compelled to enter into a contract with a party with whom he does not desire to deal. [24]

(7) A party cannot seek interim injunction on the plea of having expended considerable or huge amounts in procuring the equipments to discharge the obligations cast by the contract. [25]

(8) Injunction would be refused where the action of the Public Authority is not mala fide or arbitrary and has been taken to achieve a public purpose. [26] The urgency of the project should be kept in mind while granting interim relief. [27]

(9) Right of a party to terminate a contract cannot be abridged in the exercise of interim powers, [28] especially if the affected party can be compensated in terms of money. [29]However, if the act of termination is *mala fide* and intended to benefit only one party, then injunction can be sought. [30]

(10) In certain cases, a party cannot be compelled to discharge its obligations under a contract particularly when distrust and loss of confidence has developed. [31]

(11) An application to thwart execution proceedings is not permissible. [32]

(12) A petition to secure the amount in dispute in arbitration is not maintainable if there is no allegation in the petition that the respondent was acting in a manner so as to deprive the petitioner of the fruits of the award. [33]

(13) If the facts on record reveal that the petitioner had breached the agreement, then it cannot claim injunction. [34] However, if sufficient proof of completion of work is available, then the affected party can seek injunction. [35]

(14) The plea that on account of pendency of C.B.I. investigation, the contract cannot be enforced, is not tenable. [36]

15. RELIEF ONLY TO PARTIES TO AGREEMENT

The right conferred by section 9 of the Act is on a party to an arbitration agreement. A person who is not a party to the arbitration agreement cannot enter the court for protection. [37] When the petitioner is a third party auction purchaser in whose favour a sale certificate is drawn, he cannot be subject to proceedings initiated on the basis of an alleged arbitration agreement entered into between the respondents. [38]

An interim injunction cannot be granted to pay some amounts due, which are outside the purview of the arbitration proceeding, as it would not be for the purpose of or in relation to the arbitration proceedings. [39] The court has no power to grant an injunction restraining the Government from withholding the amounts in respect of other contracts, for the reason that such an injunction cannot be said to be ‘for the purpose of’ and ‘in relation to’ the proceedings before the court. [40]

16. COURT'S POWER TO ORDER ‘PRESERVATION, INTERIM CUSTODY OR SALE’

Where the petitioner prayed for an order of interim measure in the form of a direction from the court for the sale of all the materials lying at the site, it was held that the matter does not fall under clause (a) of section 9 because this clause relates to the preservation, interim custody, or sale of any goods which are the subjectmatter of the arbitration agreement. Subject-matter of the arbitration agreement was the claim of over rupees one crore and not the materials owned by the respondent and lying at the site of which sale was sought by the petitioner. [41]

An interim application was filed by the applicants who were not parties to the agreement. It was stated that though they were not parties to the agreement between the petitioner and the respondent, but the order that had been passed directly affected them. This section deals with the interim custody of any goods which are the subject matter of the agreement. Held that since the applicant had no *locus standi* , they were not entitled to the relief claimed and that till the disputes between the parties were resolved, goods in question were kept by the petitioners till further orders in arbitration. [42]

17. POWER OF COURT TO ORDER INJUNCTION

The grant of interim injunction is a discretionary remedy and in exercise of a judicial discretion in granting or refusing to grant an injunction, the court will take into reckoning the following as guidelines: [43]

(1) Whether the person seeking temporary injunction has made out a *prima facie* case. This is *sine qua non* .

(2) Whether the balance of convenience is in his favour, that is, whether it could cause greater inconvenience to him if the injunction is not granted than the inconvenience which the other party would be put to if the injunction is granted. As to that, the governing principle is whether the party seeking injunction could be adequately compensated by awarding damages and the defendant would be in a financial position to pay them.

(3) Whether the person seeking temporary injunction would suffer irreparable injury. It is, however, not necessary that all the three conditions must obtain. With the first condition as *sine qua non* , at least two conditions should be satisfied by the petition conjunctively and a mere proof of one of the three conditions does not entitle a person to obtain temporary injunction.

Irreparable injury does not mean that there must be no possibility of repairing the injury, but means only that the injury must be a material one, namely, one that cannot be adequately compensated by way of damages. [44] Even if a party is found to have a *prima facie* case, unless balance of convenience lies in his favour and unless damages that may have been caused cannot be compensated in terms of money, no order of injunction should be passed. [45]

An interim injunction ordinarily would precede finding of a *prima facie* case. When existence of a *prima facie* case is established, the court shall consider the other relevant factors, namely, balance of convenience and irreparable injury. Conduct of the parties is also a relevant factor. If the parties had been acting in a particular manner for a long time in interpreting the terms and conditions of the contract, if pending determination of the *lis,* an order is passed that the parties would continue to do so, the same would not render the decision as an arbitrary one. [46]

To entitle any party to an *ad interim* injunction, it must not only satisfy the court about its *prima facie* right, but also that refusal to grant injunction would result in irreparable injury and that balance of convenience lay in favour of granting the injunction rather than refusing it. [47]

The intention of the Legislature in enacting or incorporating this section is clear and explicit that the party before arbitral proceedings or at any time after making of the award, but before enforcement, can apply to the court for interim relief under this section. [48] Where the petitioner delayed approaching the court for injunction restraining the respondents from manufacturing, marketing and/or selling products of the agreement pending adjudication of disputes in arbitration, the petitioner by its long silence and conduct encouraged, acquiesced or, in any case, assented to the marketing of the product. In such a case, the petitioner is not entitled to the grant of injunction on the ground of delay alone, even through it may have a case on merits. [49]

Where the parties have agreed that disputes shall be settled by arbitration, the court has nevertheless specific power to grant interim injunctions. The power can be exercised before there has been any request for arbitration or the appointment of arbitrators, provided that the applicant intends to take the dispute to arbitration in due course. The power may, in an appropriate case, be exercised by granting an interim mandatory injunction, such as an order to continue performance of a building contract. [50]

Where the petitioner filed an application for grant of injunction restraining the respondents from dispossessing the petitioner from the Company in view of the fact that the petitioner was in possession of the company as well as because he was carrying on business, it was held that it was a fit case for grant of injunction. [51]

18. WHEN INTERIM INJUNCTIONS MAY BE REFUSED

Interim injunction should not be granted by the courts when:

(1) it amounts to compelling specific performance of a contract of personal, confidential and fiduciary service, which is barred by *section 14(1) (b) & (d) of Specific Relief Act*;

(2) in violation of *section 14(1) (a) of the Specific Relief Act*, it permits specific performance of a contract of personal service;

(3) it amounts to granting the whole relief which could be claimed at conclusion of the trial; and,

(4) principle of balance of convenience and irreparable injury lie in favour of the defendant. [52]

Injunction would be refused in the following cases:

(a) Commitment of banks must be honoured free from interference by the courts. It is only in exceptional cases, that is to say in case of fraud or in case of irretrievable injustice, that the court should interfere. [53] An irrevocable commitment, either in the form of a confirmed bank guarantee or an irrevocable letter of credit, cannot be interfered with by the courts. [54]

(b) Arbitration proceedings cannot be stayed while exercising the powers conferred by section 9 of the Act. [55]

(c) A civil court has no jurisdiction to direct the arbitrators to give an interim award and, that too, for a specific sum. [56]

(d) Where a clause in the contract authorised the Government to withhold amounts due under one contract from other contracts between the same parties, the court has no power to grant injunction restraining the Government from withholding the amounts. [57]

(e) If an injunction amounts to virtually giving a direction to pay the amount to one of the parties, then such an injunction is beyond the purview of the court. [58]

(f) A court cannot grant injunction to restrain the defendant from disposing of certain properties belonging to him. [59]

(g) The question whether the petitioner should be de-recognised for future supplies is not a matter pertaining to arbitration proceedings and, as such, injunction cannot be granted to restrain the said action. [60]

(h) If party is itself responsible for not taking delivery of the goods due to paucity of funds, it cannot seek injunction against the other party for restraining it from disposing off the stock. [61]

(i) A litigant who withholds vital documents in order to gain advantage over the other side would be guilty of playing fraud on the court as well as on the opposite side. [62] Non-disclosure of the fact that an application for interim orders was either pending or rejected by the arbitral tribunal, amounts to playing fraud on the court. [63]

19. INSTANCES OF GRANT OF INTERIM INJUNCTION

A party would be entitled to interim injunction in the following cases:

(1) Where an agreement created, right over the land in favour of a developer, he is entitled to seek injunction for restraining the owners of the land from entering into any agreement for development of the property by creating third party interest. [64]

(2) If the business of the firm is facing an imminent danger of being paralysed, then the court would be justified in restraining one of the partners from interfering with the management of the firm. [65]

(3) A petitioner who is managing the company, is entitled to grant of injunction against respondents who are trying to dispossess him. [66]

(4) If pending reference to arbitration the plaintiff is likely to suffer irreparable loss if injunction is refused, the court ought to grant *ad interim* injunction. [67]

(5) Even if the applicant is found to have a *prima facie* case, unless balance of convenience lies in his favour and unless damage cannot be compensated in terms of money, no order of injunction should be passed. [68]

20. INJUNCTION ON ENCASHMENT OF BANK GUARANTEES

A contract of bank guarantee is an independent contract between the banker and the respondent and has to be worked out independently of the disputes arising out of the contract agreement between the parties to the petition. [69] The bank is not a party to the arbitration agreement and thus, the courts cannot restrain the banks in any manner. [70]
The principles to be borne in mind by the court in the matter of grant of injunction against enforcement of bank guarantee/irrevocable letter of credit are:

(a) a bank guarantee is an independent and distinct contract between the beneficiary and the bank and the rights and obligations therein are to be determined on its own terms;

(b) a bank guarantee which is payable on demand implies that the bank is liable to pay as and when a demand is made upon the bank by the beneficiary. The bank is not concerned with any *inter-se* disputes between the beneficiary and the person at whose instance the bank had issued the bank guarantee;

(c) commitments of the bank must be honoured free from interference by the courts, otherwise trust in commerce, internal and international, would be irreparably damaged; and

(d) an irrevocable commitment either in the form of confirmed bank guarantee or irrevocable letter of credit cannot be interfered with except in case of established fraud of an egregious nature as to vitiate the entire underlying contract or in case of special equities in the form of preventing irretrievable injustice between the parties. Allegations of irretrievable injustice must be genuine and immediate as well as irreversible. [71]

Normally, the commitment of banks must be honoured free from interference by courts, otherwise trust in commerce could be irreparably damaged. [72] If the bank guarantees are unconditional and payable on demand, it implies that the bank is liable to pay as and when a demand is made by the beneficiary [73] and there can be no justification warranting injunction prohibiting encashment of the bank guarantee. [74]
It is not the duty of a bank to enquire whether the goods had been delivered by the stipulated date or not and it cannot refuse payment to the buyer on the ground that the delivery had not been affected by that date. [75] It is also not necessary for the bank to seek quantification of the loss. [76] The bank should only verify whether the amount claimed is within the terms of the bank guarantee or letter of credit. [77]
The order of the court refusing to restrain the principal from realising and encashing a bank guarantee cannot be the subject-matter of litigation in a separate proceeding on the same cause of action since it is barred by principles of *resjudicata* . [78]
In case of a confirmed bank guarantee, it cannot be interfered with unless there is fraud and irretrievable injustice involved in the case and the fraud has to be an established fraud. Mere irretrievable injustice without *prima facie* case of established fraud is of no consequence in restraining the encashment of bank guarantee. [79] The exception for fraud on the part of the beneficiary seeking to avail himself of the credit is a clear application to the maxim *ex trupi cause non oriture action* , i.e. ‘fraud unravels all’. The courts will not allow their process to be used by a dishonest person to carry out a fraud. [80] A fraud alleged in connection with a bank guarantee should be such as would vitiate the very foundation of the bank guarantee. [81]
Encashment can be denied if there is clear fraud committed by a party, of which the bank has notice, or the guarantee has been obtained by misrepresentation or concealment of material facts. [82]

Even if the disputes go to the root of the contract and are serious in nature, they cannot be brought within the concept of special equities and cannot amount to a case of irretrievable injury of exceptional nature justifying injunction against encashment of a bank guarantee. [83] Non-performance of the obligation under the contract by any of the parties cannot be equated with the inherent fraud, in the contract itself. [84] Loss of money can never be a cause of irreparable injury. [85] If the decision in arbitration is ultimately in favour of the petitioner, the amount which the petitioner had been deprived of shall come back to him. [86]

21. CONDITIONS OF BANK GUARANTEE MUST BE SATISFIED

Before granting injunction restraining encashment of the bank guarantee, the court has to consider, firstly, the terms of the bank guarantee and, secondly, the manner in which the bank guarantee had been invoked by the beneficiary. [87] The court

cannot, however, enter into the collateral area of justification of the invocation, i.e. whether it is based on contractual violations or otherwise. [88]

A bank guarantee can only be encashed as per its terms. [89] If the bank guarantee can be encashed only on the assertion or happening of specified events, then it cannot be encashed by writing a simple letter of demand. [90] A bank guarantee furnished to secure mobilisation advance can be invoked only for the amount remaining unrecovered and not for the full amount. A guarantee for a specific purpose gets released when the purpose has been achieved and cannot thereafter be invoked. [91]

A performance guarantee can be invoked in terms of the contract of guarantee but if the same is sought to be invoked for reasons alien to the agreement, it would be an unconscionable act and would lack in *bona fides* . [92]

When the bank guarantee is furnished to the Chief Engineer, it is only the Chief Engineer and no other engineer who can invoke the bank guarantee. [93] A conditional bank guarantee cannot be invoked before the time stipulated in it. [94]

22. STAY AGAINST ENCASHMENT OF BANK GUARANTEE

A court can stay encashment of a bank guarantee if the following conditions exist:

(a) There should be a serious dispute and there should be good *prima facie* case of fraud and special equities in the form of preventing irretrievable injustice to the party approaching the court in order to restrain the operation of the bank guarantee. Otherwise, the very purpose of bank guarantee would be negatived and the fabric of trading operation will get jeopardised.

(b) The Supreme Court has frowned upon the approach of the court that has proceeded on the basis that the injunction sought was not against the bank but was sought against the appellant. The Supreme Court has observed that the net effect of injunction is to restrain the bank from performing the bank guarantee and that cannot be done. One cannot do indirectly what one is not free to do directly and further observed that the aggrieved party in such circumstances is not remedyless. He can sue for damages.

(c) The autonomy of the bank guarantee/irrevocable letter of credit was entitled to protection and except in very exceptional circumstances, court should not interfere with that autonomy. The reasons stated are that the bank guarantees involve many of the trading transactions. The commitment of banks must be honoured free from interference by the courts. Otherwise, trust in commerce, internal and international would be irreparably damaged. It is only in exceptional cases, that is to say in case of fraud, or in case of irretrievable injustice be done, the court should interfere.

(d) Fraud in relation to bank guarantees is fraud of exaggerated nature so as to vitiate the underlying transaction. [1]

Special equities must exist to allow stay on encashment of the bank guarantee. [2] If the obligations expressed in the main contract are not fulfilled, then the court would be justified in passing an order against encashment of bank guarantee [3]. A bank guarantee cannot be invoked where the contractor has completed all the works under the contract and even the maintenance period has expired. [4]

Where the plaintiff *prima facie* makes out a case of utilisation of the entire mobilisation advance for procuring material for the work, the action of the respondent to invoke the bank guarantee on cancellation of the contract work is not justified. [5] If the invocation of the bank guarantee appears fraudulent, the court ought to pass an interim injunction restraining the respondent from invoking the bank guarantee. [6] Where a Disputes Resolution Board had awarded Rs. 68.49 crores in favour of the petitioner, it would be unfair to permit the respondents to invoke the bank guarantees. [7]

Courts have carved out two exceptions justifying stay on encashment of bank guarantees: (i) If there is a fraud in connection with the bank guarantee which would vitiate the very foundation of such guarantee and the beneficiary seeks to take advantage of it, then he can be restrained from doing so; and (ii) where allowing an encashment of an unconditional bank guarantee would result in irretrievable harm or injustice to one of the parties concerned. [8]

Instead of passing an interim order on an application filed by the petitioner, the court may direct the arbitrator to pass an interim order under section 17 after hearing the parties. However, there is no restriction on the part of the court to grant stay

till the prayer for interim order is heard and disposed of by the arbitrator. [9]

23. INJUNCTION CANNOT BE GRANTED AGAINST TERMINATION OF CONTRACT

A building contract cannot be specifically enforced by granting interim relief. [10] If there is a breach of such a contract, the appropriate remedy is to compensate the party in damages. [11]
An injunction against termination of a contract is statutorily prohibited if the contract is determinable in nature. [12] An injunction to restrain a party from giving effect to a termination letter would amount to specific performance of that agreement and the same cannot be granted. [13] Where a party is itself responsible for the creation of a situation necessitating a warning of cancellation of contract, he cannot seek injunction against the other party. [14]

24. SECURING AMOUNT IN DISPUTE

The party seeking protection order under section 9 (ii)(b) ordinarily must place some material before the court, besides the merits of the claim that is eminently needed to be passed as there is likelihood or an attempt to defeat the award, though the provisions of Order 38 Rule 5 of *CPC* are not required to be satisfied. [15]The purpose of passing an interim order by the court under section 9 (ii)(b) of the Act is *inter alia* for 'securing the amount in dispute in the arbitration'. Such an order is at par with an attachment before judgment as against other decree holders as per the provisions of Order 38, Rule 10 of *CPC*. [16] A party can seek interim measure of protection only if there is an amount in dispute in the arbitration. [17]
Under the scheme of the 1996 Act, provisions contained in *Code of Civil Procedure* are not applicable to the proceedings under the Act. In the absence of guidelines on how the power for grant of relief under section 9 (ii)(b) is to be exercised by the court, the principles underlying the stipulations contained in *section 18*(1) and *41*(b) of the *Arbitration Act*, 1940 are to be applied. It is only on adequate material being supplied by the petitioner that the court can form opinion that unless the jurisdiction is exercised under section 9 (ii) of the 1996 Act, there is real danger of the respondent defeating, delaying or obstructing the execution of the award made against it. [18]

A party cannot seek detention of a ship chartered by it as security for its claims in arbitration. [19] Similarly, a party cannot seek protection of the awarded amount on the ground that the respondent was in a financial crunch when the respondent proves that there was no such problem. [20] However, where the apprehension of the petitioner that the respondents could create third party interest in the movable and immovable properties is genuine, then till the *constitution* of the arbitral tribunal an *ad interim* order protecting the property was necessary. [21]

25. POWER TO APPOINT RECEIVER

The principle which governs the discretion of the court regarding appointment of Receiver is whether it is 'just and convenient' to do so. [22] The application for appointment of Receiver stands on the same footing as an application for injunction. These applications are taken out for the protection of the interests of the parties pending the decision or dispute by the civil court or in a private forum. [23] While appointing a Receiver, the court should ensure to itself that the action is 'just and convenient' and that the interest of both the parties is equally protected. [24]
When an application is placed before the court for appointment of Receiver, it is the discretion of the court to accept or not to accept the prayer. The court must weigh the scales to find out whether it would be just and convenient to appoint a Receiver. [25] Such a discretion is essentially discretionary and the court has to be more than slow in the discharge of such discretion either way. [26]
A Receiver appointed by the court for running a business cannot act beyond the terms of his appointment and dispossess a party from the property. [27]

While passing an order appointing a Receiver, the court has to hear the party in whose possession the subject-matter of the dispute is lying. [28] A Receiver can be appointed to ensure alienation of property where during the pendency of the petition, a party alienates immovable property belonging to the partnership firm. [29]

26. COURT HAS NO POWER TO STAY ARBITRATION PROCEEDINGS

Section 5 provides that no judicial authority shall intervene except where so provided. Section 9 does not permit any or all applications. It only permits applications for interim measures in clauses (i) and (ii) thereof. Thus, there cannot be any application for stay of arbitral proceedings or to challenge the existence or validity of the arbitration agreements or the jurisdiction of the arbitral tribunals. All such challenges would have to be made before the arbitral tribunal under the 1996 Act. [30]

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 1996 Act 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 removed 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. [31]

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. A party having grievances against an arbitrator on account of bias and prejudice is not without remedy. It has only to wait till the arbitral award comes. [32]

27. COURT'S POWER TO APPOINT ARBITRATORS

See under Chapter 4

28. COURT COMPETENT TO HEAR APPEAL

Section 37 fixes the forum for filing an appeal by laying down a test – the test being that it should be the court authorised by law to hear appeals from original decrees of the court passing the order. [33] For ascertaining as to the forum of appeal, the whole of the subject-matter of the dispute has to be taken into account [34], including the pecuniary value of the matter in dispute. [35]

An order passed by the Chief Justice or his nominee under section 11(6) is a judicial order [36], but it does not take away the effect of appellate jurisdiction to be exercised by a court under section 37(2). [37]

29. APPEALABLE ORDERS

A party can invoke the appellate powers of the courts under the following provisions of law:

Section 37. Appealable orders .—

(1) *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) *granting or refusing to grant any measure under section 9;*

(b) *setting aside or refusing to set aside an arbitral award under section 34*

(2) *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.*

(3) *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.*

An appeal is a creature of statute and the right of appeal cannot be extended by implication. [38] Appeal does not lie from each and every order of the arbitral tribunal. [39] Appeals can only be entertained against the types of orders specifically mentioned in section 37 and from no others. [40] The expression 'and from no others' clearly suggests the legislative intent that no appeal other than those relating to the orders mentioned in section 37 shall lie before an appellate court. [41]
An appeal does not lie against an order of the court under section 14 of the Act[42] or against a decision of the arbitral tribunal concerning the venue of arbitration. [43]
Section 37 does not bar appeals against orders passed under other provisions of law, like the *Code of Civil Procedure*. [44] If an award is confirmed after its remittal, the order is appealable. [45] An appeal from a decree, so far as a question of payment by installments is concerned, would be maintainable. [46] An order of the court regarding its jurisdiction to proceed with the matter is not an order under the Act and, is therefore, appealable. [47]

(A) Appeal Against Order Accepting Plea as to Lack of Jurisdiction

An appeal shall lie to a court from an order of the arbitral tribunal accepting the plea referred to in sub-section (2) or sub-section (3) of section 16. An order of a tribunal on the issue of jurisdiction is not an interim award. However, if an application as to lack of jurisdiction is accepted by the tribunal, an appeal shall lie under section 37 of the Act against the said order. [48]
A party is entitled to invoke the provisions of section 37 (i)(a) should the arbitrator rule against him, resulting in termination of the arbitration proceedings. [49]

(B) Appeal Against Interim Measures Ordered by Arbitral Tribunal

An appeal shall lie to a court from an order of the arbitral tribunal granting or refusing to grant an interim measure under section 17. An arbitration award cannot be equated with a money decree and hence, the court cannot direct deposit of the amount awarded. [50]

(C) Appeal Against Interim Measures Ordered by Court

All species of orders coming under section 9 are appealable. [51] An order refusing to grant of an *ex parte* injunction can be appealed against under section 37. [52]
An order passed by the court on an application for interim relief pending adjudication of the main petition filed under section 9, is not a final order and hence not appealable under the provisions of section 37. [53] Where the interim order of the High Court has become final, an appeal would not be entertained. [54] If an application for vacation of order granting *status quo* is not disposed of within a period of 30 days, an appeal against it shall not be maintainable. [55]

(D) Appeal Against Order Setting Aside or Refusing to Set Aside Award

Sub- section 37(1)(b) does not contemplate an appeal against every order passed by the court in proceedings under section 34. [56] An order of the court setting aside an award is appealable. [57] The statutory right of appeal against an award vested in a party under section 37 cannot be forfeited on technical grounds. [58] An appeal against an order dismissing an application for setting aside award is maintainable. [59]
An application filed after the period prescribed for filing objections to the award is barred by limitation and liable to be dismissed. Such an order passed by the lower court is an appealable order. [60] If the court while dismissing the objection petition does not use the expression that the award is set aside, yet the effect of the order is that the award was set aside, the order is an appealable order. [61]

An order directing an award to be returned to the arbitrator as the court was not a proper forum for filing it is not an order refusing to set aside the award and, therefore, not appealable. [62] If neither party files objections against an award, then no appeal is maintainable against the award. [63]

When an award is accepted on certain points and is remitted for reconsideration only on the remaining points, the order would amount to refusal to set aside the award on the points the award is accepted and, as such, will be appealable. [64]

30. POWER OF APPELLATE COURT

The scope of inquiry before the appellate court is even more restricted and limited than before the court dealing with objections filed under section 34. [65] In a proceeding to set aside an award, the appellate court cannot sit in appeal over the conclusion of the arbitrator [66] by re-examining and re-appraising the evidence considered by him. [67] It is not within the domain of the appellate court to substitute the view of the arbitrator by its own reasoning. [68]
In an appeal against the order refusing to set aside an award, pure questions of law can be raised when no investigation of facts is necessary and the relevant materials are on record. [69] All that has to be seen by the appellate court is whether the award can be challenged on the ground of excess of jurisdiction, incompleteness or misconduct as understood in law. [70]
When disposing of the appeal, it is open to the appellate court to set aside or vary [71] any consequential or incidental order passed by the trial court. [72]
If the discretion has been exercised by the trial court reasonably and in a judicial manner, [73] the fact that the appellate court would have taken a different view may not justify interference with the trial court's exercise of discretion. [74] Where the trial court fails to decide the existence or validity of the arbitration agreement, the court hearing the appeal is bound to interfere. [75]

31. NEW GROUNDS CANNOT BE TAKEN IN APPEAL

Where a party files an appeal, it cannot take therein a new point which had not been urged in the objection petition filed by it against the award. [76] Issue of limitation [77] or lack of proper hearing [78] or bias of the arbitrator [79] or question as to jurisdiction of the arbitrator [80] or the existence or validity of the arbitration agreement [81] or excess payment [82], cannot be urged for the first time in appeal.

A ground of law, particularly one which goes to the legal validity of the entire proceedings, can be taken for the first time in appeal, but when such a ground is abandoned in the trial court, it cannot be allowed to be raised in appeal. [83] Pure questions of law such as those relating to construction of the order of the trial court, construction of the arbitration agreement and the construction of the provisions of the Act can be raised for the first time in appeal, when no investigation of facts is necessary and relevant materials are on record. [84]

32. SECOND APPEAL

Section 37 of the Act expressly prohibits a ‘second appeal’ from an order passed in appeal, except an appeal to the Supreme Court. [85] The expression ‘second appeal’ does not mean an appeal under *section 100 of the Code of Civil Procedure*. [86]
Although the power of revision is not specifically provided by the Act, but in the absence of any express exclusion of the *CPC*, an inference cannot be drawn that provisions of the *CPC* would not apply. [87] Hence, the aggrieved party can file a revision petition in the High Court against an order of the appellate court. [88] When an appeal is held to be incompetent, then the memorandum of appeal, in a fit case, can be treated as revision, provided there is no other legal infirmity in adopting

this course. [89] The label placed on a cause is not conclusive and does not ordinarily affect the jurisdiction of the court to allow the label to be corrected by treating the appeal as a revision or a revision as an appeal provided, of course, the cause of action so demands. [90]
Merely on the ground that the decision of the trial court was wrong the High Cour will not interfere, but where the lower court has no jurisdiction to enquire into a question, the High Court has the power to interfere in revision. [91] In a revision petition, the court cannot examine the award on merits, especially when there are two concurrent judgments from the court below. [92]Interference with awards in revision is much more objectionable than in appeal. [1] Objections to the validity of the award which were not taken in the lower appellate court, cannot be allowed to be raised in revision. [2]

There is nothing in the expression 'authorised by law to hear appeals from original decrees of the court' contained in section 37, which by implication reserves the jurisdiction under the Letters Patent to entertain an appeal against an order passed in arbitration proceedings. Therefore, in so far as Letters Patent deal with appeals against orders passed in arbitration proceedings, they must be read subject to section 37 of the Act. [3]

33. RIGHT TO APPEAL TO SUPREME COURT

No second appeal shall lie from an order passed in appeal under section 37, but it shall affect or take away any right to appeal to the Supreme Court. [4]
An appeal against an award brought by special leave is not an appeal as of right. It is not intended to be an appeal on every ground of fact and of law unless the Supreme Court considers it fit to examine the matter from any special angle. Before a party can claim redress, it must show that the award is defective by reason of an excess of jurisdiction or of a substantial error in applying the law or some settled principle or of some gross and palpable error occasioning substantial injustice. [5]
While the appeal is pending, a party cannot approach the Supreme Court. [6]

34. LIMITATION PERIOD FOR FILING APPEAL

The Act of 1996 does not provide a period of limitation within which an appeal has to be filed. [7]Section 43(1) makes the provisions of the *Limitation Act* applicable to arbitrations as it applies to proceedings in court, but even the *Limitation Act* does not provide for any period of limitation for filing an appeal. [8]

35. CROSS-APPEALS

In *Municipal Corp. of Delhi v. International Security & Intelligence Agency Ltd* [9] it was held that:

(1) The right to take cross-objection is the exercise of substantive right of appeal conferred by the statute;

(2) A cross-objection can be preferred if the applicant could have sought for the same relief by filing an appeal in conformity with the provisions of the Act.

(3) If the appellate court forms an opinion that the original appeal itself was incompetent or not maintainable, then the cross-objection shall also fall and cannot be adjudicated upon on merits.

(4) Right to take cross-objection is the exercise of substantive right of appeal conferred by a statute. Available grounds of challenge against the judgment, decree or order impugned remain the same whether it is an appeal or a cross objection. The difference lies in the form and manner of exercising the right; the *terminus a quo* (the starting point) of limitation also differs.

(5) An appeal which is barred by time is not a valid appeal and the cross-objection too shall have to be rejected.

1 *NBOC Ltd. v. Patel Construction Co.* , 1993 (2) Arb LR 117 (Cal).

2 *Sushil Ansal v. Union of India,*.

3 *Nalanda Ceramic & Industries Ltd. v. N.S. Choudhary & Co. (P) Ltd.,* (1977) 4 SCC 37 : AIR 1977 SC 2142.

4 *Bijoy Das v. Union of India* , 1993 (1) Arb LR 142 (Gau).

5 *Subraya v. Manjunath* , ILR (1905) 29 Mad 45 .

6 *Calcutta Paper Industries v. Indian Oil Corp.,* (Cal).

7 7 *Union of India v. S.R. Construction Co.,* 2007 (4) RAJ 701 : 2007 (4) Arb LR 141 (Del).

8 *Globe Cogeneration Power Ltd. v. Hiranyakeshi Sahakari Sankeshwar,* AIR 2005 Kant 94 [*LNIND 2004 KANT 183*]: 2005 (1) Arb LR 502 (DB).

9 *Yeshwant Rao Ganpat Rao Vipat v. Dattatraya Ramachandra Rao Vipat,* (DB) (However see, *Krishna Iyer v. Subbarama Iyer,* and *Upendra Nath v. Het Lal,*).

10 *K.M.S. Mine & Mill Owners v. Rohtas Industries Ltd.,*.

11 *Louis Dreyfuss & Co. v. Araromal Shiv Dayal* , (1909) 4 IC 1151 : 3 Sind LR 164.

12 *Capital Fire Engineers v. State Bank of Patiala,* 2006 (1) RAJ 102 (Del); *G. E. Countrywide Consumer Financial Services Ltd. v. Surjit Singh Bhatia,* 2006 (2) Arb LR 170 (Del); *Pm Shakti Renergies Ltd. v. Megatech Control Ltd.,* 2006 (2) Arb LR 186 (Mad) (DB *); L. K. Merchants (P) Ltd. v. Sirpur Paper Mills Ltd.,* 2005 (Supp) Arb LR 124 (Cal).

13 *Shripad Baji v. Dattatraya Vittal,* ; *Nemi Chand Sowear v. Kesarimull Sowcar,* : 56 MLJ 35.

14 *Nathan v. Samson, AIR* 1931 Rang 252 (FB); *Jethanand Pitambardas v. Mirabai, AIR* 1942 Sind 79.

15 *Murli Mal v. Sant Ram,*.

16 *Gulati Construction Co. v. Betwa River Board,* : 1984 RLR 162; *Sushil Ansal v. Union of India,*.

17 *Raman Lamba v. D.M.Harish,* : 1991 (2) Arb LR 196.

18 *Globe Cogeneration Power Ltd. v. Hiranyakeshi Sahakari Sakhere Karkhane Niyamit,* AIR 2005 Kant 94 [*LNIND 2004 KANT 183*] (DB).

19 *GE Countrywide Consumer Financial Services Ltd. v. Surjit Singh Bhatia,* 2006 (2) Arb LR 170 (Del) : 129 (2006) DLT 393 [*LNIND 2006 DEL 1031*].

20 *Indian Drugs and Pharmaceuticals Ltd. v. Indo Swiss Synthetics Gem Manufacturing Co. Ltd.,* (1996) 1 SCC 54 [*LNIND 1995 SC 1119*] : AIR 1996 SC 543 : 1996 (1) Arb LR 77.

21 *Balmukand v. Shew Prosad,* AIR 1980 Cal 331 [*LNIND 1980 CAL 82*].

22 *Kuldeep Singh v. Union of India,* : 1986 (1) Arb LR 430 (FB).

23 *Food Corporation of India v. Great Eastern Shipping Co. Ltd.,* (1988) 3 SCC 291 [*LNIND 1988 SC 192*] : AIR 1988 SC 1198 : 1988 (1) Arb LR 392.

24 24 *A.B.C. Laminart Pvt Ltd. v. A.P. Agencies, Salem,* (1989) 2 SCC 163 [*LNIND 1989 SC 150*] : AIR 1989 SC 1239 : 1989 (2) Arb LR 340; *Raunaq International Ltd. v. Mini Sea Foods,* (Del).

25 *Svapn Const. v. IDPL Employees Co-op. Group Housing Society Ltd.,* 2006 (1) RAJ 486 (Del); *Triveni Oil Field Service Ltd. v. ONGC,* 2006 (1) RAJ 412 (Del).

26 *Salem Chemical Industries v. Bird and Co. (P) Ltd.,* : (1978) 2 Mad LJ 189 (DB).

27 *Dabur India Ltd. v. BSI Ltd.* , 2000 (3) Arb LR 501 (Del).

28 *Om Metals & Minerals Ltd. v. State of Punjab* , 1993 (1) Arb LR 542 (Raj); *Escorts Ltd. v. G.K. Automobile,* 2006 (1) Arb LR 346 (Del).

29 *Forbes, Forbes, Cambell & Co. v. Chela Ram* , (1909) 1 IC 938 : 3 Sind LR 8.

30 *Indian Oil Corporation Ltd. v. Multimetals Ltd.,* : (1983) 85 Pun LR (D) 151 ; *K.E.P.V.Venkatachalam Pillai v. Rajaballi M.Sujan,* ; *J.N.Sahni v. State of Madhya Bharat,* (FB).

31 *Telephone Cables Ltd. v. Chief General Manager (Telecom),* (2005) 10 SCC 294 : (2005) 3 RAJ 368 : 2005 Supp Arb LR 572.

32 *Bulk Trading S.A. v. Dalmia Cement (Bharat) Ltd.,* 2006 (1) RAJ 54 : 2006 (1) Arb LR 38 (Del).

33 *Shivnath Rai Harnarain (India) Ltd. v. Abdul Ghaftar Abdul Rehman,* (2008) 5 SCC 135 [*LNIND 2008 SC 628*] : AIR 2008 SC 1906 : 2008 (2) Arb LR 121.

34 *Jindal Vijayanagar Steel (JSW Steel Ltd.) v. Jindal Praxair Oxygen Co. Ltd.,* (2006) 11 SCC 521 [*LNIND 2006 SC 671*] : 2006 (3) RAJ 312 (SC) .

35 *Sasken Communication Technologies Ltd. v. Prime Telesystems Ltd.,* 2003 (1) RAJ 317 (Del).

36 *Sirojexport Co. Ltd. v. Indian Oil Corp. Ltd* ., AIR 1997 Raj 120 : 1996 (Supp) Arb LR 370 : 1997 (1) WLC 109.

37 *Pandey & Co. Builders (P) Ltd. v. State of Bihar,* (2007) 1 SCC 467 [*LNIND 2008 SC 1573*] : AIR 2007 SC 465 : 2007 (1) RAJ 83 : 2007 (4) Arb LR 192; *Viswa Bharti v. Sarkar and Sarkar,* AIR 2008 NOC 1934 (Cal) .

38 *S.B.L. (India) Ltd. v. Ram Chandra Construction and Carriers Pvt. Ltd.,* AIR 2007 NOC 1448 (Raj).

39 *P. Ananda Gajapathi Raju v. PVG Raju,* (2000) 4 SCC 539 [*LNIND 2000 SC 530*] : 2000 AIR SCW 1489.

40 *S.K. Contractor & Engineers v. Hindustan Petroleum Corporation Ltd.,* 2008 (2) Arb LR 263 (Del) .

41 *A.B.C. Laminart Pvt. Ltd. v. A.P. Agencies, Salem,* (1989) 2 SCC 163 [*LNIND 1989 SC 150*] : AIR 1989 SC 1239 : 1989 (2) Arb LR 340*; Continental Const. Co. v. Satluj Jal Vidyut Ltd.,* 2006 (1) RAJ 434 : 2006 (1) Arb LR 321 (Del) .

42 *Hakam Singh v. Gammon (India) Ltd.,* (1971) 1 SCC 286 [*LNIND 1971 SC 21*] : AIR 1971 SC 740 : (1971) 2 SCJ 576 [*LNIND 1971 SC 21*].

43 *Rite Approach Group Ltd. v. Rosoboronexport,* (2006) 1 SCC 206 [*LNIND 2005 SC 904*] : AIR 2006 SC 401 : 2006 (1) RAJ 63.

44 *Competent Construction Co. v. State of Himachal Pradesh* , 1988 (2) Arb LR 89 (Del); *Kumud Agarwala v. Fertilizer Corporation of India Ltd.,* : 1984 Arb LR 334; *Snehalkumal Sarabhai v. E.T. Organisation,* ; *Hatti Gold Mines Ltd. v. Vinay Heavy Equipment,* 2005 (2) RAJ 324 (DB) (Ker).

45 *Balsukh Refractories & Ceramics v. Hindustan Steel,*.

46 *S.C. Malik v. Union of India,*.

47 (2006) 11 SCC 181 [*LNIND 2006 SC 413*] : (2006) 2 Arb LR 498 : (2006) 2 RAJ 661.

48 *Brawn Laboratories Ltd. v. Fittydent International GMBH* , 2000 (2) Arb LR 64 (Del).

49 *P. Anand Gajapathi Raju v. PVG Raju,* (2000) 4 SCC 539 [*LNIND 2000 SC 530*] : AIR 2000 SC 1886 : (2000) 2 Arb LR 204 [*LNIND 2000 SC 530*] ; *Empire Jute Co. Ltd. v. Jute Corporation of India Ltd.,* 2007 (4) Arb LR 74 : 2007 (4) RAJ 627 : (2007) 14 SCC 680 [*LNIND 2007 SC 1242*] ; *Pinki Das Gupta v. Publics (India) Communications,* 2005 (Supp) Arb LR 251 (Del).

50 *Delhi Development Authority v. Alkaram,* : 1983 Arb LR 1 [*LNIND 1982 DEL 43*] (DB).

51 *Ford Credit Kotak Mahindra Ltd. v. M. Swaminathan* , 2005 (2) Arb LR 468 : 2005 (2) RAJ 225 (Mad); *Korp Gems (India) Pvt. Ltd. v. Precious Diamond Ltd.,* 2008 (3) RAJ 201 (Cal); *Alcove Industries Ltd. v. Oriental Structural Engineers Ltd.,* 2008 (3) RAJ 227 (Del). *Desirability of Restricting Intervention by Courts* 243

52 *Engineers India Ltd. v. D. Warren International Ltd.* , 1997 (3) ICC 657 (Cal) (DB).

53 *CDC Financial Services (Mauritius) Ltd. v. BPL Communications Ltd* ., (2003) 12 SCC 140 : (2005) 2 RAJ 43 : 2005 Supp Arb LR 558.

54 *State of Jharkhand v. R.K. Const. Pvt. Ltd.,* 2005 (2) RAJ 245 (Jhar); *Kohinoor Creations v. Syndicate Bank* , 2005 (2) RAJ 622 (Del)(DB).

55 *Union of India v. Popular Const. Co.,* (2001) 8 SCC 470 [*LNIND 2001 SC 2234*] : AIR 2001 SC 4010 : (2001) 3 RAJ 163 : (2001) 3 Arb LR 345.

56 *Braham Dutt Shukla v. Ashok Leyland Finance,* 2004 (1) Arb LR 493 : 2004 (2) RAJ 183 (MP)(DB); *Ispat Industries Ltd. v. M.V. Thor Orchid,* 2004 (3) RAJ 430 (Bom).

57 *Eastern Mineral & Trading Agency v. Steel Authority of India* , 2000 (3) Arb LR 7 : 2000 (3) RAJ 115 : AIR 2000 SC 3579 (1).

58 *Secur Industries Ltd. v. Godrej & Boyce Mfg. Co. Ltd.,* AIR 2004 SC 1766 : (2004) 3 SCC 447 [*LNIND 2004 SC 270*] : (2004) 1 Arb LR 425.

59 *Anuptech Equipments (P) Ltd. v. Ganpati Co-op. Group Housing Society Ltd.,* : (1999) 2 Bom CR 331 [*LNIND 1999 BOM 86*].

60 *Srikumar Textiles (P) Ltd. v. Sundaram Finance Ltd.,* 2008 (3) RAJ 658 (Mad).

61 *Eastern Mineral & Trading Agency v. Steel Authority of India, AIR* 2000 SC 3579 : 2000 (3) Arb LR 7 : 2000 (3) RAJ 115.

62 *Anuptech Equipments (P) Ltd. v. Ganpati Co-op. Group Housing Society Ltd.,* : (1999) 2 Bom CR 331 [*LNIND 1999 BOM 86*].

63 *United India Assurance Co. Ltd. v. Kumar Texturisers* , 1999 (2) Arb LR 111 : 1999 (2) RAJ 255 (Bom).

64 *GAIL (India) Ltd. v. Nagarjuna Cerachem Pvt. Ltd.,* AIR 2005 AP 151 [*LNIND 2004 AP 801*]: 2004 (5) Andh LD 511 : 2005 (6) Andh LT 543 : 2005 (2) Arb LR 150 : 2005 (1)RAJ 632 (DB).

65 *Uttar Pradesh State Road Transport Corp. v. KL Hi Tech Secure Print Ltd.,* AIR 2005 NOC 30 : 2004 (4) Andh LT 498 (AP)(DB).

66 *Engineers India Ltd. v. D. Warren International Ltd.* , 1997 (3) ICC 657 (Cal) (DB); *Manqayarkarasi Apparels Pvt. Ltd. v. Sundaram Finance Ltd.* , 2002 (3) Arb LR 210 (Mad); *BSNL v. BMW Industries Ltd.,* AIR 2007 NOC 1715 (Cal)(DB); *I.R. Coelho v. State of Tamil Nadu,* AIR 2007 SC 861 : (2007) 2 SCC 1 [*LNIND 2007 SC 35*], relied upon; *Ramjee Power Construction Ltd. v. Union of India,* 2005 (4) RAJ 285 : 2005 (3) Arb LR 570 (Del).

67 *Engineering Mazdoor Sabha v. Hind Cycles Ltd., AIR* 1963 SC 874 : (1963) 2 SCA 101 : *Rohtas Industries Ltd. v. Rohtas Industries Staff Union, AIR* 1976 SC 425 : (1976) 2 SCC 82 [*LNIND 1975 SC 523*] ; *Balkishen Gulzari Lal v. Pannal Lal Sud,* : (1972) 74 Pun LR (D) 112; *R. v. Disputes Committee of National Joint Council* , *(1953) 1 All ER 327*; *Om Prakash Satish Kumar Thapar v. Union of India* , (1996-2) 113 Pun LR 42 (DB).

68 *Rukmanibai Gupta v. Collector, Jabalpur,* AIR 1981 SC 479 : (1980) 4 SCC 556; *Har Shankar v. Dy. Excise and Taxation Commissioner, AIR* 1975 SC 1121 : [1975] 3 SCR 254 [*LNIND 1975 SC 587*].

69 *GAIL (India) Ltd. v. Nagarjuna Cerachem Pvt. Ltd.,* AIR 2005 AP 151 [*LNIND 2004 AP 801*]: (2004) 5 ALD 511 : (2004) 6 ALT 543 (DB).

70 *GAIL (India) Ltd. v. Nagarjuna Cerachem Pvt. Ltd.,* AIR 2005 AP 151 [*LNIND 2004 AP 801*]: 2004 (5) Andh LD 511 : 2005 (6) Andh LT 543 : 2005 (2) Arb LR 150 : 2005 (1) RAJ 632 (DB); *Unity Service Station v. IOC Ltd.,* 2008 (1) Arb LR 74 (Kant) : ILR (2007) Kar 3431 [*LNIND 2007 KANT 174*] ; *India Trading Oil Co. v. HPCL,* 2008 (3) Arb LR 302 (Cal)(DB).

71 *Uttar Pradesh State Road Transport Corp. v. KL Hi Tech Secure Print Ltd.,* AIR 2005 NOC 30 : 2004 (4) Andh LT 498 (AP)(DB).

72 *Kamla Const. Co. v. State of Jharkhand,* 2004 (4) RAJ 173 (Jhar).

73 *Amrit Kumar Khatoniar v. Oil India Ltd.,* 2008 (1) Arb LR 124 (Gau) : 2007 (3) GLT 921.

74 *State of Jharkhand v. R.K. Construction Pvt. Ltd.,* AIR 2006 NOC 430 : 2005 (2) RAJ 245 (Jha); *Pran Nath Gupta v. Union of India,* 2006 (2) CTLJ 97 (Jhar).

75 *M. Moideen Kutty v. Divisional Forest Officer Nilambar* , 1988 (2) Arb LR 37 (Ker).

76 *Raipur Alloys & Steels Ltd. v. Union of India,* : 1988 (1) Arb LR 84; *Venkata Krishna v. Indian Oil Corporation,* : 1989 (1) Arb LR 270.

77 *Nandlal Bhandari Mills Ltd. v. Madhya Pradesh State Electricity Board,* (DB).

78 *Score Information Technologies Ltd. v. Employees State Insurance Corp.,* 2004 (2) Arb LR 18 (Del).

79 *Agri Gold Exims Ltd. v. Sri Lakshmi Knits & Wovens,* (2007) 3 SCC 686 [*LNIND 2007 SC 82*] : (2007) 52 AIC 132; *Tata Finance Ltd. v. T.R.S. Vijairam,* AIR 2007 NOC 1319 (Mad); *Mahesh Agarwal v. Indian Oil Corporation Ltd.,* 2008 (3) Arb LR 173 (Cal) : 2008 (1) Cal LT 291 (HC); *Tejinder Pal Grover v. Murari Lal Gupta,* 2008 (2) Arb LR 204 (P&H) : 2008 (149) Pun LR 368; *A. Tosh and Sons (India) Ltd. v. Happy Valley Tea Co. Pvt. Ltd.,* AIR 2006 Cal 90 [*LNIND 2005 CAL 168*]: 2006 (2) RAJ 382 : 2006 (2) Arb LR 357 (Cal); *A.R.C. Overseas Pvt. Ltd. v. Bougainvillea Multiplex and Entertainment Centre Pvt. Ltd.,* AIR 2008 NOC 1675 (All) (DB); *Hind Motors (India) Ltd. v. Raj Kumar Arora,* 2008 (3) Arb LR 127 (P&H).

80 *Indian Drugs and Pharmaceuticals Ltd. v. Ambika Enterprises,* AIR 2008 NOC 322 : 2007 (6) ALJ 668 (All).

81 *Hindustan Petroleum Corp. Ltd. v. Pinkcity Midway Petroleums,* (2003) 6 SCC 503 [*LNIND 2003 SC 572*] : AIR 2003 SC 2881 : 2003 (2) Arb LR 666 : 2003 (3) Pun LR 746; *Fiat India Pvt. Ltd. v. Rahul Udog Viniog Ltd.,* AIR 2004 NOC 99 : 2003 (3) Cal LT 381 (Cal); *Rajasthan State Trading Corp. v. Nand Lal Saraswat,* 2005 (1) RAJ 659 (Raj); *Ford Credit Kotak Mahindra Ltd. v. M. Swaminathan,* AIR 2005 Mad 218 [*LNIND 2005 MAD 206*]: 2005 (2) Arb LR 468 : 2005 (2) RAJ 225; *Tata Finance Ltd. v. Sumit Khamsera,* AIR 2006 Raj 43 : 2006 (1) RAJ 531; *Ram Prasad Sharma v. Jharkhand State Housing Board,* 2005 (3) RAJ 267 (Jhar); *A. Josh & Sons (India) Ltd. v. Happy Valley Tea Co Pvt. Ltd.,* 2006 (2) RAJ 382 (Cal).

82 *Manish Mittal v. Mahesh Chand,* 2006 (2) RAJ 454 (Del).

83 *Fisherman Cooperative Society Ltd. v. Fishmen Cooperative Society Ltd.,* AIR 2008 NOC 1932 (AP).

1 *Kohinoor Creations v. Syndicate Bank,* 2005 (2) RAJ 622 (Del)(DB); *Vijay Viswanath Talwar v. Mashreq Bank,* 2004 (1) RAJ 588 (Del); *Mahesh Kumar v. Rajasthan State Road Transport Corp.,* 2006 (2) RAJ 146 : 2006 (1) Arb LR 615 (Raj); *Marwadi Shares & Finance Pvt. Ltd. Co. v. Kishorkumar Nagjibhai Mavani,* AIR 2009 Guj 81 [*LNIND 2008 GUJ 355*].

2 *S.B.P. & Co. v. Patel Engg. Ltd.,* (2005) 8 SCC 618 [*LNIND 2005 SC 851*] : (2005) 128 Comp Cas 465 : 2005 (3) RAJ 388 : AIR 2006 SC 450 : (2005) 3 Arb LR 285; *Indian Drugs and Pharmaceuticals Ltd. v. Ambika Enterprises,* AIR 2008 NOC 322 : 2007 (6) ALJ 668 (All).

3 *Ramji Dayawala & Sons (P) Ltd. v. Invest Import, AIR* 1981 SC 2085 : (1981) 1 SCC 80 [*LNIND 1980 SC 422*] ; *A. Chinna Ramanathan Naidu v. B. Subbarami Reddy,* (AP).

4 *F.O. Murliman Santram v. Banarsidas & Sons, AIR* 1935 Sind 62 (DB); *Ranwa Const. Co. v. Administrator, Pant Krishi Bhawan,* AIR 2006 Raj 70 : 2006 (1) RAJ 679 : 2006 (1) Arb LR 207 (Raj).

5 *Kotak Mahindra Finance Ltd. v. T.N. Balasubramanian,* 2004 (3) Arb LR 164 : 2004 (3) RAJ 492 (Mad); *Ramco Super Leathers Ltd. v. Associates India Financial Services (P) Ltd.,* 2004 (2) RAJ 87.

6 *Garden Finance Ltd. v. Prakash Industries Ltd.,* : (2002) 1 Bom CR 641 [*LNIND 2001 BOM 311*] : (2001) 4 Bom LR 310 [*LNIND 2001 BOM 311*].

7 *Jupiter Chit Fund (Pvt.) Ltd. v. Dwarika Dhish Dayal,* : 1979 (5) All LR 380.

8 *Printers (Mysore) (P) Ltd. v. Pothan Joseph,* : 38 Mys LJ 1035.

9 *Patanjal v. Rawalpindi Theatres Pvt. Ltd.,* : ILR (1969) Del 393 (DB).

10 *Leoranal v. R.B. Business Promotion (P) Ltd.* , JT 2002 (5) SC 24 : 2002 (3) RAJ 24 : 2002 Supp Arb LR 1.

11 *Sukanya Holdings Pvt. Ltd. v. Jayesh H. Pandya,* AIR 2003 SC 2252 : (2003) 5 SCC 531 [*LNIND 2003 SC 430*] : 2003 AIR SCW 2209 : 2003 (2) Arb LR 43 (SC).

12 *Shriram Hanutram v. Mohanlal & Co,* : ILR (1940) Bom 249.

13 *Lal Chand v. Alliance Jute Mills Co. Ltd.,*.

14 *Mithailal Gupta v. Inland Auto Finance,* : 1967 MPLJ 776 (DB).

15 *State of Madhya Pradesh v. Harsh Wood Products (P) Ltd.,* (MP); *Harsh Wood Products (P) Ltd. v. State of Madhya Pradesh,* : 1989 (2) Arb LR 35.

16 *Raghunandan Sao v. Narain Sao,* (DB); *Bengal Jute Mills Co. v. Lalchand Dugar,* (DB).

17 *Howrah Oil Mills Ltd. v. R.N. Rice and Oil Mills* , AIR 1955 (NOC) (Pat) 4582.

18 *R.McDill & Co. Pvt. Ltd. v. Gouri Sankar Sarda,* (1991) 2 SCC 548 [*LNIND 1991 SC 143*] : 1991 (1) Arb LR 290.

19 *Soorajmull Nagarmull v. Asiatic Trading Co.,* (DB).

20 *Ratanji Virpal & Co. v. Dhiranjilal Manilal,* ; *Bengal Jute Mills v. Jewraj Heeralal,* : ILR (1943) 2 Cal 392 .

21 *Govt. of India v. Jamnadhar Rungta,* : 1959 BLJR 527 (DB); *Rohtas Financers (P) Ltd. v. Lakshmi Commercial Bank Ltd.* , 1991 (1) Arb LR 392 (Del) (DB).

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13 Claims in Arbitration Matters

PC Markanda: Arbitration Step by Step

P C Markanda

13 Claims in Arbitration Matters

1. DISPUTES COVERED BY ARBITRATION CLAUSE – ADJUDICABLE

The arbitral tribunal, being a domestic tribunal appointed by the parties for resolution of disputes between them, it is imperative that only those disputes should be adjudicated which the parties had agreed upon between themselves. If the parties have stipulated in the arbitration agreement the nature of disputes which they want the arbitrator to decide, then the arbitrator cannot exceed the jurisdiction vested in him. If the parties have limited the jurisdiction of the arbitrator, then he has to remain within the bounds of the authority vested in him. Determination of the question whether any particular dispute or difference that has arisen between the parties is referable to arbitration must depend on whether the dispute or difference in question is one to which the agreement applies.

If in order to adjudicate upon the claims set up by a party, the arbitrator has to look into the contents of the agreement, this by itself is sufficient to say that the dispute or difference arises out of the agreement. [1] The expression 'arising out of' is very much wider than 'under' the agreement. [2] The question as to effect (scope) will ordinarily be for the arbitrator to decide, i.e. to decide the issue of arbitrability of the claims preferred before him. [3] The following are matters which are referable to arbitration:

(1) A dispute regarding payment of interest on the amount of claims is a dispute arising under the contract. [4]

(2) A question whether the firm was correctly deregistered or not, is not a matter arising out of the contract. [5]

(3) Mere signing of a no claim certificate does not disentitle a contractor from seeking arbitration because the question whether there is a no claim certificate or not, itself, is a dispute. [6] Acceptance under protest of payment in full satisfaction of amount due under the contract is no accord or satisfaction in the sense of bilateral consensus of intention and does not discharge the contract. [7]

(4) Where additional work ordered on the contractor is carried out and he claims higher rates for such work, the matter is referable to the arbitrator. [8]

(5) When an agreement was terminated before the due date, the claims arising out of such termination are referable to arbitration. [9] Validity of an action of termination of the contract is a subject-matter to be decided by the arbitrator in the arbitration forum. [10]

(6) Where the partnership firm gets dissolved due to the death of a partner, the legal representatives have a right to approach the court on the basis of the arbitration clause in the partnership agreement. [11]

(7) In a works contract, Central P.W.D. Labour Regulations had been incorporated, the disputes regarding validity of Regulations or actions thereunder are referable to arbitration. [12]

(8) An arbitrator has jurisdiction to decide whether a particular item is covered by a particular clause or not. [13]

(9) Where a dispute relates to rate for extra work [14] or additional work [15], it is a matter to be decided by the Arbitrator.

(10) Whether or not a party is entitled to damages is a matter of fact which falls within the domain and province of the arbitrator. [16]

(11) If the arbitrators have an authority to make a partition, they have an authority to determine everything incidental or consequential with reference to the mode in which the partition is to be effected. [17]

(12) It is open to the parties to confer upon the arbitrator an authority to determine the liability of one of them as the debtor and to prescribe the mode of realisation of the amount so determined. [18]

(13) Merely because a dispute relating to compensation for delay in completion is not arbitrable, does not mean that an arbitrator does not have jurisdiction to entertain a claim for escalation. [19]

(14) Where it was stipulated that differences arising as to the amount of loss or damage independently of all other question shall be referred to arbitration, then the words 'independently of all other questions' connote that the jurisdiction of the arbitrator was limited to loss or damage but that there was nothing in the clause to suggest that the parties could not submit other questions. [20]

(15) Disputes pertaining to dissolution of a firm and its accounts are within the scope of the arbitration clause. In case the arbitral tribunal fails to adjudicate, it would be deemed to be an error of jurisdiction. Even without the parties specifically agreeing to adjudication of these disputes, the tribunal would have jurisdiction to entertain the same. [21]

2. DISPUTE NOT COVERED BY ARBITRATION CLAUSE – NOT ADJUDICABLE

When a dispute is not related to the arbitration agreement, reference cannot be made to the arbitrator. An arbitration agreement is the source of power and authority of an arbitral tribunal and what is not contemplated to be settled in arbitration by the parties cannot be made the subject-matter of arbitration. An arbitrator cannot vest himself with jurisdiction by a wrong decision as to the facts on which the limit of his jurisdiction depends. In the following cases, it was held that the disputes were not referable to arbitration:

(1) A claim arising under a distinct and different contract, cannot be said to be a dispute arising under or in connection with the contract under which the liability sought to be enforced has arisen. [22]

(2) If a purchaser admits all the liabilities and only asks for postponement of encashment of the cheque, a suit would lie for recovery of the amount of the cheque, as no dispute was seen to have arisen under the contract. [23]

(3) As soon as it is held that the claims are covered by the arbitration clause, the claims in the alternative under sections 65 and 70 of the Contract Act become nugatory and of no consequence [24].

(4) A suit for non-delivery of goods after full payment had been made does not form a dispute which can be referred to arbitration. [25]

(5) Where a major part of the dispute was settled by a compromise, merely trying to withhold the security cannot even seemingly be called a dispute. [26]

(6) An arbitrator cannot give an award which is contrary to the terms of the contract. Once the parties agree to have a specific clause prohibiting award of damages, the contractor will not be entitled to the award of damages. [27]

(7) If a particular subject-matter is not amendable to its decision at all, it would be a case of patent lack of jurisdiction and acquiescence by a party to such an issue would be immaterial as no jurisdiction can be conferred by an agreement if it is otherwise inherently lacking. [28]

(8) Where the arbitration clause expressly excludes certain matters and leaves them to the sole discretion of the architect, then the decision of the architect is final and the arbitrator cannot decide on these. However, if the certificate to be granted by the architect is not meant to be 'conclusive', then the arbitrator would have power to review the certificate and decisions of the architect. [29]

(9) If there was an effective notification by one partner to retire, he cannot subsequently withdraw it and the right to purchase his share would accrue to other partners as per partnership deed. It does not mean that the original partnership deed was rendered inoperative and that the arbitration clause therein also ceased to exist or became inoperative. [30]

(10) Where an arbitrator acts beyond the terms of reference, the award is not binding upon the parties. [31] However, where both parties appeared before the arbitrator, filed their claims and counter claims, produced evidence and were heard, the contention that there was no valid reference is not tenable. [32]

(11) If a dispute is expressly excluded by an agreement of parties, an arbitrator cannot assume jurisdiction upon the same. [33] Where a dispute relating to claim for extra cost is prohibited by the contract, an arbitrator is not

empowered to award the same. [34] Where the arbitrator ignored a prohibition relating to payment of escalation, he must be deemed to have widened his jurisdiction. [35]

(12) If an arbitrator goes on a wrong track by looking into a different lease agreement, after the lease agreement which was the basis of the reference was found to be invalid, such an award is liable to be set aside. [36]

(13) An arbitrator cannot give directions in the award touching persons who are not parties before him. [37]

(14) When a party makes no demand for interest in the notice demanding arbitration, the award of interest prior to arbitration would be illegal. [38] However, an arbitrator is not debarred from granting interest on equitable ground in the case of a security deposit where fiduciary relationship exists between the depositor and depositee. [39]

(15) If an agreement states that payment for extra work would be allowed only when there are written instructions from the Engineer-in-charge, any award made by the arbitrator in contravention of the terms of the contract is bad in law. [40]

(16) Likewise, when the notice inviting tender clearly stated that the site was available for inspection, the award on account of difficulties faced in excavating the earth is bad in law. [41]

(17) If a contract is illegal and void, an arbitration clause which is one of the terms thereof, must also perish along with it. [42]

(18) If a claim is not arbitrable, it does not become arbitrable only because of its inclusion in the notice invoking the arbitration clause. [43]

3. EXTRA AND ADDITIONAL WORKS

The word ‘extras’ is generally used in relation to the works which are not expressly or impliedly included in the original contract and therefore, not included in the original contract price, provided the work is done within the framework of the original contract. Whether a particular work is extra or not will depend upon the terms and condition of the contract, its specifications, plans, drawings, nature of work etc. [44]

Where a building or engineering contract does not contain a provision that alterations in, additions to, omissions from the contract may be made, the builder is under no obligation to make them; and if he does so, the liability of the employer to pay for them depends upon various considerations. Building and engineering contracts, in most cases, impose some conditions precedent upon payment of extras. The usual conditions are the following - one or more of them may find a place in a particular contract:

(a) the contractor must obtain an order in writing to carry out extras;

(b) the order must be signed, and in some cases, counter-signed;

(c) the order must have been given before the construction of the work ordered;

(d) the order must have been given before completion of the works under the contract;

(e) the order so given must be produced;

(f) weekly accounts must be given;

(g) a previous contract must be made for any extra work; and

(h) in case of dispute, the price of the extras must be settled by the architect, or arbitration, before any claim can be made. [45]

The general principles for entitling a contractor for receiving payment for a change or variation have been summarised in a leading case [46] as follows:

(1) That the work should be outside the narrower ‘agreed scope’ of the contract, that is outside the contractor's express or implied obligations in regard to the work described in the original contract;

(2) That it should have been ordered by or on behalf of the owner;

(3) That the owner should, either by words or conduct, have agreed to pay for it;

(4) That any extra work has not been furnished voluntarily by the contractor;

(5) That the work should not have been rendered necessary by the fault of the contractor; and

(6) Where applicable that any failure of the contractor to comply with contract requirements as to procedure or form should have been waived by the owner.

An arbitrator has jurisdiction to decide matters regarding the additional work, as in deciding those matters, disputes and questions arising out of the contract may have to be considered and decided by him. [47] When the arbitrator on the interpretation of the agreement and the tender items, considered the nature of the work and found that there is extra work not covered in the tender items, it is not possible for the court to interfere with the same. However, if the rate awarded was unreasonable, the case would be different. [48] Where an entire dispute has been referred to the arbitrator, it is open to him to allow claims for additional works. [49] An arbitrator has the power to determine the rates relating to extra items in respect of which the decision of an officer has not been made final by the contract itself. [50]

The appellant had awarded a contract to the respondent for the construction of a Power House. Before undertaking the work, the appellant directed the respondent to shift the site of power house site by 55 meters. The respondent claimed extra amount for excavation of the pit. The appellant pleaded that the item of excavation was fully covered and provided for in the contract. Held that the arbitrator was justified in rejecting the claim of the respondent. [51]

Where the dispute arose regarding the enhanced rate of wooden planks on the ground that the contractor had used new wooden planks each time for the work on the insistence of the Authority whereas such planks should have been allowed to be used four or five times for shoring work, it was held that by insisting on use of new planks every time, the Authority altered the terms and conditions of contract and as such extra rate was admissible. [52]

Where the condition of the contract prohibited payment in respect of work over and above provided in the contract but the arbitrator awarded certain amount, it was held that it was not open to the contractor to claim extra cost towards rise in prices of material and labour. [53]

In view of the provisions of the arbitration clause the arbitrator has jurisdiction to decide the dispute in regard to the additional work done by the contractor as part of the main contract notwithstanding the *non obstantate* clause ‘except as otherwise provided’. [54]

Where due to leakage in the hyperbolic like roof structure, there was seepage of water on the surface of concrete, the execution of water proofing treatment required at the instance of the respondent would certainly be deemed to be an extra item for which the contractor has to be paid on the basis of rates worked out as per the terms of the agreement. Thus, award of the arbitrator allowing rate as per extra item cannot be faulted with. [55]

An arbitrator cannot allow extra rate for carrying out work of excavation in hard strata when the notice inviting tender clearly states that the contractor shall visit the site before quoting his rates to ascertain the nature of the work as to that of the description given in the schedule of items. [56]

Where the clause in the contract clearly provides that the contractor shall not be entitled to extra payment for erecting any work in/or under water or for pumping and bailing out water by any method for lowering the sub-soil water level during execution of the work, then the wording of the clause being clear and unambiguous prohibits any extra payment both in positive and negative terms. [57]

An arbitrator made an award in respect of an abandoned claim on account of extra work. This was challenged before the trial court which refused to interfere with the award holding that the withdrawal of the claim was not required to be taken into account since the appellant had not settled the dispute in respect of the extra work. Held that the arbitrator had erred in entertaining a claim which had been abandoned by the contractor. [58]

In view of a specific stipulation in the agreement regarding payment for extra work only when there are written instructions from the Engineer-in-charge, any award made by the arbitrator in contravention of the terms of the contract is bad in law and the award was liable to be set aside. Likewise, where in the notice inviting tender it had been clearly stated that the site was available for inspection, the award on account of difficulties faced in excavating the earth is bad in law because the contractor must be deemed to have inspected the site and must have been aware of the difficulties to be faced in excavating the earth. [59] If an item of work requires some other work to be performed inevitably, under the inclusive principle, the said work cannot be charged as an extra item and its price has to be deemed to be included in the price quoted. [60] Where the contractor does not inform the employer that he would treat a particular item of work as an extra item, any claim made thereon would not be sustainable. [61]

As per agreement, the appellant was required to excavate only hard soil. During the course of execution of the work, the appellant encountered hard soil mixed with pebbles and stones which entailed more work. The arbitrator awarded extra rate which was set aside by the trial court. In appeal, it was held that the award of the arbitrator was justified and the arbitrator had rightly awarded compensation. [62]

Some extra work was done by the contractor in a government contract under the directions of the engineer. Extra work done was duly entered in the Measurement Book by the engineer, however, payment on account of extra work done by the contractor was rejected. Held that the rejection was improper as it would lead to unjust enrichment of the State and denial of payment for extra work was violative of *Article 14 of the Constitution*. [63]

4. VARIATIONS CARRIED OUT ON ORAL ORDERS

When an employer orally orders varied work which he is told or knows will cost extra, the courts will imply a promise to pay for that work despite the absence of a written order, especially where any other inference from the facts would be to attribute dishonesty to the employer. The standard of proof required to establish oral promise of payment for the work done would, in such cases, be quite high. It would be strong evidence of fraud if an employer, desiring alterations or additions to be made by a contractor, and knowing that they would cost more than the contract price, himself or by his engineer or architect, were to stand by and see the expenditure going on upon the alterations and additions and then, taking the benefit, refuse to pay upon the ground that proper orders had not been obtained.

Notwithstanding a provision preventing recovery without a written order, it has been held that where a contractor requests an order in writing on the ground that an instruction involves a variation, and the architect refuses to give the order in writing, an arbitrator with a general power to decide disputes can award payment despite the absence of a written order. [64] A second and independent reason may be that such a situation will attract the principle of an ‘implied promise to pay’, now better regarded as a *quasi* -contractual remedy based on unjust enrichment. [65]

The book of specifications issued by a municipal committee contained the conditions on which work was intended to be done by the committee. One of the conditions was that no alteration or variation in the work was to be done by the contractor without the written order of the President, where the value of such alteration exceeded Rs. 1,000/-. Under instructions from the engineer, the plaintiff changed the construction from un-coursed to coursed masonry, the value of which exceeded over Rs. 1,000/-, without the written order of the President. Held that the deed executed for the particular work prevailed over the specifications and as the contractor had executed the work in accordance with the orders of the engineer the committee could not escape liability on the ground that there was no written order of the President. [66]

> Even in the absence of written instructions, where it is evident that the work was done admittedly on the basis of oral instructions issued by the subordinate staff of the defendant and the defendant had enjoyed the benefit thereof, it was held that the work was thus done for the benefit of the defendant and hence, they cannot be allowed to turn around and say that nothing extra was payable. [67]

5. DEVIATION OF QUANTITIES

It is quite common in the building industry that even though meticulous planning had been done before finalising the tenders, yet during the course of execution of work, need arises either to enlarge the scope of work or decrease the same. If such increase or decrease is not of a substantial nature, then the contractor cannot make any grouse nor can seek revision of rate for the varied quantities. Problems crop up when the variations are ordered on the contractor far in excess of what a prudent contractor could contemplate, with reasonable diligence, at the time of working out rates at the tender stage. Such problems get compounded, when though the increase in quantities in certain items of work go up by 3 to 4 times than shown in the bill of quantities, but the employer is adamant not to revise the rates in accordance with the prevalent market conditions. Surely, a contractor who had worked out the rates keeping in view the scope of work as shown in the tender, cannot be expected to continue to work on the quoted rates. Any contractor would calculate his rates under a given set of circumstances. He may quote low rates: (a) because he wants to keep his surplus establishment and labour engaged when the work in hand in the vicinity is likely to be completed in a few month's time and the work for which he has tendered is likely to be completed either simultaneously or a few months later; (b) when he has certain surplus quantity of materials; (c) there is an overall slump in construction activity at that point of time; (d) there is likelihood of more work coming up in near future and he is trying to establish himself at that place; (e) to take credit for doing a particular type of work which eventually helps him in getting pre-qualified in that organisation or elsewhere; (f) materials at low rates were available in abundance but due to large number of construction works coming up, the abrupt increase in cost is manifold; (g) due to the government order closing down certain mines or quarries or other establishments; (h) unforeseen migration of a particular category or other labour to another place or country for better prospects etc. These factors would weigh very heavily when the contractor is asked by the employer to continue to do work much beyond that agreed upon between the parties, and, consequently, give rise to disputes.

Works contracts do have in-built risks, but of minor nature, for which the contractor does keep some margin while quoting rates; but he makes no provisions for abnormal situations (like an abnormal increase or decrease in quantities) simply because in that event he would never be able to compete with other tenderers. In this era of cut throat completion, no contractor would risk for uncertainties.

> Where a contractor who was awarded a contract for construction by the Government claimed payment at enhanced rate for additional work of hard rock cutting required to be done by him and the arbitrator did not accept the said claim of the contractor in full but partly allowed the said claim, the arbitrator was entitled to do so on the construction placed by him on clause 12 of the contract, and, therefore, it could not be said that in awarding the sum for the additional work the arbitrator exceeded his jurisdiction and that the award was vitiated by an error of jurisdiction. While considering the claim of the contractor, the arbitrator was required to consider the terms of the contract and to construe the same. It was, therefore, permissible for the arbitrator to consider whether clause 12 of the contract enabled the Engineer-in-charge to require the appellant to execute additional work without any limit or reasonable limit should be placed on the quantity of the additional work, which the contractor may be required to execute at the rate stipulated for the main work under the contract. For that purpose, the arbitrator could take into consideration the practice prevalent in the Central Public Works Department in this regard as well as the correspondence between the contractor and the authorities including the letters of the Executive Engineer, Superintending Engineer and the Additional Chief Engineer recommending payment of remuneration at the increased rate for the additional work in excess of 20% of the quantity stipulated in the contract. Moreover, the standard form of contract of the Central Public Works Department has been amended and now it specifically permits for a limit of variation called ‘deviation limit’ upto a maximum of 20% and upto such limit the contractor has to carry out the work at the rates stipulated in the contract and for the work in excess of that limit at the rates to be determined in accordance with clause 12-A under which the Engineer-in-charge can revise the rates having regard to the prevailing market rates. [68]

Where a contractor makes a claim on account of deviation/alteration which he had executed without a written order from the Engineer-in-Charge which was mandatory as per conditions of the contract, the arbitrator had no jurisdiction to make an award on such a claim since the *sine qua non* for undertaking the deviation/alteration had not been complied with by the contractor. [69]

'Plus/minus 25' variation clause in a works contract came in for interpretation by the arbitrator which was held to be a plausible interpretation. The stipulation is applicable to a case where the value of the sum total of the additions and deletions exceeded 25% of the contract price. [70]

When the contract value is enhanced, it becomes part of the contract. The variation clause in the contract relates to variation in the extent of work with reference to the contract value. This means that although the contract value remains the same, the extent of the work under that contract is different. The variation, therefore, has to be seen with regard to the contract value which had been enhanced and not the original contract value. [71]

6. RATES FIXED BY CONTRACT CANNOT BE CHANGED UNILATERALLY

A clause in a works contract between the Government and the contractor provided that should there be a change in specifications, the rates of payment for work done would be altered by the engineer-in-charge and in case of dispute, the decision of the superintending engineer would be final. It was subsequently found that rates for work not involving change in specifications were altered along with rates for works involving change in specifications and further, that this was done not by the engineer-in-charge or superintending engineer but at a conference attended by Government officers including the engineer-in-charge, superintending engineer and the contractor. Held that: (1) the alteration of rates where there was no change in the specifications was *de hors* the original contract, and (2) the alteration by the meeting of the officers was also *de hors* the contract in spite of the presence of the engineer-in-charge and the superintending engineer. The decision having been made by a committee was not in terms of clauses of the contract which authorized only the superintending engineer to determine the rates. The conditions as laid down in the contract having not been followed, the rates worked out by the committee formed a new contract, which was not in compliance with the provisions of section 175(3) of the Government of India Act, 1935 and, therefore, not binding on the Union Government. [72]

If an agreement had been entered into between the Government and the Contractor for hiring machinery and the rates for hire were initially fixed, the hiring charges cannot be subsequently revised unilaterally unless there is a specific provision in the Rules or Code under which the hire is made. [73] Where the covering letter to the notice of award of work provided for a certain percentage of escalation, the same cannot be reduced at a later point of time. [74]

The terms and conditions of a contract are regulated and guided by the terms and conditions of the tender notice and the agreement between the parties, if any. At the time of allotment of the contract with the respondent, the lower rates quoted by him was the vital consideration. All the tenderers while quoting rates in their respective tenders, before submission of tenders must have calculated their respective profits by taking into consideration the rates prevalent in the district and other relevant considerations. Subsequently, rates cannot be allowed to be enhanced. If, after the allotment of contract, the enhancement of rates is allowed it would not only harm the sanctity of the tender system itself but also it will cause loss to public exchequer. [75]

Once a contract is entered into then it cannot be altered to the prejudice of either of the parties unilaterally. Railways are not exempt from ordinary law of the land. The agreement once reduced in writing, binds both the parties and the parties are bound by contractual obligations contained therein and no party has right to relieve itself of its contractual obligations much less unilaterally. [76] A party to the contract cannot at a later stage, whilethe contract was being performed, impose terms and conditions which were not part of the offer. [77]

Under the general law of contract, once the contract is entered into, any clause giving absolute power to one party to override or modify the terms of the contract at his sweet will - even if the opposite party is not in breach, – will amount to interfering with the integrity of the contract. [78]

7. RATES FIXED IN CONTRACT MAY CEASE TO BE APPLICABLE

In certain contracts, the quantities of some items vary to such an extent that the applicability of the rates originally fixed under the contract cease to have any binding effect and the rates are mutually agreed to be abandoned, either expressly or impliedly. Whether or not there had been such a variation of the terms and conditions of the contract will depend on the facts and circumstances of each case but, nevertheless, it is not an easy proposition to solve. Similarly, when the fact situation on which the contract is formed, e.g. availability of cheap import or particular geological conditions, or other similar circumstances, ceases to be applicable, then either party may seek change in the rates fixed by the contract.

Where a price was originally fixed in the contract, but such price has for some reason ceased to be applicable so that a reasonable price has become substituted for that fixed by the contract, such reasonable price depends on all the circumstances. A contract to pay for the market price has been held in a particular contract to mean the market price at the time the contract was made. [79]

There are circumstances in which the liability of the employer to pay a reasonable price will arise expressly or impliedly in the contract. In other instances, however, there are exceptions to the rule that an action upon a *quantum meruit* payment will not lie where there already exists a contract which has fixed the price, *e.g.* —

(1) The contract has been frustrated; [80]

(2) When completion has been prevented by the employer in breach of contract; [81]

(3) Where work has been done under a contract which was void *ab initio* ; [82] and

(4) Where work has been done under an unenforceable contract. [83]

In *M/s Tarapore and Company v. Cochin Shipyard Ltd.,* [84] it was held by the Supreme Court as under:

> 38 There is no room for doubt that the parties agreed that the investment of the contractor under this head would be Rs. 2 crores and the tendered rates were predicated upon and co-related to this understanding. When an agreement is predicated upon an agreed fact situation, if the latter ceases to exist the agreement to that extent becomes irrelevant or otiose. The rates payable to the contractor were related to the investment of Rs. 2 crores under this head by the contractor. Once the rates became irrelevant on account of circumstances beyond the control of the contractor, it was open to the contractor to make a claim for compensation. Therefore, it appears satisfactorily established that the claim arose while implementing the contract and in relation to the contract.

In *State of U.P. v. M/s Ram Nath International Construction Pvt. Ltd.,* [85] it was held as follows:

> 8. Admittedly under the agreement the completion period of work was 28-2-1989. The stipulated quantity of work in respect of Item 13 was 57,000 cubic metres and in respect of Item 15 it was 3500 cubic metres. In the course of execution of the contract, drawings and designs were changed as a result of which there was abnormal increase of the quantity of work and for such an increase of quantity of work when the contractor claimed a higher rate and gave the analysis before the arbitrator, which was not disputed by the State and the arbitrator accepted the rate, the court will not be justified in interfering with the same. It is not possible for us to accept the contention of Mr Sehgal that under the terms of the agreement the contractor was not entitled to claim any higher rate. The arbitrator having considered all the relevant materials and there being no legal proposition which has formed the basis for acceptance of a higher rate and on the other hand the same being arrived at on account of the abnormal increase in the quantity of work which was on account of change of drawings and designs, the court will not be justified in interfering with the same.

Where the terms of the contract specifically prohibited revision of rates due to change in scope of work or specifications, an award rendered by an arbitrator awarding the said sum is liable to be set aside. [86]

8. REDUCTION IN RATES – WHEN JUSTIFIED

In today's era of fast changing technology, the technology changes so fast that certain products having electronic components and items like computers, laptops and other goods become obsolete in a number of days and months with the introduction of new technology. There are also instances where with the entry of the competitor, the price of the product falls sharply or there is a sharp reduction in the price due to economy of scales. In this fast-changing scenario of technology and competition, a contractor can gain merely by delaying the supply of goods. If he has agreed to supply within a certain period at a particular rate, looking into fall in prices, he by merely delaying the supply can have enormous profits. If the purchaser had issued new tenders for the same items for the subsequent period and comes to know that the same product was now available at a considerable low rate, then the employer is within his rights to put a condition while extending the time period of supply of product that he would accept the product at the then prevalent rates. [87]

Tenders were floated for supply of 1672 km optical fibre cable. Work order was placed on the petitioner indicating the rate with a stipulation that the supply would be completed within a certain time. The petitioner failed to supply goods within the agreed time and the respondent reduced the rate during the time when the supply was made during the extended time. It was held that a party cannot seek to derive an undue advantage by its own default, of being paid a higher rate for supplies effected well beyond the contractual date, when the prices of the said goods are generally falling within the passage of time. [88]

Where the arbitral tribunal recorded a finding that the parties to the agreement went in for extension of time more than once and that the extension of time was on account of delay attributable to the petitioner, and in the meantime the respondent suffered increase in cost of material and wages of labour, the award of the arbitrator allowing revision in the rates of the lining work could not be interfered with. [89]

9. ESCALATION IN PRICES

Escalation is a normal and routine incident arising out of gap of time, in this inflationary age, in performing any contract of any type. If the arbitrator finds that there was escalation in prices and that the work was delayed due to the fault of the employer, the employer is liable to the consequences of the delay, namely, increase in prices at which the work was executed.

A provision in the contract provided that the contractor shall be entitled to payment of escalation of prices in the event of certain contingencies, then such provision shall have to be construed to be pre-emptive of any claim for enhancement on the ground not specified in the contract. [90]

Price escalation as per formula given in clause 10CC of the contract was payable to the contractor beyond the stipulated date of completion if the employer granted extension without holding the contractor responsible for delay. Thus, the award of the arbitrator allowing payment over and above the stipulations of clause 10CC was held to be beyond the authority of the arbitrator. [91] However, a claim for escalation is separate and distinct from that of claim for damages on account of prolongation of contract. Where in a works contract the completion period had to be extended because of various breaches of contract on the part of the employer, the arbitrator awarded damages. It was held that it could not be said that the contractor would not be entitled to anything other than escalation under clause 10CC of the contract because escalation under Clause 10CC catered only to increase in wages of labour and material rates. [92]

Where there is no escalation clause in the arbitration agreement, the arbitrator cannot assume jurisdiction to award increased rates for work done. [93]

It would not be permissible for the arbitrator to award for the additional or excess work when there was no provision in the contract permitting such escalated rate, particularly when execution of such an item was incidental and inevitable for completion of work. Further, the contractor having been granted extension of time on a clear premise that the contractor shall not be eligible for escalation in rates of labour and material or due to any other reasons under any circumstances, any award in disregard thereof shall be bad in law. [94]

A contractor incurred extra expenditure on account of escalation during the extended period of contract. In terms of clauses of the contract, escalation was payable for such period for which the contract was validly extended. On the basis of the material placed on record before the arbitrator, especially when there was increase in scope of work and on account of extra items and various hindrances, it was held that the petitioner ought to have granted extension of time. As the extra work had resulted into extension of time, it cannot be said that the contractor should continue to perform the extra work without payment of escalation on the basis of the relevant indices. [1]

If there is an escalation clause in the contract, it would equally apply for the period during the extended period of contract as it did during the stipulated period. [2]Where the contract provided for a work of six months which got extended to seven months due to extra work given to the contractor by the department, then escalation had also to be granted in accordance with clause 10CC of the standard CPWD contract format, especially in view of the fact that the contractor had also based his claim on section 73 of the Contract Act. [3]

The petitioner made a claim for loss suffered due to delay in execution of the contract because the prices of building materials had registered an unprecedented hike. The arbitrator compensated the petitioner for escalation on the basis of cost indices worked out by CPWD. Held that having got the benefit of price escalation formula as per clause 10CC under the head of damages, escalation as per clause 10CC could not be awarded separately. [4]

It is not necessary for the contractor to produce books of accounts to prove actual payment in terms of the escalation clause when the employer does not insist upon inspection of the books during the currency of contract. [5]

The very purpose of awarding escalation in costs by the arbitrator was to compensate the contractor for increase in costs of materials in the open market due to prolongation of the contract period. However, in view of the fact that iron and cement were supplied to the contractor by the department and that too at the original cost, the arbitrator was wrong in awarding 25% escalation to the contractor on the cost of the materials supplied by the department. [6] A clause in a contract debarring the contractor from claiming escalation in rates was construed to be limited to the stipulated period of contract and not beyond. [7]

If the dispute referred to the arbitrator was as to who was responsible for the delay in completion of the work and the arbitrator awarded escalation in favour of the contractor, it was held that the arbitrator did not commit misconduct in awarding the amount of compensation. [8] However, when the contract prohibits payment for any extra expenditure incurred due to prolongation of contract for any reason whatsoever, the award by an arbitrator on such an account is bad in law. [9]

A contractor abandoned the work and claimed escalation on the amount of work done. Before the arbitrator, the contractor submitted the escalation chart which was not admitted by the employer. The contractor also failed to adduce evidence in support of the claim. Held that in the factual matrix, claim for loss of profit and overhead expenses had not been established and was thus not payable. Further, escalation amount could not be worked out on the basis of a formula. [10]

10. AWARD OF DAMAGES

Section 73 of the Contract Act, 1872 which governs the subject of compensation for loss or damage caused by breach of contract provides as under:

> ***Section 73.*** *When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, which they made the contract, to be likely to result from the breach of it.*
>
> *Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach .*
>
> *When an obligation resembling those created by contract has been incurred and has not been discharged, any person injured by the failure to discharge it is entitled to receive the same compensation from the party in default, as if such person had contracted to discharge it and had broken his contract.*
>
> Explanation : *In estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience caused by the non-performance of the contract must be taken into account .*

It is mandatory on the part of the arbitrator to give a clear finding that the respondent was in breach of contract, otherwise he would have no power to award damages to the petitioner. Thus, finding as to breach is a *sine qua non* without which no liability can be fastened by way of damages. [11]

Unless and until a party proves the damages actually suffered by it or the compensation paid by it to a third party on account of breach of contract by the seller, it is not entitled to any damages or compensation. [12] Unless it is proved that the contract for re-sale is for the goods of the specification as stipulated in the contract which is the subject matter of dispute, re-sale price cannot be taken into account for assessment of damages. [13]

In case of construction of quarters, tools were to be supplied by the contractor and materials were to be supplied by the employer. Delay having been occasioned, the contractor was granted extension of time. On the contractor claiming damages due to prolongation of contract, the arbitrator without spelling out as to how the contractor suffered losses due to non-supply of materials awarded damages, which part of the award was set aside by the court. [14]

If the arbitrator has estimated the measure of damages as equivalent to the value of steel used up in making the component parts, the amount representing the value of the steel used up in making the component parts of the unfinished quantity of bins could not be the true measure of damages for their non-acceptance. The normal rule for computing the damages for non-acceptance of unfinished quantity of bins would be the difference between the contract price and the market price of such goods at the time when the contract was broken. [15]

The mere fact that the amount of damages awarded is not the amount of difference between the contract price and the market price, it does not necessarily follow that the arbitrators have not applied the law of the land and have misguided themselves. [16]

The market value is taken because it is presumed to be the true value of the goods to the purchaser. One of the principles for award of damages is that, as far as possible he who has proved a breach of a bargain to supply what he has contracted to get is placed as far as money can do it, in as good a situation as if the contract had been performed. The fundamental basis thus is compensation for the pecuniary loss which naturally follows from the breach. [17]

The fact that damages are difficult to estimate, or could not be assessed with certainty or precision, cannot relieve the wrong-doer of the necessity of paying the damages for breach. The lack of evidence in such matters would not be a

sufficient ground for awarding only nominal damages. [18]

In case of breach of contract for supply of goods, repurchase of goods at a higher price is not a sine qua non for claiming damages. It is the difference between the prices which was what the buyer was deprived of. [19]

In a works contract, the arbitrator awarded damages for prolongation of the contract period on the basis of cost indices of building works, as circulated and adopted by the CPWD from time to time. Such an award was good since the indices showed the prices prevailing at a particular time and the difference in price at which the work was to be done at the time of making the contract and the price on which it was done at the time of breach could be found out. [20]

A contractor was asked to stop construction work for a period of one month. Even the quantum of work was reduced in breach of the terms and conditions of the contract inasmuch as at each step the employer did not extend cooperation, with the result that the contractor could not complete the full quantum of work as originally envisaged. Thereafter, the employer arbitrarily terminated the contract. The contractor was put to loss on account of material purchased or agreed to be purchased or for unemployment of labour recruited. Held that the award of the arbitrator allowing overhead charges and for compensating losses cannot be interfered with. [21]

The completion of a works contract having been delayed, the arbitrator awarded some amount in favour of the employer. The contractor pleaded that when the time period of contract was extended then time did not remain the essence of the contract and thus the employer was not entitled to the award. Held that under the terms of the contract the employer was vested with the power to defer the date of commencement and that the postponement of the date of commencement would not imply that once the contract started, the contractor would equally have a right to keep delaying the contract. [22]

The terms of a contract provided that if in case of delay attributable either to the contractor or the employer or to both, the contractor sought and obtained extension of time, he would not be entitled to claim any compensation on the ground of such delay. In such circumstances, award of compensation to the contractor for loss suffered by him due to delay caused by the employer was held to be contrary to the terms of the contract and hence not sustainable. Further held that award of damages ignoring the terms of the contract amounted to legal misconduct on the part of the arbitrator. [23]

11. LOSS OF PROFIT ON ILLEGAL TERMINATION

If a contract is terminated illegally, the affected party is entitled to be compensated for the breach. The measure of compensation is the loss of profit that the affected party expected to earn on completion of the work. In order to succeed, it is necessary for the party to prove that it would have earned some profit had the work been allowed to be completed.

If the Government wrongfully rescinds the contract then the contractor would be entitled to claim damages for loss of profit which he expected to earn by undertaking the works contract. The measure of profit was assessed at 15% of the value of the remaining part of the work. [24] In a similar case, where the Government wrongfully cancelled a contract, the Kerala High Court held that the measure of damages is the amount of profit lost to the contractor by the breach. [25] The view taken by Delhi High Court in *R.K. Aneja v. Delhi Development Authority* [26] goes a step further when it says that the petitioner was entitled to 10% loss of profit on the balance amount of work left undone without proof of loss of profit which he expected to earn by executing the balance work.

When an arbitrator himself arrives at the conclusion that 15% is the rate of profit upheld by the apex court and there was no other reason or ground disclosed by the respondent for a higher rate of profit, a higher rate of profit ought not to have been applied. [27]

In a construction contract, work could not be completed by the stipulated date and the contract was finally rescinded by the respondent. After going through the record, the arbitrator arrived at the conclusion that rescission of the contract was illegal. Even though the arbitrator noted that in such like contracts, the loss of profit ranges from 10% to 15%, but the arbitrator concluded that the element of profit deemed to have been earned by the claimant at the rate of 7% of unexecuted portion of work. Held that the award could not be faulted with. [28]

When claims for escalation and for other extra works is paid with interest thereon, then the question of payment of 15% loss of profit does not arise. In order to be entitled to claim for loss of profit, the contractor has to establish that had he received the amount due under the contract, he would have utilised the same for some other business in which he could have earned profit. [29]

Clause 13 of the works contract provided that the Engineer-in-charge shall give notice in writing of curtailment of work, in which event the contractor shall have no claim to any payment of compensation. The Engineer-in-charge served a notice on the contractor informing him about curtailment of the work. The contractor claimed the amount of loss of profit on the unexecuted amount of work and despite clear stipulation in the agreement barring compensation, the arbitrator awarded the amount as claimed by the contractor. The award was set aside since the arbitrator exceeded the jurisdiction vested in him. [30]

12. AWARD OF DAMAGES IN BUILDING AND ENGINEERING CONTRACTS

An ordinary building contract enables the building contractor to go upon land for the purpose of conducting building operations so that he can perform his contract and earn his expected profits. The only remedy for the building contractor for any infringement of this condition is in damages. [31] Where prevention by the employer is a default to do something which is a condition precedent to the contractor's obligation to do the work, the contractor may treat the prevention as a repudiation of the contract, but in other cases where prevention is only partial, the contractor must complete the work and seek his remedy in damages. [32]

If the contractor treats the breach as partial and continues with the work, the most usual circumstances which give rise to claims are delay in giving the contractor possession of the site, or in the supply of drawings, or suspension of the works caused by some act or omission of the employer and consequent increase of expenses in the performance of the works. [33]

If a clear site and drawings of the construction work could not be made available to the contractor, the question of executing the work by him within the stipulated time did not arise and thus the award of the arbitrator cannot be interfered with. [34] The respondent could not be allowed to take advantage of such wrongs which resulted into prolongation of contract. Furnishing of security for due performance of the contract is a part of the contract. The party committing breach of contract cannot demand performance thereof by the other party and consequently cannot retain or forfeit the security money deposited for performance of the contract. [35]

When a contractor engages some labour for levelling and dressing of the site of construction and the employer commits a breach of the contract by not making available the drawings and the site of work, it cannot safely be said that the contractor was prevented from performing his part of the contract within the stipulated time. Under such circumstances, the award of the arbitrator allowing charges for idle labour which he sustained in consequence of the non-performance of contract was in order. [36]

The appellant was prevented by unforeseen circumstances from completing the work within the stipulated period and it was held that the delay could have been prevented had the State Government stepped in to maintain law and order problem which had been created at the work site. The materials which should have been available at the departmental quarry had to

be obtained from quarries at double the distance. Even the space for dumping of materials was not provided by the respondents and had to be dumped at quite a far off distance. Held that claim on escalation of costs awarded by the arbitrator was within his jurisdiction. [37]

If the contract is delayed due to breaches on the part of the employer the contractor would be entitled to recover his profit on the basis of loss of opportunity to earn profit elsewhere - the reason being that, but for the delay, the contractor would have received back his key men, plant, equipment and working capital which collectively form the contract organisation, ready for employment elsewhere. It is convenient for this purpose to envisage the contract organisation as a profitearning machine. The claim will be governed by time corresponding to the delay caused by the breach and by the potential daily, weekly or monthly profit-earning capacity of the particular contract organisation. [38]

Where in the course of execution of the contract, drawings and designs were changed as a result of which there was an abnormal increase in the quantity of work and for such increase in quantity of work when the contractor claimed a higher rate and gave analysis before the arbitrator and the arbitrator having considered all the relevant material accepted the rate, then the court would not be justified in interfering with the same. [39] A contractor is entitled to claim extra expenditure incurred on establishment, overhead charges, machinery, T&P, shuttering and scaffolding if the period of contract is prolonged due to breaches of contract on the part of the employer and if there is no clause in the contract prohibiting award of damages in the extended period of contract for whatever reasons. [40]

When the machinery, tools, plants and establishment of the contractor remained idle for a certain period, both in the original as well as extended period of contract, on account of non-supply of drawings and designs, an award on this account was held to be fair and equitable. [41]

If completion of the work was delayed for no fault of the contractor, the award of the arbitrator allowing revision of rates after the stipulated date of completion of the work cannot be faulted with by the courts, particularly when there is no prohibition in the contract for revision of rates. [42]

In *Mcdermott International Inc v. Burn Standard Co. Ltd.,* [43] the Supreme Court has held that sections 55 and 73 of the Contract Act do not lay down the mode and manner as to how and in what manner the computation of damages or compensation has to be made. There is nothing in Indian Law to show that any of the formulae adopted in other countries is prohibited in law or the same would be inconsistent with the law prevailing in India. Computation of damages is within the discretion of the arbitrator. The award of the arbitrator allowing damages based on the Emden formula was upheld.

There is an implied undertaking on the part of the building owner who has contracted for the buildings to be placed by the plaintiff on his land, that he will hand over the land for the purpose of allowing the plaintiff to do that which he has bound himself to do. [44] If the employer does not hand over the site at the time fixed, by the contract, or immediately if no time is so fixed, or if he excludes the contractor from the site, the contractor is entitled to throw up the work and bring an action for damages, [45] or he may after he obtains the site continue with the work and bring an action for damages for breach of contract later. [46]

It is the duty of the employer to furnish to the contractor any necessary drawings within a reasonable time. [47] Where the employer's breach goes to the root of the contract, the contractor can abandon the contract and bring an action for damages at once. If the breach does not go to the root of the contract, the contractor should first complete the work and then sue for damages in addition. [48]

If the contractor is required to do a work within a certain time and the department fails to vacate the premises for carrying out the required work and after the expiry of contracted period there was a sharp increase in prices of material, the department could not compel the contractor to carry out the work at the same rates at which he agreed to do the work within the stipulated period. [49]

The arbitrator is entitled to award damages on account of increase in the cost of construction material or extra expenditure on overheads and establishment charges because these are damages which the contractor suffers because of breach of contract by the Government due to which the period of performance is lengthened beyond the time originally fixed in the contract. [50]

If there has been an increase in labour wages due to the notification issued by the Government and the labour has been paid increased wages by the petitioner, then he is entitled to claim the increased amount from the respondent which itself had increased the wages. [51] Once it is found that there was a delay in execution of the contract due to the conduct of the respondent, the respondent becomes liable for the consequences of the delay, namely, increase in prices. [52]

In awarding compensation for prolongation of contract period, some amount of guess work is inevitable and it cannot be contended that the reasoning given is not proper. [53] In case of delay in supply of materials contracted for, the damages are to be assessed with reference to the date fixed for delivery and the court must estimate rate as best as it can. If it is proved that after rescission of the contract the claimant acting reasonably and as prudent man, he might have made a contract at better rates that could be considered a ground for abatement of damages and if after the breach of the contract, fresh contract is entered which is at the risk of the party other than the party claiming damages for he cannot make use of such a purchase for the purpose of enhancing his damages. The mere fact that it is somewhat difficult to accept the damages with certainty and precision, does not relieve the defendant of his liability to pay the damages to the plaintiff to compensate for the loss. The plaintiff would be entitled to the benefit of every reasonable presumption as to the loss suffered. [54]

Clause 59 of the A.P. Standing Specifications which provides that no claim for any compensation on account of any delay or hindrance to the work from any cause whatsoever shall lie, has been subjected to close judicial scrutiny. A single Judge of the A.P. High Court [55] held that the clause was totally inequitable and unreasonable. This judgment was confirmed by a Division Bench of the High Court, [56] but was reversed by the Supreme Court [57] and the matter was sent back to the court for final consideration. The A.P. High Court has, thereafter, been consistently holding that clause 59 is a complete bar on claims for escalation and compensation. [58]

Where the arbitrator awarded damages for delay caused in making the site available to the contractor in time and the Authority did not explain the reasons for delay and the contractor suffered huge losses on account idle machinery, T&P, labour etc., it was held that the claim was distinct from claims pertaining to escalation beyond stipulated date of completion. [59]

In a works contract, the arbitrator awarded damages for prolongation of the contract period on the basis of cost indices of building works, as circulated and adopted by the CPWD from time to time. It was held that the award was good since the indices show the prices prevailing at a particular time and the difference in price at which the work was to be done at the time of making the contract and the price on which it was done at the time of breach could be found out. [60]

After holding that the delay in the construction work had been caused by the department resulting in prolongation of contract period, the arbitrator would be justified in granting damages which may be nominal, if the contractor cannot produce vouchers in support of the losses suffered. [61]

An arbitrator awarded a claim in respect of loss of profitability due to prolongation of the contract. This claim arose on account of the fact that machinery had to be kept at the site for a long time and if it had been freed, the contractor would have gained by putting it to use on another contract. The amount was calculated on the basis of percentage of profit which the petitioner would have earned. Held that this claim was different from the claim of unutilised machinery and escalation and as such the award was valid. [62]

13. LIQUIDATED DAMAGES

On a reference being made to the arbitrator as per the arbitration clause, the arbitrator allowed the claim put forth by the Government on account of compensation for delay in performance of contract. On the question whether matter regarding quantum of compensation could be referred to arbitrator, it was held that the opening words of the arbitration clause, *viz.* , 'except where otherwise provided in the contract' placed the question of awarding compensation outside the purview of the arbitrator. [63] However, in a very recent pronouncement by the Apex Court in *J.G. Engineers Pvt. Ltd. versus Union of India,* [64] it has been held as under:

18. Thus what is made final and conclusive by Clauses (2) and (3) of the agreement, is not the decision of any authority on the issue whether the contractor was responsible for the delay or the Department was responsible for the delay or on the question whether termination/rescission is valid or illegal. What is made final, is the decisions on consequential issues relating to quantification, if there is no dispute as to who committed breach. That is, if the contractor admits that he is in breach, or if the arbitrator finds that the contractor is in breach by being responsible for the delay, the decision of the Superintending Engineer will be final in regard to two issues. The first is the percentage (whether it should be 1% or less) of the value of the work that is to be levied as liquidated damages per day. The second is the determination of the actual excess cost in getting the work completed through an alternative agency. The decision as to who is responsible for the delay in execution and who committed breach is not made subject to any decision of the respondents or its officers, nor excepted from arbitration under any provision of the contract.

19. In fact the question whether the other party committed breach cannot be decided by the party alleging breach. A contract cannot provide that one party will be the arbiter to decide whether he committed breach or the other party committed breach. That question can only be decided by only an adjudicatory forum, that is, a court or an Arbitral Tribunal.

The House of Lords in *Dunlop Pneumatic Tyre Co. Ltd. v. New Garage and Motor Co. Ltd* . [65] summed the distinction between a clause providing for payment of liquidated damages and a clause providing for payment of penalty as under:

1. That the parties who use the expression 'penalty' or 'liquidated damages' may *prima facie* mean what they say, yet the expressions are not conclusive.

2. The essence of a penalty is a payment of money *in terrorem* of an offending party; the essence of liquidated damages is a genuine pre-estimate of damages.

3. The question whether a sum is a penalty or liquidated damages is a matter of construction of the particular contract, to be judged at the time of its making, and not at the time of its breach.

4. To assist in this task of construction, various tests have been suggested, which if applicable to the case under construction may prove helpful or even conclusive. Such are—

   (i) held a penalty if sum stipulated for is extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to follow from the breach;

   (ii) held a penalty if the breach consists only in not paying a sum of money and sum the stipulated is a greater than the sum which ought to have been paid.

   (iii) presumption (but no more) that it is a penalty when a single sum is made payable by way of compensation, or occurrence of one or more or all of such events, which may occasion serious damage or trifling damage; on the other hand,

   (iv) no obstacle to the sum stipulated being a genuine pre-estimate of damage, that the consequences of breach are such as to make precise pre-estimation almost impossible. On the contrary, that is the situation when probably the pre-estimated damage was the true bargain between parties.

If the compensation named in the contract is by way of penalty, consideration would be different and the party is only entitled to reasonable compensation for the loss suffered. But if the compensation named in the contract for such breach is a genuine pre-estimate of loss, which the parties knew when they made the contract to be likely to result from the breach of

it, there is no question of proving such loss or such party is not required to lead evidence to prove actual loss suffered by him. [66]

Where the court is unable to assess the compensation, the sum named by the parties if it be regarded as a genuine pre-estimate may be taken into consideration as the measure of reasonable compensation, but not if the sum named is in the nature of penalty. Where loss in terms of money can be determined, the party claiming compensation must prove the loss suffered by him. [67]

It is a fact to be determined in each case whether the sum named in the contract is a genuine pre-estimate or just a sum fixed. [68]During the course of arbitration proceedings, it was admitted that goods had not been supplied as per contract. According to section 74 of the Contract Act, it is not necessary for the other party to prove the loss suffered by them. Since the contract contained a clause for imposition of liquidated damages, the party was justified in imposing the same upon the claimant. Held that the reasoning of the arbitrator that before the penalty could be imposed, loss had to be proved was contrary to the tenor of section 74 of the Contract Act and the award was thus liable to be set aside. [69]

Liquidated damages levied much after the stipulated period of contract cannot be upheld, especially when the liquidated damages clause operates only during the stipulated period of contract. [70]

If the arbitrator comes to the conclusion that both parties were responsible for the delay in completion of the work and that, therefore, it could not be said with certainty as to which party was responsible for the delay. In such circumstances, the finding of the arbitrator that there was no question of award of liquidated damages in favour of the respondent was proper. In other words, if both the parties are held to be responsible for delay in completion of work, liquidated damages cannot be awarded in favour of the employer. [71]

Every case of compensation for breach of contract has to be dealt with on the basis of section 73 of the Contract Act. Section 74 provides for reasonable compensation. In a case where the party complaining of breach of contract had not suffered legal injury in the sense of sustaining loss or damage, there is nothing to compensate him, for; there is nothing to recompense, satisfy or make amends and, therefore, he would not be entitled to compensation. [72]

14. PENALTY FOR POOR WORKMANSHIP

The arbitrator would be justified in disallowing a counter claim of the department for penal rate recovery on account of use of excessive material over and above of that allowed under the contract if the department failed to prove any loss having been suffered on that account [73], and moreso, when there is no allegation of pilferage, theft or loss of the material against the contractor. [74]

When the respondent withheld an *ad hoc* amount from the running bill of the contractor on the alleged plea of defects but did not spend any money on the rectification for as much as four years thereafter and even the building had been occupied in the meantime, the respondent would be justified to recover the amount actually spent, but if no expenditure is incurred, then the arbitrator would be justified in allowing a refund of the amount so withheld or recovered. [75]

Applicability of clause 25-B of the contract providing for decision of the Superintending Engineer with regard to reduction in rates would be attracted only when a certificate showing non-completion of work and notice calling upon the contractor to rectify the defect (i) by notice in writing, and (ii) within six months of the completion of the work to rectify the defect at his own cost within the time specified by the Engineer-in-Charge and on the failure of the contractor to comply with the directions to get it rectified at his risk and cost. Thus, service of notice under the clause for rectification of defects within the

time allowed is a pre-requisite without which recovery made from the bills of the contractor cannot be justifiably effected. [76]

A building contractor was contracted to put up a building of particular kind in a particular way and according to plans. The building owner provided a supervising engineer. There was collusion between the contractor and the supervision engineer. When the building was nearly complete it proved to be so defective and out of level as to make it necessary to pull down. Held, that the owner was entitled when there was either such gross negligence or gross dishonesty to put an end to the whole contract; and this apart from any special clause in it. [77]

15. WORK COVERED – MEASUREMENT HOW TO BE RECORDED

It generally happens in a works contract that the work is covered up by the contractor before measurements have actually been recorded in the measurement book e.g. backfilling of earth is done in case of brickwork in foundation; or, lean concrete in foundations is covered by brickwork or RCC footing or the like. In such cases, if there is no dispute as to the execution of the work having been done as per the directions of the engineer and/or the drawing, and the engineer refuses to pay for such work done because the work has been placed beyond reach of measurement or is not susceptible of measurement at site, then the question is whether the contractor can be denied payment of such a work? In some contracts, a condition is inserted in the printed performa that the contractor must serve a written notice of one week on the engineer before covering up the work and placing it beyond the reach of measurements, but due to compelling circumstances it is not practicable for the contractor to do so (like covering up the brickwork in foundation to enable him to erect the scaffolding for executing brickwork in superstructure), then the plea of the engineer that no payment for such covered up item shall be made needs to be examined. It has also to be taken into consideration that the engineer while recording the measurement of the work done in the measurement book, more often than not, does the exercise sitting in office on the basis of drawings. It is also a matter of fact that for each and every item of work, no engineer ever takes the aid of the measuring tape. Reliance is placed, by the engineer, on the drawings because the lay-out of the work had been done on that basis. Thus, for work placed beyond the reach of measurement, the following questions with regard to its payment would arise—

(1) Will it not be fair and reasonable to record entries of the work admittedly done strictly in accordance with the drawings?

(2) Can the work, admittedly done, be denied for payment simply because the engineer could not measure up the work earlier and the contractor failed to give a notice in writing before covering up such work?

(3) Will it be prudent for the engineer to strictly and literally give effect to the printed conditions of the contract, more so, when no ulterior motive is attributed to the contractor while placing the work beyond reach of measurement?

As stated above, the normal practice of preparing the bills on the basis of measurements recorded according to drawings is well established and is followed universally from times immemorial. Thus, there is no reason for the engineer to make a prestige issue of rigidly enforcing a particular stipulation of the contract when in respect of similarly placed items, measurements are recorded without actually doing so with a measuring tape. For example, take the case of an item of work claimed by the contractor as extra, while the work is going on, and the engineer resists the claim of the contractor. The matter lingers on for some time and ultimately the engineer realises that the item claimed by the contractor is not covered by the nomenclature of the main item or the item was not covered by any other condition of the contract from being executed without payment of extras. In such a case, undoubtedly the engineer would record measurement, sitting in office from the drawings only, because the item for which extra was conceded much later, got concealed in the meantime.

It invariably happens in a works contract that the contractor is not satisfied with the quantities of certain items of work and he challenges the correctness of the measurements. No engineer would take the stance that since the items under dispute have since been placed beyond the reach of actual measurement, no re-checking of measurements on the basis of drawings would be taken recourse to. The question whether a contractor can be denied opportunity to question the correctness of measurements came up for consideration before the Supreme Court in Hindustan Steel Ltd. v. Dalip Construction Co., [78] where it was stated:

The respondent is a firm of contractors. The respondent preferred an application under section sections 33 of the Indian *Arbitration Act*, 1940 to decide the extent, scope and effect of the agreement and whether the claim to arbitration was extinguished because of the finality to be attached to the measurement by reason of their acceptance by the respondents, in terms of the provision of the agreement between the appellants and the respondents. The respondents had represented that the acceptance of the measurements was obtained by appellants by mis-representation, pressure and undue influence. The District Judge held that the arbitrators had the jurisdiction and the High Court refused to interfere with the findings of the District Judge both under *section 115 of CPC* or *Article 227 of the Constitution*.

Held, the question whether the final measurements were accepted under undue influence, pressure and misrepresentation and thus not accepted at all is a question which is not covered by any other clause of the agreement and would, therefore, fall to be determined by arbitrators. If the measurements cannot be said to have been finalised to the satisfaction of the parties, the measurements will have to be gone into again and would be a matter for the arbitrators to decide. The finality of the measurements is a matter completely within the jurisdiction of the arbitrators and the Civil Court has no say.

Surely, there is no way to re-check measurements except by taking recourse to drawings. Whether the engineer associates himself with the re-checking of the measurements on a direction from the arbitrator or does so himself on a request from the contractor is of little significance because one thing is settled that measurements of work placed beyond the reach of actual measurement can be done from drawings in accordance with which the work had been executed. In that view of the matter, the contractor cannot be denied the payment on account of the same having been placed beyond reach of actual measurement. Thus, a term in the agreement which operates against the contractor for denial of payment if a certain item of the work cannot strictly be given effect to, would be treated as void.

When exercising checks on field officers whether the items recorded in the measurement books are correct or not, the higher officers compare the quantities with those of the estimates prepared, sometimes much before the work had actually been taken in hand. Such estimates can be relied on for exercising checks, it stands to reason that the measurement of the item placed beyond reach of measurement, are also recorded on the basis of those drawings which were followed for execution of the item in question.

Some strength can be derived from the passage in *Hudson's Building and Engineering Contracts* [79] which states:

> A bill of quantities is usually divided into columns. As prepared by the quantity surveyor, the left hand columns indicate the quantity and units of measurement which it is anticipated by the quantity surveyor will have to be carried out. Wherever possible these are calculated from or ‘taken off’ the drawings, and may be expected to be relatively accurate, but some items, such as quantities for removing soft or unsuitable soil, for importing suitable fill material, or for excavation in rock, can, in the light of information available at the tender stage, only be estimates and provisional in character. Then follows a column in which is given a ‘short hand’ description of the item of the work to which the quantities apply. The quantity surveyor then leaves two blank columns, in the first of which the contract inserts his price or rate for each unit of measurement and in the second of which the contractor grosses up the total amount to be charged for the quantities contemplated. However, the exact nature of the measurement in the bills cannot usually be fully understood without reference to the specification, which describes the work processes and qualities of material required in much greater detail compared to the ‘shorthand’ description in the bills. Uniquely in the RIBA form, however, the specifications is required to be included in the bills of quantities themselves, usually in the form of lengthy preambles to the bills as a whole and also to the individual bills as well as in the verbal descriptions of items or groups of items.

The fabrication charges of certain parts of offshore oil rigs were to be measured and the question was as to what should be the mode of measurement. The arbitrator adopted the AISC Code though not provided for in the contract for purposes of estimation. Held that the AISC Code being an industry standard and the contract being silent as to the method of measurement, the contractor having used the same in other contracts, was right in adopting the same and the arbitrator cannot be said to have acted contrary to the terms of the contract. [80]

16. SALE OF GOODS

A dispute between a buyer and seller of goods was submitted to arbitration. The seller claimed the price of goods. The property in the goods not having passed to the buyer, the arbitrator awarded to the seller damages for non-acceptance. The buyer moved to set the award aside as in excess of jurisdiction. It was held that since the whole dispute had been submitted, the arbitrator had jurisdiction to make the award he did. [81]

Where the price fixed for the goods by agreement between the parties was superseded by a notification issued by the Government fixing a ceiling price lower than the contract price before the goods were accepted after the initial rejection, it was held that the control rate would govern the price of the goods supplied. [82]

When damages for breach of contract for the supply of jute are required to be assessed by the arbitrators, it is for the arbitrators to decide as to how damages have to be assessed, but it must not be on the basis of black market price. [83]

In a contract for delivery of sugar, the contractor failed to deliver by the stipulated date and the Government, therefore, cancelled the order. This order of cancellation was however, withdrawn at the request of the seller, but another date was not fixed for delivery. Later, sugar not having been delivered, the Government again cancelled the order. The arbitrator however, held that since a new date was not fixed for delivery after withdrawl of cancellation, therefore, the Government could not again cancel the contract and claim compensation. The court set aside the award holding that when no time was fixed then the contract had to be fulfilled within a reasonable time. [84]

17. PARTITIONING OF PROPERTY

An award, insofar as it granted a monthly allowance in lieu of partition by metes and bounds, cannot be said to be without jurisdiction and is not liable to be set aside or remitted for reconsideration. [85] When the arbitrators are called upon to make a division of the joint family properties, it will be too much to say that if the arbitrators decided that certain properties did not belong to the joint family but belonged to an individual, they were acting beyond the scope of their jurisdiction. [86] Only those properties can be taken into consideration by the arbitrator in respect of which the owners thereof are parties to the arbitration agreement. Where the arbitrator included properties of every family member and decided as to which property will go to whom, it was held that the award could not be sustained because the arbitrator had gone beyond the scope of agreement. [87]

It would not be justified on the part of the Government to withhold the price of the goods supplied to it by the plaintiff when the counter statement filed by it does not contain any claim on account of damages incurred as a consequence of the alleged late supply of the goods. [88]

18. QUALITY OF GOODS/ITEMS

Where the arbitrator has to decide whether a particular heap of cotton-seed is of the required quality, it is no legal misconduct on the part of the arbitrator to decide that half of the heap is of the required quality, especially when the arbitrator is an expert in the commodity. [89]

An arbitrator cannot give meaning to a word mentioned in the agreement in utter disregard of the intention of the parties. If the arbitrator gives literal meaning to the word 'prime' brushing aside the specifications of the material agreed, such a finding cannot be given effect to. [90] General observations by the Surveyor that material was in such a bad condition that measurement was not possible cannot lead to the conclusion that the quality of goods supplied was not as per specifications. [91]

19. DISSOLUTION OF PARTNERSHIP FIRMS

Where in a suit for dissolution of accounts of a partnership business, the court referred the dispute as such to arbitration, the arbitrator could not be said to have gone beyond the scope of reference in deciding the question of dissolution when the parties never objected to the decision on the question by the arbitrator. [92]

A partner of an unregistered firm cannot apply to enforce a right arising from the contract between the partners. [93] However, a partner of an unregistered firm can apply for appointment of an arbitrator when the firm is dissolved or for rendition of accounts of the dissolved firm. [94] The words 'to sue' in section 69(3) (a) of the Partnership Act must be understood on applying to any proceedings for dissolution of partnership or for accounts of a dissolved firm or to realise the property of a dissolved firm. [95] If a sole proprietorship firm is not a legal entity, a petition seeking appointment of arbitrator should be filed by the sole proprietor in his name on behalf of sole proprietorship firm and not in the name of sole proprietorship firm. [96]

Disputes arising between partners of a firm as to whether rights and liabilities under the partnership deed have come to an end by efflux of time or not and whether one of them is discharged from complying with the terms of the arbitration agreement or not are all disputes which arise in connection with the partnership deed and are subject-matter of an arbitration clause. [97] A suit for dissolution of partnership and rendition of accounts based on a contract containing a widely worded arbitration clause would, therefore, be stayed since the said matter must be held to be within the ambit of the arbitration agreement. [98] A clause providing that disputes arising between partners shall be referred to arbitrators nominated by 'both' parties was held to include all the disputing parties since the word 'both' may cover parties more than two. [99]

20. ENHANCING AMOUNT OF CLAIM DURING ARBITRATION PROCEEDINGS

Where 'A' served upon 'B' a notice raising certain disputes for reference to the arbitrator stating alongwith the amount of claim with a further rider that the amount of claim would be subject to further variations, if found necessary, and thereafter 'A' enhanced the amount of certain claims, it was held that the entire dispute including enhancement of certain claims under the circumstances was legal. [1]

The aim of arbitration is to settle all disputes between the parties and to avoid further litigation. Hence, where the contractor claimed amounts for work done after arbitration proceedings had begun and the claim statement filed with the arbitrator also included this claim, the arbitrator had jurisdiction to make an award on the said claim also. [2]

If in the course of pleadings, a plea is raised which originates from or relates to the subject-matter of the dispute, then such a plea could form part of the dispute for adjudication before the arbitrator, unless in the statement of either of the parties it is specifically denied or objected to on the ground that the plea sought to be raised by the other party is beyond the scope of the dispute for adjudication by the arbitrator. [3]

When the amount of claim is subject to further variations, if found necessary, an additional claim can be submitted before the arbitrator. The only pre-requisite is that the claimant is to give intimation to the employer that the claims would be subject to variation as per the terms of the notice. However, if no such reservation is made by the claimant in the notice, then the claimant may be precluded from making any such enhancement in the amount. [4]

The petitioner had mentioned a certain amount of claim in the petition seeking appointment of an arbitrator. The question was whether the same could be revised by the petitioner before the arbitrator. It was held that where the arbitrator was called upon to fix the quantum of damages, then merely permitting an amendment to enhance the monetary claim could not be said to enlarge the scope of the arbitration. If the amount claimed can be reduced; it can certainly be increased. [5]

The court will not set aside an award on the ground that the arbitrator has exceeded his authority where the party complaining has made no protest at the hearing before the arbitrator. [6] A party lodged claims for an amount of Rs. 37,106/- with the appellants and enhanced the claims to Rs. 1,35,959/- before the first arbitrator. Thereafter, before the second arbitrator the claims were revised to Rs. 4,05,584/-. The Supreme Court while upholding the revision of claims stated that it was for the arbitrator to decide on the merits of the claims raised from time to time and not for the courts. [7]

Provisions of Order 2 Rule 2 of *CPC* would apply if the request for referring more disputes which he/it could and ought to have raised earlier. Where, however, an award has not been made it is open to a claimant to ask for more disputes to be referred to arbitration, provided the arbitration proceedings are not yet over. [8] Thus, where the matter is at a preliminary stage before the arbitrator, the parties can raise more claims before the arbitrator. [9]

The parties are free to approach the second arbitrator with more claims or revise the amounts claimed in the earlier arbitration if the award had been set aside by the court, if the reference to the newly appointed arbitrator is ‘for settling the disputes’ between the parties afresh. Thus, the scope of the second arbitration was not confined only to those claims which had been originally filed before the first arbitrator. By the addition of seven more claims to the original thirty, the scope of the arbitration had not been enlarged contrary to law since all the claims pertained to the contract and fell within the terms of the reference. [10]

An arbitration clause, which was very widely worded, empowered the arbitrators to adjudicate upon all disputes arising between the parties. Hence, the arbitrators while adjudicating under such a clause could adjudicate upon all disputes raised before them and not necessarily limit themselves to the disputes referred to them in terms of the reference. [11]

Claim for demurrage of the claimant was rejected by the arbitrator on the ground that the claimant had been shifting positions and revising the claim figures from time to time. Held that a mere change or shift in the claim figure at the instance of the respondents cannot disentitle the petitioners from its right. [12]

21. TERMINATION OF CONTRACT

It is open to canvass the grounds urged in justification of a cancellation of a contract in a court of law. It is quite competent for a court to review *bona fides* , go into the motives underlying such an action and if the court is satisfied that they are inadequate or insufficient, it will set them aside. Whether party is obliged to assign any reasons or not when once he chooses to do so, they are liable to be scrutinized by a court of law. These reasons must be looked for within the contract. [13]

The respondent was well within its power to cancel the contract in the event of the petitioner having failed to complete the work within the extended time, but it would not be proper to float tenders again for execution of the balance work. The department must keep in mind the consequences of re-tendering. It would entail not only the extra time but additional

expense also which would be a waste of public money. On the contrary, if the period is extended, which the petitioner had been asking for long, inasmuch it had been recommended again and again by the executive engineer even after cancellation of the work, then not only the work would be completed earlier but extra expense would also be saved. [14]

An insurance company repudiated the insurance claim on the ground that the insured had held out that she was in Government service whereas actually she was not. It was held that in order to enable the company to annul the claim on the ground of misstatement, it must be one of material facts as regards health and for wrong declaration of the insured person in the proposal of insurance that she was in Government service, the insurance company was not entitled to repudiate the contract by forfeiting the premium paid by the insured person. [15] Hence, any innocent misstatement by a contractor which has no bearing in the formation of a contract cannot form the basis for penal action.

Under the terms of a contract, it was the duty of the architect to get the drawings approved from the municipality. However, the employer entered into another contract with the architect, to which the contractor was not a party, stipulating that the contractor would get the drawings sanctioned. The contractor merely by assisting the employer to get the drawings approved did not incur any liability therefor. Held that, not obtaining of sanction and stopping work for want of such sanction could not be held to be a breach of contract on the part of the contractor so as to enable the employer to terminate the contract and fasten on the contractor liability under the risk and cost clause. [16]

Where a contractor wrote to the Executive Engineer to intimate the date of commencement of work to which it was replied that the matter was under consideration and would be confirmed shortly but subsequently, without confirming the date of commencement of work, terminated the works contract on the plea that the contractor had failed to complete the work within the stipulated period, it was held that the fixing of the date of commencement of work was extremely arbitrary and irregular and that the contractor had not violated the terms of the agreement and that the agreement had been illegally rescinded by the government on the ground that the work was not finished within 10 months and that the contractor was given no chance to complete the work. [17]

22. SECURITY DEPOSIT – REFUND

By a contract in writing the appellant agreed to sell and the respondent agreed to purchase 50,000 feet of pipes on terms and conditions mentioned in the said contract. The appellant agreed to supply further quantity of pipes not exceeding 1,50,000 feet over and above 50,000 feet ordered on the same terms and conditions. Held, that the order for supply of further 1,50,000 feet of pipes was one of the rights given under the contract itself. When the said option was exercised and an order was placed within the stipulated time, this order also formed part of the contract. Thus, there was one contract and one security deposit under the contract. Time for payment of the bills was not of the essence of the contract. The contract did not say so expressly. There was no such express provision with regard to payment. The contract having been rescinded for breach of contract on the part of the respondent, the appellant was entitled to forfeit security deposit. [18]

Where the plaintiff invited tenders for sale of rice and the tender of the defendant was accepted, failure of defendant to make payment and lift the stock even after reminder, authorised the plaintiff to forfeit the earnest money deposited with the tender. [19]

In such cases where there is no agreement between the parties enabling the appellant to forfeit the security deposit but gave right to the appellant to deduct out of the security deposit the amount of loss incurred by the appellant which was caused to them by reason of non-completion of the work by the respondent in time and to recover the extra costs of the work, which had to be completed by the appellant departmentally on account of default by the respondent, it was held that the appellant was not entitled to either the amount of damages incurred by it or the extra cost incurred by it for getting uncompleted work done departmentally since neither has been proved. Thus, the agreement that the appellant was entitled to forfeit the security deposit or any part of the same, must fail. [20]

If the Government had orally promised to supply wagons for the transportation of goods contracted but failed to do so, the security deposited by the plaintiff for the due performance of the contract could not be forfeited on the ground that the plaintiff did not perform its part of the contract. [21]

A provision in the contract cast a duty on the contractor to complete the work within the stipulated time and if he failed to do so, the Divisional Engineer was given power to cancel the contract and execute the balance work on risk-cost basis, as also to charge penalty for each day the work remained unfinished. The contract having not been completed within time, the Government cancelled the contract. Neither the contractor was allowed to do the work nor it was assigned to any one else. No notice was given to the contractor before cancellation of the contract. The Government, however, forfeited the earnest and the further security which had been deposited by the contractor on condition that amounts would be returned to the contractor upon completion of the works. Held that though the Government was entitled to cancel the contract, they had not followed the formalities laid down and therefore, it would not be entitled to forfeit the earnest and the further security. [22]

The entire quantity of goods was required to be lifted within the time fixed under the contract and payment was to be made as and when the goods were lifted. The respondent could not lift the materials within the time stipulated by the corporation. Extensions were granted from time to time so as to enable the respondent to discharge its contractual obligations. There was no escalation clause in the contract and on the contrary there was a stipulation that the rate of goods for sale will remain unaltered and unchanged. It was held that the corporation had the right to forfeit the security deposit and the unsold stocks but that contractor could not be directed to make payment for goods at an escalated rate. [23]

The defendant was awarded a contract for purchase of sub-standard rice stock. Thereafter, a prohibition was imposed by the State on movement of sub-standard rice. This rejection of permission by the State frustrated the contract and made its performance impossible. It was held that as a prudent buyer, the defendant was justified in requesting the plaintiff to treat the tender as ‘cancelled’ and since the defendant was not guilty of any willful breach of contract in not depositing the security deposit, he could not be fastened with any liability for loss sustained by the plaintiff. [24]

23. EXECUTION OF WORK ON RISK-COST BASIS

The rules applicable determining the amount of damages for the breach of a contract to perform a specified work is that the damages are to be assessed at the pecuniary amount of the difference between the state of the plaintiff upon the breach of the contract and what it would have been if the contract had been performed and not the sum which it would cost to perform the contract, though in particular cases the result of either mode of calculations may be the same. [25] It is, therefore, clear that where the plaintiff gets the work done by another, the measure of compensation is the increased cost of work on account of having got the work done. [26]

Where there was a term in the contract for payment of difference of cost for work left undone and required to be done by others at the risk and cost of the contractor and the contractor expressed inability to complete the work by 15-7-72 against authorisation received on 13-7-72 though applied for on 20-2-72, it was held that the contractor having informed the Department on 18-7-72 pointing out impossibility could not be held liable for difference in cost of work left undone by him and required to be done by others. [27]

In a works contract, time stipulated for completion of work was 18 months. As per the contractor, the department was under an obligation to supply cement and steel for the work. It was stated that the department failed to supply cement for 15 months and steel for 6 months. It was held that the department was in breach of contract and the contractor was justified in refusing to execute the work and the contractor was thus entitled to get a declaration that the department was not entitled to recover from the contractor any extra cost involved in getting the balance work executed. [28]

Tenders were floated in 2002-2003 for construction of a Cultural Centre, however, the work was awarded in the year 2004. The petitioner refused to undertake the work on the plea that the rates of the year 2002 were unworkable. The respondent threatened to execute the work at risk and cost of the petitioner. The petitioner filed a writ petition for restraining the respondent from executing work on risk-cost basis. Held that the petitioner could not be asked to do work on old rates. [29]

Where a contractor entered into a works contract with the Electricity Board for the construction of masonry earth and hume pipe drain and one of the clauses of the contract stipulated that in case the contractor left the work in the middle and if the Board incurred excess cost in completing the work by entrusting the work to another contractor, the Board would recover the same from the contractor apart from forfeiting the earnest money, and the contractor left the work in the middle, it was held that the suit filed by the Board was maintainable since there was a breach of contract on the part of the contractor. [30]

In order to complete the unexecuted work of the previous agency whose contract was terminated, the employer has to engage a debitable agency. The amount which is required to be paid to the debitable agency has to be debited to the failed contractor. The award of such an amount in favour of the employer together with interest cannot be interfered with. [31] When the balance work got completed at the risk and cost of the defaulting contractor, the employer would be entitled to interest on the excess amount which had to be paid to the successor agency. [32]

24. LOSS OF REPUTATION OR MENTAL AGONY

Damages for loss of reputation as such are not normally awarded for breach of contract, since protection of reputation is the role of the tort of defamation. However, where the breach of contract causes a loss of reputation which in turn causes foreseeable financial loss to the claimant, he may recover damages for that financial loss; in *Malik v. Bank of Credit and Commerce International SA* , [33] the House of Lords held that where by conducting a dishonest and corrupt business, the employer had broken his obligation to his employee, the employee could recover damages for the financial loss suffered by him where his future employment prospects were prejudiced by the stigma of his former employment. A further exception arises where the contract gave an opportunity to the claimant to enhance his reputation as an author or an actor; damages may be awarded for loss flowing from a failure to provide promised publicity, which loss may include loss to existing reputation. Subject to remoteness, damages are recoverable where the breach of contract causes loss of commercial reputation. Damages for loss of reputation as such are not normally awarded for breach of contract. [34]

The principle underlying the assessment of damages is to put the aggrieved party monetarily in the same position, so far as possible, in which it would have been had the contract been performed. Such loss may be compensated as the parties would have contemplated at the time of entering into contract. The question whether the rule could be applied for awarding damages for mental agony in case of failure of the seller to fulfill its part of reciprocal promise was answered by the Supreme Court in *Ghaziabad Development Authority v. Union of India* . [35] In the said case, the Authority had announced a scheme for development of plots and had invited offers. Several members made an offer. The Authority committed breach of contract. A suit for damages for mental agony was filed. Held that damages for anguish and vexation caused by breach of contract cannot be awarded in an ordinary commercial contract.

An arbitrator awarded a certain amount to the contractor because of mental agony suffered by him on the ground of denial of a justified claim. Held that since the department had refused to give the benefit of price escalation in the absence of any clause in this regard in the agreement, there was no scope for seeking compensation on the ground of harassment and mental agony and hence the award made by the arbitrator was not justified. [36]

25. DISPUTE ABOUT SPECIFIC PERFORMANCE

An arbitrator can grant specific performance of a contract relating to immovable property under an award [37]. The Supreme Court in *Olympus Superstructures Pvt. Ltd. v. Meena Vijay Khetan* [38] relied upon the observations contained in *Halsbury's Laws of England* which state: '503. *Nature of the dispute or difference* :- The dispute or difference which the parties to an arbitration agreement agree to refer must consist of a justiciable issue triable civilly. A fair test of this is whether the difference can be compromised lawfully by way of accord and satisfaction'. [39] The Supreme Court also noted the decisions contained in *Keer v. Leeman* [40], where it was held that if in respect of facts relating to a criminal matter, say, physical injury, if there is a right to damages for personal injury, then, such a dispute can be referred to arbitration. Similarly, in *Soilleux v. Herbst* [41], *Wilson v. Wilson* [42] and *Cahill v. Cahill* [43], it has been held that a husband and wife may refer to arbitration the terms on which they shall separate, because they can make a valid agreement between themselves on that matter. The Supreme Court further agreed with the observations made in *Keventer Agro Ltd. v. Seegram Comp. Ltd.* [44], wherein the Calcutta High Court had held: '...merely because the sections of the *Specific Relief Act* confer discretion on courts to grant specific performance of a contract does not mean that the parties cannot agree that the discretion will be exercised by a forum of their choice. If the converse were true, then whenever a relief is dependent upon the exercise of discretion of a court by statute, e.g., the grant of interests or costs, parties could be precluded from referring the dispute to arbitration.' Thus, disputes relating to specific performance of a contract can be referred to arbitration and section 34(2) (b)(i) is not attracted.

Disputes relating to specific performance of contract can be referred to arbitration. The right to specific performance of an agreement of sale deals with contractual rights and it is certainly open to the parties to agree – with a view to shorten litigation in regular courts – to refer the issue relating to specific performance to arbitration. There is no prohibition in the *Specific Relief Act* that issues relating to specific performance of contract relating to immovable property cannot be referred to arbitration.[45]

Where an arbitration agreement not only binds actual parties to it, but also assignees of the contract, and where the assignees were aware of the fact that the land in dispute was earlier sold to the respondent, it was held that the assignee were not entitled to any relief in view of section *sections 19 of the Specific Relief Act*.[46]

The respondent's LPG Distributorship agency was terminated by the appellant on the ground that the respondent had committed default by making delayed payment. It was also alleged that there were shortage of cylinders and regulators. A specific clause in the distributorship agreement authorised and enabled either party to terminate the agreement in the event of happening of certain events. It was held that the agreement being of determinable nature was not specifically enforceable in view of *section 14(1) (c) of Specific Relief Act* and thus the award of the arbitrator upholding that termination of distributorship was proper.[47]

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1 *Ruby General Insurance Co. Ltd. v. Pearey Lal Kumar, AIR* 1952 SC 119 : [1952] SCR 501 [LNIND 1952 SC 9]; *Sukh Darshan Singh v. Dehra Auto Financiers* , 1986 (1) Arb LR 359 (All).

2 *Manmohan Singh Harmohinder Singh v. Hotel Corp. of India* , AIR 1989 NOC 148 (Del) : 1987 (1) Arb LR 212.

3 *Renusagar Power Co. Ltd. v. General Electric Co. Ltd., AIR* 1985 SC 1156 : 1984 Arb LR 240 : (1984) 4 SCC 679 [LNIND 1984 SC 384] ; *M.V. 'Baltic Confidence' v. S.T.C.,* (2001) 7 SCC 473 : AIR 2001 SC 3381 : (2001) 3 Arb LR 96 : (2001) 3 Raj 1.

4 *M.N. Arora v. Delhi Development Authority* , 1988 (1) Arb LR 348 : (1988) 94 Pun LR (D) 52 (Del).

5 *Surana Commercial Co. v. Food Corporation of India* , 1986 (1) Arb LR 214 (Del).

6 *Jiwani Engineering Works (P) Ltd. v. Union of India* , AIR 1981 Cal 101 [LNIND 1980 CAL 94]; *Arvind Kumar v. Union of India* , (1987) 2 Arb LR 220 (Del); *Damodar Valley Corporation v. K.K. Kar, AIR 1974 SC 158* : (1974) 1 SCC 141 [LNIND 1973 SC 328] : (1974) 2 SCJ 6 [LNIND 1973 SC 328].

7 *Amar Nath Chand Prakash v. Bharat Heavy Electricals Ltd* ., AIR 1972 All 176 : 1972 All LJ 22 (DB).

8 *Anjani Lal and Sanjay v. Food Corporation of India* , 1987 (2) Arb LR 77 (Del).

9 *A.V. Industries v. Tripathi Chitra Mandir* , 1987 (1) Arb LR 30 (Del).

10 *NEPA Ltd. v. Manoj Kumar Agrawal* , 1999 (2) RAJ 246 (MP).

11 *Sunderlal Haveliwala v. Bhagwati Devi* , AIR 1967 All 400 [*LNIND 1965 ALL 117*].

12 *Dalmia Engg. Pvt. Ltd. v. Union of India* , AIR 1975 Cal 77 [*LNIND 1973 CAL 61*] (DB).

13 *Ruchi Strips & Alloys Ltd. v. Tata South East Asia Ltd.,* (2004) 13 SCC 470.

14 *Ram Nath International Construction Pvt. Ltd. v. State of U.P., AIR* 1998 SC 367 : 1997 (2) Arb LR 589.

15 *State of Orissa v. G.C. Kanungo* , AIR 1980 Ori 157 : (1979) 48 Cut LT 505.

16 *Jammu Forest Co. v. State of J&K* , AIR 1968 J&K 86 : 1986 Kash LJ 134.

17 *Murli Dhar v. Mulchand* , AIR 1924 Oudh 54 .

18 *Nawab Usmanalikhan v. Sagarmal* , AIR 1962 MP 320 [*LNIND 1960 MP 55*]: 1961 MPLJ 844 [*LNIND 1960 MP 55*].

19 *Chief Engineer v. Dayal Const. Co.,* 2005 (2) Arb LR 520 (Utr).

20 *National Fire and General Insurance Co. Ltd. v. Union of India* , AIR 1956 Cal 11 [*LNIND 1955 CAL 80*].

21 *Mahan Traders v. Amar Singh,* 2007 (2) RAJ 240 : 2006 (4) Arb LR 320 (Del).

22 *Union of india v. Birla Cotton Spinning and Weaving Mills, AIR* 1967 SC 688 : [1964] 2 SCR 599 [*LNIND 1963 SC 83*] : (1964) 2 SCJ 297 [*LNIND 1963 SC 83*].

23 *Rai & Sons (P) Ltd. v. Poysha Industries Co.Ltd.* , AIR 1972 AP 302 [*LNIND 1971 AP 14*] (DB).

24 *Shalimar Paints Ltd. v. Omprokash Singhania* , AIR 1967 Cal 372 [*LNIND 1966 CAL 118*].

25 *Lachminarain Jute Manufacturing Co. Ltd. v. Bangur Brothers Ltd.* , AIR 1968 Cal 330 [*LNIND 1967 CAL 100*].

26 *Union of India v. R.K. and Co.* , 1989 (2) Arb LR 331 : (1987-2) 92 Pun LR 532.

27 *Mohan Construction Co. v. Delhi Development Authority* , 1998 (1) Arb LR 548 (Del).

28 *Saraswat Trading Agency v. Union of India,* 2007 (4) RAJ 429 : 2007 (2) Arb LR 529 (Cal) (DB); *India Trade Promotion v. International Amusement,* 2007 (4) RAJ 545 (Cal) (DB).

29 *Yelluru Mohan Reddy v. Rastriya Ispatnigam Ltd* ., AIR 1992 AP 81 [*LNIND 1990 AP 278*]: 1992 (1) Arb LR 460 : 1991 (1) ALT 515.

30 *Jiwanlal Rajnarain Khanna v. Radhey Lal* , AIR 1968 Del 90 [*LNIND 1967 DEL 155*] (DB).

31 *Jivrajbhai Ujamshi Sheth v. Chintamanrao Balaji, AIR* 1965 SC 214 : [1964] 5 SCR 480 [*LNIND 1963 SC 259*] ; *Associated Engg. Co. v. Govt. of Andhra Pradesh, AIR* 1992 SC 232 : 1991 (2) Arb LR 180 : (1991) 4 SCC 93 [*LNIND 1991 SC 299*].

32 *Executive Engineer, R.E. Division v. J.C. Budharaj* , AIR 1981 Ori 172 [*LNIND 1981 ORI 52*]: 52 Cut LT 260.

33 *West Bengal Industrial Infra-Strictire Development Corporation v. Star Engineering Co* ., AIR 1987 Cal 126 [*LNIND 1986 CAL 275*].

34 *Continental Construction Co. Ltd. v. State of Madhya Pradesh, AIR* 1988 SC 1166 : 1988 (1) Arb LR 400 : (1988) 3 SCC 82 [*LNIND 1988 SC 150*] ; *State of U.P. v. Patel Engg. Co. Ltd.,* 2005 (1) RAJ 220 : (2004) 10 SCC 566 : (2005) 1 Arb LR 524.

35 *New India Civil Erectors (P) Ltd. v. Oil and Natural Gas Corporation, AIR* 1997 SC 480.

36 *Bansi Lal v. Union of India* , AIR 1978 J&K 39 : 1977 J&K LR 376.

37 *Mahadeo Prasad v. Kamala Varma* , AIR 1956 All 51 [*LNIND 1955 ALL 131*].

38 *M. Parmasivam v. Food Corporation of India* , AIR 1989 AP 124 [*LNIND 1988 AP 73*]: 1989 (1) Arb LR 166 : (1988) 2 Andh LT 712 [*LNIND 1988 AP 73*].

39 *L.M. Das v. State of West Bengal* , AIR 1961 Cal 456 [*LNIND 1960 CAL 121*].

40 *K.R. Anand v. Delhi Development Authority* , 1997 (2) Arb LR 109 (Del).

41 *Ibid; State of Andhra Pradesh v. Associated Engineering Enterprises* , AIR 1990 AP 294 [*LNIND 1989 AP 127*]: 1990 (2) Arb LR 375.

42 *Waverly Jute Mills Co. Ltd. v. Raymon and Co. (India) Pvt. Ltd* ., AIR 1963 SC 90 : [1963] 3 SCR 209 [*LNIND 1964 SC 416*] ; *Khardah Co. Ltd. v. Raymon and Co. (India) Pvt. Ltd* ., AIR 1962 SC 1810 : [1963] 3 SCR 183 [*LNIND 1962 SC 235*].

43 *Indian Oil Corporation Ltd. v. Artson Engg. Ltd.,* 2007 (2) RAJ 187 (Bom) : 2006 (6) Bom CR 465 [*LNIND 2006 BOM 1303*].

44 *State of U.P. v. Chandra Gupta & Co.,* AIR 1977 All 28 : 1976 All LJ 426 (DB).

45 *Halsbury's Laws of England* , 2nd Ed., Vol. 3, p. 269.

46 *Watson Lumber Company v. Guennewig,* 226 N.E. (2d) 270 (1967).

47 *State of Orissa v. B.N. Agarwala* , AIR 1981 Ori 124 [*LNIND 1981 ORI 39*]: (1981) 52 CLT 37.

48 *State of Uttar Pradesh v. Harish Chandra & Co* ., 1995 (2) Arb LR 178 (All)(DB).

49 *State of Orissa v. J.N. Choudhury* , AIR 1982 Ori 275 [*LNIND 1982 ORI 81*]: (1981) 52 CLT 451.

50 *Executive Engineer Puri, R&B Division v. G.C.Kanungo* , AIR 1990 Ori 211 : 1991 (1) Arb LR 82.

51 *State of U.P. v. Kohinoor Transporters,* AIR 2007 NOC 1248 (Utt) (DB).

52 *Calcutta Metropolitan Water and Sanitation Authority v. Chakraborty Bros* , AIR 1988 Cal 423 [*LNIND 1987 CAL 141*]: 1989 (1) Arb LR 87 (DB).

53 *Continental Construction Co. Ltd. v. State of Madhya Pradesh, AIR* 1988 SC 1166 : 1988 (1) Arb LR 400 : (1988) 3 SCC 82 [*LNIND 1988 SC 150*].

54 *State of Orissa v. G.C. Kanungo* , AIR 1980 Ori 157 : (1979) 48 Cut LT 505.

55 *Gautam Enterprises v. India Tourism Development Corporation* , 1998 (2) Arb LR 98 : 1998 (3) RAJ 31 (Del).

56 *Union of India v. Satyanarayana Const. Co.,* 2005 (2) Arb LR 496 (AP)(DB); *Govt. of Karnataka v. Shetty Const. Co. Pvt. (Ltd.),* AIR 2006 NOC 994 : 2006 (3) AIR Kar R 342 (Kant)(DB).

57 *Paras Ram Sharma v. Delhi Development Authority* , 2001 (1) Arb LR 134 (Del).

58 *Damodar Valley Corp. v. Central Conc. & Allied Products ltd.,* AIR 2007 Cal 689 : 2007 (3) Arb LR 531 : 2008 (1) RAJ 362 (DB).

59 *K.R. Anand v. Delhi Development Authority* , 1997 (2) Arb LR 109 (Del).

60 *G.D. Tewari & Co. v. D.D.A.,* 2005 (2) RAJ 422 (Del); *Hudson's Building and Engineering Contracts,* 11th Ed., para 4.037 to 4.039.

61 *Anant Raj Agencies v. D.D.A.,* 2005 (2) RAJ 46 (Del).

62 *Heera Singh v. State of Rajasthan,* 2008 (1) RAJ 457 : 2007 (4) Arb LR 417 (Raj).

63 *Raghav Const. v. State of Bihar,* AIR 2009 NOC 1525 (Pat).

64 *Brodie v. Cardiff Corporation, [1919] A.C. 337* : 88 L.K.J.B. 109 : 120 L.T. 417.

65 *Molloy v. Liebe,* (1910) 102 L.T. 616, P.C.

66 *Municipal Committee, Shimla v. Beli Ram and Co.,* AIR 1933 Lah 1011 (DB).

67 *Sports Development Authority of Tamil Nadu v. Tarapore and Co.,* 2007 (1) RAJ 51 (Mad) (DB).

68 *Harcharan Singh v. Union of India,* AIR 1991 SC 945 : 1990 (2) Arb LR 243.

69 *State of J&K v. Dev Dutt Pandit, AIR* 1999 SC 3196 : (1999) 7 SCC 339 [*LNIND 1999 SC 756*] : 1999 (3) RAJ 250.

70 *National Fertilizers v. Puran Chand Nangia,* (2000) 8 SCC 343 [*LNIND 2000 SC 1353*] : 2000 (3) Arb LR 461 : 2000 (3) RAJ 237 : AIR 2001 SC 53.

71 *Tehri Hydro Development Corporation Ltd. v. Lanco Construction Co.,* 2007 (3) Arb LR 194 : 2007 (3) RAJ 542 (Del).

72 *Surjit Singh Atwal v. Union of India,* AIR 1965 Cal 191 [*LNIND 1964 CAL 107*].

73 *State of Andhra Pradesh v. Pioneer Construction Co.,* AIR 1978 AP 281 [*LNIND 1977 AP 257*] (DB).

74 *G. Ramchandra Reddy & Co. v. Union of India,* 2009 (3) RAJ 1 : AIR 2009 SC 2629 : (2009) 6 SCC 414 [*LNIND 2009 SC 878*] : (2009) 2 Arb LR 475.

75 *Tummar Bagra v. State of Arunachal Pradesh,* 2007 (1) CTLJ 210 (Gau).

76 *Scorpian Express Pvt. Ltd. v. Union of India,* AIR 2009 Pat 106 [*LNINDORD 2009 PAT 5303*].

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78 *National Fertilizers Ltd. v. Puran Chand Nangia,* (2000) 8 SCC 343 [*LNIND 2000 SC 1353*] : AIR 2001 SC 53 : (2000) 3 RAJ 237 : (2000) 3 Arb LR 461.

79 *Mallock v. Hodghton* , (1849) 12 Dunl (Ct of Sess) 215.

80 *Halsbury's Statutes,* 2nd Ed., p. 662.

81 *Lodder v. Slowey* , *[1904] AC 442*.

82 *Lawford v. Billericay R.D.C.* , *[1903] 1 KB 772*.

83 *James v. Thomas Kent & Co.* , *[1950] 2 All ER 1099* : *[1951] 1 KB 551*.

84 AIR 1984 SC 1072 : (1984) 2 SCC 680 [*LNIND 1984 SC 378*] : 1985 Arb LR 2.

85 AIR 1996 SC 782 : (1996) 1 SCC 18 [*LNIND 1995 SC 1093*] : (1995) 2 Arb LR 577.

86 *Hindustan Construction Company Limited v. Tamil Nadu Electricity Board,* 2005 (1) Arb LR 41 (Mad) (DB); *R.B. Jodhamal v. State,* 2005 (1) Arb LR 534 (J&K).

87 *Union of India v. Daulat Ram Industries,* 2009 (2) Arb LR 327 (Del).

88 *B.W.L. Ltd. v. M.T.N.L.,* 2008 (1) RAJ 61 (Del).

89 *Tamil Nadu Electricity Board v. Kirloskar Constructions & Engineers Ltd.,* 2009 (2) RAJ 25 (Mad).

90 *State of Tripura v. Anita Barman* , AIR 2001 Gau 34 : 2000 (Suppl.) Arb LR 151 (DB); *Union of India v. Freight Carriers,* AIR 2008 NOC 1679 (Gau).

91 *G.D. Tewari & Co. v. D.D.A.,* 2005 (2) RAJ 422 (Del); *Union of India v. Mohanlal Harbanslal Bhyana* , 2002 (2) RAJ 598 (Del); *Pawan Hans Helicopters Ltd. v. Associated Const.,* 2007 (3) Arb LR 254 (Bom) (DB).

92 *Naraindas R. Israni v. Delhi Development Authority,* AIR 2006 NOC 315 : (2005) 85 DRJ 476 : 2005 (3) Arb LR 455 (Del); *P.C. Sharma v. D.D.A,* 2006 (1) RAJ 521 : 2005 (3) Arb LR 472 [*LNIND 2005 DEL 707*] (Del); *I.S.M. Airport Technics v. I.A.A.I.,* 2006 (1) RAJ 189 : 2006 (1) Arb LR 146 (Del); *Heera Singh v. State of Rajasthan,* 2008 (1) RAJ 457 : 2007 (4) Arb LR 417 (Raj).

93 *N.B.C.C. Ltd. v. Dcor India Pvt. Ltd.,* 2004 (2) Arb LR 1 : (2004) 111 DLT 146 : (2004) 74 DRJ 159 [*LNIND 2004 DEL 254*].

94 *Ramchandra Reddy & Co. v. State of Andhra Pradesh, AIR* 2001 SC 809 : (2001) 3 SCC 277 [*LNIND 2001 SC 330*] : (2001) 1 RAJ 194 : (2001) 1 Arb LR 494.

1 *NPCC v. Rajdhani Builders,* 2006 (3) RAJ 214 : 2006 (2) Arb LR 219 (Del).

2 *State of Goa v. Jyoti Ltd* ., 1996 (1) Arb LR 476 (Bom) (DB).

3 *Narain Das R. Israni v. Delhi Development Authority* , 1996 (1) Arb LR 602 (Del) for a contrary view see *Vishal Engineers & Builders v. Delhi Development Authority* , 1998 (2) Arb LR 265 : 1998 (3) RAJ 299 (Del).

4 *Anant Raj Agencies v. DDA,* 2005 (4) RAJ 470 (Del).

5 *Mohan Construction Co. v. DDA,* 2005 (2) Arb LR 486 : 2005 (2) RAJ 235 (Del); *Bedi Construction Co. v. Delhi Development Authority,* 2004 (3) Arb LR 424 (Del).

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7 *Anurodh Constructions v. DDA,* 2005 (3) RAJ 252 (Del).

8 *P.M. Paul v. Union of India, AIR* 1989 SC 1034 : 1989 (2) Arb LR 215 : 1989 Supp (1) SCC 368.

9 Continental Construction Co. Ltd. v. State of Madhya Pradesh, AIR 1988 SC 1166 : (1988) 3 SCC 82 [*LNIND 1988 SC 150*].

10 *Vijay Bhandari v. Nagar Palika Nigam,* AIR 2007 NOC 1295 (MP) (DB).

11 *Transmission Corporation of Andhra Pradesh Ltd. v. Galada Power and Telecommunication Ltd.,* 2007 (3) RAJ 443 (AP)(DB).

12 *Thyssen Stahlunion Gmbh v. SAIL,* AIR 2002 Del 255 [*LNIND 2002 DEL 35*]: (2002) 1 Arb LR 10 : (2002) 96 DLT 515 [*LNIND 2002 DEL 35*].

13 *Thyssen Stahlunion Gmbh v. SAIL,* AIR 2002 Del 255 [*LNIND 2002 DEL 35*]: (2002) 1 Arb LR 10 : (2002) 96 DLT 515 [*LNIND 2002 DEL 35*].

14 *Bharat Coking Coal Ltd. v. L.K. Ahuja and Co* ., AIR 2001 SC 1179 : (2001) 4 SCC 86 [*LNIND 2001 SC 496*] : (2001) 1 RAJ 259 : (2001) 1 Arb LR 656.

15 *Bungo Steel Furniture (P) Ltd. v. Union of India, AIR* 1967 SC 378 : [1967] 1 SCR 633 [*LNIND 1966 SC 220*].

16 *Fatehchand Murlidhar v. Juggilal Kamlapat* , AIR 1955 Cal 465 [*LNIND 1954 CAL 128*] (DB).

17 *Union of India v. Sugauli Sugar Works (P) Ltd* ., AIR 1976 SC 1414 : (1976) 3 SCC 32 [*LNIND 1976 SC 90*].

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14 Pitfalls in Smooth Conduct of Arbitral Proceedings

PC Markanda: Arbitration Step by Step

P C Markanda

14 Pitfalls in Smooth Conduct of Arbitral Proceedings

1. INTRODUCTION

There are innumerable pitfalls which are experienced by the arbitral tribunals as well as the parties in the smooth conduct of the arbitral proceedings. It is not possible to enumerate each and every pitfall in arbitral proceedings, however, common pitfalls generally encountered in arbitral proceedings have been identified and explained in detail together with possible solutions thereto. There is no universal formula which can be applied to achieve results. It will depend upon the skill of the arbitral tribunal to handle the situations which arise from time to time.

2. PRELIMINARY HEARING

(A) Purpose of Convening Preliminary Hearing

Problems normally start from the very first hearing, commonly known as 'Preliminary Hearing', after the arbitral tribunal is duly constituted. The very purpose of 'Preliminary Hearing' is to devise a procedure and work out modalities with the consent of the parties in accordance with which the arbitral tribunal shall conduct the hearings. Needless to state, more often than not the parties to the arbitration agreement do not agree with each other on most of the points. It is then left to the discretion of the arbitral tribunal for resolving the points of differences between the parties. Skilled and experienced arbitrators are successful in resolving the contentious issues to the satisfaction of the parties.

In case of disagreement between the parties, resolution thereof is more easily achieved by an arbitrator whose image and credibility is beyond doubt. A clean, independent, impartial, knowledgeable, honest and skillful arbitrator commands respect from the parties. Any direction or solution given by him is generally accepted by the parties because they know it for certain that he favours none, nor has he any enmity with any party.

(B) Fixing Time Schedule for Pleadings

The very purpose of going in for arbitration is speedy and economic resolution of disputes between the parties. Expeditious disposal of the matter should, therefore, be the guiding factor. It should be the endeavour of the arbitral tribunal to allow a reasonable period of time to both the parties to submit pleadings.

It is a matter of common knowledge that claimants instantly agree to submit the claim statement within the time allowed by the arbitral tribunal, which is anywhere between 4 to 6 weeks, depending upon the quantum of work involved. When it comes to fixation of time for the respondents (which are Government or Public Sector Undertakings in a large majority of cases) to submit their defence statement, and counter claims, if any, they normally ask for a period of 10 to 12 weeks on the plea that the record is voluminous and old and that the personnel associated with the matter have since been transferred or have retired. It is very commonly seen that even after being allowed the period of their choice, the respondents ask for a further period of 4 to 6 weeks for submission of defence statement and for submission of counter claims.

Generally, the arbitral tribunals do not favour submission of Rejoinder by the claimants. However, in certain cases, submission of Rejoinder is imperative, particularly when the respondents raise preliminary objections and/or introduce some points which call for elucidation. If the arbitral tribunal shows disinclination in allowing submission of Rejoinder, the claimants can very well submit that the Rejoinder would be limited to the extent of answering the preliminary objections and/or meeting the new points introduced in the defence statement of the respondents.

It is imperative on the part of the arbitrators to exercise control over the proceedings when the parties are in the process of completion of pleadings. It is desirable that initially equal periods of time be allowed to both the parties to submit their respective pleadings. On default by either party, the arbitral tribunal should allow one more opportunity with a clear direction that thereafter it would impose costs on the defaulting party. If, even after imposition of costs, the said party defaults, the arbitral tribunal should proceed and take action under section 23 of the 1996 Act.

(C) Fixation of Fee, Costs and Deposit

Sections 31(8), 38 and 39 of the *Arbitration and Conciliation Act, 1996*, make provisions for fixation of fee, costs and deposit. If there is no prior agreement between the parties regarding fixation of fee to be paid to the members of the arbitral tribunal, then it is the sole prerogative of the arbitral tribunal to fix reasonable fee payable to them besides costs and to call for a deposit. Parties are asked to make a deposit of a lump sum amount equivalent to 4 to 6 hearings payable in advance. This deposit is needed to meet the amount of fee, travel expenses, boarding and lodging of the members of the arbitral tribunal.

Practically speaking, there is hardly any resistance from the parties when the arbitral tribunal fixes its fees and calls for a deposit. Neither party would like to displease the arbitral tribunal by suggesting that the fee be reduced, irrespective of the fact whether they can afford it or not and whether the fee fixed is reasonable or not.

It is no longer a secret that expenses which are ultimately incurred in connection with the arbitral hearings up to the stage of making the award run into an astronomical figure. By this time, parties certainly feel the pinch and they regret their action in having entered into an arbitration agreement. Realisation about the exorbitant amount of expenditure incurred in connection with the arbitral hearings is felt at that stage of proceedings when it is no longer possible to retrieve the situation.

> The Hon'ble Supreme Court has taken notice of this highly expensive and luxurious arbitration culture. In *Union of India v. Singh Builders Syndicate,* [1] the Apex Court had been constrained to observe as under:
>
> > When a retired Judge is appointed as arbitrator in place of serving officers, the Government is forced to bear the high cost of arbitration by way of private arbitrator's fee even though he had not consented to for the appointment of such non-technical non-serving persons as arbitrator(s). The large number of sittings and charging of very high fee per sitting, with several add-ons, without any ceiling, have many a time resulted in the cost of arbitration approaching or even exceeding the amount involved in the dispute or the amount of award.

The aforesaid observations of the Supreme Court throw abundant light on the state of affairs in which arbitration matters are conducted in our country. It can safely be said that arbitration proceedings these days are affected by a five-star culture. Those who have deep pockets can afford the luxury of getting their disputes resolved in arbitration. In the aforesaid case, the Supreme Court has expressed hope that ‘It is necessary to find an urgent solution for this problem to save arbitration from the arbitration costs’.

There is no ready-made formula to curb the sky-rocketing fee being charged by the arbitrators. The knee-jerk reaction is to call for wide-scale reduction in fee of all arbitrators. However, it is submitted that this is not a practicable solution since expert and honest arbitrators would then not take part in arbitration proceedings where the scale of fee is less. A possible solution to the problem is to allow the arbitrators to fix a fee of their choice but to (a) place a cap on the number of hearings within which the matter be concluded; thereafter the arbitrators would not be entitled to any further fee; and (b) mandate that the fee would be paid after the hearings are concluded and before the award is delivered. If the above steps are taken, it would not only fix a cap on the total expenditure but would also expedite arbitration proceedings.

(D) Determination of Venue

The seat of arbitration is one which is determined by the parties, either in the arbitration agreement or by mutual consent. In case there is no stipulation in the arbitration agreement regarding the venue of hearing and the parties too do not agree on the place where arbitral proceedings shall be held, then it will be the decision of the arbitral tribunal which shall be final and binding. However, as per section 20 of the 1996 Act, such a decision of the arbitral tribunal cannot be arbitrary. It is circumscribed by the Act since it restricts the unfettered discretion of the arbitral tribunal. While fixing the venue of arbitration, the arbitral tribunal shall have ‘regard to the circumstances of the

case, including the convenience of the parties'. However, once the arbitral tribunal fixes the venue of arbitration keeping in view all the circumstances of the case, the courts will generally not entertain any objection on this account.

If the venue of arbitration is fixed in the arbitration agreement itself, the arbitrator cannot change the same, except with the express consent of the parties. If, despite the said contractual stipulation, an arbitrator acts in a unilateral manner, the aggrieved party can immediately approach the court for relief. [2] In the *Handbook of Arbitration Practice* , [3] relied upon in *Sanshin Chemical Industries v. Oriental Carbons & Chemicals Ltd.* , [4]Prof. Schmitthof rightly observed that to draft an arbitration clause, without specifying the venue or seat of the arbitration, is an act of professional negligence. It is desirable to specify the venue of arbitration, thereby indicating the judicial seat of arbitration, the supportive and the supervisory regime of the courts which is available to the parties and the mandatory requirements to which the arbitration will be subject.

> Russell [5] states: In fixing the place of trial the arbitrator should take all the circumstances into consideration and decide according to the balance of convenience. The chief circumstances to be taken into consideration are the place where most of the witnesses reside; the situation of the subject-matter of the matter, and the balance of convenience and expense.

Practical experience shows that while most arbitral tribunals take the convenience of parties and their witnesses into consideration while fixing the venue of hearing, however, in some cases, the endeavour is to fix hearings at a venue that is convenient to the members of the arbitral tribunal. The best solution to the problem is for the parties to agree upon the venue of arbitration, either in the agreement itself or during the course of arbitral proceedings. In the absence of such an agreement, the arbitral tribunals should fix the venue which is convenient and practicable. At all costs, the arbitral tribunals should avoid fixation of venue at far off, exotic holiday resorts or at venues which involve a lot of expenses on travel and accommodation for all concerned.

(E) Maintaining Record of Proceedings

In the absence of daily record of proceedings, it is possible for a party to allege that it was not given an opportunity to present its case. To avoid any confusion at a later point of time, it is thus necessary for the tribunal to record as to what transpired before it on any given date of hearing.

It is imperative on the part of the arbitral tribunal to record the presence of the persons who attend the arbitral hearing and to obtain their signature on the attendance sheet. Proceedings before the arbitral tribunal are private proceedings and only those persons who are concerned with the subject-matter of the dispute can be allowed to attend and, that too, when so authorised by the parties to the arbitration agreement.

The arbitral tribunal must record minutes of the meetings on day-to-day basis and provide a copy of the same to both the parties as well as to all the members of the arbitral tribunal. The minutes of meeting must faithfully record in brief as to what transpired on a particular day and the action, if any, taken by the tribunal. During the course of hearings, generally parties give certain tabular statements in support of their respective case and/or give additional documents which, for reasons to be explained in writing, could not be given alongwith the pleadings. The arbitral tribunal ordinarily does not refuse to entertain such documents provided the other party does not dispute their authenticity. The fact that the documents have been produced by a party during the course of hearing should be recorded in the minutes.

The practice of providing a copy of the minutes of the meeting to the parties as well as members of the arbitral tribunal on the day of the meeting itself, is quite common for the reason that recording of proceedings is quite brief. But if the minutes of the meeting are lengthy and for want of time, or for some other reason, it is not possible to record the minutes on the day of the meeting, then the member of the arbitral tribunal, authorised to issue minutes of the meeting, may do so, at a later date. However, it must be ensured that minutes are issued without any undue delay.

In case either party to the arbitration agreement, after having received the minutes of the meeting, does not raise any objection nor makes any observation on the correctness of the minutes recorded, within a reasonable period of time, then the same shall be taken to be correct and shall be deemed to be final.

It is stated that minutes to be recorded in respect of any arbitral hearing should be brief and need not record verbatim as to what the parties had stated during the course of hearing. However, if a party insists that a point raised by him may be recorded, then it is desirable that the minutes should truly reflect that point. Whether or not the point raised is essential, the arbitral tribunal loses nothing in recording it. Sometimes, arbitral tribunals do not

accede to the request of a party in recording a particular point. It is submitted that no arbitral tribunal should make such trivial matters a matter of prestige.

(F) Parties Competent to Represent

Proceedings in arbitration are of an informal nature, but this does not mean that anybody and everybody can be allowed to be present in the arbitral hearings. It is often noticed that when there are a large number of people representing a party in the arbitral hearings, each one wishes to participate. This has to be discouraged otherwise different voices with different versions will add to the confusion. It is suggested that only those persons should be allowed to be present in the arbitral hearings whose presence is absolutely essential and are duly authorised by the parties to render assistance in the matter.

In case of large business houses, it is seen that there is good sense of discipline. Everyone present in the meeting should brief the person duly authorised by the parties when the occasion arises. But in case of individual contractors this is not so. Each one present on behalf of a party, in order to please his employer, advances his own line of action and puts forth his views, asked for or unasked for. This is a dangerous trend which needs to be curbed because views expressed by a person not duly authorised may cause prejudice to his employer.

Generally, each party engages an arbitration consultant or a lawyer to represent it before the arbitral tribunal. It cannot at all be doubted that they present the matter before the arbitral tribunal in a systematic way and render due assistance to the tribunal. There are some lawyers/arbitration consultants who do not waste words. They are brief and to the point. But this cannot be said about all.

If a party engages a lawyer or an arbitration consultant, it should give a power of attorney in his favour. The arbitral tribunal shall take the same on record. It is absolutely necessary that without the power of attorney being taken on record, no lawyer or arbitration consultant, as the case may be, should be allowed to advance arguments or give suggestions or give his views, for the simple reason that a non-authorised person cannot bind a party to the arbitration agreement. Any decision by the arbitral tribunal based on a representation made by a non-authorised person would render the order/award bad in law.

Lawyers take care of the legal part of the matter in dispute. They are not techno-legal persons. May be, over a period of time they acquire some technical knowledge but such little knowledge would not be sufficient to safeguard the interest of the party. In such cases, each party authorises a technical person to represent it before the arbitral tribunal. The role of a lawyer starts after the technical person representing a party explains each claim which the party had preferred before the arbitral tribunal. It has to be ensured by the arbitral tribunal that such a technical person is duly authorised by a party and his power of attorney is also taken on record.

3. DUTY OF ARBITRAL TRIBUNAL TO DISCIPLINE PARTIES

It is the prime duty of the arbitral tribunal to discipline the parties right at the threshold. Once the arbitral tribunal makes it clear to the parties that the proceedings shall be conducted in a particular manner and that no laxity whatsoever shall be tolerated, it will send a strict message to the parties and they shall, in all probability, make it a point to follow the procedure in letter and spirit. It must be borne in mind by the arbitral tribunal that it cannot act in a dictatorial manner. It has got to consult the parties and try to reach a consensus. However, if a party or both the parties seek an unreasonable period of time for completion of the pleadings, for example, then the tribunal should step in to persuade the parties, by their skill and experience, to move in the spirit of arbitration and complete the pleadings early. In most of the cases, it is likely to have a salutary effect.

Some of the issues which crop up during the course of arbitral hearings and how the arbitral tribunal should deal with the recalcitrant party or its representatives are as under:

(A) Adherence to Time Schedule

In the preliminary hearing convened by the arbitral tribunal, the primary issue before the arbitral tribunal is as to how to ensure that pleadings are completed at an early date. Usually, the claimant, depending upon the number of claims and supporting documents required, would ask for a period ranging from 4 to 6 weeks. This is quite reasonable and there is hardly any chance that the arbitral tribunal will not grant it.

When it comes to the turn of the respondent, the real problem starts. It is generally seen that the respondent does not show any sense of urgency. In a large majority of cases, it is the Government Department which is the respondent. The officers representing the respondent, in the guise of being over-worked, ask for a period ranging from 10 to 12 weeks. This is highly unreasonable and no arbitral tribunal would consider granting such a long time for filing of defence statement by the respondent.

If after persuasion by the arbitral tribunal to cut short the time for filing the defence statement, the respondent agrees to do the needful within 6 to 8 weeks, it is not the end of the matter. A request is generally received from the respondent to extend the time for a further period of 4 to 6 weeks on the plea that it had not been able to engage a lawyer or the officers who operated the contract have been transferred to other places or the matter being quite old the files could not be traced. There may be other excuses also.

In such a situation, the helplessness of the arbitral tribunal is quite visible. It has to give another opportunity to the recalcitrant party, which, at times, may also be the claimant. The arbitral tribunal cannot proceed *ex parte* on the very first lapse by any party. In case the arbitral tribunal decides to proceed with the matter *ex parte* ; it shall be fatal to the award. The courts start doubting the purpose behind the tearing haste with which the arbitral tribunal proceeded in the matter. It needs to be remembered that recourse to *ex parte* proceedings should be taken by the arbitral tribunal only in extreme cases and that too after thoroughly satisfying itself that there is no other way to proceed with the matter.

The 1996 Act is a ‘party-dominated’ Act. It is the will of the parties which has to prevail. The arbitral tribunal comes into the picture only when the parties are not ad *idem* on any particular issue. It is a matter of common experience that parties to the arbitration agreement do not generally agree on any issue during the course of arbitral proceedings. On each such occasion, therefore, the arbitral tribunal has to step in.

Section 23(1) of the Act clearly states that parties shall complete the proceedings ‘within the time agreed upon between the parties’. But if the arbitral tribunal considers the request of either party or both the parties being unreasonable, the period for completion of the pleadings shall be ‘determined by the arbitral tribunal’. If despite reasonable time being allowed and even after extension of time has been granted by the arbitral tribunal, the claimant defaults in submission of pleadings, then as per section 25 (a) of the Act, ‘the arbitral tribunal shall terminate the proceedings’. In case of default by the respondent, then as per section 25 (b) the ‘arbitral tribunal shall continue the proceedings without treating that failure in itself as an admission of the allegations by the claimant’.

A situation may arise where one of the parties repeatedly fails to appear on the date fixed for hearing of the matter or refuses to produce documentary evidence. In such a case, the arbitral tribunal is not helpless. As per section 25 (c) of the Act, ‘the arbitral tribunal may continue the proceedings and make the award on the evidence before it’. No party can be allowed to frustrate the arbitral proceedings by exhibiting his arrogance in the form of abstaining from the proceedings or by not producing the documents which are necessary to enable the arbitral tribunal to arrive at a just decision.

(B) Levying Costs for Delay

It happens (in most of the cases) that one or both the parties delay the submission of pleadings. On one or two occasions, the arbitral tribunal may bear with the recalcitrant party but this cannot go beyond one or two hearings. In such a case, the arbitral tribunal will have no choice but to burden the erring party with costs. Though it is within the sole discretion of the arbitral tribunal to determine costs, but it is generally quantified taking into consideration the loss which the other party suffers. Such loss is in the form of payment of share of fee payable to the arbitral tribunal, on account of payment of fee to the lawyer, expenses incurred for arranging venue for arbitration hearing etc.

It is generally not a practice to burden any party with costs for delaying the submission of pleadings, but the delay should be within reasonable limits. There is a limit to tolerance. A party cannot be allowed to move leisurely in the matter. It has to be disciplined. The only way to achieve a result is to burden the erring party with costs. In Government Departments, the responsibility is fixed on the defaulting officer for having delayed the matter. It cannot be a matter of debate that if in such cases costs are not levied, there will be no end to delaying the submission of pleadings.

In case the party burdened with costs complies with the revised schedule for submission of pleadings, then it may approach the arbitral tribunal to waive of the costs. Generally, the arbitral tribunal would not be disinclined to

accede to the request. If the very purpose of levying the cost has been achieved, then there is no need on the part of the arbitral tribunal to persist with its decision and it would be in the interest of justice to recall its order whereby costs had been imposed.

(C) Request for Adjournment

One of the parties, or both the parties, may approach the arbitral tribunal to grant adjournment if, because for some reason, it is not possible to attend the arbitral hearing which had been fixed with the consent of the parties. Such a request may be genuine. However, it is also seen that it may be on frivolous grounds as well. It is for the arbitral tribunal to consider the request on merits. Such a request for adjournment should not be granted liberally because repeated requests for adjournment by one party or the other shall follow. Thereafter, it will be very difficult to control the situation and matters shall be delayed endlessly. The decision has to be taken on case-to-case basis.

Adjournment, if sought on personal grounds or on account of indisposition, is generally not opposed by the adversary or by the arbitral tribunal. But seeking adjournment on the ground that the lawyer is busy in some other arbitration or he had to go out of station to attend to some other professional matter or the like, should not be met with favour by the arbitral tribunal. It is quite inconvenient, both to the arbitral tribunal and the opposite party, when last minute adjournment is sought. Such a request disturbs the schedule of everybody except the counsel or party seeking adjournment.

Another reason for disfavouring adjournment is that it becomes very difficult to fix the next date. Convenience of all the members of the tribunal, advocates of the parties as also the representatives of the parties has to be taken into consideration while fixing the next date. In view of the pre-scheduled engagements of the members of the arbitral tribunal as also of the advocates of the parties, it is quite an uphill task to arrive at a date convenient to all. In order to avoid delay, it is suggested that when a request for adjournment is received, may be genuine or otherwise, the arbitral tribunal must meet the parties at the appointed date and time just to fix the next date. Needless to say that such a course would mean avoidable expenses but it is always better to bear extra expense than to delay the arbitral process.

Adjournment is not a matter of right. It is merely an act of postponement which cannot be allowed to the detriment of the opposite party. A party should be allowed adjournment if it is not sought for reasons which are not plausible. It needs to be borne in mind that no party has a right to cause inconvenience to the arbitral tribunal or the opposite party since it disturbs the programme of every one concerned with the arbitration matter.

(D) Payment of Fee to Arbitral Tribunal when Hearing Adjourned

In some arbitrations, it is seen that the arbitral tribunal during the course of preliminary hearing informs the parties that in case either party seeks adjournment, it shall be bound to pay fee to the members of the arbitral tribunal. Since it stands agreed between the parties as a matter of procedure, there is no difficulty in implementing the decision. But if no such agreement had been arrived at between the parties in the preliminary hearing and the members of the arbitral tribunal insist on payment of fee, then it gives rise to unsavoury situations.

A question that generally arises is as to why the members of the arbitral tribunal should be paid for the adjourned hearing? The answer to this question is that the party seeking adjournment has looked to its convenience and it has not bothered to consider that it upsets the schedule of the members of the arbitral tribunal. After all, they had earmarked the day for this particular matter and if it is adjourned, why should they suffer financially. In case adjournment had not been sought, they would have been paid the fee and simply because one party seeks adjournment, it is no reason to deny the members of the arbitral tribunal the money which they would have earned by utilising the time somewhere else. However, it depends upon each arbitral tribunal as to whether they insist on being paid for adjourned hearings as well or not. A possible solution could be that half the fees be paid for the adjourned hearing.

(E) Duration of Hearing

These days it has become usual for arbitrators to fix a fee for each session, one in the forenoon and the other in the afternoon. The forenoon session generally does not start before 10.30 a.m. But at places like Delhi and Mumbai, arbitration proceedings start either at 11 a.m. or 11.30 a.m. The proceedings continue for 2 to 2 hours at best. This is followed by lunch arranged by the parties. If the tribunal and the parties decide to hold hearings in the post-lunch session, it is generally anywhere between 30 minutes and 2 hours.

In earlier days, hearings were held between 10 a.m. and 4 p.m. with a lunch interval of nearly an hour which meant

that the effective period of hearing was 5 hours. Now, it is very rare to see arbitral hearings, both in the pre-lunch and post-lunch session, account for even 4 hours. It would be appropriate that fees be fixed on lumpsum basis per day without charging session-wise. The arbitral tribunal should also make it clear to the parties that the hearings would be held for a minimum of 4-5 hours, especially when evidence is being recorded or arguments are being advanced. The prime motive being expeditious disposal of the reference, monetary considerations should take a back seat. The institution of arbitration needs such measures to restore the confidence of the litigant and the courts.

(F) *Ex-parte* Hearings

If a party deliberately does not cooperate with the arbitral tribunal and abstains from attending the arbitral hearings without justifiable cause, then the arbitral tribunal will have no option but to proceed *ex parte* , albeit after following due procedure.

> There is no statutory rule that where an arbitrator proceeds *ex parte* , without giving a pre-emptory notice, the award must be set aside. The issuance of a notice is simply a rule of prudence and convenience. Thus, where despite various notices from the arbitral tribunal, a party does not attend, then the failure of the arbitrator to issue a final peremptory notice is not necessary, especially if it is clear from the circumstances that the recalcitrant party had no intention of appearing inspite of a notice. [6]

> The Calcutta High Court [7] has very succinctly laid down the following principles which an arbitral tribunal must follow before proceeding *ex parte* :
>
> (1) If a party to an arbitration agreement fails to appear at one of the sittings, the arbitral tribunal cannot or, at least, ought not, to proceed *ex parte* against him at that sitting.
>
> (2) If, on the other hand, it appears that the defaulting party had absented himself with a view to preventing justice or defeating the object of the reference, the arbitral tribunal should issue a notice that it intends at a specified time and place to proceed with the reference, and if the party concerned does not attend, the arbitral tribunal will proceed in his absence.
>
> (3) If the arbitral tribunal issues a similar notice and the party concerned does not appear, an award made *ex parte* , will be in order. But if the arbitral tribunal does not issue such a notice on the second occasion, but nevertheless proceeds *ex parte* , the award will be liable to be set aside in spite of a notice of peremptory hearing having been given in respect of the earlier date.
>
> (4) If it appears from the circumstances of the case that a particular party is determined not to appear before the arbitral tribunal in any event, e.g. he has openly repudiated either the reference itself or the and has shown no desire to recant, the arbitral tribunal is not required to issue a notice of an intention to proceed *ex parte* against such a recusant person.
>
> (5) Where the question arises after an *ex parte* award has, in fact, been made and it appears that no notice of an intention to proceed *ex parte* had been given, the principle to be applied is that the award will not be upheld unless it is shown or it appears that the omission to give notice has not caused any prejudice to the party against whom the *ex parte* award was made, because he had made it abundantly clear that he would not appear before the arbitral tribunal in any circumstances.

(G) Appointment of Experts

In some arbitrations, it is seen that members of the arbitral tribunal do not have expertise in the field to which the dispute relates. Obviously, therefore, such arbitral tribunals will have to take the assistance of an expert. Section 26 of the 1996 Act caters to such a situation. If the parties can agree on the name of any particular expert, the arbitral tribunal will not have any difficulty in the appointment of an expert. But if the parties do not concur in the appointment of an expert, then it is left to the discretion of the arbitral tribunal to appoint one. In such cases, the arbitral tribunal should either appoint a person who is well-known in the field or it should refer the matter to an Institution, e.g. Institution of Engineers etc. and request them to nominate a person with the requisite expertise.

The arbitral tribunal, after the appointment of an expert has been made, shall ask him to report on specific points which shall be formulated by the tribunal. The tribunal shall give directions to the party concerned to provide any relevant information or to produce certain documents relevant to determination of the dispute in question or to provide access to, any relevant documents, goods or other property for the inspection of the expert.

After going through the relevant documents and/or after getting requisite information, the expert shall submit a report to the arbitral tribunal. The arbitral tribunal shall provide a copy of the report of the expert to both the parties. The parties shall then be given an opportunity to put questions to the expert to elicit information as to how he arrived at the contents of the report. Opportunity to put questions to the expert and cross-examination of the expert are two different things which operate in different fields. Cross-examination of the expert, as is normally done in case of witnesses, is not envisaged by the provisions of the 1996 Act.

It can safely be inferred that what the Legislature intended was that the expert must not be subjected to any grueling cross-examination. The parties shall have a right to put questions to the expert and such questions cannot be extraneous to the subject-matter on which he had given the report. The expert can, however, be asked to state as to the basis on which he has arrived at his report. Whether or not the expert adopted the correct approach is a matter of argument, which the parties will have a right to advance during the course of oral arguments.

Much will depend on the report of the expert which, in all possibility, will be relied upon by the arbitral tribunal at the time of making the award. The report of the expert shall carry weight and the party, which opposes the report, should ask such questions of the expert so as either to impeach his integrity or honesty or to establish that he had no specialisation on the subject in respect of which he had prepared the report. It is imperative that an expert, besides being skilful and knowledgeable in the field to which the dispute relates, should be one who is independent and impartial and should not have been associated with either party to the dispute.

(H) Amendment of Pleadings

After the matter has made some headway, sometimes one of the parties or both come forward with an application that amendment to the pleadings is necessary to meet the ends of justice. Such an application may be made by a party for *bona fide* reasons or it may be a frivolous application filed with the sole motive of delaying the proceedings. It will be the bounden duty of the arbitral tribunal to consider the application in its proper perspective so that unnecessary delay does not take place.

Section 23(3) of the 1996 Act stipulates that either party may amend or supplement his claim or defence during the course of the arbitral proceedings unless the arbitral tribunal considers it inappropriate to allow the amendment or supplement having regard to the delay in making it. It needs to be noticed that the arbitral tribunal does not have unfettered discretion to allow amendment. It is subject to the condition that if the parties had already agreed between themselves that under no circumstances either of them shall seek amendment, then the arbitral tribunal shall reject the same. This is evident from the expression ‘unless otherwise agreed by the parties’ stipulated in section 23(3) of the Act.

Even in case of civil suits, the courts generally allow amendment of the pleadings if the same is preferred at an early stage of the proceedings. Every type of amendment cannot be allowed. It has to be one which does not change the character of the dispute. Similar principles apply to amendments in arbitral matters. Decision whether to allow amendment to the pleadings has to be a judicious one. If the arbitral tribunal is of the view that the amendment sought is one which is more in the nature of clarification rather than a new cause of action, the arbitral tribunal would be inclined to allow the same, provided such a request is not made at a belated stage of the proceedings.

The Legislature has consciously used the expression ‘unless the arbitral tribunal considers it inappropriate’. It casts a bounden duty on the arbitral tribunal to first determine whether the amendment sought is appropriate or not and secondly whether such an amendment should be allowed to determine the core issues in dispute between the parties. The word ‘inappropriate’ is to be given restrictive meaning not requiring physical impossibility.

Indian Council of Arbitration (ICA), has framed rules relating to amendment of claims etc. which are as follows:

> Amendment of the claim, defence statement, counter claim or reply submitted to the Arbitral Tribunal must be formulated in writing by the party so desiring. The Arbitral Tribunal will decide whether such amendments should be allowed or not. The Administrative fee and Arbitrator's fee (for each arbitrator) shall get revised to the extent of increase for such additional claims/counter claims. The party making such additional claim/counter claim shall deposit the entire fee payable in respect of additional claim.

It is, thus, clear that even the ICA has left it to the discretion of the arbitral tribunal to decide as to whether amendment to the pleadings is to be allowed or not. However, if the arbitral tribunal allows the amendment, the

party seeking amendment is required to pay the Administrative expenses together with the increase in the fee of the arbitral tribunal.

Generally, when an amendment to the pleadings is allowed, the arbitral tribunal burdens the party seeking amendment, with costs. As to how much costs should be imposed, is left to the discretion of the arbitral tribunal. Though no hard and fast rule can be laid down, or has been laid down, as to costs, but the general guideline for imposing costs is to take into consideration the amount expended by the opposite party for such hearings which have taken place for deciding the application for amendment of pleadings. In other words, such costs shall be the total of amount paid to the arbitral tribunal, the advocate/consultant, as also for arranging the venue and other expenses necessarily required to be incurred, for such number of days the application for amendment is under consideration of the arbitral tribunal.

(I) Oral Evidence – Whether Mandatory

This is generally an area of dispute between the parties as to whether the arbitral tribunal should proceed on the basis of documentary evidence available on record or in a manner as followed in the courts. Strictly speaking, if one goes by the intention of the Legislature, at least one thing is abundantly clear that recourse to oral evidence had not been favoured. It seems that the very purpose of not taking recourse to oral evidence was to cut short the proceedings and to save on time.

Section 24(1) speaks of ‘oral hearings for the presentation of evidence or for oral arguments’. It is significant to note that the words ‘oral evidence’ do not find mention anywhere in section 24 or anywhere else in the Act. There was nothing which precluded the Legislature from using the expression ‘oral evidence’. It seems that what the Legislature intended was that the parties should have an opportunity to present the evidence placed on record of the arbitral tribunal, which means that a party shall be given an opportunity of bringing to the notice of the arbitral tribunal all such documents which pertain to the subject-matter of dispute. At the same time, it must be stated that there is no express prohibition in the Act that either or both the parties to the arbitration agreement shall be precluded from leading oral evidence. It will be incorrect to say that oral evidence should not be allowed at all. Some cases may arise where but for oral evidence justice cannot be done. But this should be resorted to only in exceptional cases and not as a matter of routine.

(J) Cross-examination of Witness

In the event a witness is required to be cross-examined in such a matter where but for such oral deposition, it will not be possible for the arbitral tribunal to come to a proper and a just decision, then it is the bounden duty of the arbitral tribunal to see that the crossexamination does not get prolonged without justification. *Section 137 of the Evidence Act* stipulates as under:

> *Examination in Chief.—The Examination of a witness by the party who calls him shall be called his examination-in-chief.*
>
> *Cross-examination.—The examination of a witness by the adverse party shall be called his cross-examination.*
>
> *Section 138 of the Evidence Act* provides as under:
>
> *The examination and cross-examination must relate to relevant facts, but the crossexamination need not be confined to the facts to which the witness testified on his examination-in-chief.*

Under the garb of cross-examination not being ‘confined to the facts to which the witness testifies on his examination-in-chief’, the lawyers take liberty to ask questions which have no relevance whatsoever to the subject-matter of dispute. This is not a healthy practice and needs to be curbed. It is only the arbitral tribunal which can put a check on questions, wholly irrelevant to the dispute in question, which are put to a witness. The arbitral tribunal must, before the cross-examination starts, instruct the lawyer to ask questions concerning the dispute and not to put irrelevant and extraneous questions. If the lawyer does not heed to the advice, the arbitral tribunal would be well within its rights to disallow the question. The lawyers, just to browbeat the arbitral tribunal, insist that the question sought to be disallowed, must be recorded. The arbitral tribunal should not be cowed down by such threats. In such a situation, the question being disallowed should be recorded and the arbitral tribunal should also record the reason

why it is being disallowed. If the arbitral tribunal permits lawyers or parties, as the case may be, to ask only such questions which have direct relevance to the matter in dispute, it shall dissuade them from asking irrelevant questions and also, at the same time, would expedite the proceedings.

4. LENGTHY EVIDENCE, REPETITIVE ARGUMENTS – CONTROL OF

(A) Repetitive Arguments

Some lawyers have mastered the art of leading lengthy, repetitive and protracted arguments and despite repeated instructions from the arbitral tribunal not to repeat the same argument time and again, there is no impact on them. Sometimes, clients are happy only when advocates argue at length. They carry the feeling that the advocate has done his home work well and that their case has now become very strong. Another reason for leading lengthy arguments could be that the advocates charge the client on per day basis. Thus, lengthier the arguments more the income, seems to be the motive.

Parties and their advocates should have faith in the wisdom of the arbitral tribunal. It is quite irritating for the arbitral tribunal to hear the same arguments repeatedly. Arbitral tribunals generally do not disallow repetitive arguments since lawyers take shelter of section 18 of the 1996 Act which says that 'the parties shall be treated with equality and each party shall be given a *full* opportunity to present his case'. It is argued that failure on the part of the arbitral tribunal to allow them to lead arguments in the manner of their choice would amount to denial of full opportunity which would render the award bad in law. This can be taken care of by the arbitral tribunal by recording in the minutes of the meeting that arguments being led are being repeated and that in case these are repeated again, the same shall not be permitted. This will help the party defending the award to bring it to the notice of the court, that the objection of the party that it was not afforded full opportunity, is factually incorrect.

The only requirement for giving full opportunity to the parties is that they must be allowed to put forth their respective viewpoints. Let not either party feel that the arbitral tribunal is not interested to hear their arguments. In this connection, Russell [8] states:

> **5.053 A reasonable opportunity of putting case**.—Each party must be given reasonable opportunity of putting his own case. This means he must be given an opportunity to explain his arguments to the tribunal and to adduce his evidence in support of his case. Failure to comply with this argument may render the award subject to challenge under *section 68 of the Arbitration Act, 1996*. It is also a ground for refusing enforcement of the resulting award under the New York Convention.
>
> **5.054 Qualification of the right.—** The need to allow a party reasonable opportunity to present his case can give rise to difficulties. To what extent can the Tribunal intervene where, for example, a party's submission or evidence is needlessly long, repetitive, focuses on irrelevant issues or is sought to be made over an extended period of time? What if a party ignores procedural deadlines imposed by the Tribunal but maintains he still has points to put before it in support of his case? Inevitably, each situation is to be dealt with in its own context
>
> **5.057 Managing the hearing.—** Similarly, a Tribunal cannot be expected to sit through extended oral hearings listening to long-winded submissions on irrelevant matters. The Tribunal is entitled, and under section 33 is obliged and encouraged, to avoid the unnecessary delay and expense that would be caused by such an approach. The Tribunal should take a grip on the proceedings and indicate to the parties those areas on which it particularly wishes to be address and those which it does not consider relevant to the real issue in dispute. If a party fails to heed such guidance, the Tribunal might seek to focus the proceedings by allocating the remaining hearing time between the parties. This the Tribunal is entitled to do provided it will allow a reasonable time for both parties to put forward their arguments and evidence.

(B) Lengthy Evidence

The parties, their advocates as well as the arbitral tribunals must endeavour to economise on time and refrain from taking recourse to such steps which would delay the adjudication of the matter. It is a matter of common experience that such arbitral tribunals which are headed by former Judges or when all the members of the arbitral tribunal are retired Judges, they go strictly by the procedure laid down by the procedural law, like the *Code of Civil Procedure*,

Evidence Act etc. The reason for adopting such a procedure is not far to seek. They are used to a particular procedure and feel comfortable with it and also feel that justice can be dispensed only after following due procedure, even if it is protracted.

Despite repeated requests that as per section 19(1) of the Act 'the arbitral tribunal shall not be bound by the *Code of Civil Procedure, 1908* (V of 1908) or the *Indian Evidence Act, 1872* (1 of 1872)', they do not accede to the request not to make the procedure in arbitral process the same as normal court proceedings. This was not the intention of the Legislature. The Supreme Court in *Guru Nanak Foundation v. Rattan Singh & Sons* [9] deprecated the practice of arbitral tribunals making the arbitral process too technical and lengthy, and in this connection made the following observations:

> Interminable, time consuming, complex and expensive court procedures impelled jurists to search for an alternative forum, less formal, more effective and speedy for resolution of disputes avoiding procedural claptrap and this led them to *Arbitration Act*, 1940 (Act, for short). However, the way in which the proceedings under the Act are conducted and without an exception are challenged in courts, has made lawyers laugh and legal philosophers weep. Experience shows and law reports bear ample testimony that the proceedings under the Act have become highly technical accompanied by unending prolixity at every stage providing a legal trap to the unwary. Informal forum chosen by the parties for expeditious disposal of their disputes has by the decisions of the courts been clothed with 'legalese' of unforeseeable complexity.

How true and apt the above observations of the Supreme Court are! The only regret is that the message conveyed in the aforesaid judgment has not been followed at all. In fact, proceedings are becoming more complex than before. Time has come when words of wisdom flow from the court and it is made mandatory that strict adherence to procedural law, if followed, would be met with disfavor and any award made by the arbitral tribunal rejecting the claims on account of non-adherence to the procedural law, shall not be upheld.

(C) Oral Evidence

Sub-section (1) of section 24 of the Act, which is relevant for determining whether or not oral evidence can be adduced, reads: 'Unless otherwise agreed by the parties, the arbitral tribunal shall decide whether to hold oral hearings for oral presentation of evidence or for oral argument, or whether the proceedings shall be conducted on the basis of documents and other materials'. Proviso to this sub-section says that 'Provided that the arbitral tribunal shall hold oral hearings, at an appropriate stage of the proceedings, unless the parties have agreed that no oral hearing shall be held'.

The expression 'oral evidence' is nowhere to be found in the 1996 Act. It seems that the Legislature did not intend either party to lead oral evidence. In fact, the intention seems to be that the matter in dispute should be decided on the basis of documentary evidence, which is clear from the provision to the effect that 'unless the parties have agreed that no oral hearing shall be held'. If neither party makes a request for oral hearing then it is left to the discretion of the arbitral tribunal to 'decide whether to hold oral hearings for the presentation of evidence or for oral arguments'. Even here, the Legislature has not qualified the word 'evidence' with oral.

It needs to be noted that in an over-whelming majority of the cases where parties decided to adduce oral evidence, whether or not directed by the arbitral tribunal, the lawyers, during the course of oral arguments, hardly refer to the deposition of witnesses. The very purpose of oral evidence, in that event, stands defeated.

The question that arises is that if the deposition of witnesses is not be referred to during the course of oral arguments by the parties, then what is the logic in leading oral arguments? It is stated that in arbitral matters, parties freely exchange correspondence during the subsistence of the contract. Each party puts forth its problems and the party receiving the communication either rebuts it or suggests some solution. Since everything has been reduced in writing, obviously, therefore, there is hardly anything which is left to the witnesses to depose. However, it does not mean that in all cases and in all circumstances oral evidence should not be led. There are certain contracts where such disputes arise which cannot be resolved unless the parties are allowed to lead oral evidence. There are certain matters which can only be proved by circumstantial evidence.

It is true that in courts, parties have to prove their respective case strictly in accordance with the procedural law. No party can succeed in court unless it refers to the deposition of the witnesses. But this cannot be applied with equal rigour in arbitration matters in view of the provisions of section 19 of the Act. This is more so in cases where the arbitral tribunal is comprised of technical persons, who are not conversant with the intricacies of the *Evidence Act*. Can it, therefore, be said that awards made by such arbitral tribunals are not in accordance with law or stand on a

lesser pedestal than awards made by arbitral tribunal consisting of retired Judges? The obvious answer is a categorical 'no'. When technical persons can make intelligible awards without resorting to oral evidence, what precludes other arbitral tribunals from doing so? The answer to this question could be (i) when oral evidence is led, facts come out in better perspective; (ii) the demeanour of the witness can be a useful pointer to the veracity or otherwise of his case; (iii) oral evidence is a matter of procedure and the right of a party when the other side has led evidence by way of affidavit; and (iv) the courts will set aside the award if no oral evidence is led despite a request by a party. There could be more answers, but the sum and substance would remain the same, i.e. recording of oral evidence is inherent even in quasi-judicial proceedings. The contra view can be that what documentary evidence can prove, oral evidence cannot have an over-riding effect thereon. The famous legal maxim that 'a man may lie but a document would not' has to be borne in mind. Insofar as the demeanour of the witness is concerned, some persons may be genuinely nervous and not in a position to depose correctly, which does not mean that the witness is unreliable. Forceful arguments can be advanced for both situations, but the fact remains that oral evidence is not a matter of procedure and should be resorted to only in exceptional circumstances. It is, therefore, suggested that oral evidence should be discouraged when claims can be proved by the claimant and rebutted by the respondent on the basis of documentary evidence on the record of the arbitral tribunal, and only when some facts are not evident from the record should oral evidence be allowed.

(D) Administering Oath to Witnesses

If parties are allowed by the arbitral tribunal to lead oral evidence, then the party desirous of leading oral evidence is required either to file an affidavit by way of examination-in-chief or it may choose to do so orally in the presence of the arbitral tribunal. In the former case, the affidavit is required to be attested by the Notary Public/Oath Commissioner, as the case may be.

Whether or not to administer oath to the witness before his cross-examination begins is sometimes a subject-matter of debate between the parties. A party opposing administering of oath would always take the plea that there is no stipulation in the 1996 Act for the same. In support thereof, it is argued that in the 1996 Act, there is a deliberate departure by the Legislature when it did not follow provisions of section 13 (a) of the repealed *Arbitration Act*, 1940 which stated: 'The arbitrators or umpire shall, unless a different intention is expressed in the agreement, have power to – (a) administer oath to the parties and witnesses appearing' It is also argued that there was nothing which precluded the Legislature from incorporating section 13 (a) of the repealed *Arbitration Act*, 1940 in the 1996 Act. Thus, there is no question of administering oath. The opposite party generally advances the argument that if oath is not administered then whatever the witness deposes will be nothing but an oral statement and will thus, have no value in law.

It is further argued that the witness cannot be hauled up for making incorrect and false deposition if it is not on oath.

It is not understood as to why parties make the issue of oath so important. In fact, it is a non-issue. The question is as to why should a party oppose administering of oath if it feels that what he is going to state is nothing but the truth? The argument that there is no provision of administering oath in the 1996 Act can be met by asking as to where is the explicit provision in the Act for leading oral evidence. It can also be said that by resisting administering of oath to its witness, the party is sending wrong signals to the arbitral tribunal with regard to the character of the witness and the veracity of his deposition. The best course of action in such circumstances is for a member of the arbitral tribunal to administer oath to the witness to the effect that: 'I, ____ state on solemn affirmation/in the name of God that whatever I say shall be the truth and nothing but the truth'.

(E) Recording of Oral Evidence

There are two ways of recording oral evidence of a witness. It can either be in the narrative form, or it can be in the form of questions and answers. Usually, the latter course is adopted in arbitration matters for the reason that in case the witness gives evasive replies, the same can be shown to the arbitral tribunal during the course of oral arguments by a party.

The deposition of the witness must be recorded on the spot. The practice of recording deposition in short-hand by the stenographer must be discouraged because the stenographer would normally have the typed version ready on the following day and a mischievous party can simply state that the recording is not correct. This would lead to a piquant situation, the resolution of which would be a tough task. These days, questions put to the witness are typed out and displayed on a screen. When the question asked is displayed on the screen, the witness has ample time to answer the same. Thus, there is no question of any mistake in recording the deposition.

Generally, in cases where the deposition is not too lengthy, the evidence can be recorded in long hand. At the

conclusion of the deposition, the witness can append his signature thereon, which would avoid wastage of time, besides negating the objection that the recording is not correct.

After the hearing is closed for the day and the deposition of the witness is inconclusive, the question arises as to who should sign the recorded version. In some arbitrations, it is signed by the witness as well as the presiding arbitrator while in other cases, the deposition is signed only by the presiding arbitrator. In the latter case, the presiding arbitrator records that the witness had deposed in presence of the arbitral tribunal and that the recording of the same is true and correct. A copy of the testimony is sent to the parties. It is generally seen that in such cases, either party does not raise any objection as to the accuracy of the deposition of the witness duly recorded.

(F) Power of Arbitral Tribunal to Ask Question to Witness

When a witness is being cross-examined, the arbitral tribunal has the authority to *suo motu* put question(s) to the witness so as to seek clarifications. The purpose of the question(s) put by the arbitral tribunal is not to prove or disprove the case of either party. In fact, it is meant to elicit more information on the subject so as to understand the facts in a proper perspective. However, at times such questions can lead to misunderstandings and heated exchanges. It is often seen that the party which is likely to be prejudiced because of the question(s) put by the arbitral tribunal, raises an objection. All types of insinuations and aspersions are cast on the impartiality and fairness of the arbitral tribunal. Heated words are sometimes exchanged leading to an unpleasant situation. It is true that at times the party raising objection to the arbitral tribunal asking some questions is not without basis. This happens when the nominee-arbitrator of a party, out of anxiety to show loyalty, starts asking questions to the witness which he should desist from. Arbitrators must not only be fair but seem to be fair. A lot, therefore, depends on the presiding arbitrator as to how he can resolve the issue before it gets out of hand. It is suggested that the arbitral tribunals ought to limit their questions to a minimum and that too only when they require some clarifications from the witness. Another possible course open to the tribunal is to await the conclusion of the cross-examination before asking questions seeking clarifications.

(G) Restrictions on Rebuttal Arguments

A claimant has the right to rebut the points made out by his adversary in answer to the case set up by him. An arbitral tribunal should not normally deny an opportunity to the claimant to lead rebuttal arguments. However, rebuttal arguments have got to be limited to such points which had not been brought to the notice of the arbitral tribunal when the claimant initiated arguments and which were introduced by the respondent for the first time during his arguments. What actually happens is that under the garb of rebuttal arguments, the claimant re-argues the whole case. This is not desirable. It is the duty of the arbitral tribunal to make it clear to the claimant that it should confine itself to meeting specific points raised by the respondent and not repeat all the arguments which had initially been advanced. Still better would be that the arbitral tribunal formulates the points on which it would like the claimant to offer clarification/elucidation. If the latter course is adopted by the arbitral tribunal, the matter can be closed for making of the award expeditiously.

(H) Need for Day to Day Hearing

Some matters, for whatever reason, are delayed much beyond anybody's expectation. Whether the delay occurs because of acts of one party or the other, the fact of the matter is that avoidable delay is experienced. If a matter continues for a very long time, the arbitral tribunal can play an important, effective and meaningful role and resort to day-today hearings. Normally, this suggestion is met with stiff opposition from lawyers of both parties. The fact of the matter is that most of the lawyers take up arbitration matters just to supplement their professional income which they want to earn on holidays or after the court hours. Such an approach of the lawyers cannot be appreciated. They have a duty towards their clients and towards the arbitral tribunal. Such dilatory tactics should be avoided.

An arbitral tribunal consisting of retired judges told the parties that hearing shall be held on the following day (already fixed by notice in writing) at 11 a.m. One of the lawyers resisted by saying that some urgent matters were fixed in court and hence he could not come at 11 a.m. The arbitral tribunal, on being satisfied that the presence of the lawyer could not be ensured merely by making requests, directed that the hearing shall be held at 11 a.m. on the following day, even if the lawyer does not come. Next day the lawyer was present even before 11 a.m. The purpose of narrating the aforesaid experience is that if the arbitral tribunal is sincere and honest and means business, there is no reason why it cannot ensure that hearings shall be held on day-to-day basis. However, there is no need on the part of the arbitral tribunal to be too rigid. Some amount of flexibility is certainly required. If a lawyer of a party desires an adjustment of an hour or so, there can possibly be no denial by the arbitral tribunal. But the arbitral tribunal must keep in mind that such proceedings which have already been delayed beyond

expectations of a prudent person, must be brought to a logical conclusion by taking urgent and effective steps.

5. CHALLENGING ARBITRATOR ON GROUND OF BIAS

(A) Right of Party to Challenge Arbitrator

Sections 12 and 13 of the 1996 Act allow a party to the arbitration agreement to challenge an arbitrator even if he had been appointed by the party itself. Such a provision did not exist in the repealed 1940 Act. The resultant effect was that the aggrieved party was required to knock at the door of the court, and as it generally happens, it used to take years together before an order of the court could be obtained. Such an order, again, was not final. It was subject to appeal. Thereafter, the aggrieved party would file Special Leave Petition before the Supreme Court. The time lag was enormous, rendering the arbitral proceedings virtually futile. With the enactment of the 1996 Act, such delays cannot occur. An order passed by the arbitral tribunal under sections 12 and 13 is not appealable. Whether or not any party is satisfied with the order, it has to continue with arbitral proceedings. However, it shall have right to re-agitate the matter before the court of competent jurisdiction under section 34 of the Act after an award has been made.

(B) Duty of Disclosure

It is now mandatory on the part of an arbitral tribunal under section 12 of the Act to 'disclose in writing any circumstances likely to give rise to justifiable doubts as to his independence or impartiality.' For fair adjudication of the dispute, it is imperative that an arbitrator must be independent and impartial. Now, the arbitral tribunal is under a statutory obligation to make a declaration about his independence and impartiality. It is not only at the stage of the arbitral tribunal entering on reference that it has to be independent and impartial, but it must continue to be so throughout the period the matter in dispute is under adjudication. If during the continuance of the arbitral proceedings, there is any change which is likely to cause apprehension in the mind of either party, it is the duty of the arbitral tribunal to disclose the same in writing, unless the parties have already been informed.

In case a party feels that the arbitrator has failed to disclose, at the time of his appointment, something which is likely to affect his independence or impartiality or some event takes place during the continuance of the arbitral proceedings, then it may challenge the arbitrator stating clearly in detail the basis of challenge which may prevent the arbitrator from discharging his quasi-judicial function in a fair, honest and impartial manner. An arbitrator could also be challenged if he does not have that qualification which the parties had agreed between themselves, unless it had specifically been made either before the arbitrator had been appointed or thereafter.

> When a party is aware from the beginning that by reason of some disability, the matter is legally incapable of being submitted to arbitration, but still participates in arbitration proceedings without protest and fully avails of the entire arbitration proceedings and when he sees that the award has gone against him challenges the proceedings as without jurisdiction on the ground of a known disability, the same cannot be allowed. Long participation and acquiescence in the proceedings precludes such a party from contending that the proceedings were without jurisdiction. [10]

> If the parties agree upon the name of an arbitrator because of his technical qualification, an award made by him cannot be challenged on the ground that the arbitrator has ceased to hold that office which he was holding when he was appointed as an arbitrator. [11]

If the disclosure is not made by the arbitrator at an early stage, but is discovered by one of the parties during the course of arbitration proceedings, there is much likelihood of suspicion arising from such concealment. Under the circumstances, the only course which is open to the party challenging the arbitrator is to seek removal of that arbitrator, even though it may mean re-arguing of the whole matter before the reconstituted arbitral tribunal.

> When a party discovers that the arbitrator suffers from a personal disqualification for the reason which the party could not have ascertained with due diligence at the time of the reference, the party must take immediate steps to stop arbitration. If the party fails to do so, but takes part in the arbitration proceedings, he cannot later on challenge the award on that ground. [12] If an arbitrator has interest in the subjectmatter of the dispute which he is going to decide, he is not a fit person to decide

the dispute unless the parties are aware of such interest which has been disclosed to them and they have referred the dispute to him with that knowledge. [13]

Russell [14] states: The first duties of the arbitrator arise on the receipt of his appointment. He should then see that his appointment is in order, and in case it is not, should have it put in order before he proceeds with arbitration. He should also observe whether the submission (together with the agreement, if any, under which it is made) require him to possess any special qualifications; and if he does, he should make sure that either he complies with the requirement or his failure to comply is known to both parties.

(C) Arbitrator can be Challenged Only Within 15 Days

If a party wants to challenge the arbitrator, it has to do so within 15 days 'after becoming aware of the *constitution* of the arbitral tribunal or after becoming aware of any circumstances' which give rise to reasonable apprehension in the mind of a party. Such a challenge has to be made in writing. The challenge must be specific and must state all the grounds of challenge with adequate details. A challenge on the basis of general and vague grounds will be of no avail.

Sometimes, it happens that after the arbitral tribunal has made some headway, one of the parties comes to know of a ground which disqualifies the arbitrator from going ahead with the arbitral matter. In such a situation, the other party, or the arbitrator, cannot take shelter of the stipulation of 15 days and contend that challenge is too belated. All that the party challenging the arbitrator is required to do, is to prove that he could not have discovered the fact with due diligence earlier and that the challenge has been made within 15 days of becoming aware of the ground on which the challenge has been made. It will still be better if the party challenging the arbitrator establishes his point by some documentary evidence about the date of knowledge of the fact at a belated stage.

The very purpose of stipulating the period of 15 days in section 13(2) of the Act for challenging the arbitrator is to ensure that no undue delay takes place. Whatever has to be done must be done at the earliest possible opportunity and, in any case, not later than 15 days from the date of knowledge of some fact which could not have been discovered earlier.

When the arbitrator challenged receives the application in writing and a copy is also simultaneously delivered to the opposite party, a written reply shall be given by the opposite party within the time allowed by the arbitral tribunal, in case he disagrees with the grounds on which challenge has been made. But if the opposite party does not oppose the challenge made, either expressly or implicitly, then the mandate of the arbitrator challenged stands terminated and the such arbitrator will have no opportunity of defending himself.

In case the opposite party does not agree with the grounds of challenge and opposes the application in writing, then the matter is to be argued before the arbitral tribunal. The Act does not mention as to how the arbitrator challenged is to react – whether orally or in writing or even can maintain silence. The prudent course of action would be that if the arbitrator challenged does not find any merit in the application, he must straightaway rebut the grounds in writing with cogent documentary evidence, if any.

After an arbitrator has been challenged and his removal is opposed by the opposite party, the arbitral tribunal will be required to give its verdict. In case the arbitral tribunal decides to dismiss the application, then it shall continue the arbitral proceedings and make the award. But if it accepts the challenge, then it will recuse from the arbitral proceedings and the party which had appointed him will have the right to make the appointment of a substitute arbitrator. Thereafter, the proceedings shall be conducted de novo.

In the event of the arbitral tribunal dismissing the application, the remedy available to the aggrieved is to re-agitate the same matter before the court under section 34 of the Act, i.e. after the award has been made. In other words, after the application challenging the arbitrator is dismissed by the arbitral tribunal, both the parties shall start from the stage at which the proceedings got suspended because of the challenge and shall continue with the matter till such time till the award is made.

The order dismissing the application or of accepting the application should be reasoned. The parties have a right to know the basis of the decision. The situation will present no difficulty if the arbitrator recuses himself from the proceedings, in which case there need not be a reasoned order. But in case the application is dismissed, costs may be imposed or the parties may be left to bear their own costs. Costs need not be nominal. The party suffering

unnecessary expense needs to be compensated by actual cost incurred by it.

(D) *Bias* of Arbitrator

> The word '*bias* ' means a pre-conceived opinion or pre-disposition or predetermination to decide a case or an issue in a particular manner, so much so that such pre-disposition does not leave the mind open to conviction. [15]*Bias* is an inclination to decide for one party. It is a condition of mind, which sways the judgment and renders a judge unable to exercise his functions impartially in a particular case. [16]
>
> The word '*bias* ' in the popular English parlance stands included within the attributes and purview of the word 'malice', which in common acceptation means and implies 'spite' and 'ill-will', [17] and it is now well established that mere general statements will not be sufficient for the purposes of indication of ill-will. There must be cogent evidence available on record to come to the conclsion as to whether in fact there was existing *bias* which resulted in miscarriage of justice. [18]
>
> There must be purity in the administration of justice as well as in the administration of quasi-justice as are involved in the adjudicatory process before the arbitrators. Once the arbitrator enters in an arbitration, he must not be guilty of an act which can possible be construed as indicative of partiality or unfairness. [19]
>
> Where there is sufficient reason to suspect that the arbitrator will not act fairly or that he will be guilty of continued unreasonable conduct or that he has prejudged any matter likely to come before him for adjudication, his authority to act as arbitrator has to be revoked. [20] Where a circumstance exists which tends to produce *bias* in the mind of the arbitrator, he should not act as an arbitrator in the matter concerned. [21]
>
> There is an automatic disqualification for an arbitrator who has a direct pecuniary interest in one of the parties or is otherwise so closely connected with the party that can truly be said to be a judge in his own cause. [22]

A distinction has been made between actual *bias* and apparent *bias* . Actual *bias* is rarely established but clearly provides grounds for removal. More often there is a suspicion of *bias* which has been variously described as apparent or unconscious or imputed *bias* . In such majority of cases, it is often emphasised that the challenger does not go so far as to suggest that the arbitrator is actually biased, rather that some form of objective apprehension of *bias* exists.

On a perusal of the aforesaid authorities, it can be said with certainty that anybody who acts as an arbitrator must be one whose mind is open irrespective of any consideration. His conduct should be above board and nobody should be able to point a finger against him. He must weigh scales so that it is even in any situation. Justice should be available to a party, which is possible only if the arbitrator is fearless, independent, impartial and carries no ill-will towards any party.

6. ROOT CAUSE OF DELAY IN MAKING AWARD

No time limit is provided in the 1996 Act within which an arbitral tribunal would be obliged to render its award. The reason as to why the Legislature did not put restrictions on the tribunals to stick to a certain time limit, within which to make the award, cannot be fathomed. Under the old Act, arbitrators were required to make and publish the award within four months of entering upon the reference. In case it was not possible to make and publish the award within four months, the time could be extended by mutual consent of the parties and if the parties did not agree to extend the time by mutual consent, then the time limit could be extended by a maximum period of four months, at a time, by the courts, when approached by the arbitrator or either of the parties. However, in certain cases, the courts refused to grant extension of time when it was not satisfied that time needs to be extended.

The period of four months as fixed by the 1940 Act, was too small. It was neither possible to hold day-to-day hearings by the arbitral tribunal nor the parties could attend to only the arbitration matter and completely ignore their usual business. Looking from a practical angle, one hearing of the duration of 3-4 hours is possible to be held every

month. Beyond that, it is practically not possible to meet more often in a month. Therefore, to expect an arbitral tribunal to conclude the hearings in three month's time, keeping one month for making and publishing the award, was not possible. In the event of disagreement between the parties for extending time to enable the arbitral tribunal to make and publish the award, the court had to be approached, which usually entailed a period of 6 months to a year, before an order could be obtained.

By omitting to stipulate some reasonable period for finalising an arbitral award, it cannot be said that the Legislature has projected that it is not important to dispose off the matter in an expeditious manner. In a way, it can be said that the Legislature has left it to the wisdom of the arbitral tribunal, to make and publish the award, as and when the arbitral tribunal considers it reasonable to do so. The discretion, now vested with the arbitral tribunal, to make and publish the award at leisure, has not been exercised in a judicious way. It is felt that unless a particular period is prescribed for making and publishing the award, the arbitral tribunals would be under no pressure to quicken the arbitral process.

In a recent judgment, reported as *Ariba India Pvt. Ltd. v. Ispat Industries Ltd.* [23], the Delhi High Court has shown great concern for disposal of arbitral mattes in a timely manner. It has held that the power to appoint an arbitrator is coupled with the duty to appoint an independent and impartial arbitrator who could conduct the arbitral hearings efficiently and diligently to achieve the desired result of early conclusion of the arbitral proceedings within reasonable costs and expense. In the matter under reference, the arbitral tribunal continued with the arbitration matter for as long as 4 years without making any worthwhile headway. The High Court was constrained to terminate the mandate of the arbitral tribunal and appointed a sole arbitrator, on its own motion. Such a step on the part of the court to terminate the mandate of the arbitral tribunal is quite rare, but looking at the inordinate delay of 4 years during which no worthwhile headway was made, removal of the arbitral tribunal, was the only way out. The judgment has effectuated the intention of the Act for an expeditious disposal of arbitral references.

A similar matter reported as *Singh Builders Syndicate v. Union of India* , [24] came up before the Supreme Court against the order of the Delhi High Court removing the arbitral tribunal because of inordinate delay in disposing off the arbitral matter within a reasonable period of time. In that matter, adjudication of disputes could not take place for a decade and the High Court was constrained to terminate the mandate of the arbitrators, who were serving gazette railway officers, because arbitrators, one appointed after another, were transferred before resolution of disputes could take place. It was held by the Apex Court that serving officers were transferred from time to time, but an effort should have been made to ensure that only those officers who were likely to remain in a particular place were appointed as arbitrators so that the arbitral matter could be decided expeditiously. It needs to be added that delays and frequent changes in the arbitral tribunals make a mockery of the process of arbitration.

Abnormal delay in adjudication of arbitral matters also takes place because of over-busy arbitrators. After the day's hearing is over, parties have to struggle hard to get a suitable date from such busy arbitrators. In a large number of cases handled by such arbitral tribunals, hearings are fixed after a gap of 3-4 months and, that too, just for 2-3 hours. At this rate, it is understandable, as to why arbitral matters generally do not get concluded even in 3-4 years. The cost element is an added burden on the parties.

It is a matter of common experience that another reason for delay in adjudication of disputes is that advocates representing the parties are not prepared to agree to hearings being fixed in the forenoons on working days. The only plea advanced for inability to attend in the pre-lunch period is that they have to attend to court cases. It seems that lawyers give more importance to court mattes rather than arbitral matters. Such excuses need to be deprecated. Arbitral matters are as important as court matters and *vice versa* . After all, it is a full time, and not a part-time job for the advocates to handle arbitration cases. In many advanced countries, arbitral matters are heard for days together till such time these are concluded and hearings take place from 10 am to 4 pm with only an hour's break. They have developed or arbitration culture but unfortunately we have not.

In some arbitration agreements, parties stipulate in the arbitration agreement itself that the arbitral tribunal shall revolve the disputes within one year of entering upon reference, subject to the time being extended by a maximum period of one year. In a large number of cases, arbitral tribunals are successful in devising the time-table within which they make the award. In the event the arbitral tribunals cannot make the award within one year or within the extended period, their mandate stands terminated. This termination takes place because the tribunals which had been created for a fixed period have allowed their time to elapse.

In *NBCC Ltd. v. J.G. Engineers (P) Ltd.* [25], it was held that apparently under the 1996 Act there was no power for the court to fix a time limit for the conclusion of an arbitration proceeding, but the court can opt to do so in the exercise of its inherent power on the application of either party. It was further held that where the arbitration agreement itself provided the

procedure of enlargement of time and the parties have taken recourse to it, and consented to the enlargement of time by the arbitrator, 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.

When the arbitrator had not concluded the proceedings as had been agreed to by the parties within the time fixed for doing so, the mandate of the arbitrator was terminated because of the fact that the arbitrator having failed to conclude the proceedings within the time, did not warrant to be continued as an arbitrator, in the absence of consent of both the parties and that unilateral extension of time by arbitrator, without assigning cogent reasons, called for termination of the mandate of the arbitrator under section 14(1) (a) of the Act. [26]

Arbitral tribunals, generally speaking, attach very little importance to making awards after hearings are concluded. This mostly happens with those arbitral tribunals, the members of which are highly in demand. In case one or two of the members of the arbitral tribunal are not able to spare time to finalise the award in consultation with other members of the tribunal, then publication of the award remains in abeyance. It is submitted that the institution of arbitration can succeed only if the arbitrators take arbitration matters seriously and show some sense of urgency and professionalism. No time limit is prescribed either in the Act or in the agreement of the parties as to the period within which the award must be published by the tribunal after the hearings are over. It is suggested that a maximum period of two months should be allowed for the arbitral tribunal to publish the award after the conclusion of the oral hearings, subject to extension of one month if sufficient cause can be shown by the tribunal as to why it could not make the award within the said period of two months.

If the arbitral tribunal fails to make the award within two months and the extended period of one month thereafter, then the only possible remedy is that the tribunal must return the whole amount which it had received from the parties by way of fees. It can be expected that, save exceptional cases, awards shall be announced by the tribunals within the time stated hereinbefore. Returning of fees shall act as a deterrent.

In order to make the arbitral tribunals interested in giving due importance to the disposal of the arbitration matters, is it suggested that payment should be made to the members of the arbitral tribunals only when they make the award. No arbitrator would be interested in taking up more cases than he can handle, for the reason that if he cannot give time for various cases, for months together, all his payments shall be held up. This is not what any arbitrator would like to happen.

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1 (2009) 4 SCC 523 [*LNIND 2009 SC 468*] : 2009 (2) RAJ 308 : (2009) 2 Arb LR 1.

2 *Jagsons Airlines Ltd. v. Bannari Amman Exports (P) Ltd.,* 2003 (2) Arb LR 315 (Del) : (2003) 104 DLT 957 : (2003) 69 DRJ 490 [*LNIND 2003 DEL 401*].

3 21st ed., para 2.098, pp. 75-76.

4 (2001) 3 SCC 341 [*LNIND 2001 SC 432*] : AIR 2001 SC 1919 : (2001) 1 RAJ 247 : (2001) 1 Arb LR 521.

5 20th ed., p. 287.

6 *P.S. Oberoi v. Orissa Forest Corporation Ltd.,* ; *Grahams Trading Co. v. Chandulal Parmand, AIR* 1935 Sind 228 ; *Hemkunt Builders Pvt. Ltd. v. Punjabi University* , 1993 (1) Arb LR 348 : (1993) 49 DLT 314.

7 *Juggilal Kamlapat v. General Fibre Dealers Ltd.,* (DB); *Dipti Bikash Sen v. Indian Automobiles (Pvt.) Ltd.,* : 82 CWN 838; *Lohia Jute Press P. Ltd. v. New India Assurance Co. Ltd.,* : 1988 (2) Arb LR 201 (DB).

8 *Russell on Arbitration* , 22nd ed., para 5.053 and 5.054, pp. 173-174.

9 AIR 1981 SC 2075 : (1981) 4 SCC 634 [*LNIND 1981 SC 402*].

10 *Prasun Roy v. Calcutta Metropolitan Development Authority,* (1987) 4 SCC 217 [*LNIND 1987 SC 500*] : AIR 1988 SC 205 : (1987) 2 Arb LR 196; *Russell on Arbitration* , 20th ed., p. 433; *Neelkhanthan and Bros v. S.E., National Highways,* (1988) 4 SCC 462 [*LNIND 1988 SC 391*] : AIR 1988 SC 2045 : (1989) 1 Arb LR 34.

11 *Pratiba Sarkar v. Corporation of Calcutta,* (DB).

12 *Ramsahai Sheduram v. Harishchandra Dullachandji,* : 1963 MPLJ 121 (DB).

13 *Radha Kishan v. Sant Ram* , (1965) 67 Pun LR 1113.

14 *Russell on Arbitration,* 20th ed., p. 252.

15 *State of West Bengal v. Shivananda Pathak,* (1998) 5 SCC 513 : 1998 (3) JT 701 [*LNIND 1998 SC 184*] : 1998 (3) SCALE 411 [*LNIND 1998 SC 184*] : AIR 1998 SC 2050.

16 *Secretary to State Transport Deptt. v. Munuswamy Mudaliar,* 1988 Supp SCC 651 : AIR 1988 SC 2232 : (1989) 1 Arb LR 50.

17 *Stroud's Legal Dictionary,* 5th ed., Vol. 3.

18 *Kumaon Mandal Vikas Nigam Ltd. v. Girja Shankar Pant,* (2001) 1 SCC 182 [*LNIND 2000 SC 1362*] : 2000 (7) SCALE 19 [*LNIND 2000 SC 1362*] : 2000 (7) Supreme 12 : 2000 (2) JT (Supp) 206.

19 *International Airport Authority of India v. K.D. Bali,* (1988) 2 SCC 360 [*LNIND 1988 SC 198*] : AIR 1988 SC 1099 : 1988 (1) Arb LR 488.

20 *Roshan Lal Sethi v. Chief Secretary* , AIR 1971 J&K 91.

21 *Praffula Chandra Karmakar v. Panchanan Karmakar,* : 50 CWN 287 (DB)].

22 *Russell on Arbitration,* 22nd ed. P. 106.

23 2011 (3) Arb LR 163 : (2011) 125 DRJ 91.

24 (2009) 4 SCC 523 [*LNIND 2009 SC 468*] : (2009) 2 RAJ 308 : (2009) 2 Arb LR 1.

25 (2010) 2 SCC 385 [*LNIND 2010 SC 7*] : (2010) 1 RAJ 401 : (2010) 1 Arb LJ 165.

26 *Ibid* .

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15 Interpretation of Engineering Clauses

1. INTRODUCTION

Each engineering organisation has its own conditions of contract – which may be different in form and style as compared to other such-like conditions; but, there are certain clauses which are of the same nature in all contracts. Some salient clauses have been the subjectmatter of judicial scrutiny before various High Courts and/or the Supreme Court. However, some clauses have yet not elicited any authoritative pronouncement from any High Court and/or the the Supreme Court. An attempt has been made to analyse various clauses and give a plausible interpretation thereto, which need not necessarily accord with the views of some readers. Only such clauses, which have been the subject-matter of arguments at great length before the courts, have selectively been chosen for the benefit of those concerned with contracts.

2. EXAMINATION OF SITE CONDITIONS

Clause 1 of the “Additional Specification and Condition” of the CPWD and DDA reads as under:

> ***Clause 1:*** *The contractor must get acquainted with the proposed site for the works and study specifications and conditions carefully before tendering. The work shall be executed as per programme approved by the Engineer-in-charge. If part of site is not available for any reason or there is some unavoidable delay in supply of materials stipulated by the Department, the programme of construction shall be modified accordingly and the contractor shall have no claim for any extras or compensation on this account.*

A perusal of the aforesaid clause would reveal the following:

(1) The contractor must get acquainted with the proposed site of the work before tendering;

(2) The contractor must study specifications and conditions before tendering;

(3) The work shall be executed as per programme approved by the Engineer-in-charge;

(4) If part of the site is not available *for any reason* , the programme of construction shall be modified accordingly;

(5) If there is some *unavoidable delay* in supply of stipulated material, the programme of construction shall be modified accordingly; and

(6) Due to change in the programme of construction, the contractor shall have no claim for any extras or compensation.

It is clear from the clause that in the event of delay in handing over a part of the site or on account of non-supply of stipulated material, the contractor shall execute the work according to the modified programme as approved by the Engineer-in-charge, so that the work could be completed within the stipulated period. The clause does not provide for extension of time and hence, cannot be related to the contract period. If the contractor does not submit any modified programme to the Engineer-in-charge for his approval and the Engineer-in-charge does not make one of his own, then the Engineer-in-charge makes his intention bare that completion of work within the stipulated time will

not be insisted upon. In that event, there can be no prohibition for the contractor to claim damages on account of prolongation of the contract period.

A mere statement by the employer that a part of the site could not be handed over in time would be of no consequence till such time some plausible *reason* is assigned therefor. Likewise, supply of stipulated material to the contractor at a belated stage must be on account of *unavoidable* reasons. If the employer does not justify the belated handing over of a part of site or of stipulated materials, cognizance cannot be given to this part of the condition and the claim of compensation is, therefore, not prohibited.

> As per plain reading of the clause 1, a contractor is precluded from raising any claim for extras or compensation if part of the site is not available and/or there is some unavoidable delay in supply of materials. To come within the purview of the stipulation, two things have to be satisfied. Firstly, part of the site is not available on account of certain factors. But this stipulation can be stretched in a case where agreement is executed, work awarded, but the site where the work has to be executed is not made available and in view of the aforesaid clause later in the day the department can turn around to take recourse to the stipulation, and say that the contractor cannot be awarded any compensation even though he might have incurred expenditure on mobilisation of men, materials and resources. The court cannot give a loose interpretation which is not intended by the terms of the agreement between the parties. Secondly, with regard to non-supply of materials, the word occurring in the said stipulation is not delay in supply of materials but “unavoidable delay”. The use of word “unavoidable” before “delay” is not without meaning. [1]

> The stress in the stipulation is on preparing an initial programme and then updating the same periodically. Since there is no mention in the condition about extended date of completion, it is certain that the modification of the programme is required to be done with the purpose of achieving the end objective, i.e. completion of the work in the period stipulated in the contract. Since the time for completing the work as specified by the department has to be considered as of the essence of the contract, any modification of programme has to be with end date remaining the same. It is evident that any modification of initial programme on account of time lost keeping the end date same, would mean additional deployment of resources, which would mean extra expenses for the contractor. It is these extra expenses or compensation which have not been considered payable to the contractor. [2]

It happens in a number of contracts that the employer hands over part of the site just before date for completion has arrived or during the extended period of contract. In the former case, the question of modifying the programme for construction, so as to complete the work within time, does not arise because sufficient time is not available to achieve the target.

> VAUGHAN WILLIAMS L.J in *Wells v. Army & Navy Cooperative Society* [3] stated: If in a contract one finds the time limited within which the builder is to do the work, that means, not only that he is to do it within that time, but it means also that he is to have that time within which to do it.

If the whole site is not made available at the time of commencement of work, it would cause serious problems for both the parties to the contract, more particularly for the contractor, who even at the risk of upsetting the programme and planning done by him, cannot achieve completion within the stipulated time.

> COLLIN L.J in *Freeman v. Hensler* [4] stated: I think the contract clearly involves that the building owner shall be in a position to hand over the whole site to the builder immediately upon the making of the contract. I think that there is an implied undertaking on the part of the building owner, who has contracted for the building to be placed by the plaintiff on his land, that he will hand over the land for the purpose of allowing the plaintiff to do that which he has bound himself to do.

The barring clause reproduced in the beginning that the “contractor shall have no claim for any extras or compensation”, it is submitted, shall have to be interpreted in the light of the stipulation made not only in the earlier part, but also with regard to other conditions of contract. Clause 2 provides that time “shall be deemed to be of the essence of the contract” The whole exercise of the original programme (and the modified programme, if any) has to be examined in this light. As stated hereinbefore, the original programme was to be for the sole purpose of completing the work in the stipulated period of contract. Similarly, the modified programme was also to be prepared for completing the work within the stipulated time, in case the original programme could not be followed because of part site not being available or stipulated materials could not be supplied within time. If such an exercise had been

done, it would have been only for the purpose of bringing the progress of the work to the original track so as to complete the work within the stipulated time by expediting work of various activities. It is submitted that such speeding up is possible only by deploying additional resources and/or by working in double shift or even round the clock. The means of expediting progress would entail deployment of extra resources, which the aforesaid condition debars for payment.

> By clause 67, a usual stipulation of extending time on account of delay in supplying materials or handing over site, was provided in an agreement; and clause 53 relating to programme of works provided that “The date of commencement of work will be the date on which the site (or premises) is handed over to the contractor in full or in parts. If for any reason, sites are not made available on the stated dates, appropriate adjustment will be made on the completion date” There was a considerable delay in handing over the various sites, resulting in prolongation of contract period, for which the arbitrator awarded damages. Upholding the award, it was held that the combined effect of clause 67, which enables the Government to extend the period of contract, and clause 53, which states that the date of commencement of the contract will be on the date on which the site is handed over to the contractor, is that the delay in handing over the site though may result in breach of contract, damages arising therefrom are mitigated by extending the period of performance of the obligation. It was further held that there was no specific clause in the agreement stipulating at what rates the contractor will have to be paid in the event there is delay in handing over the site, material or equipment; there is no clause in the agreement specifying that in the event of the Government's delay in handing over the site or equipment or supplies, any extension of time granted will be in satisfaction of the claim for damages that may be claimed by the contractors. It was also held that the extension of time does not absolve the Government from paying damages due to inordinate delay in handing over the site unless the contractor has agreed to accept the extension of the stipulated period for completion of the work itself in satisfaction of his claim for damages. [5]

3. INTENT AND PURPOSE OF SUBMITTING PROGRAMME TO ENGINEER

During arbitrations, it has been observed that the department invariably takes the shelter of the contractor having not submitted the construction programme according to which he had planned to carry out the works. It is submitted that a contractor can furnish such a programme only when he had been supplied the drawings and the instructions. It is a matter of fact that the department continues to supply drawings from time to time even till the completion of the work. Obviously, it cannot be expected of the contractor to submit a realistic construction programme. All he can do is to submit theoretical construction programme, which for all intents and purposes, is hardly of any use insofar as implementation is concerned.

> Provisions under which the A/E is required to approve a programme to be furnished by the contractor will usually only be interpreted as assisting the Engineer in regard to the order in which the drawings and information will be required from him, or to assist him in making a decision on questions of extension of time, and not as authorising him to impose on the contractor against his wishes a particular order or sequence of working or particular working methods. To secure the result, those powers or requirements will need to be expressly stipulated in the specification or elsewhere. [6]

4. LIQUIDATED DAMAGES AND ARBITRATION CLAUSES

The clauses relating to liquidated damages (Clause 2) and Arbitration (Clause 25) in the CPWD standard form of contracts read as under:

> ***Clause 2:*** *The time allowed for carrying out the work as entered in the tender shall be strictly observed by the contractor and shall be deemed to be of the essence of the contract on the part of the contractor and shall be reckoned from the tenth day after the date on which the order to commence the work is issued to contractor. The work shall throughout the stipulated period of the contract be proceeded with all due diligence and the contractor shall pay as compensation an amount equal to one percent, or such smaller amount as the Superintending Engineer, (whose decision in writing shall be final) may decide on the amount of the estimated cost of the whole work as shown in the tender, for every day that the work remains uncommenced or unfinished, after the proper dates. And further, to ensure good progress during the execution of*

the work, the contractor shall be bound in all cases to complete one eighth of the whole of the work before one-fourth of the whole time allowed under the contract has elapsed; three-eighth of the work, before one half of such time has elapsed; and three-fourth of the work, before three-fourth of such time has elapsed. However, for special job, if a time schedule has been submitted by the contractor and the same has been accepted by the Engineer-in-charge, the contractor shall comply with the said time-schedule. In the event of the contractor failing to comply with the condition, he shall be liable to pay as compensation an amount equal to one percent or such smaller amount as the Superintending Engineer, (whose decision in writing shall be final) may decide on the said estimated cost of the whole work for every day that the due quantity of work remains incomplete; provided always that the entire amount of compensation to be paid under the provision of this Clause shall not exceed ten percent, on the estimated cost of the work as shown in the tender.

Clause 25: *Except where otherwise provided in the contract all questions and disputes relating to the meaning of the specifications, designs, drawings and instruction hereinbefore mentioned and as to the quality of workmanship or materials used on the work or as to any other question claim, right, matter or thing whatsoever, in any way arising out of or relating to the contract designs, drawings, specifications, estimates, instructions, orders or these conditions or otherwise concerning the works or the execution or failure to execute the same whether arising during the progress of the work or after the completion or abandonment thereof shall be referred to the sole arbitration of the person appointed by the Chief Engineer at the time of dispute. It will be no objection to any such appointment that the arbitrator so appointed is a Government employee that he had to deal with the matters to which the contract relates and that in the course of his duties as Government employee he had expressed views on all or any of the matters in dispute or difference. The arbitrator to whom the matter is originally referred being transferred or vacating his office or being unable to act for any reason, such Chief Engineer as aforesaid at the time of such transfer, vacation of office or liability to act shall appoint another person to act as arbitrator in accordance with the terms of the contract. Such person shall be entitled to proceed with the reference from the stage at which it was left by his predecessor. It is also a term of this contract that no person other than a person appointed by such Chief Engineer as aforesaid should act as arbitrator and, if for any reason that is not possible, the matter is not to be referred to arbitration at all. In all cases where the amount of the claim in dispute is Rs. 50,000/- (Rupees Fifty thousand) and above, the arbitrator will give reason for the award.*

Subject as aforesaid the provisions of the Arbitration Act, 1940 or any statutory modification or re-enactment thereof and the rules made thereunder and for the time being in force shall apply to the arbitration proceeding under this Clause. It is a term of the contract that the party invoking arbitration shall specify the dispute or disputes to be referred to arbitration under this clause together with the amount or amounts claimed in respect of each such dispute.

It is also a term of the contract that if the contractor(s) does/do not make any demand for arbitration in respect of any claim(s) in writing within 90 days of receiving the intimation from the Engineer-in-charge that the Bill is ready for payment, the claim(s) of the contractor(s) will be deemed to have been waived and absolutely barred and the Government shall be discharged and released of all liabilities under the contract in respect of those claims.

An analysis of clause 2 shows that:

(1) Time allowed for carrying out the work, as entered in the tender, shall be strictly observed by the contractor;

(2) The time allowed shall be deemed to be of the essence of the contract;

(3) The time shall commence to run from the tenth day after the date of award of work to the contractor;

(4) The contractor shall proceed with the work with due diligence throughout the stipulated period;

(5) If the work is not commenced, or remains unfinished, after proper dates, the contractor shall pay compensation;

(6) Such compensation shall be @ 1% on the estimated cost of the whole work, or such smaller amount as the Superintending Engineer may decide (whose decision in writing shall be final);

(7) To ensure good progress during the execution of the work, the contractor shall be bound to show due progress;

(8) Such progress shall be 1/8 th in 1/4 th time; 3/8 th in time; 3/4 th in 3/4 th of the whole time allowed under the contract has elapsed;

(9) For special jobs, if a time schedule has been submitted by the contractor and approved by the Engineer-in-charge, the contractor shall complete the work within that time;

(10) If the contractor fails to stick to the time schedule, he shall be liable to pay compensation;

(11) Such compensation, in case of special jobs, shall be @ 1% on the estimated cost of the whole work, or such smaller amount as the Superintending Engineer may decide (whose decision in writing shall be final);

(12) The compensation shall be payable for every day that the due quantity of work remains incomplete; and

(13) The amount of compensation shall not exceed 10% of the estimated cost of the work as shown in the tender.

On a reference being made to the arbitrator as per the arbitration clause, the arbitrator allowed the claim put forth by the Government on account of compensation for delay in performance of contract. On the question whether matter regarding quantum of compensation could be referred to the arbitrator, it was held that the opening words of the arbitration clause, *viz* ., “except where otherwise provided in the contract” placed the question of awarding compensation outside the purview of the arbitrator. [7] However, in a very recent pronouncement by the Apex Court in *J.G. Engineers Pvt. Ltd. versus Union of India,* [8] it has been held as under:

1 Thus what is made final and conclusive by Clauses (2) and (3) of the agreement, is not the decision of any authority on the issue whether the contractor was responsible for the delay or the Department was responsible for the delay or on the question whether termination/rescission is valid or illegal. What is made final, is the decisions on consequential issues relating to quantification, if there is no dispute as to who committed breach. That is, if the contractor admits that he is in breach, or if the arbitrator finds that the contractor is in breach by being responsible for the delay, the decision of the Superintending Engineer will be final in regard to two issues. The first is the percentage (whether it should be 1% or less) of the value of the work that is to be levied as liquidated damages per day. The second is the determination of the actual excess cost in getting the work completed through an alternative agency. The decision as to who is responsible for the delay in execution and who committed breach is not made subject to any decision of the respondents or its officers, nor excepted from arbitration under any provision of the contract.

2 In fact the question whether the other party committed breach cannot be decided by the party alleging breach. A contract cannot provide that one party will be the arbiter to decide whether he committed breach or the other party committed breach. That question can only be decided by only an adjudicatory forum, that is, a court or an Arbitral Tribunal.

The contract continues to remain in force till its completion or abandonment thereof. The time is the essence of the contract only in the sense that if the contractor completes the work within the original period, he would not be liable to pay any compensation but that in case he overstepped the time limit, he would have to compensate the employer for every day of the delay in completing the work and the right to rescission would accrue to the employer only when the compensation due exceeded the amount of the security deposit or the contractor abandoned the work. [9]

Although in clause 2 of the contract it was specifically mentioned that time was of the essence of the agreement between the parties, all that was meant was that in case the work was not completed within the time originally specified in that behalf, the plaintiff would be liable to pay such compensation for delay in execution as was fixed by the Superintending Engineer within the limits laid down in the clause. This becomes clear not only from the provisions appearing in clause 2 and stating that ‘the contractor shall pay as compensation an amount equal to 1 per cent or such smaller amount as the Superintending Engineer may decide for every day that the work remains uncommenced or unfinished after the proper dates’ but also from the contents of clause 3 of the contract, which would become operative only if the plaintiff renders himself liable to pay compensation or abandons the work either on account of serious illness or death or for any other cause and it is then that the contract would become liable to rescission. Clauses 2 and 3 have to be read together and interpreted with reference to each other and their provisions, read as one single whole, clearly mean that the contract was to continue to be in force till the completion of the work or its abandonment. [10]

A clause in an agreement gave the purchaser unilateral right to determine liquidated damages. The agreement also

provided that quantification of such liquidated damages shall be final and biding and would not be open to challenge by the supplier. Held that such a stipulation in the agreement is clearly in restraint of legal proceedings and it was then held to be bad in law. [11]

5. EXTENSION OF TIME CLAUSES

The clause relating to extension of time in the CPWD standard form of contract reads as under:

> ***Clause 5:*** *If the contractor shall desire an extension of the time for completion of the work on the grounds of his having been unavoidably hindered in its execution or any other ground, he shall apply in writing to the Engineer-in-charge within 30 days of the date of hindrance on account of which he desires such extension as aforesaid and the Engineer-in-charge shall, if in his opinion (which shall be final) reasonable grounds be shown thereof, authorize such extension of time if any, as may, in his opinion be necessary or proper.*

The Engineer-in-charge has power to grant extension of time to the contractor if the following conditions are satisfied:

(1) The contractor must apply in writing (if he desires to complete the work) seeking extension of contract period;

(2) Such application must state the grounds which hindered the contractor in the execution of the work within the stipulated time;

(3) Such application must be made within a period of 30 days of the date on which such hindrance arose; and,

(4) The Engineer-in-charge shall extend the contract period if he is of the opinion that grounds shown are reasonable and proper.

The clause provides that the opinion of the Engineer-in-charge with regard to grounds shown for the extension of time are or are not reasonable, is final; and, if the Engineer-in-charge does not consider the grounds to be reasonable and declines to grant extension of time, the contractor cannot challenge the soundness of the opinion of reference to arbitration under the arbitration clause. However, it is clear that his decision on whether the period of extension granted by him is proper or necessary, is not final. There is no bar on the contractor approaching the arbitrator with the question of adequacy of the period of extension granted. Thus, the quantum of extension of time is not a non-arbitrable issue.

An extension of time clause may, however, fail and with it the whole of liquidated damages clause, if it is not exercised within any time permitted by the contract, in certain rare cases where the contract may restrict the time for its exercise. In *J.G. Engineers Pvt. Ltd. v. Union of India,* [12] the Supreme Court has held as under:

> 1 As noticed above, the stipulated date for completion was 9-1-1995. The respondents granted the first extension up to 31-7-1995 without levy of liquidated damages, vide letter dated 24-8-1995. In fact the respondent had paid the escalation in prices under Clause (10)(*cc*) up to June 1995. The contractor was however permitted to continue the work without levy of any liquidated damages, until termination on 14-3-1996. It was only on 30-9-1999, after the contractor had submitted its statement of claim on 17-4-1997, the respondents chose to levy liquidated damages for the period 10-1-1995 to 14-3-1996. In view of the finding of the arbitrator that the contractor was not responsible for the delay, the contractor was entitled to second extension from 1-8-1995 also without levy of penalty. In fact, having extended the time till 31-7-1995 without any levy of liquidated damages, the respondents could not have retrospectively levied liquidated damages on 30-9-1999 from 10-1-1995. Be that as it may.

The question whether the Engineer-in-charge can extend the period of contract *suo motu* (if the contractor does not apply for extension of time) was examined by the Ministry of Law, Government of India (CE/Con/359 dated 9-10-1964) according to which the Engineer-in-charge can extend the time where adequate and proper grounds exist.

If the language of the clause is literally construed, it would seem as if the Engineer-in-charge has no power to extend the time *suo motu* , unless the contractor applies for extension of time within 30 days of the date of occurrence of the hindrance. The Ministry of Law, Justice and Company Affairs (Department of Legal Affairs) has opined that the period during which the contract remains valid is a matter of agreement and if the period originally provided comes to an end, nothing short of an agreement of the party (the contractor) can extend the subsistence and validity of the contract. The extension, in order to be binding, will have to be by the parties' agreement, express or implied. Thus, if the Engineer-in-charge extends the time *suo motu* and such extension of time is accepted by the contractor, either expressly or impliedly, before and subsequent to the date of completion, the extension of time granted by the Engineer-in-charge is valid. Some of the decided where it has been held that one party cannot unilaterally extend the time for completion of the contract are: *Anandram Mangturam v. Bholaram Tanumal* , [13]*Keshavlal Lallubhai Patel v. Lalbhai Trikumbl Mills Ltd.* , [14]*Venkateswara Minerals v. Jugalkishore Chiranjitlal* . [15]

In *Anandram Mangturam v. Bholaram Tanumal,* [16] mit had been held as under:

> Under section 55, the promisee is given the option to avoid the contract where the promisor fails to perform the contract at the time fixed in the contract. It is open to the promisee not to exercise the option or to exercise the option at any time, but the promisee cannot by the mere fact of not exercising the option change or alter the date of performance fixed under the contract itself. Under section 63 the promisee may make certain concessions to the promisor which are advantageous to the promisor, and one of them is that he may extend the time for such performance. But such an extension of time cannot be a unilateral extension on the part of the promisee. It is only at the request of the promisor that the promisee may agree to extend the time of performance and thereby bring about an agreement for extension of time. Therefore, it is only as a result of the operation of section 63 that the time for the performance of the contract can be extended and that time can only be extended by an agreement arrived at between the promisor and the promisee. The fact that the contract is not put an end does not entail the further consequence that the time for the performance of the contract is automatically extended.

In *Keshavlal Lallubhai Patel v. Lalbhai Trikumlal Mills Ltd.* , [17] it had been held as under:

> Every promisee may extend time for the performance of the contract. Both the buyer and the seller must agree to extend time for the delivery of goods. It would not be open to the promisee by his unilateral act to extend the time for performance of his own accord for his own benefit. The agreement to extend time need not necessarily be reduced in writing. It may be proved by oral evidence. In some cases it may be proved by evidence of conduct.

In *Venkateswara Minerals v. Jugalkishore Chiranjitlal,* [18] it had been held as under:

> Since one party to the contract could not unilaterally alter or vary the terms thereof he could not extend the time for performance thereof without the other party's intimating its consent or agreement thereto by any of the methods stated in section 4 of the Contract Act. This is clear from sections 55 and 63 of the Contract Act.

The ages-old impression that the extension of time clause is for the benefit of the contractor is not correct. In fact, it is the department which stands to gain by extending the period of contract since it operates to keep alive the liquidated damages clause in the event of delay being due to an act of the employer or his agents. In *Murdoch v. Luckie* , [19]*Meyer v. Gilmer* ; [20]*Wells v. Army and Navy Co-op. Society* ; [21]*Peak v. Mckinney* , [22] it had been held that where the extension does not cover the acts of prevention which have in fact occurred, no decision under the extension of time clause can bind the builder, or preserve the liquidated damages clause.

Another erroneous understanding on the part of engineering organisations is that a contractor would not be entitled to claim anything extra once an extension of time has been granted. It had been held by Delhi High Court that the plea that extension of time granted to the contractor would eliminate claim for damages was not tenable because the respondent-Authority could not be a judge of its own cause, and in any case, mere grant of extension of time for completion of work is

not a satisfaction for the claim of damages. [23]

Where the cause of delay is due to breach of contract by the owner, and there is also an applicable power to extend the time, the exercise of that power will not, in the absence of the clearest possible language, deprive the contractor of his right to damages for the breach. [24]

The very purpose for which an extension of time clause is provided in the contract is to keep the contract alive when the period is validly and properly extended; by extending the period of contract the parties agree to substitute, for the time fixed by the contract, a new date from which the liquidated damages are to run.

Extension of contract period must be made at the appropriate time, failing which the engineer may subsequently lose the right to do so. In that event, the time for completion of the work shall be set at large and the employer will cease to operate on the liquidated damages clause as there is no date from which the penalties could run.

An interesting decision is seen in the case of *Hawlmac Construction v. Campbell River Co.* , [25] by the Supreme Court of British Columbia. There, the contract provided that the building work should be completed by a fixed date, subject to an extension granted by the engineer. Two months before the completion date an application was made for an extension but the engineer failed to consider the application until the completion date. The work was completed 144 days after the original date of completion. When the contractor was sued for failure to complete the mark in time, the court held that the contract required the engineer to consider an application for extension of time upon receiving it and to fix the length of extension. Having failed to perform that obligation prior to the expiry of the original time for completion of the contract, there was no longer a specific date within which the contract was to be completed or from which penalties could be imposed.

6. INTERMEDIATE PAYMENTS AND FINAL BILL

The clause dealing with intermediate and final payments in the CPWD standard form of contract reads as under:

Clause 7: *No payment shall be made for a work estimated to cost rupees five thousand or less till after the whole of the work shall have been completed and certificate of completion given. But in the case of work estimated to cost more than Rs. five thousand, the contractor shall, on submitting the bill be entitled to receive monthly payment proportionate to the part thereof then executed to the satisfaction of the Engineer-in-charge, whose certificate of the sum so payable shall be final and conclusive against the contractor. But all such intermediate payments shall be regarded as payments by way of advance against the final payment only and not as payments for work actually done and completed, and shall not preclude the requiring of bad, unsound and imperfect or unskilled work to be removed and taken away and reconstructed, or re-elected or be considered as an admission of the due performance of the contract, or any part thereof, in any respect or the accruing of any claims, nor shall it conclude, determine, or affect in any way the powers of the Engineer-in-charge under these conditions or any of them as to the final settlement and adjustment of the accounts or otherwise or in any other way vary or affect the contract. The final bill shall be submitted by the contractor within one month of the date fixed for completion of the work or of the date of the certificate of completion furnished by the Engineer-in-charge and payment shall be made within three months if the amount of the contract plus that of additional items is upto Rs. 2 lakhs and in 6 months if the same exceeds Rs. 2 lakhs of the submission of such bill. If there shall be any dispute about any items of the work then the undisputed item or items only shall be paid within the said period of three months or six months or as the case may be. The contractor shall submit a list of the disputed items within thirty days from the disallowance thereof and if he fails to do this, his claim shall be deemed to have been fully waived and absolutely extinguished.*

Wherever there is likely to be delay in recording detailed measurement for making payments in the case of residential building, advance payments without detailed measurements for works done) (other than foundations and finishing items) upto (a) lintel level (including sun shade etc.) and (b) slab level, for each floor, worked out at 75% of the tendered rates may be made in running account bills by the Engineer-in-charge in his discretion on the basis of certificate from the Assistant Engineer to the effect that the work has been completed upto the level in question.

> *The advance payment so allowed shall be adjusted in the subsequent running bill by taking detailed measurements thereof. Final payment shall be made only on the basis of detailed measurements.*

It is true that as per this clause, the contractor is to submit the final bill within one month of the date of actual completion of work. It is stated that submission of final bill is possible only after complete and final measurements are recorded as per clause 8 of the contract, the onus for which lies on the employer. The stipulation of clause 8 insofar as it is relevant for the purpose is “the Engineer-in-charge may depute within seven days of the date fixed as aforesaid, a subordinate to measure up the said work in the presence of the contractor” Thus, the contractor could be expected to prepare the final bill only when the subordinate measures up the work in the presence of the contractor. The other part of clause 7 is that the contractor shall submit the final bill within one month of the date of the certificate of completion. A perusal of the certificate of completion usually issued by the Engineer-in-charge would reveal that it is not free from riders. The certificate *inter alia* states that it is issued “subject to measurements being recorded and quality being checked by the competent authority and also rectification of defects already pointed out to the contractor from time to time some of which are” Thus, the certificate of completion given by the Engineer-in-charge can, at best, be considered with certain reservation and in fact the work can be considered as fully completed only after the items mentioned in the certificate are attended to and the measurements get recorded.

In view of the foregoing, it is thus, clear that till such time, on the directions of the Engineer-in-charge, the subordinate does not make available a complete set of measurements, the contractor cannot be expected to prepare a bill, final or on account.

As per clause 8A, the Engineer-in-charge or his subordinate “shall give reasonable notice to the contractor” “before taking any measurement of any work as has been referred in clauses 6, 7 and 8 hereof”. Lest the Engineer-in-charge takes the plea that his subordinate could not record the measurements because the contractor did not turn up on the appointed day, clause 8A provides that “If the contractor fails to attend at the measurements, after such notice or fails to countersign or to record the difference within a week from the date of measurement in the manner required by the Engineer-in-charge or the subordinate deputed by him as the case may be it shall be final and binding on the contractor and the contractor shall have no right to dispute the same”. Thus, before the Engineer-in-charge or his subordinate proceeds to take measurements, it is mandatory that contractor must be given reasonable notice to that effect.

The fact that it is the Engineer-in-charge who has to prepare the bill (and not the contractor) is clear from the provisions contained in clause 25, which *inter alia* states: “that if the contractor does not make any demand for arbitration in respect of any claim in writing within 90 days of receiving the intimation from the Engineer-in-charge that the bill is ready for payment” It is submitted that all the payments which the contractor receives, as per clause 7, are “intermediate payments” which “shall be regarded as payment by way of advance against the final payment only and not as payments for work actually done and completed” The expression “the bill being ready for payment” connotes the payment of the final bill. The words used are “the bill” which can only relate to the final bill as all running payments made to the contractor are “intermediate payments” “by way of advance against the final payment only.” Thus, the words “the bill” can mean only one specific bill which is the final bill and not the running bills. In addition, it is submitted that the word “bill” has been used in a singular form implying a unique bill, which can only be the final bill.

> It is common knowledge that in such contract works, payment against running bills are made during the progress of the work and final bill is submitted after the completion of the work. All such relevant material would be required so that bill could be processed after considering the various details, extent of work, rate, amount item-wise, payments made, extent of material supplied by the owner and account of such materials consumed for the work or otherwise, the details of balance stores, the extent of liability of the contractor for unaccounted stores or for other shortcomings, that may have been noticed during the progress of the work. [26]

In interpreting a contract, the courts will not read any clause in isolation but shall gather the intention of the parties on a conjoint reading of all the relevant clauses. For instance, a mere reading of clause 7 may convey that the contractor is bound to submit the final bill and if he does not do so, he should not expect to be paid by the Engineer-in-charge, but if one reads clauses 6, 7, 8 and 9 conjointly, then the intention of the parties would be absolutely clear that a set of measurements has to be made available by the Engineer-in-charge to the contractor before the

contractor can be called to make an abstract of cost, which is nothing but a narration of items together with quantities and rates as applicable to each time, constituting the bill.

In *Rajaram Koduram Nikhera v. Madhaorao Gangadharrao Chitnavis* [27], it had been held that even if running bills have been passed by the Engineer-in-charge that does not mean that such passing would preclude the building owner from challenging the work.

7. DEVIATION LIMIT – SCOPE AND PURPOSE

The concept of variation of the question of work is no doubt a common feature of a works contract. This is so because in contracts relating to major works, the estimate of the work at the time the tenders are invited can only be approximate. But it was also realised that the power of the employer to vary the terms relating to the quantum of work cannot be unlimited. [28] In *Hudson's Building and Engineering Contracts,* [29] it had been pointed out that this power "although unlimited, is in fact limited to ordering extras up to a certain value."

Under the general law of contracts, once the contract is entered into, any clause giving absolute power to one party to override or modify the terms of the contract at his sweet will or to cancel the contract – even if the opposite party is not in breach, will amount to interfering with the character of the contract. [30]

The question has often arisen whether the contractor under the variation clause is liable to execute the extra or additional quantities of the tendered items at the tendered rates to an unlimited extend. In some awards given by the arbitrators for contracts relating to CPWD, the variation of the tendered quantities has been restricted to 10%, beyond which the contractor could claim extra. Due to a subsequent amendment, deviation limit has been increased to 25%. If the quantities exceed 25% over and above the Schedule of Quantities, the Engineer-in-Charge can revise the rates having regard to the prevailing market rates. [31]

When a contractor bids in a contract, he has to offer reasonable rates for the works which are both difficult to perform and other works which are not that difficult to perform. Every contractor tries to balance his rates in such a manner that the employer may consider his offer reasonable. In that process, the contractor tries to get a reasonable margin of profit by balancing the more difficult (and less profitable items) and the less difficult (and more profitable items). His bid is, normally, a package. If the employer is permitted in law to make variations, upwards and downwards – even if it be up to a limit beyond which market rates become payable – then the interpretation of the clause must be one which balances the rights of both the parties. For example, if the plus and minus variations go beyond 25% and are made in a manner increasing the less profitable items and decreasing the more profitable items, and if the net result of the contract is to be the basis, then it may work out that the contractor could be made to perform a substantially new contract on the same contracted rates. [32]

8. DEDUCTIONS FROM BILLS OF CONTRACTOR

While quoting rates at the time of bidding, the contractors, usually, take into consideration the cash flow which they will have to manage during the execution of the work. To achieve this end, they wish to be assured that the employer would be making payments within the time stipulated in the bid documents. It is stated that even though there is a stipulation in the bid documents that running payments would be made every fortnight/monthly, but the schedule is not strictly adhered to. It, therefore, goes without saying that the whole financial planning done by the contractors goes haywire.

A contractor cannot afford to face a financial crunch when the work is in full swing, or or that matter, at any stage of the work. The suppliers, labour, establishment and lenders/financial institutions would not wait beyond the date when the contractor had made a commitment to pay. In order to ensure that the employer does not delay payments and adheres to the conditions of the bid documents, the contractor gives an incentive to the employer to avail of a rebate of % (or any other percentage) if the running payments are made on time. A similar percentage is also

offered for settling the final bill within the stipulated period. The employer is too willing to accept such conditions, which are also financially beneficial to them.

Another advantage of acceptance of rebate is that since his overall quotation is financially reduced, he stands a better chance of acceptance of the tender. It is a matter of common experience that the even though the employer accepts the rebate conditions, but the running payments are invariably delayed and the final bill is always delayed. It is incumbent on the employer to make the payments within the time allowed to avail of the rebate. It would not suffice if the employer says that the rebate is justified for at least those payments which are made on time. Delay in payment of even one bill constitutes a breach.

> Where a contractor gives a rebate in the tender for ensuring that payment of running/final bill shall be made within the time specified, it is incumbent upon the employer to ensure compliance of the accepted condition in letter and spirit. But if the payments are not made within time, the employer loses the right to claim benefit. In such a situation, the employer will be liable to refund the amount availed on account of rebate. [33]

> The respondent availed of the rebate from the bills of the contractor on the ground that the respondent could not make the payment within the time stipulated in the contract since the contractor failed to submit the bill within the time stated therein, it was held that to attract the provisions of the clause which deals with monthly payment, the prerequisite was that the date on which the contractor was required to submit the running or final bill had to be fixed by the department and having failed to do so, the department could not make a grouse of it. [34]

> Sometimes the department makes penal rate recovery on the basis of consumption statement worked out as per quantities of various items of running bills. This is not proper. It is not unknown that while preparing the running bill, the departmental officials skip to record measurements in respect of some items or do not record certain items which are incomplete. Where the respondent made some penal rate recovery during the currency of the work, it was held to be not proper since consumption statement could finally be prepared only on knowing the ultimate quantities of various items of work which was possible only when the work was finally measured up after the completion of the work. [35]

> The respondent recovered a certain amount on account of alleged defects in the work because of objections raised by the audit cell of the respondent organisation. The objection had been raised while the work was still in progress. According to the arbitrator, the proper stage is when the work stood completed since in that event the contractor would have an opportunity to rectify the defects. Held that the logical corollary of the finding of the arbitrator was that when final work was accepted, defects had to be gone into at that stage and if defects were not rectified at that stage, the respondent would have a right to make deduction. [36]

9. STIPULATED MATERIALS

Clause 10 of the CPWD standard form of contract deals with the use and return of the stipulated materials of the Government as under:

> ***Clause 10: Stores supplied by Department.—*** *If the specification of schedule of items provides for the use of any special description of materials to be supplied from Engineer-in-charge's stores or if it is required that the contractor shall use certain stores to be provided by the Engineer-in-charge as shown in the schedule of materials hereto annexed, the contractor shall be bound to procure and shall be supplied such materials and stores, as are from time to time required to be used by him for the purposes of the contract only, and the value of the full quantity of materials and stores so supplied at the rates specified in the said schedule of materials may be set off deducted from any sums then due, or thereafter to become due to the contractor under the contract, or otherwise or against or from the security deposit, or the proceeds of sale thereof if the same is held in Govt. Securities, the same of a sufficient portion thereof being in this case sold for the purpose. Notwithstanding any thing to the contrary contained in any other clause of the contract and (or the CPWD Code) all stores/materials so supplied to the contractor or procured with the assistance of the Department shall remain the absolute property of Department and the contractor shall be the trustee of the stores/materials and the said stores/materials shall not be removed/disposed of from the site of the work on any account and shall be at all times open to inspection by*

the Engineer-in-charge, any such stores/materials remaining shall be returned to the Engineer-in-charge at a place directed by him if by a notice by him he shall so require, but in case it is decided not to take back the stores/materials the contractor shall have no claim for compensation on any account of such stores/ma-terials so supplied to him as aforesaid and not used by him or for any wastage in or damages to in such stores/materials.

On being required to return the stores/materials, the contractor shall hand over the stores/materials on being paid or credited such price as the Engineer-in-charge shall determine, having due regard to the condition of the stores/materials. The price allowed to the contractor, however, shall not exceed the amount charged to him, excluding the stores charge, if any. The decision of the Engineer-in-charge shall be final and conclusive. In the event of breach of the aforesaid condition, the contractor shall in addition to throwing himself open to account for contravention of the terms of the licences or permit and/or criminal breach of trust be liable to the Department for all advantages of profit resulting or which in the usual course would have resulted to him by reason of such breach. Provided that the contractor shall in no case be entitled to any compensation or damages on account of any delay in supply or non-supply thereof all or any such materials and stores. Provided further that the contractor shall be bound to execute the entire work if the materials are supplied by the Department within the schedule time for completion of the work plus 50% thereof (Schedule time plus 6 months if the time of completion of the work exceeds 12 months) but if a part only of the materials has been supplied within the aforesaid period then the contractor shall be bound to do so much of the work as may be possible with the materials and stores supplied in the aforesaid period. For the completion of the rest of the work, the contractor shall be entitled to such extension of times as may be determined by the Engineer-in-charge, whose decision in this regard shall be final.

An analysis of the foregoing provision reveals as under:

(1) The employer shall provide the stores named in the schedule for use in items given in schedule of quantities;

(2) Such stipulated materials and stores shall be supplied, from time to time, by the employer for purposes of the contract only;

(3) The contractor shall be bound to use the stipulated material for *bona fide* use on the work;

(4) The value of the stipulated materials and stores supplied by the employer shall be priced at the rates specified in the tender;

(5) The employer shall have a right to deduct the amount from any sum that may be due to the contractor or may thereafter become due to the contractor under the contract;

(6) If the value of the stipulated materials and stores is not available from being deducted from the contractor, then it shall be deducted from the amount of security deposit available with the employer;

(7) If neither the amount of stipulated materials nor stores can be deducted for want of adequate amount at the credit of the contractor nor is it possible to realise from the security deposit, then the employer shall realise it from the proceeds of sale of the materials belonging to the contractor held in Government securities;

(8) Notwithstanding anything to the contrary contained in the provisions of the contract or CPWD Code, all the stipulated materials and stores supplied to the contractor or procured with the assistance of the employer, the contractor would not be a trustee for the same;

(9) The contractor shall have no right whatsoever to dispose of or remove from the site of work the stipulated materials and stores and any other materials procured with the assistance of the employer;

(10) The contractor shall offer to the employer for inspection the stipulated materials and stores and any other materials procured with the assistance of the employer;

(11) The employer shall have a right to require the return to the stores any such stipulated materials, stores or materials procured with the assistance of the employer;

(12) The contractor shall not be entitled to any compensation if the employer does not take back any of the stipulated materials or stores issued or materials procured with the assistance of the employer or on account of wastage or damage caused to such materials;

(13) Whenever called upon to return the stores/materials, the contractor shall hand over the same on being paid or credit price to be determined by the Engineer-in-charge according to the condition in which the stores/materials are;

(14) The price to be paid for the stores/materials handed over by the contractor shall not exceed the amount charged to him, excluding the amount paid as storage charges, if any.

(15) Decision of the Engineer-in-charge regarding the price to be given for such store/materials shall be final and binding;

(16) Breach of any of the aforesaid conditions shall entail consequences like cancelling of licences or permit and/or criminal breach of trust etc.

(17) The employer shall in no case be liable to compensation or damages if there is a delay in supply or non-supply of stipulated material;

(18) Notwithstanding foregoing stipulations, whatever stipulated material had been issued to the contractor within the original period of contract shall be incorporated in the work within 6 months beyond schedule of time (or 50% of the schedule time). It must be noted that the contractor is bound to use only that much part of the stores/materials which were issued only during the original schedule of time (and not applicable to stores/materials supplied thereafter). No compensation or damages shall be admissible for use of stipulated materials issued before the expiry of original period and that too within six months (or 50% of the stipulated time);

(19) Stores/materials issued by the employer beyond schedule of time shall be used for completing the rest of the work for which the engineer shall grant extension of time; and,

(20) The decision of the engineer regarding quantum of extension on account of delay caused in issuing stores/materials shall be final and binding.

It is apparent from a careful study of the clause that there is no blanket ban for payment of compensation or damages if the employer delays issue of stores/materials. The contractor is precluded from claiming compensation/damages on account of delay in supply/nonsupply of stores/materials during the original period of contract, nor would he be entitled to any compensation or damages if the stores/materials have been issued during the original schedule of time but have been incorporated in the work within 6 months or 50% of the period of contract, whichever is less.

The most noteworthy fact is that the clause does not envisage issue of stores/stipulated materials beyond schedule of time without payment of compensation or damages. Supposing the whole quantity of stores/materials has been issued a day before the expiry of original period of contract, the contractor shall have no right to claim compensation or damages if the quantity of stores/materials issued are incorporated in the work within 6 months or 50% of the contract, whichever is less; but if the employer issues stores/materials even one day after the original contract period then the contractor shall be entitled to claim compensation or damages for the period during which the work continues beyond contract period. Another situation is that the contractor has been issued a part of the stores/materials within original time, in which event, the contractor would not be entitled to claim compensation or damages if the quantity could be incorporated in the work within 6 months after expiry of the contract time or 50% of the contract period, whichever is less.

> The employer by stipulating in the clause that “for the completion of the rest of the work, the contractor shall be entitled to such extension of time as may be determined by the Engineer-in-charge” has made it absolutely clear that the contractor shall have a right to claim extension of time on account of delay in issue or non-issue of stores/materials, but the clause does not say that the mere extension of time shall prohibit grant of compensation or damages. In *Metro Electric Co. v. Delhi Development Authority* , [37]*Rawla Construction Co. v. Union of India* , [38] and *State of Karnataka v. R.N. Shetty and Co.,* [39] reliance was placed on *Hudson's Building and Engineering Contract,* [40] wherein it was observed that: “Where the cause of delay is due to breach of contract by the employer, and there is also an applicable power to extend the time, the exercise of that power will not in the absence of the clearest possible language, deprive the contractor of his right to damages for the breach.” In *Roberts v. Bury Commissioners* , [41] KELLY C.B. said: “It is provided that it shall be lawful for the architect to grant an extension of time, but it is neither said that the architect must accept whatever extension of time the architect is pleased to give, in full satisfaction of his claim for damages.”

In *P.C. Sharma & Co. v. Delhi Development Authority* , [42] it has been held by Delhi High Court as under:

> Respondent's reference to clause 10 of the contract is also found to be overstretched. Clause 10 does not provide unrestricted and unhindered powers to respondents to supply stipulated time for completion as 12 months for this contract. As per provisions of this contract, the claimants were required to complete only that much of work which

could be done with materials supplied in 18 months time. For getting total work completed, the respondents, therefore, should have supplied entire material in 18 months time. This clause, therefore, defines a maximum reasonable time for issue of all and entire materials which in this case is 18 months. Another 3 months after 18 months can be considered for incorporating these materials in work. It would, therefore, be reasonable to conclude that as per this clause a maximum period of not more than 21 months can be considered as reasonable for completing the work. In the present contract, respondents have considered a delay of 1364 days justified as against a total period of 9 months which can be considered reasonable under clause 10 of the contract. It is seen that certain items of materials stipulated for had been supplied by respondents even more than 2 years after the stipulated date of start. The delay of 1089 days on the part of the respondents over and above the delay of nine months for which respondents can be considered to get protection under clause 10 of the contract entitles the claimants for compensation and damages.

10. EXTRA ITEMS AND DEVIATION CLAUSES

The CPWD standard form clauses relating to Extra items (Clause 12) and Deviation (Clause 12A) are reproduced hereinbelow:

Clause 12: *The Engineer-in-Charge shall have power to make alterations in, omissions from, additions to or substitutions for, the original specifications, drawings, designs and instructions that may appear to be necessary during the progress of work, and the contractor shall carry out the work in accordance with any instructions which may be given to him in writing signed by the Engineer-in-charge, and such alterations, omissions, additions or substitutions shall not invalidate the contract and any altered, additional or substituted work which the contractor may be directed to do in manner above specified as part of the work shall be carried out by the contractor on the same conditions in all respects on which he agreed to do the main work and at the same rates as are specified in tender for the main work. The time for the completion of the work shall be extended in the proportion that the altered, additional or substituted work bears to the original contract work and the certificate of the Engineer-in-charge shall be conclusive as to such proportion. Over and above this, a further period to the extent of 25 percent of such extension so extended shall be allowed to the contractor. The rates for such additional, altered or substituted work under this clause shall be worked out in accordance with the following provisions in their respective order:*

(i) *If the rates for the additional, altered or substituted work are specified in the contract for the work, the contractor is bound to carry out the additional, altered or substituted work at the same rates as are specified in the contract for the work.*

(ii) *If the rates for the additional, altered or substituted work are not specifically provided in the contract for the work, the rates will be derived from the rates for a similar class of work as are specified in the contract for the work.*

(iii) *If the altered, additional or substituted work includes any work for which no rate is specified in the contract for the work and cannot be derived from the similar class of work in the contract then such work shall be carried out at the rates entered in (current CPWD schedule of rates). Schedule of rates with upto date correction slips minus/plus percentage which the total tendered amount bears to the estimated cost of the entire work put to tender.*

(iv) *If the rates for the altered, additional or substituted work cannot be determined in the manner specified in Sub-Clause (i) & (ii) above, then the rates for such works shall be worked out on the basis of the Schedule of Rates of the District specified above minus/plus the percentage which the total tendered amount bears to the estimated cost of the entire work put to tender. Provided always that if the rate for a particular part or parts of the item is not in the Schedule of Rates, the rates for such part or parts will be determined by the Engineer-in-charge on the basis of the prevailing market rates when the work was done.*

(v) *If the rate for the altered, additional or substituted work cannot be determined in the manner specified in sub-clauses (i) to (iv) above, then the contractor shall, within 7 days of the date of receipt of order to carry out the work, inform the Engineer-in-charge of the rate which it is his intention to charge for such class of work, supported by analysis of the rate or rates claimed and the Engineer-in-charge, shall determine the rate or rates on the basis of prevailing market rates and pay the contractor accordingly, however the Engineer-in-charge, by notice in*

writing, will be at liberty to cancel his order to carry out such class of work and arrange to carry it out in such a manner as he may consider advisable. But under no circumstances the contractor shall suspend the work on the plea of non-settlement of rate of items falling under the clause.

(vi) *Except in case of items relating to foundations provisions contained in sub-clause (i) to (v) above shall not apply to contractor or substituted items as individually exceed the percentage set out in the tender documents (referred to herein below as deviation limit) subject to the following restrictions:-*

(a) *The deviation limit referred to above is the net effect (algebraic sum) of all additions and deductions ordered.*

(b) *In no case shall the additions/deductions (arithmetical sum) exceed twice the deviation limit.*

(c) *The deviation ordered on items of an individual trade included in the contract shall not exceed plus/minus 50% of the value of that trade in the contract as a whole or half the deviation limit; whichever is less.*

(d) *The value of additions of items of any individual trade not already included in the contract shall not exceed 10% of the deviation limit.*

For the purpose of operation of clause 12(vi) the following work shall be treated as work relating to foundations:-

(a) *For Building, plinth level or 1.2 metres above ground level, whichever is lower, excluding items of flooring and D.P.C. but including base concrete below the floors.*

(b) *For abutment piers, retaining walls or culverts and bridges, walls of water reservoirs, the bed or floor level.*

(c) *For retaining wall where floor level is not determinate 1.2 metres above average ground level or bed level.*

(d) *For roads all items of excavations of filling including treatment of sub-base and soling work.*

(e) *For water supply lines, sewer lines, underground storm water drains and similar works, all items of work below ground level except items of pipe work and masonry work.*

(f) *For open storm water drains, all items of work except lining of drains.*

Note: Individual trade means the trade sections into which a schedule of quantities annexed to the agreement has been divided or in the absence of any such division, the individual sections of the CPWD Schedule of Rates specified above such as excavation and earthwork, concrete, wood work and joinery etc.

The rates for any such work except items relating to foundation which is in excess of the deviation limit shall be determined in accordance with the provisions contained in clause 12-A.

Clause 12-A as contained in the CPWD/DDA tender form reads as under:

In the case of contract, substituted items or additional items which result in exceeding the limits laid down in sub-clause (vi) of clause 12 except the item relating to foundation work, which the contractor is required to do under clause 12 above, the contractor shall within 7 days from the receipt of order, claim revision of the rates supported by proper analysis in respect of such items for quantities in excess of the deviation limit, notwithstanding the fact that rates for such items exist in the tender for the main work or can be derived in accordance with the provisions of sub-clause (ii) of clause 12 and the Engineer-in-charge may revise their rates, having regard to the prevailing market rates and the contractor shall be paid in accordance with the rates so fixed. The Engineer-in-charge shall, however, be at liberty to cancel his order to carry out such increased quantities of work by giving notice in writing to the contractor and arrange to carry it out in such a manner as he may consider advisable, but under no circumstances the contractor shall suspend the work on the plea of non-settlement of rates of items falling under this clause.

All the provisions of the preceding paragraphs shall equally apply to the decrease in the rates of items or quantities in excess of the deviation limit, notwithstanding the fact that the rates for such items exist in the tender for the main work or can be derived in accordance with the provisions of sub-clause (ii) of the preceding clause 12, and the Engineer-in-charge

may revise such rates having regard to the prevailing market rates.

On an analysis of clause 12, it is seen that:

(1) Engineer-in-charge shall have power to make any alterations in, or additions to, the original specifications, drawings, designs and instructions;

(2) Such changes must be those which the Engineer-in-charge considers as necessary or advisable;

(3) Such changes can be ordered only when the work is in progress;

(4) The contractor shall be bound to carry out the instructions of the Engineer-in-charge;

(5) Such instructions have to be given by the Engineer-in-charge in writing and duly signed by him;

(6) Changes ordered by the Engineer-in-charge shall not invalidate the contract;

(7) The altered work shall be carried out by the contractor on the same conditions in all respects on which he agreed to do the main work;

(8) The contractor shall be bound to execute the altered work at the same rates as are specified in the tender for the main work;

(9) Time for completion of the work shall be extended in the proportion that the altered work bears to the original contract work and a further period of 25% of such extension shall be allowed to the contractor;

(10) The rates for such altered work shall be worked out in the following manner in their respective order:

(i) if the rate is available in the contract for the work, the contractor shall be bound to do the additional, altered or substituted work at the same rates as are specified in the contract;

(ii) if no rate is available in the contract, then the rate will be derived from the rates for a similar class of work as are specified in the contract;

(iii) if no rate is specified in the contract and can also not be derived from similar class of work then the rate as given in CPWD Schedule of Rates shall be taken on which minus/plus percentage which the total tendered amount bears to the estimated cost of the entire work put to tender, shall be added;

(iv) if the rate cannot be worked out in any of the manners stated in (i), (ii) and (iii), then rates of District with plus/minus percentage which the total tendered amount bears to the cost of the entire work put to tender shall be added. However, if no rate exists in Schedule of Rates, then the Engineer-in-charge shall determine the rates keeping in view the prevailing market rates;

(v) if the rate cannot be determined in the manner stated in (i) to (iv) above, then the contractor shall, within seven days of the receipt of the order to execute the work, convey to the Engineer-in-charge the rate which it is his intention to charge supported with proper analysis. However, if the rate so conveyed is not acceptable to the Engineer-in-charge, then he shall be at liberty to cancel his order to carry out such class of work. The contractor shall, however, not suspend the work on the plea of non-settlement of rate; and

(vi) sub-clauses (i) to (v) above, shall not apply to contracts or substituted items as individually exceed the percentage set out in the tender (*i.e.* deviation limit), subject to limitations given in paras (a) to (d) of the clause. The provision as to deviation limit shall not apply to items executed in foundations.

The clause further provides that except for the items of work done in foundations, the rates for the deviated quantities shall be worked out as per stipulations contained in clause 12-A.

A close scrutiny of clause 12-A would show:

(a) For execution of substituted or additional items which exceed the deviation limit laid down in clause 12(vi) (except for foundation work), the contractor shall obtain orders in writing from the Engineer-in-Charge;

(b) The contractor shall claim revision of rates in respect of deviated items;

(c) Proper analysis shall be submitted by the contractor within 7 days of the receipt of such orders from the Engineer-in-charge;

(d) Revision in rate is admissible even if rates for such items exist in the contract or can be derived in accordance with clause 12(ii);

(e) Engineer-in-charge may revise the rates in accordance with the prevalent market rate;

(f) The contractor shall be paid in accordance with the revised rate;

(g) If the rates quoted by the contractor are not acceptable to the Engineer-in-charge, he shall be at liberty to cancel the order given to the contractor for execution of substituted or additional work;

(h) The Engineer-in-charge shall give notice in writing of cancellation of order given to the contractor earlier;

(i) The Engineer-in-charge shall thereafter get the substituted or additional items beyond deviation limit carried out in such manner as he may consider desirable;

(j) Pending finalisation of rates, the contractor shall not suspend the work on the plea of their non-settlement; and

(k) Provisions of clause 12-A shall equally apply to decrease in quantities beyond the limit specified in the main contract.

Of all the clauses contained in the Standard Form of Contract of the CPWD, clause 12(v) is probably one sub-clause which has been subject to conflicting judicial pronouncements; even the highly placed departmental officers who are required to interpret the clause day in and day out, when so approached by their subordinates or the contractors, give decisions which are at great variance. Insofar as sub-clauses (i) to (iv) of clause 12 are concerned, there is hardly any scope for different interpretation.

The words used in clause 12(v) are a clear pointer to the fact that the intention of the parties is that if no cancellation order is given, it will be presumed that the rate as quoted by the contractor has been accepted. In *Union of India v. Khetra Mohan Banerjee,* [43] it was held that “in view of the language used in the above clause of the contract, if the Engineer-in-charge does not intimate the rejection of the rates quoted by the contractor, he must be deemed to have accepted them.”

A four-judge bench of the Supreme Court in *Union of India v. Khetra Mohan Banerjee* [44] stated:

> The learned counsel for the appellant raised before us two points:—
>
> (1) The plaintiff's claim should have been rejected, as he did not specifically allege in the plaint that he had complied with the necessary condition laid down in clause 12 of the agreement, namely that he had sent his revised quotations to the Engineer-in-charge within seven days from the receipt of several orders. As the plaintiff had not alleged in his plaint that he had complied with this condition, the argument proceeded that the suit was liable to be dismissed *in limine* and he should not have been allowed to adduce evidence to substantiate his claim, *i.e.* the analysis had been accepted by the Engineer-in-charge.
>
> (2) On a true construction of clause 12 of the agreement, the plaintiff would not be entitled to the rates according to his analysis, as the said rates were not accepted by the Government but he would be entitled only to be paid such rates as ascertained in accordance with the terms of that clause.

It is true that in the plaint the plaintiff did not state that he made his demand within seven days from the date of each of the orders issued to him by the Engineer-in-charge but all the necessary facts disclosing his cause of action were given. It was stated that the Engineer-in-charge asked him to do work with specifications different from that agreed upon by him, that from time to time he submitted his analysis of rates for the work he was directed to do, and that in the circumstances narrated by him the analysis submitted by him was accepted by the defendant. On those allegations the plaint disclosed a complete cause of action. The defendant in its written statement, though it denied that it had accepted the said analysis submitted by the plaintiff, did not raise the plea that the plaintiff would not be entitled to the rates claimed by him in view of the non-compliance of the condition laid down in clause 12 of the agreement. Neither did it raise the said plea in its Special Leave Petition or even in the Statement of Case. Indeed, both the parties adduced evidence in the High Court in respect of the question whether the plaintiff submitted his claim for modified rates within the prescribed time. Both the learned Judge, as well as the Divisional Bench accepted the evidence adduced on the side of the plaintiff and held that such submission was made within the time prescribed. The defendant is not in any way prejudiced by the said omission in the plaint. There

are no merits in this contention.

The second contention turns upon the construction of clause 12 of the agreement. The relevant part of the Agreement reads:—

> If such class of work is not entered in the said schedule of rates, then the contractor shall within seven days of the date of his receipt of the order to carry out the work inform the Engineer-in-charge of the rate which it is his intention to charge for such class of work and if the Engineer-in-charge does not agree to this rate, he shall by notice in writing, be at liberty to cancel his order to carry out such class of work and arrange to carry it out in such manner as he may consider advisable, provided always that if the contractor shall commence work or incur any expenditure in regard thereto before the rates shall have been determined as lastly hereinbefore mentioned, then and in such case he shall only be entitled to be paid in respect of the work carried out or expenditure incurred by him prior to the date of the determination of the rate as aforesaid according to such rate or rates as shall be fixed by the Engineer-in-charge. In the event of a dispute the decision of the Superintending Engineer of the Circle shall be final.

The argument is that under this clause if the Engineer did not accept the rate which the contractor claimed in respect of the new work he was ordered to do, he would only be entitled to be paid such amount at such rate as determined by the Engineer or in the event of dispute, by the Superintending Engineer. It was further contended that in the present case, there was no communication by the Engineer agreeing to pay the plaintiff the rates claimed by him and therefore his rates should be worked out only under the terms of the proviso. A perusal of the said clause does not bear out the contention of the learned counsel that there should be a communication by the Engineer-in-charge expressly accepting the rates claimed by the contractor. On the other hand, the clause visualises that if the Engineer-in-charge did not agree to the rates claimed, he had the liberty to cancel the order to carry out the work indicated by him and that thereafter alone the proviso would come into play. If there was no such cancellation within a reasonable time from the date that he received the claim for higher rates, it would be appropriate to hold that he accepted the claim. Otherwise, the object of the clause would be frustrated, for an Engineer could allow a contractor to do the entire work without rejecting his claim and after the entire work was done, could dictate his own terms. We therefore hold that under the terms of clause 12 if the Engineer did not refuse the claim within a reasonable time, he must be deemed to have agreed to the claim made by the contractor. Indeed, MITTER J., as well as the Divisional Bench, accepted this construction and held the Engineer had accepted the claim set up by the plaintiff.

> That apart as the High Court held there was inconsistency between the finding of MITTER J. that the Engineer-in-charge accepted the claim for higher rates made by the plaintiff and then referring the question of fixation of rates to the referee appointed by him. If the claim for higher rates was accepted by the Engineer-in-charge, no other question would arise, for the plaintiff would be entitled to be paid at the rates claimed, but the plaintiff did not prefer an appeal against that part of the decree of MITTER J. and therefore the Divisional Bench was not in a position to set aside that part of the decree. Before MITTER J. the learned counsel appearing for the State stated that the plaintiff would be entitled only to reasonable rates. Presumably, the plaintiff accepted this position. If so, the only outstanding dispute between the parties was whether reasonable rates suggested by the defendant or market rates as claimed by the plaintiff, should be given. The Divisional Bench rightly pointed out that in the circumstances of the case the market rates would be reasonable rates.

A different view was taken by a three-judge bench of the Supreme Court in *Bombay Housing Board v. Kharbase Naik & Co.* , [45] which is as follows:

> Where a contract contained a term that if additional or altered work, for which no rate is entered in the Schedule of Rates, is ordered to be carried out before the rates are agreed upon then the contractor shall, inform the Engineer-in-charge of the rate which it is his intention to charge and if the Engineer-in-charge does not agree he shall by notice in writing cancel his order to carry out such class of work and that if the contractor incurs any expenditure in regard thereto before the rates shall have been determined then in such case he shall only be entitled to be paid in respect of the work carried out or expenditure incurred by him previous to the date of the determination of the rates as aforesaid according to such rate or rates as shall be fixed by the Engineer-in-charge.

> On the question whether the contractor could put in a claim for additional or altered work on the basis of rates quoted by it in the notice; held: that until the rates were settled by agreement the contractor was under no obligation to carry out the altered or additional work. The mere fact that the Engineer-in-charge did not exercise the liberty to cancel the order it could not be said that there was a concluded contract between the parties, on contractor's terms.

The above decision of the Supreme Court is materially different from the earlier decided case of *Union of India v. Khetra Mohan Banerjee* , [46] probably because of the following reasons:

(1) The earlier judgment of the four-judge bench does not appear to have been brought to the notice of the later three-judge bench judgment reported as *Bombay Housing Board v. Kharbase Naik & Co.* ; [47] and

(2) The deviation clause in the contract in the later case was worded slightly differently from the clause in the earlier judgment – the additional words being: “before the rates are agreed upon” as existing in the later case.

Clause 12(vi) is also subject to different interpretations - one varying in large degree from the other, in relation to ‘deviation limit’. “Memorandum” provided for the ‘deviation limit’ in the tender form of CPWD is contained in clause (e), which reads as under:

> (e) *should this tender be accepted, in whole or in part, I/We hereby agree:*
>
> (i)
>
> (ii) *To execute all the works referred to in the tender documents on terms and conditions contained referred to therein and to carry out such deviations as may be ordered upto a maximum of 20% (twenty per cent) at the rates quoted in tender documents and those in excess of limit at the rates to be determined in accordance with the provisions contained in clause 12-A of the tender form*

A bare reading of clauses 12 and 12-A certainly creates confusion in the minds of engineers as well as contractors – each stretching and interpreting the clause to his advantage.

It needs no emphasis to say that a contractor cannot be asked to carry out quantities of work without defining a limit because such a contract would be void. Thus, to overcome this legal requirement, sub-clause (e)(ii) of the “Memorandum” provides for the deviation limit. Clause 12(vi) puts a restriction on the powers of the Engineer-in-charge to order deviations.

As per the dictum of the Hon'ble Supreme Court in *Bombay Housing Board v. Kharbase Naik & Co.* , as stated above, there being no fresh agreement between the parties for payment of rates as quoted by the contractor for items executed in excess of the deviation limit, payment can only be made at the rates determined by the Engineer-in-charge. It is submitted with great respect that this view does not accord well with the practical situation. Invariably, and without any exception, when the Engineer-in-charge orders the contractor to execute certain items of work beyond the defined deviation limit and the contractor conveys the rate which it is his intention to charge supported by proper analysis within 7 days of such order, the Engineer-in-charge, in all fairness, must either accept or reject the rate within a reasonable period of time. As to what would be the reasonable time for action by the Engineer-in-charge in such a situation is itself answered in the clause. If the Engineer-in-charge expects the contractor to act with utmost promptitude in submitting the rate within 7 days, the Engineer-in-charge is equally obliged to show due haste by either approving or rejecting the rate. Any period of time taken by the Engineer-in-charge in excess of 7 days would not accord with the spirit of clause 12-A. If the Engineer-in-charge accepts the rate, the matter ends without any dispute whatsoever between the parties, but if the Engineer-in-charge takes no action to reject the rate till the completion of the work (as is normally the case), or thereabout, then as per decision of the Supreme Court, the contractor is rendered helpless. In other words, the Engineer-in-charge has been given a licence to act in a most unreasonable and whimsical manner and whatever rate may be approved shall have to be acceptable to the contractor. It is submitted that law does not permit premium to be put on wrongs.

Again, if the Engineer-in-charge does not convey his rejection to the rate quoted by the contractor within a reasonable time, the contractor will achieve substantial progress with the deviated items of work. The contractor cannot dictate terms. He cannot tell the Engineer-in-charge that he will not take up the work relating to deviated

items till such time the rates are approved because the contract prohibits him to do so. The clause *inter alia* states that “under no circumstances the contractor shall suspend the work on the plea of non-settlement of rate” Contractually, the contractor cannot refuse to continue with the execution of items of work beyond the deviation limit.

What was the intention of the parties when they stipulated in the clause that if the Engineer-in-charge does not accept the rate he shall “be at liberty to cancel his order to carry out such increased quantities of work by giving notice in writing to the contractor and arrange to carry it out in such a manner as he may consider advisable%”? The question is: If the Engineer-in-charge by his inaction or non-action (or may be deliberately) does not convey rejection of rate intimated by the contractor, and as per condition contained in this clause he cannot “suspend the work on the plea of non-settlement of rate”, where would be the occasion for the Engineer-in-charge to “cancel his order to carry out such increased quantities of work”?

In all fairness, in matters of contract, both parties have to be placed at the same footing and have to be treated equally and fairly. If one party, for whatever reason, does not act with due haste, and at the same time encourages the other party to accelerate the progress of the work so as to achieve completion early, then can the party executing the work be taken for a ride and “be paid in accordance with the rates so fixed” by the Engineer-in-charge which may even be much below the actual expenditure incurred by the contractor? The question is: Can one party to a contract who is negligent in the performance of his contractual duties be permitted to capitalise on his wrongs?

The question is whether a contractor would be entitled to claim revision in rates, in respect of deviated quantities in excess of the deviation limit, if he fails to submit an analysis of rates at the appropriate time and that too within 7 days of the order of the Engineer-in-charge to undertake such work. The Delhi High Court in *Suresh Chander v. Delhi Development Authority* , [48] held that if the contractor failed to comply with the mandatory provision laid down in clause 12-A of the agreement to claim revision of rates within 7 days from the receipt of the order supported by proper analysis, then any award made by the arbitrator shall be bad in law and would be liable to be set aside.

If the Engineer-in-charge does not give instructions in writing to execute an item of work or items of work in excess of the deviation limit, then the contractor is not entitled to claim any extra rate over and above the rate given in the contract. In *K.R. Anand v. Delhi Development Authority* , [49] where the contractor claimed extra payment on account of difficulty in excavating soil, it was held that in view of the fact that there was a specific provision in the agreement regarding payment for extra work only when there was a written instruction by the Engineer-in-charge; as also when in clause 2-A of the notice inviting tenders, it was stipulated that the site was available for inspection; the contractor was deemed to have inspected the site, it was held that in view of the fact that the contractor having obtained no written instructions in writing as stipulated under clause 12, the contractor was not entitled to extra payment.

On the issue whether the courts can go into the merits of the controversy with regard to award in respect of deviated quantities, the Delhi High Court in *K.C. Goyal & Co. v. Delhi Development Authority* , [50] relying on *Harcharan Singh v. Union of India* , [51] held that the courts cannot go into the sufficiency or insufficiency of the evidence led in connection with the claim for extra rate in terms of clause 12-A. It had further been held that:

> In view of the observations by the arbitrator that total contract had deviated by 27% and in view of specific finding of arbitrator that such increase was not on account of soil conditions but on account of increase in scope of work, the argument that the increase related to foundation work cannot be sustained The arbitrator has given his award on the basis of material before him and even if I come to a different opinion, I will not substitute my opinion for that of the arbitrator.

If a contract does not stipulate the deviation limit, it cannot be said that the employer has an unfettered right to get quantities of work done to any extent in utter disregard to the quantities shown in the bills of quantities appended with the tender. Where no deviation limit is specified, it is submitted, the employer can order deviation within reasonable limits, which has been taken to be 20% by the Supreme Court in *Harcharan Singh v. Union of India* . [52] The clause in the contract provided:

> The Engineer-in-charge shall have power to make any alterations in, omissions from, additions to or substitution for, the original specifications, drawings, designs and instructions, that may appear to him to be necessary or advisable during the progress of the work, and the contractor shall be bound to carry out the work in accordance with any instructions which may be given to him in writing signed by the Engineer-in-charge, and such alterations, omissions, additions or substitutions shall not invalidate the contract, and any altered, additional or substituted work which the contractor may be directed to do in the manner above specified as part of the work shall be carried out by the contractor on the same conditions in all respects on which he agreed to do the main work and at the same rates as are specified in the tender for the main work. The time for

the completion of the work shall be extended in the proportion that the additional or substituted work bears to the original work, and the certificate of the Engineer-in-charge shall be conclusive as to such proportion. And if the altered, additional or substituted work included any class of work for which no rate is specified in this contract, then such class of work shall be carried out at the rates entered in the schedule of rates of the CPWD Schedule of Rates 53-54 on which the estimated cost shown on page 1 of tender is based provided that when the tender for the original work is a percentage above the schedule rates the altered, additional or substituted work required as aforesaid shall be chargeable at the said schedule rate plus the same percentage deduction/addition and if such class of work is not entered in the said schedule of rates, then the contractor shall within seven days of the date of receipt of the order to carry out the work inform the Engineer-in-charge of the rate which it is his intention to charge for such class of work, and if the Engineer-in-charge does not agree to this rate he shall by notice in writing be at liberty to cancel his order to carry out such class of work and arrange to carry it out in such manner as he may consider advisable provided always that if the contractor shall commence work or incur any expenditure in regard thereto before the rates shall have been determined as lastly hereinbefore mentioned, then and in such case he shall only be entitled to be paid in respect of the work carried out or expenditure incurred by him prior to the date of the determination of the rate as aforesaid according to such rate or rates as shall be fixed by the Engineer-in-charge. In the event of a dispute the decision of the Superintending Engineer of the Circle shall be final.

Analysing the above clause, the Supreme Court observed:

Under this clause the Engineer-in-charge was empowered to make any additions to the original specifications that may appear to him to be necessary or advisable during the progress of the work and the contractor was bound to carry out the work in accordance with any instructions given to him in writing signed by the Engineer-in-charge. As regards payment for the additional work which the contractor was directed to do it was provided that:

(i) The contractor shall be paid at the same rates as are specified in the tender for the main work;

(ii) If the additional work included any class or work for which no rate was specified in the contract then the contractor shall be paid at the rates entered into the schedule of rates of the CPWD Schedule of Rates 53-54 on which the estimated cost shown on page 1 of tender is based and if the tender for the original work is a percentage above the schedule rates the additional work shall be chargeable at the schedule rates plus the same percentage deductions/addition; and

(iii) If such class of work is not entered in the said Schedule of Rates then the contractor should inform the Engineer-in-charge, within seven days of the receipt of the order the rate he wants to charge for such class of work and the Engineer-in-charge, if he does not agree to the said rate, may cancel the order for such additional work and if the contractor has commenced the work or incurred expenditure in regard thereto before the determination of the rates according to such rate or rates as shall be fixed by the Engineer-in-charge and in the event of a dispute the decision of the Superintending Engineer of the Circle would be final.

On the reasonableness of deviation, the Supreme Court relied on the practice prevailing in Central P.W.D. and observed as under:

> the question has often arisen whether the contractor under the variation clause is liable to execute the extra or additional quantities of the tendered items at the tendered rates to an unlimited extent. In some awards given by the arbitrators in the Central Public Works Department of the Government of India the variation of the tendered quantities under the variation clause in the contract has been restricted to 10% beyond which the contractor was entitled to claim as extras and awards have been accepted and implemented by the Government. It appears that the standard form of contract of the Central Public Works Department has been amended and now it specifically permits for a limit of variation called “deviation limit” up to a maximum of 20% and up to such limit the contractor has to carry out the work at the rates stipulated in the contract and for the work in excess of that limit at the rates to be determined in accordance with Cl. 12-A under which the Engineer-in-charge can revise the rates having regard to the prevailing market rates.

In the above case, the Supreme Court also noted the observations of SINGLETON L.J. in para 14, which states:

I find myself unable to agree with the submissions of Mr. REWCASTLE that, under the contract as varied by the deed of variation, the contractors would have been bound to continue making alterations and additions, if ordered, for years and years, without any extra payment by way of profit. That would have led to manifest absurdity and injustice, as MATHEW J. said in *Bush v. Whitehaven Trustees* [53], "there must be a limit".

11. POWER TO OMIT WORKS FROM CONTRACT

The CPWD standard form clause dealing with the power of the Engineer-in-charge to omit parts of the work from the contract reads as under:

> ***Clause 13:*** *If at any time after the commencement of the work the Authority shall for any reason whatsoever not require the whole thereof as specified in the tender to be carried out, the Engineer-in-charge shall give notice in writing of the fact to the contractor who shall have no claim to any payment of compensation whatsoever on account of any profit or advantage which he might have derived from the execution of the work in full, but which he did not derive in consequence of the full amount of the work not having been carried out, neither shall he have any claim for compensation by reason of any alterations having been made in the original specifications, drawings, designs and instructions which shall involve any curtailment of the work as originally contemplated.*
>
> *Provided that the contractor shall be paid the charges on the cartage only of materials actually and bonafide brought to the site of the work by the contractors and rendered surplus as a result of the abandonment or curtailment of the work or any portion thereof and then taken back by the contractor provided however that the Engineer-in-charge shall have in all such cases the option of taking over all or any such material at their purchase price or at local current rates whichever may be less. In the case of such stores having been issued from D.D.A Stores and returned by the contractor to D.D.A. Stores, credit shall be given to him by the Engineer-in-charge at rates not exceeding those at which they were originally issued to him, after taking into consideration and deduction for claims on account of any deterioration or damages while in the custody of the contractor and in this respect the decision of the Engineer-in-charge shall be final.*

The aforesaid clause provides:

(1) The Government shall have power to omit to do whole or part of the work;

(2) The Government can exercise power to reduce or abandon the work, 'for any reason';

(3) Such authority to reduce the quantum of work or abandonment of work shall be made by the Engineer-in-charge only if order for commencing work has been given;

(4) Such order shall be given by the Engineer-in-charge in writing to the contractor;

(5) Upon notice in writing being given, the contractor shall have no claim to any payment or compensation whatsoever on account of any profit or advantage which he might have derived from the execution of the work in full or in part;

(6) Any alteration in specifications, designs, drawings, or instructions which lead to curtailment of the work as originally contemplated shall not qualify for any compensation;

(7) Payment on account of cartage shall be payable to the contractor if he had brought material meant for use in the work before the Engineer-in-charge orders in writing conveying curtailment or abandonment of work and such materials has been rendered surplus as a consequence thereof;

(8) If any stipulated material had been issued to the contractor, the same shall be returned to the employer and credit shall be given at the rates not exceeding those at which the same were issued to him; and

(9) Deduction for claims on account of any deterioration or damage while in the custody of the contractor shall be made by the Engineer-in-charge whose decision shall be final.

Clause 13 had been introduced in the standard printed performa only with a view to cater to a situation where, for unknown or unforeseeable reasons, circumstances arise calling for abandonment of work or reduction in scope of work. The stipulation is not meant to cause any financial harm to the contractor by depriving him the gains which he might derive in consequence of execution of work; and instead of the work being executed from him, got executed from another contractor. In short, the omission in scope of work or abandonment thereof should be an honest act and not *mala fide* .

> The power not to get the whole of the work executed after order for commencement of work has been given to the contractor means that the Government does not want to proceed with the construction of the project. But where the Government wants to proceed with the execution of the project on the basis of different designs and drawings, it cannot be allowed to cancel the work awarded in favour of the contractor. There is no escape from the conclusion that the ground of cancellation of the contract does not flow from any of the terms of the agreement, it is *de-hors* any terms of the contract and, as such, can be subject-matter of judicial review. [54]

> A bare reading of the aforesaid clause (omitting the provisos) goes to show that it will not apply to a case where the construction work has not even commenced. It is not correct to say that the decision by the Engineer-in-charge on abandonment or curtailment of the work shall be final and would not be open for adjudication by the arbitrator in terms of the arbitration agreement between the parties. In fact, the second proviso appended to the aforesaid clause clearly indicates that the decision of the Engineer-in-charge was made final thereunder only in respect of deduction for claims on account of any deterioration or damage to the stores issued from the Government stores while in custody of the contractor. [55]

> The true interpretation of clause 13 is that this will have application only in a situation where the work is restricted and the same is not to be carried out at all at a later date through any other agency. Any other interpretation placed on the clause will not be fair, just and reasonable. [56]

> A building contract gave power to order omissions from the contract without in any way affecting or making void the contract, and provided that there should be a deduction from the contract price by a fair and reasonable valuation. Held, that the word “omission” contemplated things to be left out of the contract altogether, not such as were taken out of the contract and given to another contractor. [57]

The contractor, it is submitted, is entitled to execute the whole of the contract work so that any stipulation in the contract vesting authority to the architect or engineer to order omission only contemplates genuine omissions. It means that such omissions should only be those which have altogether to be omitted from being executed. In other words, such omissions should not be with a view to omit works from the contract in order to give it to another contractor for execution.

> Clause 13 comes into operation after the work has been commenced. Thereafter, if the authority for any reason, whatsoever, is of the opinion that the work to be performed is not to be completed or performed, then the authority after giving a notice could curtail the scope of the work and in that circumstance the claimant would not be entitled to claim compensation or damages from the authority. Thus, the intention of the parties has to be construed from the words ‘not required’ and ‘no claim to any payment of compensation whatsoever on account of any profit or advantage which he might have derived from the execution of the work in full’. Despite this stipulation, the contractor still would be entitled to be paid the charges on account of cartage of material brought to the site. The formation of any opinion by the Authorities that the work is not required to be completed and the curtailment of work is necessary, must be *bonafide* and reasonable. [58]

> A contract work was originally allotted to the contractor for the construction of 18 blocks. Thereafter, the contractor was informed, during the currency of the work that the work was likely to be curtailed to 14 blocks as there was a stay in respect of the lands required from remaining blocks. The respondent curtailed the work when the stay order was no longer in force. Held that the act of the respondent was arbitrary, as immediately after curtailing the work of the petitioner to 14 blocks, they invited tenders for the remaining 4 blocks and thus, the petitioner was entitled to the award of loss of profit on the unexecuted amount of work. [59]

12. INTIMATION OF FINAL BILL MUST BE CONVEYED IN WRITING

> The signatures of the petitioner obtained on the Measurement Book cannot by any stretch of imagination be deemed as an intimation as provided in the agreement to the effect that the final bill was ready. The title 'Measurement Book' itself suggests and shows that it pertains to details of the work done by the contractor and nothing more. Thus, the first and the foremost obligation of the respondent was to send an intimation in writing to the petitioner that the final bill was ready for payment. [60]

13. QUALITY CONTROL

The CPWD standard form of contract provides for maintenance of quality control over the work. The clause therefor reads as follows:

> ***Clause 14:*** *If it shall appear to the Engineer-in-charge or his authorised subordinate-in-charge of the work or the Chief Engineer, Additional Chief Engineer, Superintending Engineer, Chief Technical Examiner/Technical Examiner of Central Vigilance Commission and Chief Engineer Quality Control, or by an Officer of the Vigilance of the Authority that any work has been executed with unsound, imperfect or unskillful workmanship or with materials of any inferior description, or that any materials or articles provided by him for the execution of the work are unsound or of quality inferior to that contracted for or otherwise not in accordance with the contract, the contractor shall on demand in writing which shall, be made within six months of the completion of the work from the Engineer-in-charge specifying the work, materials or articles complained of notwithstanding that the same may have been passed, certified and paid for, forthwith rectify or remove and reconstruct the work so specified in whole or in part, as the case may require or as the case may be remove the materials or articles, so specified and provide other proper and suitable materials or articles at his own proper charge and cost, and in the event of his failing to do so within a period to be specified by the Engineer-in-charge in his demand aforesaid then the contractor shall be liable to pay compensation at the rate of one per cent on the estimated amount put to tender for everyday not exceeding ten days while his failure to do so shall continue and in the case of any such failure, the Engineer-in-charge may rectify or remove and re-execute the work or remove and replace with others, the materials or articles complained of as the case may be at the risk & expense in all respects of the contractor.*

The decision made by the Superintending Engineer made under clause 14 has been made final and binding by the following clause:

> ***Clause 25(B):*** *The decision of Superintending Engineer regarding the quantum of reduction as well as justification thereof in respect of rates for sub standard work which may be decided to be accepted will be final and would not be open to arbitration."*

On the issue whether the employer can unilaterally prepare a Reduction Item Statement without serving a notice of defects to the contractor, it has been held by the Delhi High Court in *Nav Bharat Construction Co. v. Delhi Development Authority* [61] that:

> On scrutiny of the aforesaid clause, I find that there is a prerequisite of serving a notice under Clause 14 of the Agreement for setting right the defect in the work, if any. In the instant case, I find that no such notice as envisaged under Clause 14 of the Agreement was issued by the respondent to the petitioner calling upon the petitioner to make good the defective work and unilaterally prepared a Reduction Item Statement. It further appears that in terms of Clause 14, the Engineer-in-charge has the obligation first to call upon the contractor in writing to rectify the defects, failing which the Engineer-in-charge has the option to rectify the defects or to re-execute the work at the risk and expenses of the contractor. In the instant case, the respondent failed to issue the notice as envisaged under Clause 14 of the Agreement calling upon the petitioner to rectify the defects. The Arbitrator was justified in holding that the recovery made by the respondent from the Bills of the petitioner was not justified and that no recovery under such

circumstances could be effected.

If the employer fails to call upon the contractor to rectify defects in terms of clause 14 of the contract and instead unilaterally prepares a Reduction Item Statement reducing the rates of certain items, the same cannot be enforced against the contractor and under such circumstances the employer cannot be allowed to take the plea that the arbitrator has no jurisdiction to arbitrate on the matter. In *Nav Bharat Construction Co. v. Delhi Development Authority* , [62] the Delhi High Court held that:

> I further find that the arbitrator has come to a definite conclusion on appreciation of evidence on record that clause 25B of the agreement is not applicable to the facts and circumstances of the present case.
> The arbitrator has also the right to consider and interpret the various clauses of the agreement and since in exercise of such a power the Arbitrator has come to a plausible conclusion that Clause 25B of the Agreement is not applicable and that the recovery sought to have been done in the instant case could not have been so effected for non-compliance of the requirements of Clause 14 of the agreement.

A contractor claimed compensation due to statutory increase in wages of labour and cost of materials. This was opposed by the department before the arbitrator on the ground that books of accounts had not been placed on record. The arbitrator awarded the amount on the basis of the escalation formula given in the contract. The award was challenged on the same ground before the High Court. It was held that the objection raised was without merit as the department never sought production of books of accounts as provided in escalation clause. [63]

14. LABOUR RETURNS

A contractor has been vested with the duty to submit fortnightly reports as to labour in the following terms:

> ***Clause 19D:*** *The contractors shall submit, by the 4th and 19th of every month to the Engineer-in-charge a true statement showing, in respect of the second half of the preceeding month and the first half of the current month, respectively :*
>
> (1) *the number of labourers employed by him on the work;*
>
> (2) *their working hours;*
>
> (3) *the wages paid to them;*
>
> (4) *the accidents that occurred during the said fortnight showing the circumstances under which they happened and the extent of damage and injury caused by them and;*
>
> (5) *the number of female workers who have been allowed Maternity Benefit according to clause 19F and the amount paid to them, failing which the contractor shall be liable to pay to the Government, a sum not exceeding Rs. 50 for each default or materially incorrect statement. The decision of the Divisional Officer shall be final in deducting from any bill due to the contractor the amount levied as fine.*

A perusal of the stipulations made in clause 19D shows that the contractor is duty bound to comply with the following during the currency of the contract. On 4th of the month, the true statement for the second half of the previous month; and on 19th of the month, for the first half of the current month, the contractor shall submit:

(1) Statement regarding strength of labour employed;

(2) Duration of employment for each day;

(3) Wages paid;

(4) Report regarding accidents together with reasons and follow-up action; and

(5) Strength of female labour on maternity leave.

If the contractor fails to comply with the aforesaid stipulations, he shall be liable to pay a sum not exceeding Rs. 50 for each default of materially incorrect statement. The decision of the Divisional Officer shall be final in deducting from any bill due to the contractor the amount levied as fine.

Clause 19D came up for consideration before the Delhi High Court in *S.S. Jetley v. Delhi Development Authority* . [64] It was held that since the respondents failed to make any deductions from the running bills of the contractor nor any notice as required under clause 19D had been served on the contractor, the findings of the arbitrator that recovery made by the respondents was not justified, could not be faulted.

Likewise, in the same case [65], the court held that the recovery effected by the respondents on account of non-submission of clearance certificate from the Labour Officer was not justified as no notice was issued in accordance with clause 19D, nor there was any complaint on this score.

15. REIMBURSEMENT OF INCREASE IN PAYMENT OF MINIMUM WAGES

Escalation is a normal and routine incident arising out of gap of time in this inflationary age in performing any contract of any type. If the arbitrator finds that there was escalation by way of statutory wage revision, and then comes to the conclusion that it was reasonable to allow escalation, the award cannot be faulted. Once it was established that the arbitrator had jurisdiction to find whether there was delay in execution of the contract due to the fault of the employer, the employer was liable for the consequences of the delay, namely, increase in statutory wages. It was also held that the award of the arbitrator had been passed in consonance with the principles of natural justice. [66]

Where under the terms of the contract, the work was to be completed by the contractor within a period of one year but due to financial difficulties – less budget having been provided for in the said year, the contractor was requested by the authorities to spread over the work for two years more, i.e. to complete the same in three years, but the contractor was agreeable to spread over the work for two years more as suggested on condition that extra payment will have to be made to him in view of increased rates of material or wages and the Government did not intimate to the contractor that no extra payment on account of increased rates would be paid to him or that he will have to complete the work on the basis of original rates, and only when after completion of work the contractor submitted his final bill claiming 20 per cent over and above the rates originally agreed upon between the parties, the Government stated that he was not entitled to increased rates, it was held that both in equity and in law the contractor was entitled to receive extra payment. [67]

Where the contract executed between the parties made it mandatory on the part of the contractor to pay to the labour minimum wages as fixed by the State and the contractor pays in accordance with the Notification, then the award of the arbitrator awarding the said amount to him cannot be interfered with due to the compulsive nature of the clause casting duty on the contractor to pay minimum wages to the labour. [68]

Compensation due to statutory increase in labour wages and cost of materials was claimed by the contractor in arbitration. The department took the stand that benefit was available during the original period of time and not during the extended period of the contract. The arbitrator held neither party responsible for delay and also held that the department extended the time for completion of work without levy of liquidated damages and without notifying to the contractor that it would not be entitled to benefit under the escalation clause and hence, it was liable to pay the said amount. Held, that the objection of the department was unsustainable. [69]

16. PROPER USE OF STIPULATED MATERIALS

To prevent misuse of stores supplied by the employer, the following term is usually incorporated in most contracts:

Clause 42:

(i) *The contractor shall see that only the required quantities of materials are got issued. Any such material remaining unused and in perfectly good condition at the time of completion or determination of the contract shall be returned to the Engineer-in-charge at a place where directed by him, by a notice in writing under his hand, if he shall so require. Credit for such materials will be given at the prevailing market rate not exceeding the amount charged from him excluding the element of storage charges levied at the time of issue of materials to him. The contractor shall also not be entitled to cartage and incidental charges for returning the surplus materials from and to the stores wherefrom they were issued.*

(ii) *After completion of the work, the theoretical quantity of cement to be used in work shall be calculated on the basis of statement showing quantity of cement to be used in different items of work provided in Delhi Schedule of Rates, 1995 printed by the CPWD In the case any item is executed for which the standard constants for the consumption of cement are not available in the above-mentioned statement or cannot be derived from this statement, the same shall be calculated on the basis of standard formula to be laid down by the Superintending Engineer of the circle concerned. Over this theoretical quantity of cement, shall be allowed a variation upto 3% plus/minus for works estimated cost of which as put to tender is not more than Rs. 5 lacs and upto 2% plus/minus for works the estimated costs of which put to tender is more than Rs. 5 lacs. The difference in the quantity of cement actually issued to the contractor and the theoretical quantity including authorised variation, if not returned by the contractor, shall be recovered at twice the issue rate, without prejudice to the provision of the relevant conditions regarding return of materials governing the contract. In the event of it being discovered that the quantity of cement used is less than the quantity ascertained as herein before provided (allowing variation on the minus side as stipulated above), the cost of quantity of cement not so used, shall be recovered from the contractor on the basis of stipulated issue rates and cartage to site.*

(iii) *The provision of foregoing sub-clause shall apply mutatis-mutandis in the case of steel reinforcement of structural steel sections (each diameters/section or category shall be considered separately) except that the theoretical quantity of the steel shall be taken as the quantity required as per design or as authorised by Engineer-in-charge including authorised lappages plus 3% wastage due to cutting into pieces. Over this theoretical quantity 2% plus/minus shall be allowed as variation due to wastage being more or less.*

(a) *xx*

(b) *xx*

(c) *xx*

(iv) *After the completion of the work, the actual quantity of cables (other than underground cables) wire, conduit/G.I./C.I./S.C.I pipes, G.I/M.S. sheets used in the various items of work shall he calculated on the basis of measurements recorded in the measurement book for purposes of payment and for assessing the consumption of material used on works. Over this quantity a variation of 5% plus shall be allowed for wastage of materials during execution in case of cables other than underground cables) wires, conduit pipes/G.I./C.I./S.C.I. pipes and 10% plus in case of G.I./M.S. sheets. The difference in quantity of materials issued to the contractor and the quantity recorded in the measurement book including authorised variation as stated above, if not returned by the contractor shall be recovered at twice the issue rates plus cartage to site, without prejudice to the provisions of the relevant condition regarding return of materials governing the contract.*

(v) *to (xi)*

An analysis of clause 42(i) would reveal that:

(1) The contractor shall draw only the required quantities of materials;

(2) Any unused materials in good condition at the time of completion or rescission of contract shall be returned to the Engineer-in-charge, if he shall so desire, by a notice in writing;

(3) Credit for the material returned shall be given at stock issue rate but the storage charges amount shall not be credited; and,

(4) Cartage and incidental charges from and to the stores shall be payable by the contractor.

The Engineer-in-charge may or may not like to have the unused materials after the completion or rescission of the contract. If he wishes to take back the unused materials, he is contractually bound to give a 'notice in writing under his hand'. Thus, it is the Engineer-in-charge (and not his subordinate or any other departmental officer) who can demand back the unused materials.

It is common experience that the department while seeking arbitration claims penal rate recovery for materials used in excess of materials theoretically calculated including allowable wastage as per agreement, without complying with the contractual requirement of demanding the return of the unused materials by 'a notice in writing under his hand.'. Obviously, therefore, the department cannot succeed in arbitration. Alternatively, if the department has already recovered the cost of the unused materials at penal rates, the contractor makes a claim for waiving the penal rate in the absence of the failure of the Engineer-in-charge to give a 'notice in writing under his hand' seeking return of the unused materials. The contractor normally meets with success in arbitration.

Insofar as clause 42(ii) is concerned, the sub-clause provides as follows:

(a) Theoretical quantity of cement used in the work shall be calculated as per factors given in Delhi Schedule of Rates;

(b) If a factor is not available in Delhi Schedule of Rates for any particular item of work, then it shall be determined by the Superintending Engineer;

(c) If the amount of work put to tender is less than Rs. 5 lacs, variation upto 3% plus/minus shall be allowed; in case of works above Rs. 5 lacs, wastage of plus/minus 2% shall be allowed on theoretical cement consumption;

(d) If the unused quantity over and above the allowable cement consumption is not returned to the stores, penal rate recovery shall be effected; and,

(e) For consumption lower than what should theoretically be used (after accounting for variation percentage) shall be returned on the basis of stipulated issue rates and cartage to site.

Clause 42(iii) relates to reinforcement steel and structural steel sections and analysis of the sub-clause is as under:

(i) Provisions of clause 42(ii) shall apply *mutatis mutandis* in the case of reinforcement steel and structural steel;

(ii) Consumption shall be worked out separately for each diameter/section;

(iii) Overall theoretical consumption shall be the sum total of quantity required as per design plus lappages and 3% wastage due to cutting into pieces; and

(iv) Add 2% plus/minus on the quantity worked out under (iii) above due to wastage.

Clause 42(iv) concerns cables, where, conduit, G.I./C.I./S.C.I. pipes, G.I./M.S. sheets. The sub-clause provides:

(1) Quantity of materials (stated hereinbefore) as entered in the measurement book for the *purpose of payment and for assessing the consumption plus* variation;

(2) Variation of 5% (plus) to be allowed for cables (other than underground), wires, conduits and G.I./C.I./S.C.I. pipes;

(3) Variation of 10% (plus) in case of G.I./M.S. sheets shall be allowed; and

(4) Difference in quantities from those issued minus the quantity entered in the measurement book including authorised variation, if not returned shall be recovered at twice the issue rates plus cartage to site.

Very rarely the wastage element, particularly S.C.I. pipes, would fall within the limits laid down in the contract. The reason for this is not far to seek. The true import and intent of clause 42(iv) needs to be properly understood. The sub-clause provides that the quantity shall be calculated as per entries made in measurement book for purposes of payment 'and for assessing the consumption of materials'. Thus, quantity as recorded would be different from the quantity which will be taken into consideration for purposes of consumption. For the purpose of payment, entry in the measurement book is made according to the length of the pipe visible for the portion of the S.C.I. pipe. The invisible portion of the pipe, i.e. the length of the S.C.I. pipe which goes into the spigot, though not payable, but

certainly has to be assessed for purposes of consumption. The sub-clause provides for ‘assessing the consumption of material’, which means that the length of the pipe which goes into the spigot shall not be payable but shall be assessed for purposes of consumption. Though length of pipe which goes into the spigot shall vary with the diameter of the S.C.I. pipe but on an average, it can safely be said that it shall be in the vicinity of 3%. In addition, wastage is caused due to cutting of pipes in small pieces, for example, in kitchen, WC etc. All in all, wastage, as per practical experience, plus the length of pipe which goes into the spigot, works out to more than 7%.

Whether or not penal rate recovery on account of excessive use of stipulated materials, over and above the allowable limits, can be made by the employer without proving actual loss suffered thereby, has been examined by the Delhi High Court in the following cases:

In the case of *Jagan Nath Ashok Kumar v. Delhi Development Authority,* [70] it has been stated that:

> Clause 42 of the agreement stipulates that the contractor was to see that only the required quantities of materials are got issued. It was further the term of the agreement that the difference in quantity of cement actually issued to the contractor and theoretical quantity including the authorised variations, if not returned by the contractor, shall be recovered at twice the issue rate without prejudice to the provision of the relevant conditions regarding return of materials governing the contract For a double recovery, the DDA was to lead evidence and satisfy the arbitrator, but DDA failed to do so.

In *P.C. Sharma & Co. v. Delhi Development Authority* , [71] the court upheld the award of the arbitrator by stating as under:

> Respondents have not produced any correspondence indicating that they asked for the return of excess materials. Clause 42(i) requires the Engineer-in-charge to issue a notice for the return of the unused material at a place he desired. If no material remained unused and all excess material got used in work, recovery at double the issue rate will amount to a penal action which in the absence of any loss suffered by the respondents is not warranted. The respondents have not complained of any misuse of material issued by them or its misappropriation. Under the circumstances and facts of the case, the recovery at double the issue rates is not justified.

In *Shiv Kumar Wasal v. Delhi Development Authority,* [72] the court observed:

> The objection to the award under this claim was that on theoretical working and even by allowing the permissible variation 400 bags of excess cement have been supplied to the contractor and as such the department was justified in making penal recovery on double rates for 400 bags of cement. It is contended that the theoretical working was in accordance with the terms of the agreement. However, the arbitrator found that the cement was being issued to the contractor on day to day basis and the work was regulated by departmental officers and no allegation of misuse or exchange of cement by the contractor had been made by DDA. Counsel for the DDA contends that it was not for the DDA to make allegations of misuse or exchange of cement and rather it was for the contractor to prove that for the work it *bona fide* consumed cement of more quantity than permissible under the agreement working it on theoretical basis, it cannot be said that the reasons given by the arbitrator about the consumption of cement for *bona fide* use for the work and there being no allegation of misuse or exchange by the department can be said to be extraneous or irrelevant. Even if two view are possible this court cannot substitute its own views for the view expressed by the arbitrator.

17. CLAUSES PROHIBITING PAYMENT OF INTEREST

Various State Departments and organisations have introduced clauses which purport to deny the contractor interest in case the department delays payment of their dues. The said clauses and the judgments in relation thereto are dealt with hereunder:

(A) Clause of Interest in Bihar State Contracts

> **2.32 Claims for Interest.—** No claim for interest or damage shall be made against the department with respect to any money or balance which may be lying with the department owing to any dispute, unsettled claim, difference of understanding between the Engineer-in-charge on the one hand and the contractor on the other hand with respect to any unavoidable delay on the part of the Executive Engineer in making final payment in any respect whatsoever.

The Supreme Court in *State of Bihar v. Hanuman Mal Jain* [73], interpreted the above clause in the following terms:

> When we turn to said clause 2.32 we find that it may *prima facie* be found to be applicable to the claims for interest or damage in connection with any money or balance which may be lying with the department and which the plaintiff may rightfully claim to be refundable to him. The phrase 'money or balance which may be lying with the department' may cover not only any amount or money but even any balance of money meaning thereby the claim may refer to the whole amount which the plaintiff claims to be refundable to him or any balance of it after having been refunded a part of it and thus the claim is confined to only the balance being left with the department. In either case, it would be a claim for refund of an amount of money already lying with the department.

(B) Clause of interest in Port of Calcutta Contracts

Clause 13(g) of the contracts entered into by Board of Trustees of Port of Calcutta reads as follows:—

> No claim for interest will be entertained by the Commissioners with respect to any money or balance which may be in their hands owing to any dispute between themselves and the contract or with respect to any delay on the part of the Commissioners in making interim or final payment or otherwise.

The above said clause came up for consideration before the Supreme Court in *Board of Trustees for the Port of Calcutta v. Engineers-De-Space-Age* . [74] The contention urged by the appellants was that the clause contained an absolute prohibition against the payment of interest on account of any delay on the part of the Commissioners in making interim or final payment or otherwise. Repelling the argument, it was held:

> Now the term in sub-clause (g) prohibits the Commissioner from entertaining any claim for interest and does not prohibit the arbitrator from awarding interest. The opening words 'no claim for interest will be entertained by the Commissioner' clearly establish that the intention was to prohibit the Commissioner from granting interest on account of delayed payment to the contractor. Clause has to be strictly constructed for the simple reason that as pointed out by the *Constitution* Bench, ordinarily, a person who has a legitimate claim is entitled to payment within a reasonable time and if the payment has been delayed beyond reasonable time he can legitimately claim to be compensated for that delay whatever nomenclature one may give to his claims in that behalf. If that be so, we would be justified in placing a strict construction on the term of the contract and the arbitrator would be entitled to consider the question of grant of interest *pendentelite* and award interest if he considers the claim to be justified. We are, therefore, of the opinion that under the clause of the contract the arbitrator was in no manner prohibited from awarding interest *pendentelite* .

However, the correctness of the judgment in *Engineers-De-Space-Age* case has been doubted by the Supreme Court in *Sayeed Ahmed and Company v. State of Uttar Pradesh* , [75] by holding as under:

> The observation in *Engineers-De-Space-Age* that the term of the contract merely prohibits the department/employer from paying interest to the contractor for delayed payment but once the matter goes to the arbitrator, the discretion of the arbitrator is not in any manner stifled by the terms of the contract and the arbitrator will be entitled to consider and grant the interest pendente lite, cannot be used to support an outlandish argument that bar on the Government or department paying interest is not a bar on the arbitrator awarding interest. Whether the provision in the contract bars the employer from entertaining any claim for interest or bars the contractor from making any claim for interest, it amounts to a clear prohibition regarding interest. The provision need not contain another bar prohibiting the arbitrator from awarding interest. The observations made in the context of interest pendente lite cannot be used out of contract.

(C) Clause of Interest in HPSEB Contracts

Clause 9(C) of contracts entered into by Himachal Pradesh State Electricity Board, Shimla provides as follows:

> *No omission on the part of the Engineer-in-charge to pay the amount due upon measurement or otherwise shall vitiate or make void the contract, nor shall the contractor be entitled to interest upon guarantee or payments in arrears nor upon any balance which may on the final settlement of his accounts be due to him.*

After perusing the judgment in *Board of Trustees for the Port of Calcutta v. Engineer-De-Space-Age* [76] and *Ansal Properties & Industries Ltd. v. H.P. State Electricity Board* , [77] the H.P. High Court held as under:

> Following the ratio laid down by the Apex Court, we hold that clause 9-C of the agreement does not prohibit the arbitrator to award *pendentelite* interest. Besides, the dispute whether under the terms of the agreement the arbitrator was prohibited from awarding interest *pendentelite* , that was a matter which fell within the jurisdiction of the arbitrator, as the arbitrator has to interpret the clause in question and to decide whether that clause prohibits him from awarding such interest. The arbitrator was, therefore, well within his jurisdiction in awarding such interest.

Clause 9B of the contracts of Himachal Pradesh State Electricity Board provides as under:

> *The contractor agrees that no claim for interest or damages shall be entertained or payable by the Board in respect of any money or balances which may be lying with HPSEB owing to any disputes differences or misunderstanding between the parties or in respect of any delay or omission on the part of the Engineer-in-charge in making intermediate or final payments or in any other respect whatsoever.*

It was held by a Division Bench of Himachal Pradesh High Court that in view of judgment of the Supreme Court in *State of U.P. v. Harish Chandra & Co.* , [78] clause 9B of HPSEB Contracts does not prohibit the award of interest *pendentelite* by the arbitrator. [79]

(Also see comments under Head 17-B)

(D) Clause of Interest in U.P. State Contracts

Clause 1.9 of the contracts entered into by the State of U.P. stipulate as under:-

> ***No claim for delayed payment due to dispute etc.—*** *No claim for interest or damages will be entertained by the Government with respect to any moneys or balances which may be lying with the Government owing to any dispute, difference or misunderstanding between the Engineer-in-charge in making periodical or final payments or in any other respect whatsoever.*

According to the Supreme Court the true meaning of the clause aforesaid is as follows:

> A mere look at the clause shows that the claim for interest by way of damages was not to be entertained against the Government with respect to only a specified type of amount, namely, any moneys or balances which may be lying with the Government owing to any dispute, difference between the Engineer-in-charge and the contractor, or misunderstanding between the Engineer-in-charge and the contractor in making periodical or final payments or in any other respect whatsoever. The words “or in any other respect whatsoever” also referred to the dispute pertaining to the moneys or balances which may be lying with the Government pursuant to the agreement meaning thereby security deposit or retention money or any other amount which might have been withheld by the Government. The claim for damages or claim for payment for the work done and which was not paid for would not obviously cover any money which may be said to be lying with the Government. Consequently, on the express language of this clause, there is no prohibition which could be culled out against the contractor that he could raise the claim for interest by way of damages before the arbitrator on the relevant items placed for adjudication. [80]

In another case reported as *Ram Nath International Construction Pvt. Ltd. v. State of U.P.* , [81] clause 1.18 reproduced hereinabove came up for consideration before the Supreme Court and in para 10, it had been held:

> In our view, this clause does not debar an arbitrator from granting interest during the pendency of the reference if, in his discretion, he considers it appropriate to award it. As is held by the *Constitution* Bench in the *G.C. Roy* [82] case, the power of the arbitrator to grant interest *pendentelite* is based on principles analogous to *section 34 of the Code of Civil Procedure*. Such interest is granted by the arbitrator in order to do complete justice between the parties When parties go before an arbitrator, they expect that the disputes will be decided in accordance with law as they would have been decided had the decision been of a court of law.

The judgment in *Harish Chandra's* case came up for consideration in *Sayeed Ahmed and Company v. State of Uttar Pradesh* . [83] After reviewing the law of the land, the Supreme Court held as under:

1 The appellant strongly relied upon the decision of this court in *State of U.P. v. Harish Chandra & Co.* to contend that Clause 1.09 of the contract did not bar the award of interest. The clause barring interest that fell for consideration in that decision was as under: (SCC p. 67, para 9)

2 *No claim for delayed payment due to dispute, etc* .—No claim for interest or damages will be entertained by the Government with respect to any moneys or balances which may be lying with the Government owing to any dispute, difference; or misunderstanding between the Engineer-in-Charge in making periodical or final payments or in any other respect whatsoever.

> This court held that the said clause did not bar award of interest on any claim for damages or for claim for payment for work done. We extract below the reasoning for such decision: (SCC p. 67, para 10)

3 A mere look at the clause shows that the claim for interest by way of damages was not to be entertained against the Government with respect to only a specified type of amount, namely, any moneys or balances which may be lying with the Government owing to any dispute, difference between the Engineer-in-Charge and the contractor; or misunderstanding between the Engineer-in-Charge and the contractor in making periodical or final payments or in any other respect whatsoever. The words ‘or in any other respect whatsoever’ also referred to the dispute pertaining to the moneys or balances which may be lying with the Government pursuant to the agreement meaning thereby security deposit or retention money or any other amount which might have been with the Government and refund of which might have been withheld by the Government. *The claim for damages or claim for payment for the work done and which was not paid for would not obviously cover any money which may be said to be lying with the Government* . Consequently, on the express language of this clause, there is no prohibition which could be culled out against the respondent contractor that he could not raise the claim for interest by way of damages before the arbitrator on the relevant items placed for adjudication.” (emphasis supplied)

4 In *Harish Chandra* a different version of Clause 1.09 was considered. Having regard to the restrictive wording of that clause, this court held that it did not bar award of interest on a claim for damages or a claim for payments for work done and which was not paid. This court held that the said clause barred award of interest only on amounts which may be lying with the Government by way of security deposit/retention money or any other amount, refund of which was withheld by the Government.

5 But in the present case, Clause G1.09 is significantly different. It specifically provides that no interest shall be payable in respect of any money that may become due owing to any dispute, difference or misunderstanding between the Engineer-in-Charge and contractor *or* with respect to any delay on the part of the Engineer-in-Charge in making periodical or final payment or in respect of any other respect whatsoever. The bar under Clause G1.09 in this case being absolute, the decision in *Harish Chandra* will not assist the appellant in any manner.

The position of law as existing on date is that the judgment in *Harish Chandra's* case was rendered in view of the specific language of the clause under consideration of the court. However, in view of the clause having been amended, to the extent that by the addition of the words “or any become due”, a complete prohibition has been made for the arbitral tribunal to award interest.

In the recent past, the Supreme Court has taken a view that if there is a prohibition in the contract, the arbitral tribunal is totally precluded from awarding interest [84]. The contra view taken in *Madnani Construction Corp. (P) Ltd. vs. Union of India* , [85] was not favoured in any of the subsequent judgments, primarily because the same was based on the view taken in *Engineers-De-Space-Age* case.

18. CLAUSE REGARDING "NO CLAIM CERTIFICATE"

In view of large number of cases going to arbitration, the engineering organisations evolved a "No Claim Certificate" for being signed by the contractors before payment against the final bill was made to them. After obtaining the "No Claim Certificate", the employer would put forth a plea before the arbitrator that with the contractor signing a "No Claim Certificate" nothing survives and that the arbitrator has no jurisdiction to entertain the matter since the arbitration clause perished with the furnishing of the "No Claim Certificate".

"No Claim Certificates" may be categorised into two parts:

(1) Voluntary

(2) Involuntary

(A) No Claim Certificate given Voluntarily

In case of voluntary furnishing of "No Claim Certificate", the contractor can possibly have no stand in arbitration. Whether or not a "No Claim Certificate" was given under undue influence is a matter which has to be gone into by the courts.

> The Supreme Court while dealing with the voluntary furnishing of a "No Claim Certificate" stated that where the contractor acknowledged the receipt of the amount paid to him and stated that he was unconditionally withdrawing his claim in the suit in respect of labour escalation, there can be no two opinions that there was full and final settlement of the claims and thereby there was no arbitrable dispute in respect of labour escalation; but any other claim which the respondent made in the suit, for that the court is to consider whether arbitrable disputes arose under the contract for reference to arbitration. [86]

> Where the contractor writes in his own hand "Final measurement and payment accepted in full and final settlement of the contract", he cannot be allowed to agitate, after receiving the final payment, that certain claims are still outstanding against the employer. With the furnishing of the certificate of satisfaction of final measurement as well as receipt of final payment there is accord and satisfaction by final settlement of the claims. The subsequent allegation of coercion is an afterthought and a devise to get over the settlement of the dispute, acceptance of the payment and receipt voluntarily given. [87] Repelling arguments of the contractor that in similar circumstances the Supreme Court in *Damodar Valley Corporation v. K.K. Kar* [88] had upheld the plea of undue influence and coercion, the Supreme Court noted the observations made in that case which *inter alia* were: "No doubt the respondent was asked to submit his bill along with a receipt stating that he received the payment in full and final settlement of all payments and that there was no other claim. *But the respondent while submitting his bill did not give the receipt as desired* . The amount of bill was, however, paid after receipt of which the respondent claimed further sums from the appellants including damages for repudiation of the contract."

> In a case, the Railways made an offer to the appellant and stipulated that if the offer was not acceptable the cheque should be returned forthwith, failing which it would be deemed that the appellant has accepted the offer in full and final settlement of its claim. It was also stated that the retention of the cheque and/or encashment thereof will automatically amount to satisfaction in full and final satisfaction of the claim. Thus, if the appellant accepted the cheque and encashed without anything more, it would amount to acceptance of the offer. It is significant that protest and non-acceptance, if any, must be conveyed before the cheques are encashed. An offeree cannot be permitted to change his mind after the unequivocal acceptance of the offer. [89]

> Once there is a full and final settlement in respect of a particular dispute or difference in relation to a matter covered under the arbitration clause and that dispute or difference is finally settled, such a dispute or difference does not remain an

arbitrable matter and the arbitration clause cannot be invoked. [90]

Where the petitioner sustained huge loss on account of short circuit in the electric cables passing over his land, causing burning of his sugarcane crops, acceptance of compensation of lesser amount than claimed would preclude him from claiming further amount when he had already executed an agreement on a stamp paper acknowledging full and final settlement of compensation. [91] When a full and final settlement had been arrived at between the parties voluntarily, the main contract, as well as the arbitration clause contained therein, gets extinguished. [92] Where the petitioner does not allege that the no-claim certificate was given under undue influence or coercion, then such a dispute would not remain an arbitrable dispute. [93]

(B) No Claim Certificate given Involuntarily

A contractor accepted the final bill in full and final settlement but later claimed that there were outstanding dues and requested for arbitration under the agreement between the parties. Both the parties to the contract nominated their respective arbitrators. Later on, the respondent filed an application to the effect that agreement no longer subsisted. Held that whether an amount is due to be paid and how far the claim made by the appellant is tenable are matters to be considered by the arbitrator. In fact, whether the contract has been fully worked out and whether the payments have actually been made in full and final settlement are questions to be considered by the arbitrator when there is a dispute regarding the same. [94]

Necessitas non habit legem is an old age maxim which means necessity knows no law. A person may sometimes have to succumb to the pressure of the other party to the bargain, who is in a stronger position. Although it may not be strictly in place but the court cannot shut its eyes to the ground reality that in a case where a contractor has made a huge investment, he cannot afford not to take from the employer the amount due under the bills, for various reasons, which may include discharge of his liability towards banks, financial institutions and other persons. In such a situation, public sector undertaking would have an upper hand. They would not release money unless a ‘No Demand Certificate’ is signed. A case where a party has had to succumb to the pressure of the other party to the bargain, who is in a stronger position, has to be made out and proved before the arbitrator from obtaining an award. [1]

In *R.L. Kalathia v. State of Gujarat,* [2] the Supreme Court has summed up the legal position as under:

1 From the above conclusions of this court, the following principles emerge:

(i) Merely because the contractor has issued “no-dues certificate”, if there is an acceptable claim, the court cannot reject the same on the ground of issuance of “no-dues certificate”.

(ii) Inasmuch as it is common that unless a discharge certificate is given in advance by the contractor, payment of bills are generally delayed, hence such a clause in the contract would not be an absolute bar to a contractor raising claims which are genuine at a later date even after submission of such “noclaim certificate”.

(iii) Even after execution of full and final discharge voucher/receipt by one of the parties, if the said party is able to establish that he is entitled to further amount for which he is having adequate materials, he is not barred from claiming such amount merely because of acceptance of the final bill by mentioning “without prejudice” or by issuing “no-dues certificate.

While arriving at its aforesaid conclusions, the Supreme Court relied upon the judgments reported as *NTPC Limited v. Reshmi Constructions, Builders & Engineers* ; [3]*Ambica Construction v. Union of India* , [4] and *National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd.* [5]

If the conduct of the parties as necessitated from the correspondence shows that not only the final bill was submitted by the respondent but had also been rejected by the plaintiff and instead another final bill was prepared by the plaintiff with a printed format of ‘No Demand Certificate’ which had to be executed, otherwise the final bill would not have been paid inasmuch as immediately thereafter categorically stated in the letter under which

circumstances it was compelled to sign the said printed letter, it was held that it was a clear case of coercion and undue influence. [6]

In ***Halsbury's Laws of England,*** [7] it is stated:

> On the principle that a person may not approbate and reprobate a special species of estoppel has arisen. The principle that a person may not approbate and reprobate expresses two propositions:
>
> (1) That the person in question, having a choice between two courses of conduct is to be treated as having made an election from which he cannot resile.
>
> (2) That he will not be regarded, in general at any rate, as having so elected unless he has taken a benefit under or arising out of the course of conduct, which he has first pursued and with which his subsequent conduct is inconsistent.

A no-claim certificate is required to be submitted by a contractor once the works are finally measured up. When the work was yet to be completed and a no-claim certificate was signed by the contractor, it has no value if the contractor successfully makes out a case of coercion or undue influence. Held, that it was apparent that unless a discharge certificate is given in advance, payment of bills are generally delayed and hence the no claim certificate is bad in the eyes of law. [8]

The Committee of Arbitrators while deciding the claim took note of the objections raised and the claim of the respondent that they had given the undertaking earlier under duress was accepted because of the reason that the claimant claimed the final bill under protest and without prejudice to their rights and that the escalation benefits have been given to the claimant for the period of their over stay. Held, that the reasons signed by the Committee of Arbitrators are cogent and call for no interference. [9]

Work got extended beyond the stipulated date of completion due to late issue of drawings and decisions. There was also a delay in getting the electrical conduits laid and this also resulted in dislocating the claimant's work. The respondents granted extension of time without levy of liquidated damages, which also goes to establish that the claimants were not responsible for the delay in the execution of the work. Thus, the undertaking given by the contractor that he would not claim damages for delay in execution of the work under economic duress and coercion and not of free will and hence cannot be given cognizance. [10]

Where a single judge refused to refer claims to the arbitrator, on an application filed under *section 20 of the Arbitration Act*, 1940, on the plea that the contractor had given a “No Claim Certificate” and nothing thus survived for being referred to arbitration, a Division Bench of Bombay High Court held:

> We, however, find it extremely difficult to accept the same for reasons more than one. First, a question whether there was a discharge of the contract by accord and satisfaction or not itself is a dispute arising out of the contract which has to be referred to arbitration. Second, in order to entitle the court to refuse to refer the dispute to arbitration, there must be voluntary and unconditional written acceptance of payment by the appellant in full and final settlement of contract. By no process of reasoning or interpretation the ‘No Demand Certificate’ furnished by the appellant as a pre-condition for the scrutiny of the bill can be construed as a voluntary and unconditional acceptance of payment in full and final settlement of the contract because such a certificate was furnished alongwith the bill or claim obviously as a pre-condition for scrutiny of the bill much before the claimant could know as to which part of his claim was going to be accepted by the other side or what amount would be offered against his claim. It is clear in this case that various letters issued by the respondents that it was a practice of the claimants to obtain a ‘No Demand Certificate’ in the format supplied by it as a condition precedent for the scrutiny of the bill itself. The format of the ‘No Demand Certificate’ is as follows:
>
> > I _____ certify that I have no claims from CIDCO whatsoever against the Corporation in connection with or arising out of the said contract, remains unadjusted.

The above 'No Demand Certificate', in our opinion, is a certificate obtained by the respondents before the scrutiny of the claim to ensure that the claim made in the final bill includes all claims of the contractor and no additional claim would be made by him in future. This is the only just and reasonable interpretation of the above certificate. In any event, the above 'No Demand Certificate' cannot be construed to mean discharge of the contract by accord and satisfaction, because it is required to be furnished alongwith the claim and even before it is scrutinised by the respondents. The question of receipt in full and final settlement can only arise after an offer is made of a specified amount by the other side in full and final settlement of the claim. It is only at that stage that one can apply his mind and accept the payment in full and final settlement if he is satisfied with the same and only in such a case, the acceptance can be termed as voluntary and unconditional. [11]

The foregoing observations were based in the background of the decision of the Supreme Court in *Union of India v. L.K. Ahuja & Co.* , [12] where it was observed that in order to be entitled to ask for a reference under *section 20 of the Arbitration Act*, 1940, there must be an entitlement to money and a difference or dispute in respect of the same. It was further held that on completion of the work, right to get payment would normally arise but on settlement of the final bill, the right to get further payment gets weakened but the claim subsists and whether it does subsist is a matter which is arbitrable. Also refer to *Bharat Heavy Electricals Ltd. v. Amar Nath Bhan Prakash* [13], where it was held that the question whether or not there was discharge of the contract by accord and satisfaction is a matter for the arbitrator to see.

Signing of 'no claim certificate' does not prevent a claimant from claiming a reference of disputes to arbitration. [14] If any document has been executed under undue influence or coercion, then it will have no effect. [15] It is for the arbitrator to decide whether there had been a "full and final settlement" when the payment of the final bill has been made to the contractor. [16]

Considering the fact that respondent itself continued negotiations with the petitioner in respect of claims and even went to the point of informing him that the name of arbitrator will be informed soon, it cannot later turn around and say that the claim is time-barred. Merely because the final bill has been accepted in full and final settlement, does not preclude the petitioner from pursuing its other claims for additional expenditure which were not the subject-matter of the bill. [17]

The question whether the final measurements were accepted under undue influence, pressure and misrepresentation and thus, not accepted at all has to be determined by arbitrators. If the measurements cannot be said to have been finalised to the satisfaction of the parties, the measurements will have to be gone into again. [18]

It is so well known and a notorious fact that unless a no claim certificate is issued by the contractor, payment of final bill will not be made, but that will not prevent the contractor from raising its claim before arbitrator. [19] However, a different view has been taken by the Bombay High Court according to which, if the contractor does not allege coercion, mistake, misrepresentation, without prejudice, or under protest etc. when invoking the arbitration clause, and it is invoked *simpliciter* , it will have to be held that the contract itself had come to an end and with it the arbitration clause which was part and parcel of it. [20]

Acceptance under protest of payment in full satisfaction of amount due under contract is no accord or satisfaction in the sense of bilateral consensus of intention and does not discharge the contract. [21]

The petitioner requested the respondent for release of payment. The respondent asked the petitioner to give a 'no claim certificate' as a pre-condition for release of payment. The petitioner wrote to the respondent that it was in dire need of funds and submitted a 'no claim certificate'. The respondent still did not release payment but instead conveyed that nothing, in fact, was due. Held that the petitioner was not bound by what he had undertaken since the 'no claim certificate' was given under duress. [22]

(C) Pre-dated Receipt of Full and Final Settlement cannot be Voluntary

If the party which has executed the discharge agreement or discharge voucher alleges that the execution of such discharge agreement or voucher was on account of fraud/coercion/undue influence practiced by the other party and is able to establish the same, then obviously the discharge of the contract by such agreement purchaser is rendered void and cannot be acted upon. Consequently, any dispute raised by such party would be arbitrable. [23]

Obtaining of undated receipts-in-advance in regard to routine/regular payments of Government departments and corporate sector is an accepted practice which has come to stay due to administrative exigencies and accounting necessities. What is of concern is the routine insistence by some Government departments, statutory Corporations and Government companies for issue of undated “no-dues certificates” or “full and final settlement vouchers” acknowledging receipt of a sum which is smaller than the claim in full and final settlement of all claims, as a condition precedent for releasing even the admitted dues. Such a procedure is unfair, irregular and illegal and requires to be deprecated. [24]

Departments/employers normally take undated receipts and in a *proforma* furnished by them containing irrelevant and inappropriate statements. Claimants are required to sign on the dotted lines. Where the discharge voucher was signed and given by the respondent when payment of about Rs. 2.30 crores had been pending and it was only after receiving the voucher that some settlement was made, it was held to be an unconscionable settlement. Furthermore, at the time of signing the voucher by the respondent and at the time of delivery of voucher by the respondent to the appellant, the contents of the vouchers that the said amount had been received in full and final settlement of all the claims, and that in consideration of such payment, the company was absolved of any further liability, are false and not supported by consideration. [25]

19. SUBMISSION OF RETURNS REGARDING EXTRAS

Some State P.W.D.'s have made it obligatory to submit returns regarding extras to the Engineer-in-charge by the 10th of every month. The Punjab P.W.D. standard form of contract provides as under:

Clause 5-A: *A Contractor to submit a return every month for any works claimed as extra- The Contractor shall deliver in the office of Executive Engineer, on or before the 10th day of every month during the continuance of the work covered by this contract a return showing details of any work claimed as for as Extra, and such return also contain the value of such work as claimed by the contractor which value shall be based upon the rates and prices mentioned in the contract or in the Schedule of Rates enforced in Distt. for the time being. Distt. rates mean the P.W.D; B&R rate of the Distt. applicable to the Division. The contractor shall include in such monthly return particulars of all claims of that kind and however arising which at the date thereof he has or may claim to have against the Executive Engineer under or in respect of, or in any manner arising out of the execution of work and the contractor shall be deemed to have waived all claims not included in such return and will have no right to enforce any such claims not so included, whatsoever be the circumstances.*

In *Punjab State v. Amar Nath Aggarwal Construction (P) Ltd.* , [26] the court repelled the argument of the State that the contractor was not entitled to any payment because of non-compliance of the provisions of the clause, for the simple reason that the department without insisting on the submissions of the return itself paid a certain amount on account of this item. In other words, the department waived the submission of the monthly return. Moreover, it is settled law that if a certain work has been done, the person doing the work is entitled to reasonable compensation unless it was intended that the work was being done *gratis* . Section 70 of the contract clearly applies and, therefore, the claim of the contractor cannot be negatived simply on the ground that he failed to file the requisite return.

20. CLAUSES PROHIBITING AWARD OF DAMAGES

A contract specifically provided that in the event of delay in completion of work the contractor shall not be entitled to compensation. Work could not be completed within time and the contractor was allowed extension of time for completing the work. Disputes arose between the parties and the contractor claimed compensation on account of prolongation of contract period. The arbitrator awarded compensation. Held that the award being contrary to the stipulation of the contract, deserved to be set aside. [27]

Some contracts provide that no compensation shall be payable to the contractors in the event of delays caused. Two such conditions are dealt with hereunder:

(A) Military Engineering Services Contracts

Clause 11 of the 'General Conditions of Contracts For Lump Sum Contracts (I.A.F.W.-2249)' provides as under:

11. Time, Delay and Extension—

(A) Time is of the essence of the Contract and is specified in the contract documents or in each individual Works Order.

As soon as possible after the contract is let or any substantial Works Order is placed and before Work under it is begun, the G.E. and the contractor shall agree upon a Time and Progress Chart. The Chart shall be prepared in direct relation to the time stated in the contract documents or the Works Order for completion of the individual items thereof and/or the Contract or Works Order as a whole. It shall indicate the forecast of the dates for commencement and completion of the various trade processes or sections of the work, and shall be amended as may be required by agreement between the G.E. and the Contractor within the limitation of time imposed in the contract documents or Works Order. If the Works be delayed :-

(i) by force majeure *, or*

(ii) by reason of abnormally, bad weather, or

(iii) by reason of serious loss or damage by fire, or

(iv) by reason of civil commotion, local combination of workmen, strike or lockout, affecting any of the trades employed on the work, or

(v) by reason of delay on the part of nominated sub-contractors, or nominated suppliers which the Contractor has, in the opinion of G.E., taken all practicable steps to avoid, or reduce, or

(vi) by reason of delay on the part of Contractors or tradesmen engaged by Government in executing works not forming part of the contract, or

(vii) by reason of any other cause, which in the absolute discretion of the Accepting Officer is beyond the Contractor's control;

then, in any such case the Officer hereinafter mentioned may make fair and reasonable extension in the completion dates of individual items or groups of items of work for which separate periods of completion are mentioned in the contract documents or Works Order, as applicable.

"Upon the happening of any such event causing delay, the Contractor shall immediately, but not later than 30 days of the happening of the event, give notice thereof in writing to the G.E. but shall nevertheless use constantly his best endeavour to prevent or make good the delay and shall do all that may reasonably be required to the satisfaction of the G.E. to proceed with the works. Extension of time shall be granted as under:-

(a) by G.E. for all Term Contracts;

(b) by Accepting Officer of the contract for all other Contracts.

In case the contractor fails to notify the G.E. of happening of an event(s) causing delay within the period of 30 days stipulated in sub-para 3 above, he shall forfeit his right to claim extension of time for the delay caused due to such event(s).

Extension of time as granted above, shall be communicated to the Contractor by G.E. in writing and shall be final and binding. PROVIDED THAT in the case of contracts (other than Term Contracts) accepted by the G.E., in the event of the Contractor not agreeing to the extension granted by the G.E., the matter shall be referred to the C.W.E. whose decision shall be final and binding.

(B) *If the Works be delayed:-*

(a) by reason of non-availability of Government stores mentioned in Schedule 'B'; or

(b) by reason of non-availability or breakdown of Government Tools and Plant mentioned in Schedule 'C';

then, in any such event, notwithstanding the provisions hereinbefore contained, the G.E. may in his discretion grant such extension of time as may appear reasonable to him and the Contractor shall be bound to complete the works within such extended time. In the event of the Contractor not agreeing to the extension granted by the Garrison Engineer, the matter shall be referred to the Accepting Officer (or C.W.E.) in case of contract accepted by Garrison Engineer whose decision shall be final and binding.

(c) No claim in respect of compensation or otherwise, howsoever arising, as a result of extensions granted under Conditions (A) and (B) above shall be admitted."

In *Parkash Brothers v. Union of India* , [28] the above clause came for consideration before the Delhi High Court. The court upheld the award of the arbitrator granting damages to the contractor in the following terms:

> As regards claim no. 11 it pertained to compensation for damages caused by various damages of contract by Union of India by way of increase in cost of construction and infructuous expenditure on over-heads and establishment, and the Arbitrator gave an award of Rs. 34,045.00 against the claim of Rs. 1,09,658.00. It is submitted with reference to condition no. 11 of the General Conditions of the Contract between the parties, that under cl. (C) no claim in respect of compensation or otherwise however arising as a result of extension granted under cls. (A) and (B) of Condition 11 specify the circumstances under which extension could be granted if there was delay in execution of the contract. From the award, which is a non-speaking one, it is difficult to say if the award under claim no. 11 was given in contravention or in breach thereof as aforesaid. Again, I do not find any error apparent on the face of the award for me to interfere in the matter.

In *Rawla Construction Co. v. Union of India* , [29] the Delhi High Court held as under:

> 4. Counsel for the Union of India says that under clauses 9, 11, and 63 of the Conditions of the Contract, the contractor is not entitled to any compensation even if the delay in the execution of the contract is caused by reason of default on the part of the Government. I cannot accept this argument. If there is delay in the execution of the contract by reason of default on the part of the Government, none of the three clauses referred to by counsel will stand in the way of the contractor in making a claim before the arbitrator regarding the increase in the cost of materials or expenses on account of overheads and establishment charges. Hudson in his *Building and Engineering Contracts* (9th Ed., p. 492) states the principle governing damages in these words:

Where the cause of delay is due to the breach of contract by the employer, and there is also an applicable power to extend the time, the exercise of that power will not, in the absence of clearest possible language, deprive the contractor of his right to damages for the breach.

> Such provision as attempt to deprive the contractor of the right to claim damages will be strictly construed against the employer (Hudson, p. 493). Because such a clause will have calamitous consequences for the contractor. He will have no remedy elsewhere, however outrageous the conduct or behaviour of the employer may be, however interminable the delay.

Further in the same judgment it has been held as under:

> 8. If the duration of the work is prolonged, the expenses will increase. The question then will be: Who is responsible for delay? Who is in breach? Who is the prolonger? Neither clause 9 nor clause 11 nor clause 64 take away the arbitrator's jurisdiction to adjudicate upon the claim of the contractor, and award him damages for the loss sustained by the breach. If the contractor himself is guilty of delay, the arbitrator will dismiss the claim because no party can take advantage of his own wrong. But if he is not at fault and the other party to the contract is in default, the arbitrator may award damages.

The Punjab and Haryana High Court, [30] however, set aside the award of the arbitrator awarding damages to the contractor. It was held that clause 11(C) was a prohibitory clause and an award made beyond the terms of the same was void. It was held that:

> Thus, it is clear from an admitted contract between the parties that condition No. 11-C would govern and bind the parties at all stages. It is a settled rule of law that an Arbitrator and for that matter even courts cannot substitute an agreement between the parties. The contract is one which is agreed and entered upon between the parties voluntarily and by which they opt to be bound. This term of the contract specifically bars grant of any claim of compensation as a result of extension granted under Conditions (A) and (B) of the contract. The parties having opted to and having agreed to this term and to be bound by the same cannot be permitted to avoid its consequences at any stage. The claimant respondents had with their eyes open signed this agreement which contained this clause and in fact the arbitration clause itself is a part of this agreement which has been invoked by the claimants. The learned Arbitrator had no jurisdiction to alter the agreement between the parties or to frustrate an agreed term by his award.

The Bombay High Court in *Union of India v. Shyama Charan Agarwala & Sons,* [31] also set aside an award made by the arbitrator awarding damages in the following terms:

> The Claim No. 8 of the Respondents for Rs. 28,76,035/- was considered by the Arbitrator and the Arbitrator has partly awarded the sum of Rs. 20,95,255/- to the Respondents. According to the Respondents, though the time was stated to be the essence of the contract, the Petitioners did not consider it in real spirit and extended dates of completion of the said work from time to time. Clause 11(C) amongst other things records an agreement between the Petitioners and the Respondents in categorical terms prohibiting admission of any claim by the Petitioners in respect of compensation or otherwise as a result of extensions granted under sub-clauses (A) and (B) of the said Clause 11. Sub-clause (A) of Clause 11 records one of the reasons for delay being caused as the circumstances beyond the contractor's control. The fact that the circumstances beyond the Respondents' control existed necessitating the grant of extensions for completion of the said work has been admitted by the Respondents in the statement of claims filed before the Arbitrator. The Arbitrator on considering rival contentions raised before him concluded that the Petitioners were responsible for delay in completion of the said work resulting in extension of period of performance of the said Contract and held that the Respondents were entitled for the increased cost of works in whatever form the Respondents have suffered, be that on material, labour or supervisory staff or other incidental expenses on interpreting or construction of Clause 11 contained in the said Contract, the Arbitrator held that there was no prohibition in the said Contract for making payment

> to the Respondents increased cost suffered by the Respondents on supervisory staff, idle machinery and other incidental expenses The award of the said sum to the Respondents by the Arbitrator has been in contravention or violation of the express terms of the said Contract viz., Clause 11(C) which in terms prohibited grant of any claim in respect of compensation or otherwise, howsoever arising, as a result of extensions granted under sub-clauses (A) and (B) of Clause 11 of the said Contract, being an express term of Contract duly agreed between the parties thereto, is clear and unambiguous

In *Ramnath International Construction Pvt. Ltd. v. Union of India,* [32] the Supreme Court held as under:

> The causes for delays specified in clause A, thus, encompass all delays over which the contractor has no control. This will necessarily include any delays attributable to the employer or any delay for which both the employer and the contractor are responsible. The contract thus provides that if there is any delay, attributable either to the contractor or the employer or both, and the contractor seeks and obtains extension of time for execution on that account, he will not be entitled to claim compensation of any nature, on the ground of such delay, in addition to the extension of time obtained by him.
>
> Clause 11(C) amounts to a specific consent by the contractor to accept extension of time alone in satisfaction of his claim for delay and not claim any compensation. In view of the clear bar against award of damages on account of delay, the arbitrator clearly exceeded his jurisdiction, in awarding damages, ignoring clause 11(C).

However, a contrary view was expressed in *Asian Techs Ltd. v. Union of India* , [33] wherein the Supreme Court held as under:

> “Apart from the above, it has been held by this court in *Port of Calcutta* v. *Engineers-De-Space-Age,* [34] that a clause like Clause 11 only prohibits the *Department* from entertaining the claim, but it did not prohibit the *arbitrator* from entertaining it. This view has been followed by another Bench of this court in *Bharat Drilling & Treatment (P) Ltd.* v. *State of Jharkhand* . [35]

What we are now faced with are two judgments of the Apex Court, which run contrary to each other. How to resolve the dilemma? In an unreported judgment of the Delhi High Court titled *Simplex Concrete Piles (I) Ltd. v. Union of India* , Suit No. 614A/2002 decided on 23-2-2010, the counsel for the parties cited the aforementioned judgments of the Supreme Court. By relying upon settled precedents, the court held that when there are conflicting judgments of Supreme Court of co-equal Benches, then, the High Court ought to follow the judgment which lays down the law more correctly. The Delhi High Court also relied upon a judgment of the Supreme Court reported as *M.G. Brothers Lorry Service v. M/s. Prasad Textiles* , [36]wherein it was held that a contractual clause which is in the teeth of a provision which furthers the intendment of a statute, has to give way and such a clause becomes void and inoperative by virtue of section 23 of the Contract Act. The High Court summed up the position as follows:

> Provisions of the contract which will set at naught the legislative intendment of the Contract Act, I would hold the same to be void being against public interest and public policy. Such clauses are also void because it would defeat the provisions of law which is surely not in public interest to ensure smooth operation of commercial relations. I therefore hold that the contractual clauses such as Clauses 11A to 11C, on their interpretation to disentitle the aggrieved party to the benefits of sections 55 and 73, would be void being violative of section 23 of the Contract Act.

(B) APDSS Forms

Clause 59 of the Andhra Pradesh Detailed Standard Specifications (APDSS) forms provides as under:

> ***59. Delays and extension of time. —*** *No claim for compensation on account of delays or hindrances to the work from any cause whatever shall lie, except, as hereinafter defined. Reasonable extension of time will be allowed by the Executive Engineer or by the officer competent to sanction the extension, for unavoidable delays, such as may result from causes, which, in the opinion of the Executive Engineer, are undoubtedly beyond the control of the contractor. The Executive Engineer shall assess the period of delay or hindrance caused by any written instructions issued by him, at twenty five per cent in excess of the actual working period so lost.*
>
> *In the event of the Executive Engineer failing to issue necessary instructions and thereby causing delay and hindrance to the contractor, the latter shall have the right to claim an assessment of such delay by the Superintending Engineer of the Circle whose decision will be final and binding. The contractor shall lodge in writing with the Executive Engineer a statement of claim for any delay or hindrance referred to above, within fourteen days from its commencement, otherwise no extension of time will be allowed.*
>
> *Whenever authorised alterations or additions made during the progress of the work are of such nature in the opinion of the Executive Engineer as to justify an extension of time in consequence thereof, such extension will be granted in writing by the Executive Engineer or other competent authority when ordering alterations or additions.*

Clause 59 of the A.P. Standing Specifications which provides that no claim for any compensation on account of any delay or hindrance to the work from any cause whatsoever shall lie, has been subjected to close judicial scrutiny. A single Judge of the A.P. High Court [37] held that the clause was totally inequitable and unreasonable. This judgment was confirmed by a Division Bench of the High Court, [38] but was reversed by the Supreme Court [39] and the matter was sent back to the High Court for final consideration. The A.P. High Court has thereafter been consistently holding that clause 59 is a complete bar on claim for escalation and compensation. [40]

The Supreme Court has upheld the validity of clause 59 of the A.P. Standing Specification and held that any award for escalation beyond the contractual period was barred and could not be sustained. [41]

However, if the State itself waives off the benefit of clause 59 and entered into an agreement to pay extra rates for one year when the work was extended, it cannot deny the same benefit to the contractor for the next year when the work was delayed due to its own fault. The arbitrators finding that it was just and proper to apply the principle of providing extra rates for the next year was, therefore, held to be unassailable. [42]

21. EXCEPTED MATTER – WHAT IS

Those claims which are covered by several clauses of the Special Conditions of Contract can be categorised in two categories. One category is of such claims which are just not leviable or entertainable. Each of these clauses provides for such claims not capable of being raised or adjudged by employing such phraseology as ‘shall not be payable’, or ‘no claim whatsoever will be entertained by the Railways’ or ‘no claim will be entertained’. These are ‘no claims’, ‘no damages’ or ‘no liability clauses’. The other category of claims is where the dispute or difference has to be determined by an authority of the Railways as provided in the relevant clause. The first category is an ‘excepted matter’ because the claims as per the terms and conditions of the contract are simply not entertainable; the second category of claims falls within the ‘excepted matters’ because the claim is liable to be adjudicated upon by an authority of the Railways whose decision the parties have, under the contract, agreed to treat as final and binding and hence, not arbitrable. The expression ‘and the decision thereon shall be final and binding on the contractor’ refers to the second category of ‘excepted matters’. [43]

22. TERMS “WITHHOLDING”, “RETAINING, “RECOVERY”—IMPLICATION OF

The terms “withholding” or “Retaining” in a clause may or may not be a step towards recovery, but certainly not actual recovery, for it is only a tentative decision to withhold and retain the money. So long the money is just withheld or retained, the action of the respondent would not be questionable. But the moment the purchaser claims that he has recovered the amount, the purchaser exceeds the limit. It would not be correct if the respondent proceeds to recover the amount and does not indicate any withholding or retaining the amount till the claim of the purchaser arising out of the same contract or any other contract is either mutually settled or determined either by the arbitrator or by the competent court. [44]

The word “Recover” has a technical meaning in law whereby it signifies to recover by action or by judgment of the court. But it could be used in large and more popular sense by any legal means which would include distress. Where there is a successful set-off, the plaintiff/party could be said to have recovered the balance due to him. Recovery does not have any tentative character. [45]

23. FIDIC CONDITIONS OF CONTRACT

(A) Site

Giving possession of site is one of the obligations which the Employer has to perform. The obligation of the Employer to give possession of the site to the Contractor, in law, means handing over possession of the entire site, not a part thereof or in bits and pieces, unless there is a stipulation to that effect. The contract clearly implies that the building owner should be in a position to hand over the site to the Contractor and for this purpose it is necessary for the Employer to have the possession of the land. The obligation of the Employer to hand over the site cannot be avoided on the plea of non-availability of site.

In case of failure of the building owner to hand over the entire site to the Contractor at the very commencement, the breach will be deemed to be on the part of the building owner. The obligation extends to the point of handing over of the site but the site should be in such a condition that it is reasonably fit for immediate erection thereon of the building proposed. Often a plea is taken that there was a clause in the building contract providing that before the commencement of the building works the Contractor will have to acquaint himself with the condition of the land. [46]

(B) Engineer

Clause 3.1 of the FIDIC contracts defines the Engineer's duties and authority as under:

(1) General

(2) Standard of care

(3) Design

(4) Examination of the site

(5) Drawings, information and instructions

(6) Manner of execution

(7) Nomination of a sub-contractor or supplier

(8) Compliance with legislative requirements

(9) Exercise of check on estimates

(10) Framing of quantities

(11) Recommendation of builders

(12) Supervision of works

(13) Exercise of administrative control

(14) Survey

(15) Appointment of quantity surveyor

(16) Agent of the Employer

(17) Quasi-judicial duties. [47]

(C) Drawings, Information, and Instructions

It is the duty of the Engineer to supply drawings, information and instructions when requested by the builder or Contractor. This has to be complied within a reasonable period of time. It may be that by reason of delay or failure in supplying of plans the Contractor becomes entitled to rescind the contract altogether or is released of an obligation to complete the work within a specified time. The Engineer may become liable to the Employer for the loss incurred by him, and a part of such loss may be part of rent or profit which would have been derived from the building, or it may be loss of interest on capital. [48]

(D) Supervision of Works

An engineer is not expected to be constantly on the works and supervise every detail, yet it is not sufficient for him to make occasional visits and get the defects rectified. His duty is to devote such amount of supervision as will enable him to give a certificate that the work has, or has not, been done honestly and in accordance with the terms of the contract. Although he may depute some parts of his duty to subordinates, such as clerks, workers or an inspector, he cannot avoid his responsibility by saying that the negligence was theirs.

The failure of the engineer to discover that the quality of the materials used thereof were not good or not as provided for in the contract or might lead to a loss for the employer, will render him liable to make good the loss.

If an engineer finds that a part of the work that he is required to do is outside his expertise, he may either refuse to do the whole job or recommend the appointment of a specialist consultant by the employer (in which case he will have no responsibility for the work of that specialist consultant), or appoint a specialist consultant himself (in which case he will be responsible for the work of that specialist consultant but will owe the same duty in respect of the specialist consultant as he owes to the employer). [49]

(E) Delegation by Engineer

If an engineer finds that a part of the work that he is required to do is outside his expertise or otherwise, the engineer may appoint a specialist consultant to do the work in which case the engineer will be responsible for the work done by such consultant appointed by him.

The maxim *delegates non potet delegare* clearly debars the agent from delegating his powers beyond the limit prescribed by the principal. The engineer may appoint a substitute only with an implied or express consent of the employer and not otherwise. As a general rule, an engineer cannot delegate his power to another person to execute a work involving the exercise of discretion. [50]

(F) Instructions of Engineer

It is now recognised that unless there is some genuine reason which is outside the control of the engineer, he has to provide instructions for the employer taking into consideration the requirements of the builder. In general, unless the contract expressly stipulates to the contrary, the contractor is entitled to choose his method of working; the corollary of this is that the contractor is not entitled, when faced with difficulties, to demand or require instructions as to how to overcome them.

If an engineer finds the contractor using or proposing to use a method of working, which he considers potentially unsafe, or which is likely to fail in its intention, his duty to the employer will require him to intervene and give instructions to the contractor. [51]

(G) Substantial Performance

In the absence of any indication in the contract, substantial performance will be treated as sufficient performance of an entire contract. The contractor will be allowed to recover the full price, if he has substantially performed the contract less the deduction in respect of defective work. The principle related to *quantum meruit* will be applicable in giving due compensation to the contractor. [52]

(H) Unforseeable Physical Conditions

The expression “unforeseeable claims” in relation to the claim in performance of a contract or its breach means those claims which arise out of the situations or circumstances which are unexpected or not provided in the contracts. Such claims arise on occurrence of loss due to act of God or Force Majeure such as strikes, break-downs, lock-outs, riots or other unforeseen circumstances which the parties to the contract did not contemplate. [53]

It has been held that if any of the materials brought to the site for work are damaged or destroyed in consequence of hostilities etc., the Contractor shall (when ordered by the Engineer-in-Charge) remove all serviceable materials salvaged from the damaged work. The Contractor shall be paid as per the contract rates in accordance with the contract agreement for the re-construction of all the works ordered by the Engineer-in-Charge, such payments being in addition to the compensation up to the value of the work originally executed before being damaged and not paid for. [54]

(I) Plant, Materials and Workmanship

Where the ownership either of materials or plant is effectively transferred to the building owner, by an express provision or otherwise, the transfer is never quite absolute, since it will usually be subjected to a right, express or implied, for the contractor to remove all the excess plant and materials, which have not been used and fixed for the completion of works. The property in all materials and fittings, once incorporated in or affixed to a building, will pass to the free-holder. As soon as materials of any description are used in a building or any other erection, they cease to be the contractor's property and become that of the free holder. The employer under a building contract may not necessarily be the free-holder, but may be a lessee or licensee, or may even have no interest in the land at all, as in the case of a sub-contractor. However, once the builder has annexed materials, the property in them passes from him, and at least as against him, they become the absolute property of his employer, whatever be the latter's tenure of or title to the lands. The builder owner may himself be entitled to sever them as against some person for example, if the materials are tenant's fixtures. The builder cannot reclaim them if the building owner or anyone else has subsequently severed them from the soil. [55]

(J) Manner of Execution

A contractor shall undertake to do work and supply materials:

(1) With due skill and care, in a workman like manner; and

(2) With materials of a good quality. In the case of materials described expressly, they shall be free from defects. In case the materials are not described, or not described in sufficient details, the contractor has to warrant their quality. [56]

(K) Extension of Time for Completion

Normally, in Indian contracts, if in the opinion of the Engineer the work is delayed:

(1) By force majeure; or

(2) By reason of exceptionally inclement weather; or

(3) By reason of proceedings taken or threatened by dispute with adjoining or neighbouring owners or public authorities arising otherwise than through the contractor's own default; or

(4) By works or delays of other contractors or tradesmen engaged or nominated by the employer and not referred to in specifications; or

(5) By reason of the Engineer's instructions; or

(6) By reason of civil commotion, local combination of workers or strike or lockout affecting any of the building traders; or

(7) In consequence of the contractor not having received in due time the necessary instructions from the Engineer,

The Engineer shall make reasonable and fair extension for time of completion of the contract works. The Engineer shall give a written notice thereof to the Contractor. The Contractor shall nevertheless use his endeavours to prevent delay and shall do all that may be reasonably required to the satisfaction of the architect to proceed with the works. [57]

(L) Delay and Prevention

If the Contractor's performance of the contract is prevented or delayed due to:

(1) A cause beyond its reasonable control which is reasonably unforeseeable and without the fault or negligence of contractor,

(2) An act of God, any act or neglect of the employer or the owner, or by any sub-contractor employer by the employer, act of civil or military authority, Governmental priority, strike, lock-out, flood, earthquake, epidemic, war, riot, fire, or

(3) Inability on account of a cause beyond the reasonable control of the contractor to obtain necessary materials, components, services or facilities for which no other substitute is reasonably available, the contractor shall, as soon as practical, within a reasonable time, i.e. from the time the contractor becomes aware of the commencement of any such delay, give to the employer written notice thereof and the anticipated impact of the delay on the performance of the work.

With respect to such delay, an extension of time shall be the contractor's sole remedy, except that in the event when the contractor's performance is delayed by acts of the employer or owner or by other contractors under the employers or owners control and the contractor is unable to take action to avoid an increase in its cost of performance, the contractor shall be entitled to actual costs in respect of each delay.

Actual costs may include:

(1) Invoiced costs of all sub-contractors to the contractor;

(2) Labour and material escalation costs;

(3) Standby costs incurred during period of suspension of works, if any;

(4) Costs associated with mobilisation and de-mobilisation;

(5) Extended over-head costs incurred as a result of such delay, including but not limited to insurance and bond premiums, extended supervision, site costs, and proportional home office overheads.

Such costs may be verified by the employer. The contractor shall be fully responsible for the timely ordering, scheduling, expediting, and delivering of all equipment and materials furnished by the contractor under the contract. [58]

(M) Defects

If the work done by the contractor is found to be defective, he will not be said to have performed his obligations of executing the work in accordance with the contract and as such will be liable to the employer for such defects. This principle is recognised and incorporated in *section 73, Indian Contract Act, 1872* and can be explained as follows:

> 'A' contracts to repair 'B's house in a certain manner, and receives payment in advance. 'A' repairs the house, but not according to the contract. 'B' is entitled to recover from 'A' the cost of making the repairs which confirm to the contract.

If the work executed by the contractor is defective, he is liable to replace it by good work and if this is not possible, he must pay damages to the employer. The damages will be either the amount required for repairing the work done or the payment of the contract price at reduced rates.

The builder or contractor is not bound to do more than repair the existing structure, including making good the effects of ordinary wear and tear as well as damages from other causes.

If a contractor undertakes to repair and make good defects discovered within a fixed period, his obligation extends to and is limited by defects discovered within that time, although the cause of those defects (or other defects) may not be discovered until after the expiration of the period. [59]

(N) Cost of Remedying Defects

In the absence of any term to the contrary, where the work to be done on the approval of the employer has been paid for by him, it is submitted that the employer is estopped from recovery of defects, or from saying that there was no approval from him, as they become the absolute property of his employer, whatever be the latter's tenure of or title to the lands. The builder owner himself not have provided for any particular work to be done. In such case payment will not debar the employer from claiming damages for defective work done by the contractor.

Mere lapse of time does not, subject to the law of limitation and express provision in the contract, debar a building owner from complaining of defective work although, the effect of it may make it more difficult to prove that any damage which may appear was caused by defective work. However, if that is proved, liability must follow. [60]

(O) Measurement and Valuation

In the FIDIC Red Book, as in Indian re-measurement contracts, the Engineer-in-charge shall, except as otherwise provided, ascertain and determine by measurement the value in accordance with the contract.

Measurement of all items having financial value shall be entered in Measurement Book and/or Level Field Book so that a complete record is maintained of all measurable works to be performed under the contract.

All measurements and levels shall be taken jointly by the Engineer-in-charge or the contractor or their authorised representatives from time to time during the progress of the work and such measurements shall be signed and dated by the Engineer-in-charge or the contractor or their representatives in token of their acceptance. If the contractor objects to any of the measurements recorded, a note shall be made to that effect and signed by both parties.

If for any reason, the Contractor or his authorised representative is not available and the work of recording measurements is suspended by the Engineer-in-charge, the Government shall not entertain any claim from a contractor for any loss or damage on this account. If the contractor or his authorised representative does not remain present at the time of such measurements after a notice has been given in writing three days in advance or fails to counter-sign or record objections within a week from the date of the measurement, then such measurements recorded in his absence by the Engineer-in-charge or his representative shall be deemed to be accepted by the contractor.

The contractor shall, without any extra charge, provide all assistance with every appliance, labour and other things necessary for measurements and recording levels. [61]

(P) Payment of Retention Money

Retention money is that which has been earned and has become due to the contractor, but the payment of which is deferred under the terms of the contract until some event (generally final certified completion/acceptance) has occurred.

It is the difference between the value of the work executed and the money advanced on account. It is money earned but not yet payable and does not include money certified as payable.

Most building contracts provide that ‘interim certificates’ shall be given by an engineer for payment from time to time by the employer to the contractor up to a certain percentage of the value of the ‘labour and materials already supplied and fixed in the building’. Such payments represent an approximate value of the work done. The interim certificate may also include the price of the materials delivered at the site by the builder. As the interim payments to the contractor are usually made at a specified per cent on the value of the work done and materials supplied, there remains on each of these values, a balance unpaid. These balances constitute what is called retention money which is retained by the employer as a security for the due completion of the work, and as a fund to be draw upon whether to complete the work or to rectify defects, on the failure of the contractor to do so.

A contract may provide for progress payments to be made as the work proceeds but retention money is to be held until completion. Then, entire performance is usually a condition precedent to payment of the retention money but not to the progress payments. In building contracts the retention money, generally, does not exceed ten per cent of the payments.

The time for the retention money to become payable depends on the contract. No retention may be taken where there are no contractual provisions for it. Where there is no mention about its payment, then, it is submitted that it will become payable after the actual completion of the work according to the terms and conditions of the contract. If the contract provides that retention money shall become payable upon ‘practical completion’ which may mean to be equivalent to ‘substantial completion’, the contractor shall be entitled to get back his retention money on the completion of the work. This is subject to any provision for the maintenance period in the contract.

In most of the Indian Government contracts, the term ‘retention money’ is used for a security deposit, which consists of the money deposited by the contractor with his tender. Deductions are made from time to time in his running bills according to the terms of the contract. Some contractors deposit a lump sum amount towards the security deposit, in which case they are exempted from the payment of earnest money only but not the usual deductions which are to be made from the running

bills. This is done strictly in accordance with the terms of the contract. [62]

(Q) Termination by Employer

Typically in Indian contracts the employer will be entitled to terminate the contract if the contractor has:

(1) Abandoned the work; or

(2) Not followed the stipulations in the contract and thereafter not taken steps to rectify the mistakes; or

(3) Refused to perform the contract; or

(4) Subcontracted the whole works; or

(5) Indulged in misconduct; or

(6) Failed to comply wit the necessary laws, by-laws and regulations of the local body, etc.; or

(7) Being a company, has passed a resolution that the company shall be wound up.

Such termination can take place only if a notice in writing has been served upon the contractor without prejudice to any other right or remedy against the contractor. In India, as in England and other common law jurisdictions, termination may take place as a result of the operation of the contract or as a result of the operation of law. [63]

(R) Contractor's Entitlement to Suspend Work

'Repudiation' has several meanings, but it is the most convenient term to describe circumstances where one party so acts or so expresses himself so as to show that he does not mean to accept the obligations of a contract any further. Such a repudiation, if accepted by the other party, releases the innocent party from further performance. Even breach of contract entitles the other party to damages further performance. Every breach of contract entitles the other party to damages to compensate for the loss sustained in consequence of breach. The following are the circumstances where breach of contract by one party entitles the other party to put to an end to all remaining primary obligations of both parties:

(1) Where the contracting parties have agreed, whether by express words or implication of law, that any breach of the contractual term in question shall entitle the other party to put to an end to all remaining primary obligations of both parties, i.e. where there is a breach of conditions;

(2) Where the event resulting from the breach of contract has the effect of depriving the other party substantially of the whole benefit as intended by the parties, i.e. where there is a fundamental breach.

Where there is a breach of a fundamental term of the contract, the cause of action in damages does not depend on the innocent party rescinding the contract. Depending on the circumstances the breach may occur later, in which case the innocent party may alternatively elect not to rescind the contract, but the breach will nevertheless sustain a claim for damages.

In general, a term is necessarily implied in any contract that neither party shall prevent the other from performing it. In the case of prevention, that is to say where the employer has wrongfully terminated the contract, or has committed a fundamental breach justifying the builder in treating the contract as over and the latter accordingly ceases work, the measure of damages will be the loss of profit which he would otherwise have earned. Usually, where the work is partly carried out at the time when the contract is repudiated, the builder will normally be entitled to the value of the work done at the contract rates plus his profits.

In cases where the work is partly carried out and the contract is repudiated, a contractor should consider his position carefully before deciding to sue for damages for breach of contract, since it has been held that in such a case, he may choose not to sue for damages but instead bring an action in *quantum meruit* for the work done by him. [64]

It is a question of fact in each case when the contract has not been performed as to which party was at fault in rendering the contract ineffective. Performance may be prevented by the employer rendering himself incapable of carrying out the contract. A party, who by his own act disables himself from fulfillment of the contract, makes himself liable for breach of it and dispenses with the necessity of any request that he will perform it.

The prevention of performance may be total or partial. Prevention may take place prior to the commencement of the work, when the work is partly performed, or before the completion of the work.

If the employer by his own act renders himself incapable of carrying out the contract he has made, e.g. by selling the land on which the works are to be constructed, the contractor at once ceases to be bound by the contract and can bring an action for compensation against the the employer for his failure to perform his part of the contract.

In the case of partial prevention, i.e. where the breach by the employer is not fundamental and does not entitle the builder to cease work, or, being fundamental, is not treated as a repudiation by the builder, the measure of damages is the loss of profit arising from the reduced profitability or added expense of the work carried out and completed by the builder. It is, of course, quite possible for a continuing fundamental breach by the employer to affect the profitability of work carried out (since the builder may not immediately elect to treat the contract as ended) and then to give rise to a claim for loss of profit on the uncompleted work.

If the prevention goes to the root of the contract, all operations must cease, otherwise the builder must go on with the completion.

The contractor will not be entitled to treat the contract as repudiated merely because of the breach of a particular stipulation which does not go to the root of the contract. In such a case, the remedy is by way of a claim for damages for the particular breach.

The law is clear that the breach of one stipulation does not necessarily carry with it even an implication of an intention to repudiate the whole contract. Further, if the parties have proceeded with the performance of the contract, it is less likely that, by the breach of a stipulation by one party, one should intend to declare one's incapacity to perform the contract or his intention not to carry it out. Each situation should be carefully evaluated on its own facts. [65]

24. TERMINATION BY CONTRACTOR (CLAUSE 16.2)

Normally, in Indian contracts and practice, the contractor is entitled to terminate the contract on the occurrence of any of the following:

(A) Prevention by not Affording Possession of Site

In a building contract, it is the duty of the building owner to hand over the possession of the site to the contractor. He is bound to deliver the entire site. In the case of failure of the building owner to hand over the entire site to the contractor, the breach will be deemed to be on the part of the building owner. The site should be handed over by the building owner to the contractor within a reasonable time. What is reasonable time is a question of fact in each case. If the contractor does not get possession of the site within a reasonable time, he is entitled to refuse any longer to do the work; or he may, as soon as he obtains its possession, commence and continue the work, in which case he waives the right of treating the obligation to

provide the site as a condition precedent, but reserves his right to claim damages for breach of contract from the building owner.

(B) Prevention by not Supplying Plans or Instructions

An employer, who either expressly or impliedly, has contracted to supply drawings, without which the work cannot be completed, prevents performance if he or his architect does not do so within a reasonable time. What is a reasonable time is a question of fact, but usually plans and instructions should be furnished reasonably promptly upon request because it is necessary for the builder to make provision for the supply and preparation of the materials and the plans are, therefore, required often long before the date at which the work itself will actually be put into the building or works. The builder, within reasonable limits, is entitled to say when it is necessary for him to have such plans and instructions, for he is entitled to carry out the work to the best of his advantage.

(C) Prevention by the Architect/Engineer

If specialists are employed directly by the building owner, then the employer will, in the absence of a contrary stipulation, be responsible to the contractors for delay caused by them as his agents.

(D) Prevention by Fraud

If the building owner or employer has made fraudulent representations as to the facts, which have deceived the person tendering and caused him to make a disadvantageous tender, the builder or contractor who has had his tender accepted, on discovering the fraud may rescind the contract and, if necessary, bring an action or commence arbitration for that purpose.

(E) Effect of Prevention

If the building owner prevents performance, a contract to pay what is reasonable is implied by the law, and the contractor may recover the contract price and damages for the prevention. [66]

(F) Force Majeure

The expression Force Majeure, in Indian law is more exhaustive in meaning than the Latin expression *'vis major'* and includes strikes, lock-outs, etc. not included in the latter and the 'act of God'. Its requirements are [67]:

(1) It must proceed from a cause not brought about by any of the parties.

(2) The cause must be inevitable and unforeseeable.

(3) The cause must make the execution of the contract wholly impossible.

Force Majeure is embodied in the doctrine of frustration in *section 56 of the Indian Contract Act, 1872*, which reads as under:-

> A contract to do an act which, after the contract is made, becomes impossible, or by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.
> Where one person has promised to do something which he knew, or, with reasonable diligence, might have known, or which the promisee did not know to be impossible or unlawful, such promisor must make compensation to such promisee for any loss which such promisee sustains through the non-performance of the promise."

Force Majeure may be defined as the occurrence of an intervening event or change of circumstances so fundamental as to be regarded by the law both as striking at the root of an agreement, and as entirely beyond what was contemplated by the

parties. Frustration would apply if an event which could not be foreseen by both the parties supervenes. The Supreme Court has held that frustration could be equated to the expression 'impossible performance. [68]

A list of frustrating events can only be illustrative and not exhaustive. Some such events are as follows:

(a) Destruction of the subject matter of the contract e.g. by fire, flood or other causes, natural or otherwise.

(b) Requisition of the subject-matter of the contract by the government.

(c) Delay sufficiently long to have the effect of frustrating the commercial venture embodied in the contract.

(d) Total non-availability of materials and men.

(G) Run Away Inflation

The Indian law relating to frustration will be directly applicable by operation of law (and Article 19.7) in addition to the contractual provisions set out in Clause 19 of the FIDIC standard forms. [69]

25. THE EFFECT OF CERTIFICATES

One does come across, from time to time, claims which have been successfully defeated because of the allegedly final or conclusive effect of certificates. This is quite natural, because if one thinks about it, especially with perishable or fungible goods, there is often only a relatively short period within which their quality may be properly tested. If certificates, especially ones called for by a contract and designated as final, were not normally conclusive, international commerce would find itself awash with disputes. Accordingly, one should not be surprised to know that the contractually intended effect of certificates is frequently honoured by arbitrators.

If one examines the wording of clause 14, particularly sub-clauses 14.6, 14.7 and 14.8, it can be see that the draftsmen intend certified payments to be promptly honoured, otherwise 'financing charges' would not be immediately payable under sub-clause 14.8. However, the contracts do not set out the intended effect of certificates as clearly as they might. It would have been useful perhaps for the contracts to state that the certificates create debts immediately due from the Employer to the Contractor. The reason this should be stated '*ex abundanti caurela'* is that the legal effect of certified sums varies widely from country to country, and if, as is apparently the case, the sums certified are intended to be paid (more or less immediately), it behoves the draftsmen to say so – clearly. The discussion below of the position relating to set off outlines one person (only) why this should be the case. Generally, every DAB and subsequent arbitral tribunal will have the right, in light of their own experience and legal knowledge, to decide whether these contracts are worded in such a way as to give a right to immediate payment. The clearer the wording is, the less doubt there should be in any individual case.

The certificate issued on completion described in GC 14.10 through to 14.14 is in a slightly different position. It is described as a 'Final Payment Certificate' and is clearly intended, subject to the DAB/arbitration provisions, to bring to a close any controversies about the sums finally due to the Contractor. [70]

26. PERFORMANCE SECURITY

The wording of these provisions is such that, while the notions underlying the words feels quite familiar, they are not that specific, and probably intentionally are capable of being understood in a number of ways. While this may be laudable from some points of view, it is very unfortunate when one goes to consider that the law of guarantees, indemnities, letters of

credit and related topics is very specific, and often very developed. This means, generally, that “woolly” language may not accomplish that which the beneficiary hoped for.

At the very least it can be appreciated that if “on demand” rights to immediate payment are to be created, the “local” rules relating to the language to be used may have to be observed. At the very least there will be a danger that inexact language may turn something which is intended to be “on demand” or “conditional” (or even valid) to be something else. What the local rules are, may in turn vary according to the law governing the guarantee. The FIDIC drafts are not bad precedents, and people who go with “back of the envelope” drafts produced by people who are not experts in the field and in the governing law, do so at their own peril.

Finally, there is no reason why the examples given by FIDIC should not be tied into the same or similar dispute provisions as those found in the contract. If there is a dispute about payment, the party making the claims should not be required upon non-observance to sue in the courts of the Defendant's residence, which is the position that might arise without providing for ICC arbitration or some other appropriate form of dispute resolution in relation to the Performance Security itself. [71]

27. LIQUIDATED DAMAGES

Whether or not you have to prove actual losses under these conditions is a common issue, and is decided differently from country to country. One of the changes from the Text edition 1998 to the First edition 1999 was the verification of the fact that the right to deduct liquidated damages is subject to the Employer's claim provisions under Article 2.4. In other words, liquidated damages are not a “self-help” remedy if the cash flow is getting a little tight towards the end of the project; the entitlement is subject to verification by the DAB or even in arbitration. Of course, it may be vital in a particular contract to have this contractual and inter parties situation reflected in the Performance Security itself, otherwise old tricks may come to the fore.

In some jurisdictions (mainly civil law) it is possible to have agreed damages lowered if the actual damage suffered is lower. In some countries (mainly common law), liquidated damages provisions have to be nullified if they are not a “genuine pre-estimate of loss”. There is little that the draftsmen of the contract can do to deal with these varied situations, but it could be said that the wording of the sample standard form clauses could be less sparse in order to parry some of the obvious points that non-paying respondents may wish to raise. [72]

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1 *Sunder Lal Khatri v. Delhi Development Authority,* 1994 (2) Arb LR 479 : 1996 AIHC 742 (Del).

2 *P.C. Sharma & Co. v. Delhi Development Authority,* 1998 (2) RAJ 336 (Del) : 1998 Supp Arb LR 300.

3 (1902) 86 LT 764*: Hudson's BC* , 4th Ed., Vol. 2, p. 354.

4 *Ibid* .

5 *State of Karnataka v. R.N. Shetty and Co.,* AIR 1991 Kant 96 [*LNIND 1990 KANT 36*] (DB) : (1990) 1 Kar LJ 286 [*LNIND 1990 KANT 36*].

6 *Hudson's Building and Engineering Contracts,* 11th ed., Vol. 1, para 4.173, p. 590.

7 *Vishwanath Sood v. Union of India,* (1989) 1 SCC 657 [*LNIND 1989 SC 48*] : AIR 1989 SC 952 : 1989 (1) Arb LR 357; *Hans Construction Co. v. Delhi Development Authority,* 1996 (Suppl) Arb LR 420 (Del); *Union of India v. S. Kumar,* 2004 (4) RAJ 219 (Del) (DB); *Puran Chand Nangia v. Delhi Development Authority,* 2006 (2) Arb LR 456 (Del); *Union of India v. Arctic India,* 2008 (1) RAJ 481 (Bom); *National Building Construction Corporation v. R.C. Bhatia,* 2006 (3) RAJ 596 : 2006 (2) Arb LR 52 (Del); *Subhash & Co. v. DDA,* 2006 (3) RAJ 618 (Del).

8 (2011) 5 SCC 758 [*LNIND 2011 SC 464*].

9 *State of Maharashtra v. Digambar Balwant Kulkarni,* (1979) 2 SCC 217 [*LNIND 1979 SC 115*] : AIR 1979 SC 1339 : [1979] 3 SCR 188 [*LNIND 1979 SC 115*].

10 *Ibid.*

11 *B.S.N.L v. Motorola India Pvt. Ltd.,* AIR 2009 SC 357 : (2009) 2 SCC 337 [*LNIND 2008 SC 1835*] : (2008) 3 Arb LR 531 [*LNIND 2008 SC 1835*] : (2008) 4 RAJ 326.

12 (2011) 5 SCC 758 [*LNIND 2011 SC 464*].

13 AIR 1946 Bom 1 : 47 BLR 719 : 222 IC 337 (DB).

14 AIR 1958 SC 512 : 1958 SCJ 866 [*LNIND 1958 SC 27*] : 60 Bom LR 948.

15 AIR 1986 Kant 14 [*LNIND 1985 KANT 113*]: ILR (1985) Kant 2992.

16 AIR 1946 Bom 1 : 47 BLR 719 : 222 IC 337 (DB).

17 AIR 1958 SC 512 : 1958 SCJ 866 [*LNIND 1958 SC 27*] : 60 Bom LR 948.

18 AIR 1986 Kant 14 [*LNIND 1985 KANT 113*]: ILR (1965) Kant 2992.

19 (1897) 15 NZLR 296.

20 (1899) 18 NZLR 129.

21 (1902) 86 LT 764.

22 July 1, 1970, CA, *unreported.*

23 *N.D.R. Israni v. Delhi Development Authority,* (1989) 2 Arb LR 349 (Del).

24 *Hudson's Building and Engineering Contracts,* 11th Ed., Vol. 2, para 10.091, p. 1191; *Metro Electric Co. v. Delhi Development Authority,* AIR 1980 Del 266 [*LNIND 1980 DEL 14*] (DB); *Rawla Construction Co. v. Union of India,* ILR (1982) 1 Del 44 ; *State of Karnataka v. R.N. Shetty and Co.,* AIR 1991 Kant 96 [*LNIND 1990 KANT 36*]: 1991 (1) Arb LR 334 (DB).

25 13 CILL 57.

26 *Continental Construction Co. v. National Hydroelectric Power Corporation Ltd.,* 1998 (1) Arb LR 534 (Del).

27 AIR 1941 Nag 111 : 1940 NLJ 486 : 194 IC 257 (DB).

28 *National Fertilizers Ltd. v. Puran Chand Nangia,* (2000) 8 SCC 343 [*LNIND 2000 SC 1353*] : AIR 2001 SC 53 : (2000) 3 RAJ 237 : (2000) 3 Arb LR 461.

29 8th ed., pp. 294-296.

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31 *Harcharan Singh Arora v. Union of India,* (1990) 4 SCC 647 [*LNIND 1990 SC 462*] : AIR 1991 SC 945 : 1990 (2) Arb LR 243.

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(IN) PC Markanda: Arbitration Step by Step

PC Markanda: Arbitration Step by Step

P C Markanda

APPENDIX 1 The Arbitration and Conciliation Act, 1996 [1][No. 26 of 1996]

[16th August, 1996]

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.

WHEREAS THE UNITED NATIONS Commission on International Trade Law (UNCITRAL) has adopted the UNCITRAL Model Law on International Commercial Arbitration in 1985 :

AND WHEREAS the General Assembly of THE UNITED NATIONS has recommended that all countries give due consideration to the said Model Law, in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice :

AND WHEREAS the UNCITRAL has adopted the UNCITRAL Conciliation Rules in 1980 :

AND WHEREAS the General Assembly of THE UNITED NATIONS has recommended the use of the said Rules in cases where a dispute arises in the context of international commercial relations and the parties seek an amicable settlement of that dispute by recourse to conciliation :

AND WHEREAS the said Model Law and Rules make significant contribution to the establishment of a unified legal framework for the fair and efficient settlement of disputes arising in international commercial relations :

AND WHEREAS it is expedient to make law respecting arbitration and conciliation, taking into account the aforesaid Model Law and Rules :

BE it enacted by Parliament in the Forty-seventh Year of the Republic as follows:

PRELIMINARY

S. 1. Short title, extent and commencement.—

(1) This Act may be called the *Arbitration and Conciliation Act, 1996*.

(2) It extends to the whole of India :

Provided that Parts I, III and IV shall extend to the State of Jammu and Kashmir only insofar as they relate to international commercial arbitration or, as the case may be, international commercial conciliation.

Explanation.— In this sub-section, the expression ‘international commercial conciliation’ shall have the same meaning as the expression ‘international commercial arbitration’ in clause *(f)* of sub-section (1) of Section 2, subject to the modification that for the word ‘arbitration’ occurring therein, the word ‘conciliation’ shall be substituted.

(3) It shall come into force on such date [2] as the Central Government may, by notification in the official Gazette appoint.

PART 1 ARBITRATION

CHAPTER 1 GENERAL PROVISIONS

S. 2. Definitions—

(1) In this Part, unless the context otherwise requires,—

(a)

'arbitration' means any arbitration whether or not administered by permanent arbitral institution;

(b)

'arbitration agreement' means an agreement referred to in Section 7 ;

(c)

'arbitral award' includes an interim award;

(d)

'arbitral tribunal' means a sole arbitrator or a panel of arbitrators;

(e)

'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;

(f)

'international commercial arbitration' means 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

(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;

(g)

'legal representative' means a person who in law represents the estate of a deceased person, and includes any person who in-termeddles 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;

(h)

'party' means a party to an arbitration agreement.

Scope

(2) This Part shall apply where the place of arbitration is in India.

(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.

(4) This Part 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 thereunder.

(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, this Part shall apply to all arbitrations and to all proceedings relating thereto.

Construction of references

(6) Where this Part, except Section 28, leaves the parties free to determine a certain issue, that freedom shall include the right of the parties to authorise any person including an institution, to determine that issue.

(7) An arbitral award made under this Part shall be considered as a domestic award.

(8) Where this Part—

(a) refers to the fact that the parties have agreed or that they may agree, or

(b) in any other way refers to an agreement of the parties,

that agreement shall include any arbitration rules referred to in that agreement.

(9) Where this Part, 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 counterclaim, and where it refers to a defence, it shall also apply to a defence to that counterclaim.

SERVICE OF DOCUMENTS, ETC. [SEC. 3]

The provision on the subject of service of notices in the preceding 1940 Act was in Section 42. [3] The provisions of *Section 3 of the Arbitration and Conciliation Act, 1996* are more or less to the same effect. The parties may make their own agreement as to the mode of service.

S. 3. Receipt of written communications.—

(1) Unless otherwise agreed by the parties,—

(a) 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

(b) if none of the places referred to in clause (*a*) can be found after making a reasonable inquiry, 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.

(2) The communication is deemed to have been received on the day it is so delivered.

(3) This section does not apply to written communications in respect of proceedings of any judicial authority.

WAIVER AND ESTOPPEL [SEC. 4]

S. 4. Waiver of right to object.—

A party who knows that—

(a) any provision of this Part from which the 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.

ROLE OF JUDICIAL AUTHORITY [S. 5]

Section 5 defines the role of judicial authority in respect of arbitration matters.

S. 5. Extent of judicial intervention.—

Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervence except where so provided in this Part.

ADMINISTRATIVE ASSISTANCE [SEC. 6]

S. 6. 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.

CHAPTER 2 ARBITRATION AGREEMENT

Arbitration agreement : Sections 2(b) and 7

The concept of arbitration agreement is spelled out in the *Arbitration and Conciliation Act, 1996* in S. 2(*b*) and S. 7. These provisions are as follows:

‘arbitration agreement’ means an agreement referred to in Section 7.

S. 7. Arbitration agreement.—

(1) In this Part, ‘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;

(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 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. [4]

POWER OF JUDICIAL AUTHORITY TO REFER PARTIES TO ARBITRATION

Section 8 of the Arbitration and Conciliation Act, 1996 confers the power on a judicial authority to stay its proceedings and refer the parties to arbitration. The section runs as follows:

S. 8. Power to refer parties to arbitration where there is an arbitration agreement—

(1) A judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration.

(2) The application referred to in sub-section (1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof.

(3) Notwithstanding that an application has been made under sub-section (1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made.

S. 9. Interim measures, etc. by Court.—

A party may, before, or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with Section 36, apply to a court—

(i) for the appointment of a guardian for a minor or a person of unsound mind for the purposes of arbitral proceedings; or

(ii) for an interim measure of protection in respect of any of the following matters, namely:—

(a) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;

(b) securing the amount in dispute in the arbitration;

(c) the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising any samples to be taken or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;

(d) interim injunction or the appointment of a receiver;

(e) such other interim measure of protection as may appear to the court to be just and convenient,

and the Court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it.

CHAPTER 3 COMPOSITION OF ARBITRAL TRIBUNAL

Under Sec. *Section 10 of the Arbitration and Conciliation Act, 1996*, the parties are free to determine the number of arbitrators.

S. 10. Number of arbitrators.—

(1) The parties are free to determine the number of arbitrators, provided that such number shall not be an even number.

(2) Failing the determination referred to in sub-section (1), the arbitral tribunal shall consist of a sole arbitrator.

APPOINTMENT OF ARBITRATORS

Section 11 of the Arbitration and Conciliation Act, 1996 replaces Section 8 of the 1940 Act. [5] The power of the parties to constitute an arbitral tribunal and that of the court to do so have been stated in the same section.

S. 11. Appointment of arbitrators.—

(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.

(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) 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 any 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 situate and, where the High Court itself is the Court referred to in that clause, to the Chief Justice of that High Court.

DISQUALIFICATIONS OF ARBITRATORS

Sections *Section 12* and *13* of the *Arbitration and Conciliation Act, 1996* lay down a set of provisions about the disqualifications of an arbitrator and the procedure for challenge. The provisions of Section 12 are as follows :

S.12. Grounds for challenge.—

(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.

(2) 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.

(3) An arbitrator may be challenged only if—

(a) circumstances exist 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.

(4) 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.

PROCEDURE FOR CHALLENGING ARBITRATOR

S.13. Challenge procedure.—

(1) Subject to sub-section (4), the parties are free to agree on a procedure for challenging an arbitrator.

(2) 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.

(3) 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.

(4) If a challenge under any procedure agreed upon by the parties or under the procedure under subsection (2) is not successful, the arbitral tribunal shall continue the arbitral proceedings and make an arbitral award.

(5) 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.

(6) Where 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.

S. 14. Failure or impossibility to act.—

(1) The mandate of an arbitrator shall terminate if—

(a) he becomes *de jure* or *de facto* unable to perform his functions or for other reasons fails to act without undue delay; and

(b) he withdraws from his office or the parties agree to the termination of his mandate.

(2) If a controversy remains concerning any of the grounds referred to in clause (a) of sub-section (1), a party may, unless otherwise agreed by the parties, apply to the Court to decide on the termination of the mandate.

(3) If, under this section or sub-section (3) of section 13, an arbitrator withdraws from his office or a party agrees to the termination of the mandate of an arbitrator, it shall not imply acceptance of the validity of any ground referred to in this section or sub-section (3) of section 12.

SUBSTITUTION OF ARBITRATOR ON TERMINATION OF MANDATE

Section 15 first provides in sub-s. (1) two additional grounds on which the mandate of an arbitrator becomes terminated. One of them is the arbitrator's withdrawal from office for any reason. The other is that the parties have by their agreement or in pursuance of it terminated his mandate. The vacancy in the office of an arbitrator can be filled up by appointing a new arbitrator by following the same procedure by which the original arbitrator was appointed. Hearings, if any, already held can be ordered to be repeated at the discretion of the new arbitral tribunal but subject to any agreement between the parties. Earlier rulings or orders would remain intact inspite of the replacement of an arbitrator but again subject to any agreement between the parties.

S. 15. Termination of mandate and substitution of arbitrator.—

(1) In addition to the circumstances referred to in Section 13 or Section 14, 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.

(2) 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.

(3) 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.

(4) 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.

CHAPTER 4 JURISDICTION OF ARBITRAL TRIBUNALS

Arbitral Tribunal's power to decide questions as to its own jurisdiction

Over the matter of jurisdiction, the provision in the *Arbitration and Conciliation Act, 1996* is to be found in Section 16, in Chapter IV under the heading 'Jurisdiction of Arbitration Tribunals.' The Chapter carries only two sections. One deals with the matters of jurisdiction and the nature and validity of the arbitration clause and agreement [Sec. 16] and the other with the power of the arbitral tribunal as to interim measures. [Sec. 17].

S. 16. Competence of arbitral tribunal to rule on its jurisdiction.—

(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.

(2) 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 that he has appointed, or participated in the appointment of, an arbitrator.

(3) 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.

(4) 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.

(5) 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.

(6) A party aggrieved by such an arbitral award may make an application for setting aside such an arbitral award in accordance with section 34.

INTERIM MEASURES BY ARBITRAL TRIBUNAL

The arbitral tribunal has inherent power to order a party to take interim measures of protection, unless the power is excluded by agreement between the parties. This power is now specifically incorporated in *Section 17 of the Arbitration and Conciliation Act, 1996*.

S. 17. Interim measures ordered by arbitral tribunal.—

(1) Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order a party to take any interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject-matter of the dispute.

(2) The arbitral tribunal may require a party to provide appropriate security in connection with a measure ordered under sub-section (1).

CHAPTER 5 CONDUCT OF ARBITRAL PROCEEDINGS

S.18. Equal treatment of parties.—

The parties shall be treated with equality and each party shall be given a full opportunity to present his case.

S. 19. Determination of rules of procedure.—

(1) 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).

(2) Subject to this Part, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting its proceedings.

(3) Failing any agreement referred to in sub-section (2), the arbitral tribunal may, subject to this Part, conduct the proceedings in the manner it considers appropriate.

(4) The power of the arbitral tribunal under sub-section (3) includes the power to determine the admissibility, relevance, materiality and weight of any evidence.

Place of arbitration

Section 20 deals with the place of conducting arbitration proceedings.

S. 20. Place of arbitration.—

(1) The parties are free to agree on the place of arbitration.

(2) Failing any agreement referred to in sub-section (1), 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.

(3) 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.

COMMENCEMENT OF ARBITRAL PROCEEDINGS

Section 21 provides that where the arbitration agreement is silent about the date of commencement of the arbitral proceedings, the proceedings will be taken to have commenced on the date of receipt of the notice requesting reference to arbitration.

S. 21. Commencement of arbitral proceedings.—

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.

LANGUAGE OF PROCEEDINGS

Section 22 deals with the matter of the language to be used in arbitral proceedings.

S. 22. Language.—

(1) The parties are free to agree upon the language or languages to be used in the arbitral proceedings.

(2) Failing any agreement referred to in sub-section (1), the arbitral tribunal shall determine the language or languages to be used in the arbitral proceedings.

(3) 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.

(4) 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.

FACTS SUPPORTING CLAIMS

Section 23 lays down the principle that procedural rules governing statements of claims and defence shall be subject to the parties' agreement.

S. 23. Statements of claim and defence.—

(1) 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.

(2) The parties may submit with their statements all documents they consider to be relevant or may add a reference to the documents or other evidence they will submit.

(3) 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 inappropriate to allow the amendment or supplement having regard to the delay in making it.

S. 24. Hearings and written proceedings.—

(1) 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.

(2) The 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.

(3) 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.

S. 25. Default of a party.—

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.

S. 26. Expert appointment by arbitral tribunal.—

(1) 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.

(2) 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.

(3) 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.

S. 27. Court assistance in taking evidence.—

(1) The arbitral tribunal, or a party with the approval of the arbitral tribunal, may apply to the Court for assistance in taking evidence.

(2) The 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;

(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.

(3) 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.

(4) 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.

(5) 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.

(6) In this section the expression 'Processes' includes summonses and commissions for the examination of witnesses and summonses to produce documents.

CHAPTER 6 MAKING OF ARBITRAL AWARD AND TERMINATION OF PROCEEDINGS

Section 28 contains provisions about the law applicable to the decisions of an arbitral tribunal.

S. 28. Rules applicable to substance of dispute.—

(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;

(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;

(2) The arbitral tribunal shall decide *ex aequo et bono* or as *amiable compositeur* only if the parties have expressly authorised it to do so.

(3) 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.

S. 29. Decision making by panel of arbitrators.—

(1) 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.

(2) 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.

S. 30. Settlement.—

(1) 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.

(2) If, during 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.

(3) An arbitral award on agreed terms shall be made in accordance with Section 31 and shall state that it is an arbitral award.

(4) An arbitral award on agreed terms shall have the same status and effect as any other arbitral award on the substance of the dispute.

S. 31. Form and contents of arbitral award.—

(1) An arbitral award shall be made in writing and shall be signed by the members of the arbitral tribunal.

(2) For the purposes of sub-section (1), 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.

(3) The arbitral award shall state the reasons upon which it is based, unless—

(a) the parties have agreed that no reasons are to be given, or

(b) the award is an arbitral award on agreed terms under Section 30.

(4) The arbitral award shall state its date and the place of arbitration as determined in accordance with Section 20 and the award shall be deemed to have been made at that place.

(5) After the arbitral award is made, a signed copy shall be delivered to each party.

(6) The arbitral tribunal may, at any time during the arbitral proceedings, make an interim arbitral award on any matter with respect to which it may make a final arbitral award.

(7)

(a) Unless otherwise agreed by the parties, where and in so far as an arbitral award is for the payment of money, the arbitral tribunal may include in the sum for which the award is made interest, at such rate as it deems reasonable, on the whole or any part of the money, for the whole or any part of the period between the date on which the cause of action arose and the date on which the award is made.

(b) A sum directed to be paid by an arbitral award shall, unless the award otherwise directs, carry interest at the rate of eighteen per centum per annum from the date of the award to the date of payment.

(8) Unless otherwise agreed by the parties,—

(a) the costs of an arbitration shall be fixed by the arbitral tribunal;

(b) the arbitral tribunal shall specify—

(i) the party entitled to costs,

(ii) the party who shall pay the costs,

Explanation. —For the purpose of clause (a), 'costs' means reasonable costs relating to—

(i) the fees and expenses of the arbitrators and witnesses,

(ii) legal fees and expenses,

S. 32. Termination of proceedings.—

(1) The arbitral proceedings shall be terminated by the final arbitral award or by an order of the arbitral tribunal under sub-section (2).

(2) The arbitral tribunal shall issue an order for the termination of the arbitral proceedings where—

(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.

(3) 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.

S. 33. Correction and interpretation of award; additional award.—

(1) Within thirty days from the receipt of the arbitral award, unless another period of time has been agreed upon by the parties—

(a) a party, with notice to the other party, may request the arbitral tribunal to correct any computation errors, any clerical or typographical errors or any other errors of a similar nature occurring in the award;

(b) if so agreed by the parties, a party, with notice to the other party, may request the arbitral tribunal to give an interpretation of a specific point or part of the award.

(2) If the arbitral tribunal considers the request made under sub-section (1) to be justified, it shall make the correction or give the interpretation within thirty days from the receipt of the request and the interpretation shall form part of the arbitral award.

(3) The arbitral tribunal may correct any error of the type referred to in clause (*a*) of sub-section (1), on its own initiative, within thirty days from the date of the arbitral award.

(4) Unless otherwise agreed by the parties, a party with notice to the other party, may request, within thirty days from the receipt of the arbitral award, the arbitral tribunal to make an additional arbitral award as to claims presented in the arbitral proceedings but omitted from the arbitral award.

(5) If the arbitral tribunal considers the request made under sub-section (4) to be justified, it shall make the additional arbitral award within sixty days from the receipt of such request.

(6) The arbitral tribunal may extend, if necessary, the period of time within which it shall make a correction, give an interpretation or make an additional arbitral award under sub-section (2) or subsection (5).

(7) Section 31 shall apply to a correction or interpretation of the arbitral award or to an additional arbitral award made under this section.

CHAPTER 7 RECOURSE AGAINST ARBITRAL AWARD

The way in which the proceedings under the Act are conducted and without an exception challenged in courts has made lawyers laugh and legal philosophers weep. Experience shows and law reports bear testimony that the proceedings under the Act have become highly technical accompanied by unending prolixity at every stage providing a legal trap to the unwary. An informal forum chosen by the parties for expeditious disposal of their disputes has by the decisions of the courts been clothed with 'Legalese' of unforeseen complexity. [6]

Let us hope that the laudable effort made by the *Arbitration and Conciliation Act, 1996* to minimise court intervention will bear fruit in this respect.

The grounds and procedure for setting aside an award are to be found in *Section 34 of the Arbitration and Conciliation Act, 1996*. The section is as follows :

S. 34. Application for setting aside arbitral award.—

(1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with subsection (2) and sub-section (3).

(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

(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.

Explanation.— 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.

(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 the said period of three months it may entertain the application within a further period of thirty days, but not thereafter.

(4) 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.

CHAPTER 8 FINALITY AND ENFORCEMENT OF ARBITRAL AWARDS

Finality of awards

S. 35. Finality of arbitral awards.—

Subject to this Part an arbitral award shall be final and binding on the parties and persons claiming under them respectively.

S. 36. Enforcement.—

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* (5 of 1908) in the same manner as if it were a decree of the court.

CHAPTER 9 APPEALS

An appeal lies from the orders specified in Section 37(1) and (2) and from no others. [7]

S. 37. Appealable orders.—

(1) 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) granting or refusing to grant any measure under section 9 :

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

(2) An 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 [8]

(b) granting or refusing to grant an interim measure under section 17.

(3) 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.

CHAPTER 10 MISCELLANEOUS

Section 38 of the Arbitration and Conciliation Act, 1996 contains provisions as to deposits for costs. The section is as follows:

S. 38. Deposits.—

(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.

(2) 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 of counter-claim, as the case may be.

(3) 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.

S. 39. Lien on arbitral award and deposits as to costs.—

(1) Subject to the provisions of subsection (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.

(2) 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.

(3) 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.

(4) 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.

This section substantially incorporates the subject-matter of sections 14(2) and 38 of the preceding 1940 Act. [9]

EFFECT OF DEATH OF PARTY ON ARBITRATION PROCEEDING

S. 40. Arbitration agreement not to be discharged by death of party thereto.—

(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.

(2) The mandate of an arbitrator shall not be terminated by the death of any party by whom he was appointed.

(3) 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. [10]

INSOLVENCY

Section 41 deals with the effect of insolvency of a party to arbitration proceedings.

S. 41. Provisions in case of insolvency.—

(1) Where it is provided by a term in a contract to which an insolvent is a party that any dispute arising thereout 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.

(2) 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.

(3) In this section the expression 'receiver' includes an Official Assignee. [11]

JURISDICTION OF COURTS

Section 42 of the Arbitration and Conciliation Act, 1996 contains a provision about jurisdiction of courts. The section is as follows:

S. 42. Jurisdiction.—

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

LIMITATION ACT APPLIES TO ARBITRATION

Section 43 makes the provisions of the *Limitation Act, 1963* applicable to arbitral proceedings.

S. 43. Limitations.—

(1) The *Limitation Act, 1963* (36 of 1963), shall apply to arbitrations as it applies to proceedings in court.

(2) 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.

(3) 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.

(4) 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.

1 Received the assent of the President of India on August 16, 1996 and published in the Gaz. of India. Extra., Part II. Section I, dated 19th August, 1996 No. 55, pp. 1-36.

Statement of Objects and Reasons in the Arbitration and Conciliation Bill, 1995

The Statement of Objects and Reasons for this Bill was as follows :—

The law on arbitration in India is at present substantially contained in three enactments, namely, the *Arbitration Act*, 1940, the Arbitration (Protocol and Convention) Act, 1937 and the *Foreign Awards (Recognition and Enforcement) Act, 1961*. It is widely felt that the 1940 Act, which contains the general law of arbitration, has become outdated. The Law Commission of India, several representative bodies of trade and industry and experts in the field of arbitration have proposed amendments to this Act to make it more responsive to contemporary requirements. It is also recognised that our economic reforms may not become fully effective if the law dealing with settlement of both domestic and international commercial disputes remains out of tune with such reforms. Like arbitration, conciliation is also getting increasing worldwide recognition as an instrument for settlement of disputes. There is, however, no general law on the subject in India.

THE UNITED NATIONS Commission on International Trade Law (UNCITRAL) adopted in 1985 the Model Law on International Commercial Arbitration. The General Assembly of THE UNITED NATIONS recommended that all countries give due consideration to the said Model Law, in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice. The UNCITRAL also adopted in 1980 a set of Conciliation Rules. The General Assembly of THE UNITED NATIONS recommended the use of these Rules in cases where the disputes arise in the context of international commercial relations and the parties seek amicable settlement of their disputes by recourse to conciliation. An important feature of the UNCITRAL Model Law and Rules is that they have harmonised concepts on arbitration and conciliation of different legal systems of the world and thus contain provisions which are designed for universal application.

Though the UNCITRAL Model Law and Rules are intended to deal with international commercial arbitration and conciliation, they could, with appropriate modifications, also serve as a model for legislation on domestic arbitration and conciliation. The present Bill seeks to consolidate and amend the law relating to domestic arbitration, international commercial arbitration, enforcement of foreign arbitral awards and to define the law relating to conciliation, taking into account the UNCITRAL Model Law and Rules.

The main objectives of the Bill are as under :—

(i) to comprehensively cover international commercial arbitration and conciliation as also domestic arbitration and conciliation;

(ii) to make provision for an arbitral procedure which is fair, efficient and capable of meeting the needs of the specific arbitration;

(iii) to provide that the arbitral tribunal gives reasons for its arbitral award;

(iv) to ensure that the arbitral tribunal remains within the limits of its jurisdiction;

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

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

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

(viii) 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

(ix) 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.

The Bill seeks to achieve the above objects.

2 Came into force on 22-8-1996 *vide* Notification No. G.S.R. 375(E) dated 22-8-1996.

3 Section 42**. Service of notice by party or arbitrator.—** Any notice required by this Act to be served otherwise than through the Court by a party to an arbitration agreement or by an arbitrator or umpire shall be served in the manner provided in the arbitration agreement, or if there is no such provision, either—

(a) by delivering it to the person on whom it is to be served, or

(b) by sending it by post in a letter addressed to that person at his usual or last known place of abode or business in India and registered under Chapter VI of the *Indian Post Office Act, 1898* (6 of 1898).

4 The definition in the 1940 Act was as follows : In this Act, unless there is anything repugnant in the subject or context,—

(a) ‘‘arbitration agreement’ means a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not;..... .’

5 The provisions in the 1940 Act were as follows :

S. 8. Power of Court to appoint arbitrator or umpire.—

(1) In any of the following cases—

(a) where an arbitration agreement provides that the reference shall be to one or more arbitrators to be appointed by consent of the parties, and all the parties do not, after differences have arisen, concur in the appointment or appointments; or

(b) if any appointed arbitrator or umpire neglects or refuses to act, or is incapable of acting, or dies, and the arbitration agreement does not show that it was intended that the vacancy should not be supplied, and the parties or the arbitrators, as the case may be, do not supply the vacancy; or

(c) where the parties or the arbitrators are required to appoint an umpire and do not appoint him; any party may serve the other parties or the arbitrators, as the case may be, with a written notice to concur in the appointment or appointments or in supplying the vacancy.

(2) If the appointment is not made within fifteen clear days after service of the said notice, the Court may, on the application of the party who gave the notice and after giving the other parties an opportunity of being heard, appoint an arbitrator or arbitrators or umpire, as the case may be, who shall have like power to act in the reference and to make an award as if he or they had been appointed by consent of all parties.

STATE AMENDMENT

UTTAR PRADESH — **Amendment of Section 8.** —In Section 8 of Act 10 of 1940 in sub-section (1), in clause (b), for the words ‘and the parties or the arbitrators, as the case may be, do not supply the vacancy’ the words ‘and as the case may be, the parties or the arbitrators do not supply, or the person designated does not under subsection (3) of Section 4 supply, the vacancy’ shall be substituted—U.P. Act 57 of 1976, S. 16, (w.e.f. 1-1-1977) : (1997) 2 Arb LR 492.

6 Guru Nanak Foundation v. Rattan Singh & Sons, AIR 1981 SC 2075 : (1981) 4 SCC 634 [*LNIND 1981 SC 402*].

7 *G.C. Sharma v. University of Delhi,* AIR 1982 Del 227 [*LNIND 1981 DEL 254*]: (1982) 21 DLT 22 [*LNIND 1981 DEL 254*].

8 See *Scan Organics Ltd. v. Mukesh Babu Financial Services Ltd.,* (1998) 3 RAJ 240 (Bom) : (1988) 1 Arb LR 685 appeal against acceptance of plea.

9 Those two provisions were as follows:

—The arbitrators or umpire shall, at the request of any party to the arbitration agreement or any person claiming under such party or if so directed by the Court and upon payment of the fees and charges of filing the award, cause the award or a signed copy of it, together with any depositions and documents which may have been taken and proved before them, to be filed in Court, and the Court shall thereupon give notice to the parties of the filing of the award.

Section 38. Disputes as to arbitrator's remuneration or costs. —

(1) If in any case an arbitrator or umpire refuses to deliver his award except on payment of the fees demanded by him, the Court may, on an application in this behalf, order that the arbitrator or umpire shall deliver the award to the applicant on payment into Court by the applicant of the fees 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 arbitrator or umpire by way of fees such sum as the Court may consider reasonable and that the balance of the money, if any, shall be refunded to the applicant.

(2) An application under sub-section (1) may be made by any party to the reference unless the fees demanded have been fixed by written agreement between him and the arbitrator or umpire, and the arbitrator or umpire shall be entitled to appear and be heard on any such application.

(3) The Court may make such orders as it thinks fit respecting the costs of an arbitration where any question arises respecting such costs and the award contains no sufficient provision concerning them.

STATE AMENDMENT

UTTAR PRADESH.—Amendment of Section 38. —In Section 38 of Act 10 of 1940 for the words ‘fees demanded’ where they occur for the second time, the following words shall be substituted namely :—

‘fees determined in accordance with any rules framed by the High Court, and in the absence of any such rule, or where such rules are not applicable, the fees demanded’— U. P. Act 57 of 1976, S. 21, w. e. f. 1-1-1977.

Schedule I clause (8)

The costs of the reference and award shall be in the discretion of the arbitrators or umpire who may direct to, and by whom and in what manner, such costs or and part thereof shall be paid, and may tax or settle the amount of costs to be paid or any part thereof and may award costs to be paid as between legal practitioner and client.

STATE AMENDMENT

UTTAR PRADESH. —In the First Schedule to Act 10 of 1940—

(a) in paragraph 2, for the words 'not later than one month from the latest date of their respective appointments' the words 'within one month from the latest date of their respective appointments or within such extended time as the parties to reference agree to, and in the absence of such agreement as the court may allow' shall be substituted;

(b) in paragraph 3, or the words 'or within such extended time as the court may allow', the words 'or within such extended time as the parties to the reference agree to, and in the absence of such agreement, as the Court may allow' shall be substituted;

(c) in paragraph 5, for the words 'or within such extended time as the court may allow', the words 'or within such extended time as the parties to the reference agree to, and in the absence of such agreement, as the court may allow' shall be substituted;

(d) after paragraph 7, the following paragraph shall be inserted, namely:—

'7-A. Where and in so far as an award is for the payment of money, the arbitrators or the umpire may, in the award, order interest at such rate as the arbitrators or umpire may deem reasonable to be paid on the principal sum awarded, from the date of the commencement of the arbitration, as defined in sub-section (3) of Section 37, to the date of award, in addition to any interest awarded on such principal sum for any period prior to such commencement, with further interest at such rate not exceeding six per cent per annum as the arbitrators or umpire may deem reasonable on such principal sum from the date of the award to the date of payment or to such earlier date as the arbitrators or umpire may think fit, but in no case beyond the date of the decree to be passed on the award'—U. P. Act 57 of 1976, S. 24, w.e.f. 1-1-1977.

Note.—See also Ss. 37 and 38 of U.P. Act 57 of 1976 given in Part V.

10 The provision is a replacement of Section 6 of the 1940 Act and is virtually the same with a slight change of terminology in sub-s. (2).

11 This provision of the 1996 Act replaces those of Section 7 of the 1940 Act.