



# ARBITRATION LAWS IN INDIA



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## **PREFACE**

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India Juris is glad to introduce first edition of e-Book on Arbitration Laws in India. We are thankful to Partners and team of India Juris who have worked hard in completing this e-Book. The intention of bringing out this e-Book is to give only the essential and basic information about Arbitration laws in India. We hope this e-Book will be useful not only to prospective entrepreneurs, foreign and Indian, but also to various institutions engaged in promotion of industrial development in India.

The information contained in this e -Book is drawn from various sources including Government and other publications. The development in Arbitration laws and other laws regulating industry and trade is expected to be a continuous process. Readers are advised that this e-Book is not intended to be comprehensive and in particular circumstances professional advice should be sought. Readers interested in further details about any of the topics covered in this e -Book are welcome to contact us

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## Developments in Arbitration Laws in India

In India prior to 1996 Arbitrations were governed by Arbitration and Conciliation Act of 1940. New Act was passed in 1996 which brought changes in the said law in India. Changes under the new Act called Arbitration and Conciliation Act of 1996 are summarized as under:

One of the important changes brought in by the Arbitration and Conciliation Act, 1996, (hereinafter referred to as the 1996 Act or Act of 1996) in the field of law concerning arbitration, compared to the analogous provisions in the earlier enactment, Arbitration Act of 1940 (herein after referred to as the 1940 Act or Act of 1940) is relating to 'enforcement of awards'.

### **Recognition of arbitral awards under the Act of 1996**

In the new Act of 1996, it seems, the legislature has wisely incorporated two provisions:

- (i) Conferring finality to the arbitral award under Section 35 and
- (ii) Enforcement of awards in the same manner as if it were a decree of the court under Section 36.

Section 35 gives recognition to the arbitral award as final and binding, unless impeached on the grounds set out under Section 34.

Of course, in the Act of 1940 as an implied condition it was prescribed, in the First Schedule, that the award is final and binding on the parties and persons claiming under them respectively. Yet there was confusion or confrontation for sometime on the point of recognition of award unless and until decreed.

### **No decree necessary under the Act of 1996 for enforcement of award**

Undoubtedly, arbitration is a speedy and effective remedy to resolve disputes between the parties by experts in technical, commercial or like fields, selected by parties' own choice as far as possible, or otherwise, with the intervention of court. Experience shows that under the old Act of 1940 once the award is published by the arbitrator it is only the end of one round of litigation for commencement of another round, which at times becomes more onerous and time consuming because under Section 14 of that Act the arbitrator has to file the award before the court, either on request of the interested party or on direction of the court, the affected or defeated party can, seek to modify the award under Section 15, remit the award under Section 16 or even seek to set aside the award under Section 33 for the grounds set out in Section 30. Under the new Act of 1996, the second round of litigation to confirm the award into a decree has been taken away, of course, subject to the power of the court to have the final word on the award, because the award is still subject to scrutiny under Section 34 for impeachment which however gives only a narrow scope for interference by the court compared to the grounds under 1940 Act.

In yester years the scope of interference on the ground of misconduct was very limited, whereas, later on, courts began to scrutinize awards with lot of suspicion and circumspection. Besides, the ground of excessive jurisdiction of arbitrator got judicial acceptance as a new dimension in challenging award and at times it went out of proportion so that ultimately Supreme Court had to caution in *State of Rajasthan Vs. Puri Construction Company Ltd.* (1994) 6 SCC 485) "It is necessary, however, to put a note of caution that in the anxiety to render justice to the party to arbitration, the court should not reappraise the evidences intrinsically with a close scrutiny for finding out that the conclusion drawn from some facts, by the arbitrator is, according to the

understanding of the court, erroneous. Such exercise of power which can be exercised by an appellate court with power to reverse the finding of fact is alien to the scope and ambit of challenge of an award under the Arbitration Act."

Thus it is a unique feature of the arbitral award under the 1996 Act that the party need not wait for a formal decree for enforcement of the award. Kerala High Court in *Ramaswamy vs. Principal Subordinate Judge*, 1997 (2) KLT 393 has held that the Execution Court is duty bound to accept the execution petition with a certified copy of the award. Later on, Kerala High Court has made clear in *Sulekha Clay Mines Vs. Union of India*, 2000 (1) KLT 691 = 2000 (1) KLJ 472 (by J. B. Koshy J.) that the 'court' defined under Section 2 (e) of the Act 1996 (as far as Kerala is concerned), is the District Court, being the Principal Civil Court of the District.

### **Whether award under 1940 Act final - doubt raised by Courts**

As stated above, for sometime, there was difference of opinion among various High Courts on this point in relation to the award under the 1940 Act.

One line of thinking was that no party could be prejudiced by mere existence of an award since an award by itself did not extinguish the rights of the parties and it was not open to a defendant to set up such an award as bar to a suit filed on the original cause of action. (See *Ratanji Virpal & Co. Vs. Dhirajlal Manilal* - AIR 1942 Bom 101; *Chandrabhaga Sadashiv Vs. Bhikachand Sadashiv* AIR 1959 Bom 549; *Pamandass Sugharam Vs. Manikyam Pillai* - AIR 1960 AP 59; *Habiba Khatoon Vs. Nawab Lal* - AIR 1961 Pat 372; *Mohd. Yusuf Levai Vs. Mohd. Hussain Rowther* - AIR 1964 Mad 1; *Ram Sahai Vs. Babulal* - AIR 1965 All 217.) The other view was that an award operated to merge and extinguish all claims once the award was made and it was the only basis by which the right of the parties could be determined. (See *Nanhelal Vs. Singhai* - AIR 1944 Nag 24; *Gulzarimal Gheesalal Vs. Rameshchandra Radheyshyam* - AIR 1959 Raj 162; *Pushraj Puranmal Mills Co. Vs. Clive Mills* - AIR 1960 Cal 180; *Municipal Committee, Harda Vs. Harda Electric Supply Co.* - AIR 1964 MP 101; *Union of India Vs. Pratap Chandra Biswas* - AIR 1964 Assam 141)

It seems, even though the Supreme Court had decided on this issue as early as in 1962 in *M/s. Uttam Singh Dugal and Co. vs. Union of India* ( C. A. No. 162 of 1962 decided on 11.10.1962) since the decision remained unreported, the High Courts did not have the benefit of that decision and went on to take contrary views in its own way whereas in *Satish Kumar Vs. Surinder Kumar* - (AIR 1970 SC 833) the three judges Bench of the Supreme Court had occasion to consider two Full Bench decisions of Patna High Court and Punjab & Haryana High Court - AIR 1958 Patna 252 and AIR 1968 Punjab & Haryana 204; of course, on the dual questions whether the arbitration award requires registration and also whether it is a waste paper unless it is decreed. Patna High Court was of the view that under the scheme of the Arbitration Act, 1940 unless a decree was passed in terms of the award it had no legal effect. The Full Bench of the Punjab High Court followed the same reasoning and added two additional reasons; (i) it is a waste paper unless it was made a rule of the court even if the award is registered (ii) because of Section 16 court could remit the award from time to time before it could be made a rule of the court and once the award is remitted a new award has to be necessarily made which means finality could not be attributed to the award unless it is decreed.

Confronted with the above situation, the Supreme Court had to consider *Satish Kumar's* case in which it was ultimately held that the award is not a mere waste paper unless it is made a rule of the court but has some legal effect. It is final and binding on the parties. Supreme Court quoted with approval the observation of Mookerjee J. in the case of *Bhajahari Saha Banikya vs. Behary Lal Basak* (1909) ILR 33 Cal 881 reading "the award is, in fact, a final adjudication of a Court of the parties' own choice, and until impeached upon sufficient grounds in an appropriate proceeding, an award, which is on the face of it regular, is conclusive upon the merits of the

controversy submitted, unless possibly the parties have intended that the award shall not be final and conclusive.....as between the parties and their privies, an award is entitled to that respect which is due to judgment of a court of last resort..... (page 836). Incidentally, the Supreme Court relied on the unreported decision in M/s. Uttam Singh Dugal and Co. Vs. Union of India, Civil Appeal No. 162 of 1962. Supreme Court has also taken note of the point that under paragraph 7 of Schedule 1 to 1940 Act the award shall be final and binding on the parties and persons claiming under them respectively. This decision has been later on followed by the Supreme Court in Sardar Singh vs. Krishna Devi & another - 1994 (4) SCC 18.

### **Enforcement of award under 1996 Act subject to two conditions**

It is to be borne in mind, the enforcement of an arbitral award, though final and binding, is again subject to two conditions under S.36.

(i) Time for making application to set aside the arbitral award under Section 34 has to expire i.e. three months from the date of receipt of the copy of the arbitral award plus 30 days which Court could give extension in its discretion, if concerned party proves sufficient cause, but not thereafter.

(ii) If such an application is made it has to be refused.

### **Limitation for application to set aside award - difference under Act of 1940 and Act of 1996**

Under the Act of 1940 the time limit was subject to application of the law of limitation since provisions of Limitation Act is applicable to arbitration also, under Section 37 of the said Act. The decision of the Supreme Court in State of A. P. Vs. Chandra Sekhara Reddy and other (1998) 7 SCC 141 on 22.0.1998 which has been followed by other High Court also make the point clear. The Full Bench of the Kerala High Court had held so even before, by judgment dt. 31.3.1998 in C.M.P No. 3131/1997 in MFA 724/97, upholding a Division Bench decision still earlier, in State of Kerala Vs. Madhusoodanan Pillai (1994(1) KLT 268) in view of contrary decisions of two Division Benches. However, under the 1996 Act the discretionary power conferred on the court for extension of time for thirty days beyond three months followed by the expression "but not thereafter" in S.34 (3) proviso prescribes a cut off date.

### **Enforcement of Domestic Awards and Foreign Awards - distinction**

#### **(1) Before the commencement of the 1996 Act**

Regarding enforcement of domestic awards and foreign awards there are certain differences under the two enactments of 1940 and 1996. In the 1940 Act Section 17 make clear (apparently in the case of domestic awards) once a judgment was pronounced according to the award a decree shall follow which always could be executed under the provisions of the Code of Civil Procedure. The said Act is silent about enforcement of foreign award. However, being a party to the Multilateral International Conventions, viz. the Geneva Convention of 1927 and the New York Convention of 1958, India enacted two legislations for enforcement of foreign arbitral awards i.e. (i) The Arbitration (Protocol and Convention) Act, 1937 for enforcement of foreign arbitral awards to which the Geneva Convention of 1927 applied, (ii) the Foreign awards (Recognition and Enforcement) Act, 1961 pursuant to the New York Convention of 1958 with a distinction that the Geneva Convention ceased to apply to those awards to which the New York Convention applied.

It is relevant in this context to note, the Geneva Convention suffered from certain defects which hampered the speedy settlement of disputes through arbitration and thus the New York Convention was entered into. The New York Convention seeks to remedy those defects by

providing for much more simple and effective methods of obtaining recognition and enforcement of the foreign awards.

## **(2) After the commencement of Arbitration & Conciliation Act, 1996**

By the enactment of 1996 adequate provisions have been brought in for enforcement of a domestic award as also foreign award under the self same Act. Enforcement of domestic award has been brought under Chapter VIII of Part I which contains only two sections viz. Sections 35 & 36.

Provisions for enforcement of foreign awards under New York Convention are provided under Part II, Chapter I consisting of Sections 44 to 52 whereas enforcement of Geneva Convention awards has been brought under Part II, Chapter II consisting of Sections 53 to 60.

### **Enforcement of award under the two Conventions**

The conditions to be satisfied in order to obtain recognition or enforcement of a foreign arbitral award under the Geneva Convention are the following:

- (a) The arbitration agreement is valid;
- (b) Subject-matter of dispute is capable of settlement by arbitration;
- (c) The award is made by a validly constituted Arbitral Tribunal;
- (d) The award has become final in the country in which it has been made;
- (e) Recognition and enforcement of award is not contrary to the public policy or the law of India.

(See S. 57 of the 1996 Act)

Even if these conditions are fulfilled, the recognition and enforcement of the award could be refused if the court is satisfied that (a) the award is annulled, (b) sufficient notice of the arbitration proceedings is not given to the party; and (c ) the award does not deal with contemplated differences.

The party against whom the award under New York Convention is sought to be enforced can object to recognition and enforcement of the foreign award on the following grounds;

- (a) Incapacity of the parties or invalidity of the agreement
- (b) Lack of proper notice of appointment of arbitrator or arbitral proceedings
- (c) The award deals with differences not contemplated within the submission to arbitration
- (d) The composition of the arbitral authority or procedure does not accord with the agreement
- (e) The award has not as yet become binding
- (f) The subject-matter is not capable of settlement by arbitration

(g) Recognition and enforcement of the award is contrary to public policy of India

(see S. 48 of 1996 Act)

Both the Conventions have been incorporated as schedules to the 1996 Act and thus have been made part thereof.

Supreme Court has made clear that a foreign award given after the commencement of the new Act 1996 can be enforced only under that Act and there is no vested right to have the foreign award enforced under Foreign Awards (Recognition and Enforcement Act, 1961 irrespective of when arbitral proceedings commenced in the foreign jurisdiction, since such Act stands repealed. (see Thyssen Stahlunion GmbH Vs. Steel Authority of India Ltd., (1999) 9 SCC 334 = AIR 1999 SC 3923)

### **Only domestic awards can be set aside**

An interesting feature in this respect is that though Chapter VII under Part I dealing with enforcement of *domestic arbitral award* it contains only two sections namely Section 35 and 36. The two conditions which have to be necessarily satisfied before enforcement of award under S. 36 viz. (i) time for making an application to set aside the award has to expire and (ii) such application having been made, it has to be refused, makes it clear that the legislature has wisely given ultimate power to the court to look into the question whether the award is hit by mischief on account of grounds set out under S. 34 on which an award can be set aside. Again, the Court has been conferred similar powers in the case of *foreign awards* in respect of the New York Convention awards on account of grounds set out under Section 48 and in respect of the Geneva Convention awards on account of grounds set out under Section 57. The difference between the two is; in the case of domestic awards court can set aside the award whereas in the case of foreign awards it is limited to refusal to *enforce it*, and no power has been conferred on the court to set aside the award as such.

It is to be pointed out, the new law affords only a restrictive right to the courts in India to refuse enforcement of a foreign award and this is in accordance with the wishes of the international commercial community to the effect that judicial control on the award should be restricted to the barest minimum possible.

Recognition and enforcement of awards under UNCITRAL (United National Commission on International Trade Law) Model Law on International Commercial Arbitration

The Supreme Court in Sudaram Finance Ltd. Vs. NEPC India Ltd., (1999) 2 SCC 479 = AIR 1999 SC 565 has observed that the provisions of the 1996 Act have to be interpreted being uninfluenced by the principles underlying the 1940 Act and in order to get help in construing the provisions of the said Act, it is more relevant to refer to the UNCITRAL Model Law rather than the 1940 Act. (see para 9 of SCC) [A copy of Chapter VIII dealing with recognition and enforcement of awards under UNCITRAL Model Law is also furnished as Appendix V for reference.]

### **The striking difference between these two classes of awards under the UNCITRAL Model Law and the 1996 Act is:**

(i) Under the UNCITRAL Model Law, court is not called upon or is not empowered to set aside an arbitral award. On the other hand, court can refuse recognition of the award; of course enforcement is dependent on such recognition. Under the 1996 Act in respect of domestic awards, before enforcement of the award the party concerned can seek for setting aside the award under Section 34 and finality can be attributed to the award only subject to that. For

enforcement of foreign awards under the New York Convention and Geneva Convention as envisaged in Sections 49 and 58 of the 1996 Act, the court is not called upon to grant or refuse recognition of the award but on the other hand, court has to see that the awards satisfy the condition under Sections 48 and 57 respectively, failing which court can refuse enforcement of awards.

In other words, when we compare the three types of awards i.e. awards under the UNCITRAL Model Law, domestic awards and foreign awards under the 1996 Act the distinction is that in *respect of awards under UNCITRAL Model Law before enforcement of the award court has to grant recognition, and in respect of domestic awards under the 1996 Act, court can even set aside the award whereas in the case of foreign awards court can only refuse enforcement.*

(ii) Another major difference is that under the UNCITRAL Model Law the party relying on an award or applying for its enforcement has to supply duly authenticated copy of the original award and a duly certified copy and the original arbitration agreement or a duly certified copy thereof. Added to that, if the award or the arbitration agreement is not made in official language of the particular country when the recognition or enforcement is sought for, the party shall supply a duly certified translation thereof into the language of that country. Obviously, it was only prudent on the part of the legislature to incorporate such provisions for an effective application of mind of the court in such cases.

#### **Difficulty encountered for want of power to cause the original award to be filed before court**

When we come to the question of enforcement of foreign awards under 1996 Act, Sections 47 and 56 made applicable to foreign awards in the New York Convention and Geneva Convention respectively, make it obligatory on the party applying for enforcement of the foreign awards to produce the *original award or a duly authenticated copy* as also the original arbitration agreement or a duly certified copy thereof along with necessary evidence to prove that the award is a foreign award coming under the definition clause vide Sections 44 and 53. In this context, it is to be borne in mind, in the case of *domestic awards*, there is no provision making it obligatory on the party who desires to enforce the award to cause the original award to be filed or request the court to call upon the arbitrator or the custodian of the award to file the award and/or the appurtenant documents relating to the award before the court. Of course, the rules made under the Act by certain High Courts provide for an application to be filed to call for the arbitral records for the purpose of an application under Section 34 to set aside the award (see Rule 3 (d) of Kerala Arbitration and Conciliation (Court) Rules, 1997)

From experience, it is found that lack of such a provision either making it incumbent upon the arbitrator to file the award before the Court or making it obligatory on the part of the party who wants to enforce the award/impeach the award, to take steps for filing of the award and records before the court, causes considerable difficulty. There is no provision making it obligatory for the court to call for the original award and such records. If there is difference between the parties regarding the authenticity of the award, in the absence of the original of the award before the court, what exactly is the course of action to be adopted by the court is not clear. Again, the opinion of the court may differ from court to court regarding the necessity of calling upon the arbitrator to file the award and records before the court which, if not done, may cause prejudice to the party who is concerned about the award, in such circumstances.

#### **Enforcement of awards under general law**

Needless to add, once the awards get over the hurdles of S. 34 in the case of domestic awards, satisfy the conditions set out in Sections 48 and 57 in the case of foreign awards, it is deemed to be a decree of the court and enforcement of such award/decreed shall be subject to the provisions

of general law i.e. the Code of Civil Procedure in India, like any other ordinary decree of civil court. `Court' in all these instances means the same court i.e. the principal Civil Court of original jurisdiction in a district including High Courts in exercise of its ordinary original civil jurisdiction, having jurisdiction of the award if the same had been the subject-matter of a suit by virtue of the definition clause 2 (e), in respect of domestic award. Explanations under Sections 47 and 56 of the 1996 Act also refer to the same court in respect of foreign awards.

## The Arbitration and Conciliation Act, 1996

- 2

### PREAMBLE

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 of India as follows:—

### PRELIMINARY

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 in so far 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<sup>1</sup> as the Central Government may, by notification in the Official Gazette, appoint.

## **PART I: ARBITRATION**

### CHAPTER I: GENERAL PROVISIONS

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 intermeddles with the estate of the deceased, and, where a party acts in a representative character, the person on whom the estate devolves on the death of the party so acting;

(h) "Party" means a party to an arbitration agreement.

(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 provision 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.

(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 authorize any person including an institution, to determine that issue.

(7) An arbitral award made under this Part shall be considered 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 counter-claim, and where it refers to a defense, it shall also apply to a defense to that counter-claim.

**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.

**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.

**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 intervene except where so provided in this Part.

**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 II: ARBITRATION AGREEMENT**

**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.

**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, arbitration may be commenced or continued and an arbitral award made.

**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 or 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 III: COMPOSITION OF ARBITRAL TRIBUNAL**

**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.

**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) 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-section 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.

**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.

**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 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.

**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.

**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 IV: JURISDICTION OF ARBITRAL TRIBUNALS**

**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 defense; 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.

**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 V: CONDUCT OF ARBITRAL PROCEEDINGS**

**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.

**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.

**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.

**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.

**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 languages agreed upon by the parties or determined by the arbitral tribunal.

**23. Statements of claim and defense.**—(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 defense 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 defense 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.

**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 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.

**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 defense 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.

**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.

**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 a 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 or ordering that the evidence be provided directly to the arbitral tribunal.

(4) The Court may, while making or 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 fault, 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: VI MAKING OF ARBITRAL AWARD AND TERMINATION OF PROCEEDINGS**

**28. Rules applicable to substance of dispute.**—(1) Where the place of arbitration is situated 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;
- (iii) Failing any designation of the law under clause (a) by the parties, the arbitral tribunal shall apply the rules of law it considers to be appropriate given all the circumstances surrounding the dispute.

(2) The arbitral tribunal shall decide *ex aequo et bono* or as *amiable compositeur* only if the parties have expressly authorized 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.

**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 authorized by the parties or all the members of the arbitral tribunal, questions of procedure may be decided by the presiding arbitrator.

**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.

**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 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,

(iii) The amount of costs or method of determining that amount, and

(iv) The manner in which the costs shall be paid.

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,

(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.

**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 recognizes 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.

**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 electrical 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 an 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.

## CHAPTER VII: RECOURSE AGAINST ARBITRAL AWARD

**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 matter 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.

#### **FINALITY AND ENFORCEMENT OF ARBITRAL AWARDS**

**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.

**36. Enforcement.**— Where the time for making an application to set aside the arbitral award under 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 IX APPEALS**

**37. Appealable orders.**—(1) An appeal shall lie from the following orders (and from no others) to the Court authorized 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

(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 taken away any right to appeal to the Supreme Court.

#### **CHAPTER X MISCELLANEOUS**

**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 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.

**39. Lien on arbitral award and deposits as to costs.**—(1) Subject to the provisions of sub-section (2) and to any provision to the contrary in the arbitration, agreement, the arbitral tribunal shall have a lien on the arbitral award for any unpaid costs of the arbitration.

(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, in 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.

**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.

**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 a 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.

**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.

**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 further 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.

## **PART II: ENFORCEMENT OF CERTAIN FOREIGN AWARDS**

### **CHAPTER I: NEW YORK CONVENTION AWARDS**

**44. Definition.**—In this Chapter, unless the context otherwise requires, "foreign award" means an arbitral award on differences between persons arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India, made on or after the 11th day of October, 1960—

- (a) In pursuance of an agreement in writing for arbitration to which the Convention set forth in the First Schedule applies, and
- (b) In one of such territories as the Central Government, being satisfied that reciprocal provisions have been made may, by notification in the Official Gazette, declare to be territories to which the said Convention applies.

**45. Power of judicial authority to refer parties to arbitration.**— Notwithstanding anything contained in Part I or in the Code of Civil Procedure, 1908 (5 of 1908), a judicial authority, when seized of an action in a matter in respect of which the parties have made an agreement referred to in section 44, shall, at the request of one of the parties or any person claiming through or under him, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

**46. When foreign award binding.**—Any foreign award which would be enforceable under this Chapter shall be treated as binding for all purposes on the persons as between whom it was made, and may accordingly be relied on by any of those persons by way of defense, set off or otherwise in any legal proceedings in India and any references in this Chapter to enforcing a foreign award shall be construed as including references to relying on an award.

**47. Evidence.**—(1) The party applying for the enforcement of a foreign award shall, at the time of the application, produce before the court—

- (a) The original award or a copy thereof, duly authenticated in the manner required by the law of the country in which it was made;
- (b) The original agreement for arbitration or a duly certified copy thereof; and

(c) Such evidence as may be necessary to prove that the award is a foreign award.

(2) If the award or agreement to be produced under sub-section (1) is in a foreign language, the party seeking to enforce the award shall produce a translation into English certified as correct by a diplomatic or consular agent of the country to which that party belongs or certified as correct in such other manner as may be sufficient according to the law in force in India.

Explanation. ---In this section and all the following sections of this Chapter, "Court" means the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction over the subject-matter of the award if the same had been the subject-matter of a suit, but does not include any civil court of a grade inferior to such principal Civil Court, or any Court of Small Causes.

**48. Conditions for enforcement of foreign awards.**—(1) Enforcement of a foreign award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the court proof that—

(a) the parties to the agreement referred to in section 44 were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(c) The award deals with a difference 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, that part of the award which contains decisions on matters submitted to arbitration may be enforced; or

(d) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place ; or

(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

(2) Enforcement of an arbitral award may also be refused if the court finds that—

(a) The subject -matter of the difference is not capable of settlement by arbitration under the law of India; or

(b) The enforcement of the award would be contrary to the public policy of India.

Explanation. ---Without prejudice to the generality of clause (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.

(3) If an application for the setting aside or suspension of the award has been made to a competent authority referred to in clause (e) of sub-section (1) the Court may, if it considers it

proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

**49. Enforcement of foreign awards.**—Where the Court is satisfied that the foreign award is enforceable under this Chapter, the award shall be deemed to be a decree of that Court.

**50. Appealable orders.**—(1) An appeal shall lie from the order refusing to—

- (a) Refer the parties to arbitration under section 45;
- (b) Enforce a foreign award under section 48, to the court authorized by law to hear appeals from such order.

(2) 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.

**51. Saving.**—Nothing in this Chapter shall prejudice any rights which any person would have had of enforcing in India of any award or of availing himself in India of any award or of availing himself in India of any award if this Chapter had not been enacted.

**52. Chapter II not to apply.**—Chapter II of this Part shall not apply in relation to foreign awards to which this Chapter applies.

#### **CHAPTER: GENEVA CONVENTION AWARDS**

**53. Interpretation.**—In this Chapter "foreign award" means an arbitral award on differences relating to matters considered as commercial under the law in force in India made after the 28th day of July, 1924,—

(a) In pursuance of an agreement for arbitration to which the Protocol set forth in the Second Schedule applies, and

(b) between persons of whom one is subject to the jurisdiction of some one of such Powers as the Central Government, being satisfied that reciprocal provisions have been made, may, by notification in the Official Gazette, declare to be parties to the Convention set forth in the Third Schedule, and of whom the other is subject to the jurisdiction of some other of the Powers aforesaid, and

(c) in one of such territories as the Central Government, being satisfied that reciprocal provisions have been made, may, by like notification, declare to be territories to which the said Convention applies, and for the purposes of this Chapter an award shall not be deemed to be final if any proceedings for the purpose of contesting the validity of the award are pending in the country in which it was made.

**54. Power of judicial authority to refer parties to arbitration.**—Notwithstanding anything contained in Part I or in the Code of Civil Procedure, 1908 (5 of 1908), a judicial authority, on being seized of a dispute regarding a contract made between persons to whom section 53 applies and including an arbitration agreement, whether referring to present or further differences, which is valid under that section and capable of being carried into effect, shall refer the parties on the application of either of them or any person claiming through or under him to the decision of the arbitrators and such reference shall not prejudice the competence of the judicial authority in case the agreement or the arbitration cannot proceed or becomes inoperative.

**55. Foreign awards when binding.**—Any foreign award which would be enforceable under this Chapter shall be treated as binding for all purposes on the persons as between whom it was made, and may accordingly be relied on by any of those persons by way of defense, set off or otherwise in any legal proceedings in India and any references in this Chapter to enforcing a foreign award shall be construed as including references to relying on an award.

**56. Evidence.**—(1) the party applying for the enforcement of a foreign award shall, at the time of application procedure before the Court—

- (a) The original award or a copy thereof duly authenticated in the manner required by the law of the country in which it was made;
- (b) Evidence proving that the award has become final; and
- (c) Such evidence as may be necessary to prove that the conditions mentioned in clauses (a) and (c) of sub-section (1) of section 57 are satisfied.

(2) Where any document requiring to be produced under sub-section (1) is in a foreign language, the party seeking to enforce the award shall produce a translation into English certified as correct by a diplomatic or consular agent of the country to which that party belongs or certified as correct in such other manner as may be sufficient according to the law in force in India.

Explanation. ---In this section and all the following sections of this Chapter, "Court" means the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction over the subject-matter of the award if the same had been the subject matter of a suit, but does not include any civil court of a grade inferior to such principal Civil Court, or any Court of Small Causes.

**57. Conditions for enforcement of foreign awards**—(1) In order that a foreign award may be enforceable under this Chapter, it shall be necessary that—

- (a) The award has been made in pursuance of a submission to arbitration which is valid under the law applicable thereto;
- (b) The subject-matter of the award is capable of settlement by arbitration under the law of India;
- (c) The award has been made by the arbitral tribunal provided for in the submission to arbitration or constituted in the manner agreed upon by the parties and in conformity with the law governing the arbitration procedure;
- (d) the award has become final in the country in which it has been made, in the sense that it will not be considered as such if it is open to opposition or appeal or if it is proved that any proceedings for the purpose of contesting the validity of the award the pending;
- (e) The enforcement of the award is not contrary to the public policy or the law of India.

Explanation. ---Without prejudice to the generality of clause (e), it is hereby declared, for the avoidance, of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption.

(2) Even if the conditions laid down in sub-section (1) are fulfilled, enforcement of the award shall be refused if the Court is satisfied that—

- (a) The award has been annulled in the country in which it was made;

(b) The party against whom it is sought to use the award was not given notice of the arbitration proceedings in sufficient time to enable him to present his case; or that, being under a legal incapacity, he was not properly represented;

(c) the award does not deal with the differences contemplated by or falling within the terms of the submission to arbitration or that it contains decisions on matters beyond the scope for the submission or arbitration;

Provided that if the award has not covered all the differences submitted to the arbitral tribunal, the Court may, if it thinks fit, postpone such enforcement or grant it subject to such guarantee as the Court may decide.

(3) If the party against whom the award has been made proves that under the law governing the arbitration procedure there is a ground, other than the grounds referred to in clauses (a) and (c) of sub-section (1) and clauses (b) and (c) of sub-section (2) entitling him to contest the validity of the award, the Court may, if it thinks fit, either refuse enforcement of the award or adjourn the consideration thereof, giving such party a reasonable time within which to have the award annulled by the competent tribunal.

**58. Enforcement of foreign awards.**—Where the Court is satisfied that the foreign award is enforceable under this Chapter, the award shall be deemed to be a decree of the Court.

**59. Appealable orders.**—(1) An appeal shall lie from the order refusing—

(a) To refer the parties to arbitration under section 54: and

(b) To enforce a foreign award under section 57,

To the court authorized by law to hear appeals from such order.

(2) 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.

**60. Saving**—Nothing in this Chapter shall prejudice any rights which any person would have had of enforcing in India of any award or of availing himself in India of any award if this Chapter had not been enacted.

### **PART III: CONCILIATION**

**61. Application and scope.**—(1) Save as otherwise provided by any law for the time being in force and unless the parties have otherwise agreed, this Part shall apply to conciliation of disputes arising out of legal relationship, whether contractual or not and to all proceedings relating thereto.

(2) This Part shall not apply where by virtue of any law for the time being in force certain disputes may not be submitted to conciliation.

**62. Commencement of conciliation proceedings.** — (1) the party initiating conciliation shall send to the other party a written invitation to conciliate under this Part, briefly identifying the subject of the dispute.

(2) Conciliation proceedings shall commence when the other party accepts in writing the invitation to conciliate.

(3) If the other party rejects the invitation, there will be no conciliation proceedings.

(4) If the party initiating conciliation does not receive a reply within thirty days from the date on which he sends the invitation, or within such other period of time as specified in the invitation, he may elect to treat this as a rejection of the invitation to conciliate and if he so elects, he shall inform in writing the other party accordingly.

**63. Number of conciliators.** — (1) There shall be one conciliator unless the parties agree that there shall be two or three conciliators.

(2) Where there is more than one conciliator, they ought, as a general rule, to act jointly.

**64. Appointment of conciliators.**—(1) Subject to sub-section (2),—

(a) In conciliation proceedings with one conciliator, the parties may agree on the name of a sole conciliator;

(b) In conciliation proceedings with two conciliators, each party may appoint one conciliator;

(c) In conciliation proceedings with three conciliators, each party may appoint one conciliator and the parties may agree on the name of the third conciliator who shall act as the presiding conciliator.

(2) Parties may enlist the assistance of a suitable institution or person in connection with the appointment of conciliators and in particular,—

(a) A party may request such an institution or person to recommend the names of suitable individuals to act as conciliator; or

(b) The parties may agree that the appointment of one or more conciliators be made directly by such an institution or person:

Provided that in recommending or appointing individuals to act as conciliator, the institution or person shall have regard to such considerations as are likely to secure the appointment of an independent and impartial conciliator and, with respect to a sole or third conciliator, shall take into account the advisability of appointing a conciliator of a nationality other than the nationalities of the parties.

**65. Submission of statements to conciliator.**— (1) The conciliator, upon his appointment, may request each party to submit to him a brief written statement of his position and the facts and grounds in support thereof, supplemented by any documents and other evidence that such party deems appropriate. The party shall send a copy of such statement, documents and other evidence to the other party.

(2) The Conciliator may request each party to submit to him a further written statement of his position and the facts and grounds in support thereof, supplemented by any documents and other evidence that such party deems appropriate. The party shall send a copy of such statement, documents and other evidence to the other party.

(3) At a stage of the conciliation proceedings, the conciliator may request a party to submit to him such additional information as he deems appropriate.

Explanation. ---In this section and all the following sections of this Part, the term "conciliator" applies to a sole conciliator, to or three conciliators as the case may be.

**66. Conciliator not bound by certain enactments.**—The conciliator is not bound by the Code of Civil Procedure, 1908 (5 of 1908) or the Indian Evidence Act, 1872 (1 of 1872).

**67. Role of conciliator.**—(1) the conciliator shall assist the parties in an independent and impartial manner in their attempt to reach an amicable settlement of their dispute.

(2) The conciliator shall be guided by principles of objectivity, fairness and justice, giving consideration to, among other things, the rights and obligations of the parties, the usages of the trade concerned and the circumstances surrounding the dispute, including any previous business practices between the parties.

(3) The conciliator may conduct the conciliation proceedings in such a manner as he considers appropriate, taking into account the circumstances of the case, the wishes the parties may express, including any request by a party that the conciliator hear oral statements, and the need for a speedy settlement of the dispute.

(4) The conciliator may, at any stage of the conciliation proceedings, make proposals for a settlement of the dispute. Such proposals need not be in writing and need not be accompanied by a statement of the reasons therefor.

**68. Administrative assistance.**—In order to facilitate the conduct of the conciliation proceedings, the parties, or the conciliator with the consent of the parties, may arrange for administrative assistance by a suitable institution or person.

**69. Communication between conciliator and parties.**—(1) The conciliator may invite the parties to meet him or may communicate with them orally or in writing. He may meet or communicate with the parties together or with each of them separately.

(2) Unless the parties have agreed upon the place where meetings with the conciliator are to be held, such place shall be determined by the conciliator, after consultation with the parties, having regard to the circumstances of the conciliation proceedings.

**70. Disclosure of information.**—When the conciliator receives factual information concerning the dispute from a party, he shall disclose the substance of that information to the other party in order that the other party may have the opportunity to present any explanation which he considers appropriate:

Provided that when a party gives any information to the conciliator subject to a specific condition that it be kept confidential, the conciliator shall not disclose that information to the other party.

**71. Co-operation of parties with conciliator.**—The parties shall in good faith co-operate with the conciliator and, in particular, shall endeavor to comply with requests by the conciliator to submit written materials, provide evidence and attend meetings.

**72. Suggestions by parties for settlement of dispute.**—Each party may, on his own initiative or at the invitation of the conciliator, submit to the conciliator suggestions for the settlement of the dispute.

**73. Settlement agreement.**—(1) When it appears to the conciliator that there exist elements of a settlement which may be acceptable to the parties, he shall formulate the terms of a possible settlement and submit them to the parties for their observations. After receiving the observations of the parties, the conciliator may reformulate the terms of a possible settlement in the light of such observations.

(2) If the parties reach agreement on a settlement of the dispute, they may draw up and sign a written settlement agreement. If requested by the parties, the conciliator may draw up, or assist the parties in drawing up, the settlement agreement.

(3) When the parties sign the settlement agreement, it shall be final and binding on the parties and persons claiming under them respectively.

(4) The conciliator shall authenticate the settlement agreement and furnish a copy thereof to each of the parties.

**74. Status and effect of settlement agreement.**—The settlement agreement shall have an effect as if it is an arbitral award on agreed terms on the substance of the dispute rendered by an arbitral tribunal under section 30.

**75. Confidentiality.**—Notwithstanding anything contained in any other law for the time being in force, the conciliator and the parties shall keep confidential all matter relating to the conciliation proceedings. Confidentiality shall extend also to the settlement agreement, except where its disclosure is necessary for purposes of implementation and enforcement.

**76. Termination of conciliation proceedings.**—The conciliation proceedings shall be terminated

(a) By the signing of the settlement agreement by the parties; on the date of the agreement; or

(b) by a written declaration of the conciliator, after consultation with the parties, in the effect that further efforts at conciliation are no longer justified, on the date of the declaration; or

(c) By a written declaration of the parties addressed to the conciliator to the effect that the conciliation proceedings are terminated, on the date of the declaration; or

(d) by a written declaration of a party to the other party and the conciliator, if appointed, to the effect that the conciliation proceedings are terminated, on the date of the declaration.

**77. Resort to arbitral or judicial proceedings.**—The parties shall not initiate, during the conciliation proceedings, any arbitral or judicial proceedings in respect of a dispute that is the subject-matter of the conciliation proceedings except that a party may initiate arbitral or judicial proceedings, where, in his opinion, such proceedings are necessary for preserving his rights.

**78. Costs.**—(1) Upon termination of the conciliation proceedings, the conciliator shall fix the costs of the conciliation and give written notice thereof to the parties.

(2) For the purpose of sub-section (1), "costs" means reasonable costs relating to—

(a) The fee and expenses of the conciliator and witnesses requested by the conciliator, with the consent of the parties;

(b) Any expert advice requested by the conciliator with the consent of the parties;

(c) Any assistance provided pursuant to clause (b) of sub-section (2) of section 64 and section 68.

(d) Any other expenses incurred in connection with the conciliation proceedings and the settlement agreement.

(3) The costs shall be borne equally by the parties unless the settlement agreement provides for a different appointment. All other expenses incurred by a party shall be borne by that party.

**79. Deposits.**—(1) The conciliator may direct each party to deposit an equal amount as an advance for the costs referred to in sub-section (2) of section 78 which he expects will be incurred.

(2) During the course of the conciliation proceedings, the conciliator may direct supplementary deposits in an equal amount from each party.

(3) If the required deposits under sub-sections (1) and (2) are not paid in full by both parties within thirty days, the conciliator may suspend the proceedings or may make a written declaration of termination of the proceedings to the parties, effective on the date of that declaration.

(4) Upon termination of the conciliation proceedings the conciliator shall render an accounting to the parties of the deposits received and shall return and expended balance to the parties.

**80. Role of conciliator in other proceedings.**—Unless otherwise agreed by the parties:—

(a) The conciliator shall not act as an arbitrator or as a representative or counsel of a party in any arbitral or judicial proceeding in respect of a dispute that is the subject of the conciliation proceedings;

(b) The conciliator shall not be presented by the parties as a witness in any arbitral or judicial proceedings.

**81. Admissibility of evidence in other proceedings.**—The parties shall not rely on or introduce as evidence in arbitral or judicial proceedings, whether or not such proceedings relate to the dispute that is the subject of the conciliation proceedings,-

(a) Views expressed or suggestions made by the other party in respect of a possible settlement of the dispute;

(b) Admissions made by the other party in the course of the conciliation proceedings;

(c) Proposals made by the conciliator;

(d) The fact that the other party had indicated to accept a proposal for settlement made by the conciliator.

#### **PART IV: SUPPLEMENTARY PROVISIONS**

**82. Power of High Court to make rules.**—The High court may make rules consistent with this Act as to all proceedings before the court under this Act.

**83. Removal of difficulties.**—(1) If any difficulty arises in giving effect to the provisions of this Act, the central Government may, by order published in the Official Gazette, make such provisions, not inconsistent with the provisions of this Act as appear to it to be necessary or expedient for removing the difficulty:

Provided that no such order shall be after the expiry of a period of two years from the date of commencement of this Act.

(2) Every order made under this section shall, as soon as may be after it is made, be laid before each Houses of Parliament.

**84. Power to make rules.**—(1) The Central Government may, by notification in the Official Gazette, make rules for carrying out the provisions of this Act.

(2) Every rule made by the Central Government under this Act shall be laid, as soon as may be, after it is made before each House of Parliament while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule.

**85. Repeal and savings.**—(1) The Arbitration (Protocol and Convention) Act, 1937 (6 of 1937), the Arbitration Act, 1940 (10 of 1940) and the Foreign Awards (Recognition and Enforcement) Act, 1961 (45 of 1961) are hereby repealed.

(2) Notwithstanding such repeal,—

(a) the provisions of the said enactments shall apply in relation to arbitral proceedings which commenced before this Act came into force unless otherwise agreed by the parties but this Act shall apply in relation to arbitral proceedings which commenced on or after this Act comes into force;

(b) All rules made and notifications published, under the said enactments shall, to the extent to which they are not repugnant to this Act, be deemed respectively to have been made or issued under this Act,

**86. Repeal of Ordinance 27 of 1996 and saving.**—(1) The Arbitration and Conciliation (Third) Ordinance, 1996 (27 of 1996) is hereby repealed.

(2) Notwithstanding such repeal, any order, rule, notification or scheme made or anything done or any action taken in pursuance of any provision of the said Ordinance shall be deemed to have been made, done or taken under the corresponding provisions of this Act

**THE FIRST SCHEDULE  
CONVENTION ON THE RECOGNITION AND ENFORCEMENT  
OF FOREIGN ARBITRAL AWARDS**

**ARTICLE 1**

1. This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.

2. The term "arbitral awards" shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.

3. When signing, ratifying or acceding to this Convention, or notifying extension under article X hereof, and State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial undertaking national law of the State making such declaration.

**ARTICLE II**

1. Each Contracting State shall recognize an agreement in writing under which the parties undertaking to submit to arbitration all or any differences which have arisen or which may arise between them in respect of defined legal relationship, whether contractual or not, concerning a subject-matter capable of settlement by arbitration.

2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless in finds that the said agreement is null and void, inoperative or incapable of being performed.

**ARTICLE III**

Each Contracting State shall recognize arbitral awards as binding and enforcement them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

**ARTICLE IV**

1. To obtain the recognition and enforcement mentioned in the proceeding article, the party applying for recognition and enforcement shall, at the time of the application, supply:

- (a) The duly authenticated original award or a duly certified copy thereof;
- (b) The original agreement referred to in article II or a duly certified copy thereof.

2. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.

## **ARTICLE V**

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that—

(a) the parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(c) the award deals with a difference 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, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(d) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that—

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country.

## **ARTICLE VI**

1. If an application for the setting aside or suspension of the award has been made to a competent authority referred to in article V (1) (e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

## **ARTICLE VII**

1. The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.

2. The Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 shall cease to have effect between Contracting States on their becoming bound and to the extent that they become bound by this Convention.

**ARTICLE VIII**

1. This Convention shall be open until 31st December, 1958 for signature on behalf of any Member of the United Nations and also on behalf of any other State which is or hereafter becomes member of any specialized agency of the United Nations, or which is or hereafter becomes a party to the Statute of the International Court of Justice, or any other State to which an invitation has been addressed by the General Assembly of the United Nations.

2. This Convention shall be ratified and the instrument of ratification shall be deposited with the Secretary-General of the United Nations.

**ARTICLE IX**

1. This Convention shall be open for accession to all States referred to in article VIII.

2. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

**ARTICLE X**

1. Any State may, at the time of signature, ratification or accession, declare that this Convention shall extend to all or any of the territories for the international relations of which it is responsible. Such a declaration shall take effect when the Convention enters into force for the State concerned.

2. At any time thereafter any such extension shall be made by notification addressed to the Secretary-General of the United Nations and shall take effect as from the ninetieth day after the day of receipt by the Secretary-General of the United Nations of this notification, or as from the date of entry into force of the Convention for the State concerned, whichever is the later.

3. With respect to those territories to which this Convention is not extended at the time of signature, ratification or accession, each State concerned shall consider the possibility of taking the necessary steps in order to extend the application of this Convention to such territories, subject, where necessary for constitutional reasons, to the consent of the Governments of such territories.

**ARTICLE XI**

In the case of a federal or non-unitary State, the following provisions shall apply:—

(a) with respect of those articles of this Convention that come within the legislative jurisdiction of the federal authority, the obligations of the federal Government shall to this extent be the same as those of Contracting States which are not federal States;

(b) with respect to those articles of this Convention that come within the legislative jurisdiction of constituent States or provinces which are not, under the constitutional system of the federation, bound to take legislative action, the federal Government shall bring such articles with a favorable recommendation to the notice of the appropriate authorities of constituent States or provinces at the earliest possible moment;

(c) a federal State Party to this Convention shall, at the request of any other Contracting State transmitted through the Secretary-General of the United Nations, supply a statement of the law and practice of the federation and its constituent units in regard to any particular provision of this Convention, showing the extent to which effect has been given to that provision by legislative or other action.

**ARTICLE XII**

1. This Convention shall come into force on the ninetieth day following the date of deposit of the third instrument of ratification or accession.

2. For each State ratifying or acceding to this Convention after the deposit of the third instrument of ratification or accession, this Convention shall enter into force on the ninetieth day after deposit by such State of its instrument of ratification or accession.

**ARTICLE XIII**

1. Any Contracting State may denounce this Convention by a written notification to the Secretary-General of the United Nations. Denunciation shall take effect one year after the date of receipt of the notification by the Secretary-General.

2. Any State which has made a declaration or notification under article X may, at any time thereafter, by notification to the Secretary-General of the United Nations, declare that this Convention shall cease to extend to the territory concerned one year after the date of the receipt of the notification by the Secretary-General.

3. This Convention shall continue to be applicable to arbitral awards in respect of which recognition or enforcement proceedings have been instituted before the denunciation takes effect.

**ARTICLE XIV**

A Contracting State shall not be entitled to avail itself of the present Convention against other Contracting States except to the extent that it is itself bound to apply the Convention.

**ARTICLE XV**

The Secretary General of the United Nations shall notify the States contemplated in article VIII of the following:—

- (a) Signatures and ratifications in accordance with article VIII;
- (b) Accessions in accordance with article IX;
- (c) Declarations and notifications under articles I, X and XI;
- (d) The date upon which this Convention enters into force in accordance with article XII;
- (e) Denunciations and notifications in accordance with article XIII.

**ARTICLE XVI**

1. This Convention, of which the Chinese, English, French, Russian and Spanish texts shall be equally authentic, shall be deposited in the archives of the United Nations.

2. The Secretary General of the United Nations shall transmit a certified copy of this Convention to the State contemplated in article XIII.

## **THE SECOND SCHEDULE PROTOCOL ON ARBITRATION CLAUSES**

The undersigned, being duly authorized, declare that they accept, on behalf of the countries which they represent, the following provisions:—

1. Each of the Contracting States recognizes the validity of an agreement whether relating to existing or future differences between parties subject respectively to the jurisdiction of different Contracting States by which the parties to a contract agree to submit to arbitration all or any differences that may arise in connection with such contract relating to commercial matters or to any other matter capable of settlement by arbitration, whether or not the arbitration is to take place in a country to whose jurisdiction none of the parties is subject.

Each Contracting State reserves the right to limit the obligation mentioned above to contracts which are considered as commercial under its national law. Any Contracting State which avails itself of this right will notify the Secretary-General of the League of Nations in order that the other Contracting States may be so informed.

2. The arbitral procedure, including the constitution of the Arbitral Tribunal, shall be governed by the will of the parties and by the law of the country in whose territory the arbitration takes place.

The Contracting States agree to facilitate all steps in the procedure which require to be taken in their own territories, in accordance with the provisions of their law governing arbitral procedure applicable to existing differences.

3. Each Contracting State undertakes to endure the execution by its authorities and in accordance with the provisions of its national law of arbitral awards made in its own territory under the preceding articles.

4. The Tribunals of the Contracting Parties, on being seized of a dispute regarding a contract made between persons to whom Article I applies and including an Arbitration Agreement whether referring to present or further differences with is valid in virtue of the said article and capable of being carried into effect, shall refer the parties on the application of either of them to the decision of the Arbitrators.

Such reference shall not prejudice the competence of the judicial tribunals in case the agreement or the arbitration cannot proceed or becomes inoperative.

5. The present Protocol, which shall remain open for signature by all States, shall be ratified. The ratification shall be deposited as soon as possible with the Secretary, General of the League of Nations, who shall notify such deposit to all the Signatory States.

6. The present Protocol will come into force as soon as two ratifications have been deposited. Thereafter it will take effect, in the case of each Contracting State, one month after the notification by the Secretary-General of the deposit of its ratification.

7. The present Protocol may be denounced by any Contracting State on giving one year's notice. Denunciation shall be effected by a notification addressed to the Secretary-General of the League, who will immediately transmit copies of such notification to all the other Signatory States and inform them of the date on which it was received. The denunciation shall take effect one year after the date on which it was notified to the Secretary-General, and shall operate only in respect of the notifying State.

8. The Contracting States may declare that their acceptance of the present Protocol does not include any or all of the under-mentioned territories; that is to say, their colonies, overseas possessions or territories, protectorates or the territories over which they exercise a mandate.

The said States may subsequently adhere separately on behalf of any territory thus excluded. The Secretary- General of the League of Nations shall be informed as soon as possible of such adhesions. He shall notify such adhesions to all Signatory States. They will take effect on month after the notification by the Secretary-General to all Signatory states The Contracting States may also denounce the Protocol separately on behalf of any of the territories referred to above. Article 7 applies to such denunciation.

**THE THIRD SCHEDULE  
CONVENTION ON THE EXECUTION OF  
FOREIGN ARBITRAL AWARDS**

**Article 1.**---(1) In the territories of any High Contracting Party to which the present Convention applies, an arbitral award made in pursuance of an agreement, whether relating the existing or future differences (hereinafter called "a submission to arbitration") covered by the Protocol on arbitration Clauses opened at Geneva on September 24th.1923, shall be recognized as binding and shall be enforced in accordance with the rules of the procedure of the territory where the award is relied upon, provided that the said award has been made in a territory of one of the High Contracting Parties to which the present Convention applies and between persons who are subject to the jurisdiction of one of the High Contracting Parties.

(2) To obtain such recognition or enforcement, it shall, further, be necessary: ---

- (a) That the award has been made in pursuance of a submission to arbitration which is valid under the law applicable thereto;
- (b) That the subject-matter of the award is capable of settlement by arbitration under the law of the country in which the award is sought to be relied upon;
- (c) that the award has been made by the Arbitral Tribunal provided for in the submission to arbitration or constituted in the manner agreed upon by the parties and in conformity with the law governing the arbitration procedure;
- (d) that the award has become final in the country in which it has been made, in the sense that it will not be considered as such if it is open to opposition, appeal or pourvoi en cassation (in the countries where such forms of procedure exist) or if it is proved that any proceedings for the purpose of contesting the validity of the award are pending;
- (e) That the recognition or enforcement of the award is not contrary to the public policy or to the principles of the law of the country in which it is sought to be relied upon.

**Article 2**—Even if the conditions laid down in Article I hereof are fulfilled, recognition and enforcement of the award shall be refused if the Court is satisfied:—

- (a) That the award has been annulled in the country in which it was made:—
- (b) that the party against whom it is sought to use the award was not given notice of the arbitration proceedings in sufficient time to enable him to present his case; or that, being under a legal incapacity, he was not properly represented;
- (c) That the award does not deal with the differences contemplated by or falling within the terms of the submission to arbitration or that it contains decisions on matters beyond the scope of the submission to arbitration.

If the award has not covered all the questions submitted to the arbitral tribunal, the competent authority of the country where recognition or enforcement of the award is sought can, if it thinks fit, postpone such recognition or enforcement or grant it subject to such guarantee as that authority may decide.

**Article 3**—If the party against whom the award has been made proves that, under the law governing the arbitration procedure, there is a ground, other than the grounds referred to in Article 1(a) and (c), and Article 2(b) and (c), entitling him to contest the validity of the award in a

Court of Law, the Court may, if it thinks fit, either refuse recognition or enforcement of the award or adjourn the consideration thereof, giving such party a reasonable time within which to have the award annulled by the competent tribunal.

**Article 4**—The party relying upon an award or claiming its enforcement must supply, in particular:—

(1) The original award or a copy thereof duly authenticated, according to the requirements of the law of the country in which it was made;

(2) documentary or other evidence to prove that the award has become final, in the sense defined in Article 1 (d), in the country in which it was made;

(3) When necessary, documentary or other evidence to prove that the conditions laid down in Article 1, Paragraph (1) and paragraph (2) (a) and (c), have been fulfilled.

A translation of the award and of the award and of the other documents mentioned in this Article into the official language of the country where the award is sought to be relied upon may be demanded. Such translations must be certified correct by a diplomatic or consular agent of the country to which the party who seeks to rely upon the award belongs or by a sworn translator of the country where the award is sought to be relied upon.

**Article 5**.—the provisions of the above articles shall not deprive any interested party of the right of availing himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.

**Article 6**.—The present Convention applies only to arbitral awards made after the coming into force of the Protocol on Arbitration Clauses opened at Geneva on September 24th, 1923.

**Article 7**.—The present Convention, which will remain open to the signature of all the signatories of the Protocol of 1923 on Arbitration Clauses, shall be ratified.

It may be ratified only on behalf of those Members of the League of Nations and Non-member States on whose behalf the Protocol of 1923 on Arbitration Clauses shall be ratified.

Ratification shall be deposited as soon as possible with the Secretary-General of the League of Nations, who will notify such deposit to all the signatories.

**Article 8**.—The present Convention shall come into force three months after it shall have been ratified on behalf of two High Contracting Parties. Thereafter, it shall take effect, in the case of each High Contracting Party, three months after the deposit of the ratification on its behalf with the Secretary-General of the League of Nations.

**Article 9**.—The present Convention may be denounced on behalf of any Member of the League or Non-Member State. Denunciation shall be notified in writing to the Secretary-General of the League of Nations, who will immediately send a copy thereof, certified to be in conformity with the notifications, to all the other Contracting Parties, at the same time informing them of the date on which he received it

The denunciation shall come into force only in respect of the High Contracting Party which shall have notified it and one year after such notification shall have reached the Secretary-General of the League of Nations.

The denunciation of the Protocol on Arbitration Clauses shall entail, ipso facto, the denunciation of the present Convention.

**Article 10.**—The present Convention does not apply to the colonies, protectorates or territories under suzerainty or mandate of any High Contracting Party unless they are specially mentioned.

The application of this Convention to one or more of such colonies, protectorates or territories to which the Protocol on Arbitration Clauses opened at Geneva on September 24th, 1923, applies, can be effected at any time by means of a declaration addressed to the Secretary-General of the League of Nations by one of the High Contracting Parties.

Such declaration shall take effect three months after the deposit thereof.

The High Contracting Parties can at any time denounce the Convention for all or any of the colonies, protectorates or territories referred to above. Article 9 hereof applied to such denunciation.

**Article 11.**—A certified copy of the present Convention shall be transmitted by the Secretary-General of the League of Nations of every Member of the League of Nations and to every Non-Member State which signs the same.

## **THE APPOINTMENT OF ARBITRATORS BY THE CHIEF JUSTICE OF INDIA SCHEME, 1996**

No. F.22/1/95 SCA/Genl. -- In exercise of the power conferred on the Chief Justice of India under sub-section (10) of section 11 of the Arbitration and Conciliation Ordinance, 1996, I hereby make the following Scheme.

**1. Short title.**—This Scheme may be called the appointment of Arbitrators by the Chief Justice of India Scheme, 1996.

**2. Submission of request.**—The request to the Chief Justice under sub-section (4) or sub-section (5) or sub-section (6) of shall be made in writing and shall be accompanied by—

- (a) The original arbitration agreement or a duly certified copy thereof;
- (b) The names and addresses of the parties to the arbitration agreement;
- (c) The names and addresses of the arbitrators, if any, already appointed;
- (d) The name and address of the person or institution, if any, to whom or which any function has been entrusted by the parties to the arbitration agreement under the appointment procedure agree upon by them;
- (e) The qualification required, if any, of the arbitrators by the agreement of the parties;
- (f) A brief written statement describing the general nature of the dispute and the points at issue;
- (g) The relief or remedy sought; and
- (h) an affidavit, supported by the relevant document, to the effect that the condition 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, has been satisfied.

**3. Authority to deal with the request.**—Upon receipt of a request under paragraph 2, the Chief Justice may either deal with the matter entrusted to him or designate any other person or institution for that purpose.

**4. Forwarding of request to designated person or institution.**—Where the Chief Justice designates any person or institution under paragraph 3, he shall have the request along with the documents mentioned in paragraph 2 forwarded forthwith to such person or institution and also have a notice sent to the parties to the arbitration agreement.

**5. Seeking further information.**—The Chief Justice or the person or the institution designated by him under paragraph 3 may seek further information or clarification from the party making the request under this scheme.

**6. Rejection of request.**—Where the request made by any part under paragraph 2 is not in accordance with the provisions of this Scheme, the Chief Justice or the person or the institution designated by him may reject it.

**7. Notice to affected persons.**—Subject to the provisions of paragraph 6, the Chief Justice or the person or the institution designated by him shall direct that a notice of the request be given to all the parties to the arbitration agreement and such other person or persons as may seem to him or is likely to be affected by such request to show cause, within the time specified in the notice, why the appointment of the arbitrator or the measure proposed to be taken should not be made or taken and such notice shall be accompanied by copies of all documents, referred to in

paragraph 2 or, as the case may be by information or clarification, if any, sought under paragraph 5.

**8. Withdrawal of authority.**—If the Chief Justice, on receipt of a complaint from either party to the arbitration agreement or otherwise is of opinion that the person or institution designated by him under paragraph 3 has neglected or refused to act or is incapable of acting he may withdraw the authority given by him to such person or institution and either deal with the request himself or designate another person or institution for that purpose.

**9. Intimation of action taken on request.**—The appointment made or measure taken by the Chief Justice or any person or institution designated by him in pursuance of the request under paragraph 1 shall be communicated in writing to—

- (a) The parties to the arbitration agreement;
- (b) The arbitrators, if any, already appointed by the parties to the arbitration agreement;
- (c) The person or the institution referred to in paragraph 2(d);
- (d) The arbitrator appointed in pursuance of the request.

**10. Requests and communication to be sent to Registrar.**—All request under this Scheme and communication relating thereto which are addressed to the Chief Justice shall be presented to the Registrar of this Court, who shall maintain a separate Register of such requests and communications.

**11. Delivery and receipt of written communications.**—The provisions of sub-sections (1) and (2) of section 3 of the Arbitration and Conciliation Ordinance, 1996 shall, so far as may be, apply to all written communications received or sent under this Scheme.

**12. Costs for processing requests.**—The party making a request under this Scheme shall, on receipt of notice of demand from-

- (a) The Registry of the court where the Chief Justice make the appointment of an arbitrator or takes the necessary measure, or
  - (b) The designated person or the institution as the case may be, where such person or institution makes appointment or arbitrator or takes the necessary measure,
- Pay an amount of Rs. 15,000 in accordance with the terms of such notice towards to costs involved in processing the request.

**13. Interpretation.**—If any question arises with reference to the interpretation of any of the provisions of this scheme, the question shall be referred to the Chief Justice, whose decision shall be final.

**14. Power to amend the Scheme.**—The Chief Justice may, from time to time, amend by ways of addition or variation any provision of this Scheme.

## **Recent arbitration cases decided by Supreme Court - 3**

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### **I.T.C. Ltd. vs. George Joseph Fernandes and Anr. (19.11.2004 - SC)**

#### **ORDER**

1. By this application the applicant has prayed that the Registry of this Court be directed to transfer the arbitral award dated 25.6.1996 made by the learned Arbitrator late Justice A.C. Gupta, filed in this Court to the Principal Senior Civil Judge at Vishakhapatnam, Andhra Pradesh.

2. The circumstances under which the application has been made are as under:

The applicant and the respondent entered into an agreement with regard to the hiring of applicant's trawlers Ave Maria I and Ave Maria II. The agreement contains an arbitration clause. Certain disputes arose between the parties pertaining to the subject matter of the agreement the appellant (ITC Limited) terminated the agreement by notice and followed it up with a suit CS No. 736 of 1978 on the original side of the Calcutta High Court seeking a declaration that the agreements dated 21.3.1977 and 2.2.1978 were illegal and for a decree for the sum of Rs. 39.64 lakhs.

3. On 24.4.1979 the applicant filed a petition under Section 34 of the Arbitration Act, 1940 praying for stay of the aforesaid suit in view of the Arbitration clause contained in the agreement. The High Court allowed the petition and ordered stay of the suit. An appeal carried before the Division Bench of the Calcutta High Court failed. The applicant carried the matter to this Court by Civil Appeal No. 1795 of 1982. The said appeal was disposed of by a judgment dated 6.2.1989 (Reported in [1989] 2 SCC 1). By this judgment this Court upheld the view of the courts below that the reliefs claimed in the suit other than the question of ab initio illegality of the contract would be arbitrable, since the parties agreed to have disputes arbitrated. This Court disposed of the appeal by the following observation:

"Mr. C.S. Vaidyanathan for the respondents states that the respondent shall have no objection to a retired Judge of the Supreme Court being appointed as arbitrator and the respondents shall not raise the question of limitation as indicated by Mr. Shanti Bhushan learned counsel for the appellant, We have no doubt that the arbitrator so appointed shall proceed in accordance with law to decide the questions including that of jurisdiction, if raised.

In the result, we find no merit in this appeal and hence it is dismissed leaving the parties to bear their own costs."

4. The parties thereafter agreed upon the name of late Justice AC. Gupta, a retired Judge of this Court, as Arbitrator. The Arbitrator commenced proceedings and made his Award on 25.2.96. On 27.2.96 the learned Arbitrator gave notice of making the Award to the advocate for the applicant forwarding a copy of the Award. He also informed the applicant's advocate that the original Award and other papers had been filed in this Court.

5. On 22.3.1996 the appellant forwarded to the applicant a sum of Rs. 6, 67,385/- towards the amount payable under the Award, one month's interest thereon at the rate of 18%, and the costs of reference. This amount was received by the applicant who acknowledged it by a letter dated 6.4.1996. By this letter, the applicants declared his intention to challenge the Award insofar as it negatives his claim in excess of Rs. 667385/- and stated he had received the demand draft sent by the appellant "without prejudice to our right to challenge the Award before the competent Court of law".

6. On 22.4.96 the applicant filed an application under Section 14(2) of the Arbitration Act, 1940 before the Court of Principal Senior Civil Judge at Vishakhapatnam. In this application he prayed

for a direction to the learned Arbitrator to take back the Award from this Court and to file it in the Court at Vishakhapatnam. He also filed an application for condoning the delay of 25 days in filing the said application.

7. On 27.1.1998 the applicant filed IA No. 1 of 1998 in Civil Appeal No. 1795 of 1982 in this Court; the substantive prayer made in this I.A. was as under:

"...a) direct the Registry of this Hon'ble Court to transfer the Arbitral Award dated 25.2.1996 passed by Justice Sri A.C. Gupta, learned Arbitrator filed in this Hon'ble Court to the file of the Hon'ble Court of the Subordinate Judge at Vizag;"

8. On 23.4.1998 an office report was made by the Registry of this Court informing advocates of both the parties that the Arbitrator had sent the Award to this Court.

9. On 12.5.1998 the appellant filed its counter-affidavit in I.A.1/98 opposing it, inter alia, on the ground that a similar application was already pending before the Vishakhapatnam Court.

10. On 13.5.1998 this application was heard and dismissed as withdrawn.

11. On 2.7.02 the Principal Senior Judge Vishakhapatnam disposed of the application for condonation of delay by condoning the delay upon payment of cost. The main application under Section 14(2) of the Arbitration Act, 1940 before the Principal Civil Judge, is still pending.

12. On 7.2.03 the appellant filed a Civil Review Petition No. 3214/02 before the High Court of Andhra Pradesh which was admitted and further proceedings in the Arbitration Application were stayed.

13. Sometime during the year 2003 the learned Arbitrator died.

14. On 28.1.2004 the present I.A. No. 2/2004 was taken out for directions as indicated hereinabove.

15. The application has been vehemently opposed by the appellant and we have heard learned counsel on both sides.

16. Although the learned counsel for the appellant raised a number of objections, it appears to us that most of the objections pertain to the validity of the Award, which is really not in issue before us. As and when such objections are raised before the appropriate court, the appropriate court will deal with them. In the present application we are only concerned with physical transmission of the Arbitral Award to the Court in Vishakhapatnam. This request has been made to this Court on account of the peculiar facts and circumstances of the case. The arbitration was suggested and directed by the Order dated 6.2.1989 of this Court made in its judgment in ITC Limited (supra). The Award was accordingly made by the learned Arbitrator. The Arbitrator perhaps thought that the arbitration having been directed by this Court it was appropriate that the Award should be filed in this Court. The appellant has already paid the amount payable under the Award to the applicant. It is the applicant who wants to challenge the Award insofar as the Award is restricted to the amount as indicated. He had filed an application under Section 14(2) of the Arbitration Act, 1940 before the court at Vishakhapatnam to issue a direction to the Arbitrator to take back the Award from the Registry of this Court and to file it before the Court at Vishakhapatnam. Pending this application, the learned Arbitrator passed away.

17. It is obvious that the Court at Vishakhapatnam would not be in a position to give any direction to this Court, nor to the Arbitrator. Hence, the attempt on the part of the applicant to see that the Award is physically transmitted to the court at Vishakhapatnam.

18. The learned counsel for the appellant however contends that the appellant is entitled to object to the petition being entertained at this stage by any Court as it is hopelessly barred by time. He contends that, upon receiving notice from this Court about the filing of the Award, no objection was filed within 30 days as provided in Article 119 B read with Section 14(2) of the Arbitration Act, 1940 and thus the applicant has lost his opportunity to object to and challenge the said Award. It is further urged that if this Court transmits the Award to the Vishakhapatnam Court, the applicant is likely to take the stand that the objections can be filed within a period of 30 days from the date on which the Vishakhapatnam Court receives the Award. According to the appellant this should not be permitted.

19. In our view, it is not necessary for us to decide even this contention. It would be appropriate if the Award is transmitted to the Court in Vishakhapatnam and the parties are left at liberty to raise all contentions, including the aforesaid contention before the said court.

20. In the result, the application is disposed of by the following order:

1. The Registry is directed to transmit the Award filed by late Justice A.C. Gupta, in the matter of Arbitration between ITC Ltd. v. George Joseph Fernandes and Anr. Under cover of its letter dated 27.2.1996 to the Court of Principal Senior Civil Judge at Vishakhapatnam for being dealt with in accordance with law.

2. Both the parties are at liberty to raise all their contentions before the said Court. The transmission of the Award to the said court shall be without prejudice to the contentions of the appellant that the application/objections for setting aside the Award is barred by limitation as it was not filed before this Court within 30 days as provided in Article 119B of the Limitation Act, 1963 read with Section 14(2) of the Arbitration Act, 1940. It shall also be without prejudice to the contentions of the applicant to the contrary.

21. The application is accordingly disposed of without any order as to costs.

**[Dr. Manju Varma vs. State of U.P. and Ors. \(17.11.2004 - SC\)](#)**

**JUDGMENT**

1. The subject matter of challenge in this appeal is an order passed by the Chief Justice of the Allahabad High Court transferring writ petition No. 1678(S/B) of 1998 (Dr. Manju Verma v. State of U.P. and Ors.) from the Lucknow Bench of the High Court to Allahabad for hearing.

2. The respondent has raised a preliminary objection that the appeal was not maintainable under Article 136 of the Constitution. According to the respondent, the impugned order was not an "order" passed by a "Court" or a "Tribunal" within the meaning of Article 136, but was an order passed under paragraph 14 of the United Provinces High Courts (Amalgamation) Order 1948 on the administrative side. It is also submitted that the appropriate remedy of the appellant was under Article 226 of the Constitution. The Respondent has relied upon the decisions of this Court in *Konkan Railway Corporation Ltd and Anr. v. Rani Construction Pvt. Ltd.* 2002 (2) SCC 388, *Rajasthan High Court Advocate's Association v. Union of India* 2001(2) SCC 294 and *State of Rajasthan v. Prakash Chand* 1998 (1) SCC 1, to contend that the nature of the power conferred and exercised by the Chief Justice under paragraph 14 of the 1948 order was purely administrative.

3. The appellant has submitted that since the territorial jurisdictions of the High Court Benches at Lucknow and Allahabad are rigidly divided, the power exercised by the Chief Justice under paragraph 14 of the 1948 Order was similar to the powers conferred under Section 24 of the Code of Civil Procedure and Article 139-A of the Constitution. It is submitted that the transfer of

the case from one territorial jurisdiction to another territorial jurisdiction has always been considered to be judicial in nature and the functionary exercising such power, a Court or a Tribunal. It is submitted that a litigant as the dominus litis cannot be deprived of the right to choose a forum without being heard. According to the appellant, there was a lis between the appellant and the respondent as to whether the writ petition should be transferred or not. The Chief Justice in deciding such a lis exercised quasi judicial power and would be a Tribunal for the limited purposes for deciding the transfer of a case. It is contended that the power which was being construed in the Konkan Railway case (supra) was the power of the Chief Justice under Section 11(6) of the Arbitration and Conciliation Act 1996 which only involved the nomination of an Arbitrator to decide a case. Here there was already a case pending before a competent Court. Another distinction with Section 11(6) of the Arbitration Act is that the appointment could be questioned before the Arbitrator, whereas under Clause 14 of the 1948 Order, the correctness of the Chief Justice's order could not be argued before the Court to which the case was directed to be transferred.

4. Article 136 of the Constitution confers broad powers on this Court to grant special leave to appeal from any order whether an appeal lies from such an order under law or not. "The article itself is worded in the widest terms possible. It vests in the Supreme Court a plenary jurisdiction in the matter of entertaining and hearing appeals, by granting of special leave against any kind of judgment or order made by a Court or Tribunal in any cause or matter and the powers could be exercised in spite of the specific provisions for appeal contained in the Constitution or other laws. The Constitution for the best of reasons did not choose to fetter or circumscribe the powers exercisable under this article in any way" *Durga Shankar Mehta v. Thakur Raghuraj Singh and Ors.*, 1954 SCR 272. According to *The Engineering Mazdoor Sabha and Anr. v. The Hind Cycles Ltd.*, (1963) supp (1) SCR 625, AIR 1963 (1) 875

"It is clear that Art.136 (1) confers very wide powers on this Court and as such, its provisions have to be liberally construed. The constitution-makers thought it necessary to clothe this Court with very wide powers to deal with all orders and adjudications made by Courts and Tribunals in the territory of India in order to ensure fair administration of justice in this country. It is significant that whereas Arts. 133(1) and 134 (1) provide for appeals to this Court against judgments, decrees and final orders passed by the High Courts, no such limitation is prescribed by Art. 136(1). All Courts and all Tribunals in the territory of India except those in Cl.(2) are subject to the appellate jurisdiction of this Court under Art.136(1). It is also clear that whereas the appellate jurisdiction of this Court under Arts.133 (1) and 134(1) can be invoked only against final orders, no such limitation is imposed by Art. 136(1). In other words, the appellate jurisdiction of this Court under this latter provision can be exercised even against an interlocutory order or decision. Causes or matters covered by Art.136 (1) are all causes and matters that are brought for adjudication before Courts or Tribunals. The sweep of this provision is thus very wide".

5. Thus two conditions must be satisfied for invoking Article 136 (1):-

(1) The proposed appeal must be against a judicial or quasi judicial and not a purely executive or administrative order and;

(2) The determination or order must have been made or passed by any Court or Tribunal in the territory of India.

6. The decision in *Engineering Mazdoor Sabha* notices that the designation of an act as quasi judicial or as purely executive depends on the facts and circumstances of each case. But generally speaking if there is a contest between two contending parties and a statutory authority is required to adjudicate upon the competing contentions then the act is a quasi judicial one [See *Indian National Congress (I) v. Institute of Social Welfare and Ors* (2002) 5 SCC 685].

7. In *Jaswant Sugar Mills Ltd. v. Lakshmi Chand*: 1963 Supp. 1 SCR 242: AIR 1963 SC 677 three characteristics of a judicial order have been indicated.

"1) It is in substance a determination upon investigation of a question by the application of objective standards to facts found in the light of pre-existing legal rules;

2) it declares rights or imposes upon parties obligations affecting their civil rights; and

3) that the investigation is subject to certain procedural attributes contemplating an opportunity of presenting its case to a party, ascertainment of facts by means of evidence if a dispute be on questions of fact, and if the dispute be on question of law on the presentation of legal argument, and a decision resulting in the disposal of the matter on findings based upon those questions of law and fact". (p.682)

8. We can now consider whether the impugned order can be described as quasi-judicial.

9. Prior to 1948, the High Court at Allahabad and the Chief Court in Oudh exercised jurisdiction over the different territories. Historically, the territories within the jurisdiction of the Oudh Chief Court were the 12 districts of Lucknow, Fatehpur, Sultanpur, Rai Bareilly, Pratapgarh, Bara Banki, Gonda, Bahraich, Solapur, Kheri, Hardoi and Unnao. By the United Provinces High Courts (Amalgamation) 1948 Order from 26th July, 1948, the High Court in Allahabad and the Chief Court in Oudh were amalgamated to constitute one High Court by the name of the High Court of Judicature at Allahabad. Under paragraph 7 of the Order the new High Court was vested with all such original appellate and other jurisdiction, as under the law in force immediately before 26th July, 1948 was exercisable in respect of any part of that Province by either of the "existing High Courts". The phrase "existing High Courts" has been defined in paragraph 2(1) of the Amalgamation Order to mean the High Courts referred to in Section 219 of the Government of India Act, 1935 as the High Court in Allahabad and the Chief Court in Oudh. Clause 14 of the 1948 Order which is required to be interpreted by us reads:-

"The new High Court, and the judges and division courts thereof, shall sit at Allahabad or at such other places in the United Provinces as the Chief Justice may, with the approval of the Governor of the United Provinces appoint:

Provided that unless the Governor of the United Provinces with the concurrence of the Chief Justice, otherwise directs, such judges of the new High Court not less than two in number, as the Chief Justice, may, from time to time nominate, shall sit at Lucknow in order to exercise in respect of cases arising in such areas in Oudh, as the Chief Justice may direct, the jurisdiction and power for the time being vested in the new High Court:

Provided further that the Chief Justice may in his discretion order that any case or class of cases arising in the said areas shall be heard at Allahabad."

10. This paragraph has already been the subject of interpretation in *Sri Nasiruddin v. State Transport Appellate Tribunal*, 1975 (2) SCC 671. This Court held that the power of the Chief Justice to direct what areas in Oudh are within the exclusive jurisdiction of Judges of the Lucknow Bench meant that areas once determined would continue to hold good. It was further held that under the first proviso to paragraph 14 of the 1948 Order, Lucknow was the seat in respect of causes of action arising in the Oudh areas. It was held that the second part of the first proviso to paragraph 14 showed that once a direction was given including certain areas in Oudh there was no power or discretion which could be again exercised to change the areas from time to time. It was held that if a cause of action arose wholly or in part at a place within specified Oudh areas, the Lucknow Bench would have the jurisdiction and if the cause of action arose wholly within the specified Oudh areas then the Lucknow Bench would have exclusive jurisdiction in such a matter. This Court went on to say:-

"If the cause of action arises in part within the specified areas in Oudh it would be open to the litigant who is the dominus litis to have his forum conveniens. The litigant has the right to go to a court where part of his cause of action arises. In such cases, it is incorrect to say that the litigant chooses any particular court. The choice is by reason of the jurisdiction of the court being attracted by part of cause of action arising within the jurisdiction of the court. Similarly, if the cause of action can be said to have arisen in part within specified areas in Oudh and part outside the specified Oudh areas, the litigant will have the choice to institute proceedings either at Allahabad or Lucknow. The court will find out in each case whether the jurisdiction of the court is rightly attracted by the alleged cause of action."

11. With this interpretation of clause 14, it is clear that the Benches of Lucknow and Allahabad although part of one High Court, exercise distinct and exclusive jurisdiction over demarcated territories. The decision in Nasirudin also makes it clear that it was open to a litigant to invoke the jurisdiction of any one of the Benches, if part of the cause of action had arisen within the territorial jurisdiction of both.

12. It would be instructive in this context to compare the power of transfer of litigation from one jurisdiction to another under Section 24 of the Code of Civil Procedure. Section 24 allows the High Courts or the district Courts either on the application of any of the parties after notice and hearing or of its own motion without such notice to inter alia transfer any suit/appeal or other proceedings, pending in any court subordinate to it for trial or disposal to any other court subordinate to it and competent to try and dispose of the same. Similar power has been granted under the Letters Patent to Chartered High Courts to withdraw proceedings from any Court within its jurisdiction to itself. Thus clause 13 of the Letters Patent 1865 in relation to the Calcutta High Court provides:-

"And we do further ordain, that the said High Court of Judicature at Fort William in Bengal shall have power to remove, and to try and determine, as a Court of extraordinary original Jurisdiction, any suit being falling within the jurisdiction of any Court, whether within or without the Bengal Division of the Presidency of Fort William, subject to its superintendence, when the said High Court shall think proper to do so, either on the agreement of the parties to that effect, or for purposes of justice, the reasons for so doing being recorded on the proceedings of the said High Court."

13. Again, this Court has been empowered under Article 139A of the Constitution to transfer proceedings from one High Court to another, either on its own motion or on an application made either by the Attorney General of India or by a party to any such case.

14. It may be that the orders passed under the first two provisions are not appealable as a matter of right, but nonetheless they remain judicial orders and susceptible of correction under Art. 136. The mere fact that the power has been vested in the Chief Justice under paragraph 14 of the Amalgamation Order and not in the Court would not detract from the nature of the power exercised. The power of transfer from one territorial jurisdiction is distinct from the power of the Chief Justice to frame a roster to determine the distribution of judicial work in the High Court. In the latter case it is an intra jurisdictional as opposed to an inter jurisdictional act. [See: State of Rajasthan v. Prakash Chand (Supra); Rajasthan High Court Advocates Association v. Union of India (supra)]. It is also distinct from the power of the Chief Justice or his designate to appoint an arbitrator under S.11 (6) of the Arbitration & Conciliation Act, 1996. Under that section "... the only function of the Chief Justice or his designate under Section 11 is to fill the gap left by a party to the arbitration agreement or by the two arbitrators appointed by the parties and nominate an arbitrator" Konkan Railway Corporation Ltd and Anr. v. Rani Construction Pvt. Ltd. 2002 (2) SCC 388, 405. While exercising this discretion there is no need to serve notice on any party and a rule providing for notice upon the party to the arbitration agreement to show cause why the nomination of an arbitrator as requested should not be made, is bad. The only purpose for which a notice may be given would be to inform a party of such appointment or for assistance of the Chief Justice or his designate to nominate an arbitrator. No lis exists nor is decided.

15. There was nothing executive in the procedure followed in this case. The respondent had applied to the Chief Justice under paragraph 14 for a transfer of the appellant's writ petition from Lucknow to Allahabad. The Chief Justice heard the parties and by a detailed and reasoned order directed such transfer. There can in the circumstances be no doubt that the order of the Chief Justice was, if not judicial, at least quasi judicial.

16. The next question is whether the Chief Justice could be said to have acted as a "Court" or as a "Tribunal".

17. In *Durga Shankar Mehta v. Thakur Raghuraj Singh and Ors.* 1954 SCR 272 this Court declared:-

"...the expression "Tribunal" as used in article 136 does not mean the same thing as "Court" but includes, within its ambit, all adjudicating bodies, provided they are constituted by the State and are invested with judicial as distinguished from purely administrative or executive functions. The only Courts or Tribunals, which are expressly exempted from the purview of article 136, are those which are established by or under any law relating to the Armed Forces as laid down in clause (2) of the article.

18. In *Indian National Congress (I) V. Institute of Social Welfare and Ors.* (2002) 5 SCC 685 this Court posits:-

"Where there is a lis or two contesting parties making rival claims and the statutory authority under the statutory provision is required to decide such a dispute, in the absence of any other attributes of a quasi-judicial authority, such a statutory authority is quasi-judicial authority."

19. In ordering the transfer of the case under the 1948 Amalgamation Order, the Chief Justice was determining the plea of the respondent and the objection of the appellant to the transfer of the appellant's writ petition. He could not allow the plea without hearing the affected party and without determining on objective criteria and upon investigation whether the case was (a) transferable and (b) should be transferred. His decision would affect the right of the appellant to choose her 'forum conveniens'. He was therefore acting as an adjudicating body empowered by the Constitution to discharge judicial functions. We would accordingly hold that the Chief Justice while exercising jurisdiction under paragraph 14 of the 1948 Order, acts as a judicial authority with all the attributes of a Court and his order is therefore amenable to correction under Article 136. The preliminary objection of the respondent is therefore rejected.

20. Coming to the merits - the appellant's writ petition had been filed on 12th November 1998 (W.P. No. 1678 of 1998) and related to the seniority list of the Readers in Obstetrics and Gynecology in the State Medical Colleges. The appellant sought for promotion from the date her juniors, Dr. Sandhya Aggarwal and Dr. Gauri Ganguli, were given promotion. Dr. Gauri Ganguli was added as the respondent No. 6 to the appellant's writ petition in 1999. Hearing of the writ petition was concluded and judgment was reserved by a Bench of two Judges in December 1999. Subsequently, the matter was released because of the personal embarrassment faced by one of the Judges who had heard the matter. It was again heard by another Bench inconclusively because one of the Judges was transferred. During this period, pleadings were complete. The matter then appeared in the list of two learned Judges on 10th July 2001. An application was filed for adjournment by the respondent No. 6. The application was rejected by a reasoned order. The order records that while the appellant's petition had been taken up for hearing several months back and arguments had commenced, the matter had been adjourned on several occasions to accommodate the respondent No. 6 and her counsel. It was noted that the respondent No. 6 had filed a writ petition on 4th July 2001 in connection with her appointment to the post of Reader in the Department of Obstetrics and Gynecology and obtained an interim order without impleading the present appellant as a party. It was also noted that the hearing of the appellant's writ petition had been fixed with the consent of the parties. After further discussion, the Court was of the view that the application for adjournment was a device to get the case adjourned so that the

respondent No. 6 could get an appointment order issued in her favour in her writ petition. Having rejected the respondent's No. 6 application for adjournment, the matter was directed to be proceeded with. It was then that the respondent No. 6 filed the application for transfer of the appellant's writ application from Lucknow to Allahabad. When the appellant's writ application was taken up for hearing on 25th July 2001 an order was passed by the Division Bench to the following effect:

"Supplementary counter affidavit on behalf of respondent No. 6 filed today be placed on record.

Heard learned counsel for the petitioner and learned counsel for the opposite parties.

Arguments concluded. Judgment is reserved."

21. Six months later on 23rd January 2002 the Chief Justice of the High Court allowed the respondent No. 6's application for transfer. Before considering the reasons given by the Chief Justice for allowing the transfer it is necessary to delineate the ambit of his power under paragraph 14 of the Order. The first proviso of paragraph 14 which confers the power of transfer on the Chief Justice allows the Chief Justice to provide that in respect of such cases, namely, those which arise in areas in Oudh, shall be heard at Allahabad. The proviso assumes first, that the case or class of cases to be transferred by the Chief Justice from Lucknow to Allahabad are those which the Lucknow Bench would otherwise have the jurisdiction to entertain; and second that the power of transfer must be exercised for the purpose of having the matter heard at Allahabad. If the matter has already been heard, then the Chief Justice would not have power to transfer the case from Lucknow to Allahabad.

22. One of the reasons for allowing the transfer was that the writ petition filed before the Lucknow Bench by respondent No. 6 being Writ Petition No. 1945 of 2000 relating to the same issue had been rejected by the High Court on the ground that the Lucknow Bench had no jurisdiction to entertain the petition and that accordingly a writ petition had been filed by the respondent No. 6 at Allahabad. There was, according to the impugned order, no reason to take a different stand in the writ petition filed by the appellant when the consequential effect of both the writ petitions was the same.

23. The factual assumption underlying this reason is incorrect. It is true that the respondent No. 6 had filed a writ petition in 2000 before the Lucknow Bench ( W. P. No. 1945 (S/B) of 2000). It is also true that an order had been passed by the Lucknow Bench holding that it had no jurisdiction to entertain the writ petition and that the writ petition should have been filed at Allahabad. What has been overlooked is that the respondent No. 6 has challenged this order by way of civil revision and the civil revision petition is still pending. Independent of this, a second writ petition (W.P. No. 23879 of 2001) was filed by respondent No. 6 in the High Court in Allahabad in 2001. This writ petition pertains to the issuance of an appointment order to the respondent No. 6 as a Reader as noted by us earlier.

24. The legal basis of this reason for transfer of the appellant's writ petition is also erroneous. It needs to be emphasized that the power under paragraph 14 envisages transfer of a case or class of cases where the Lucknow Bench otherwise has jurisdiction to decide the matter. Whether the Lucknow Bench had/had no jurisdiction was not only an issue to be decided judicially in the appellant's writ petition but also an issue which would, if answered in the negative, cut at the root of the Chief Justice's power under paragraph 14 of the Order since paragraph 14 confers the power in the Chief Justice to transfer cases only in respect of any case or class of cases otherwise within the jurisdiction of the Lucknow Bench to Allahabad.

25. The second reason for transfer was that the appellant and the respondent No. 6, as well the U.P. Public Service Commission was at Allahabad. But the State Government which issued the impugned order and against which the mandamus was prayed for by the appellant is in Lucknow.

In the circumstances, the mere fact that the respondent No. 6 and the appellant were both in Allahabad should not have weighed with the Chief Justice in depriving the appellant of her right as dominus litis.

26. The third and final reason which persuaded the Chief Justice to order the transfer is equally insupportable. The reason was that the hearing of the appellant's petition was not concluded. This reason is contrary to the express language of the order of the Division Bench dated 25th July 2001. Merely because an application was made by the respondent No. 6 for recalling the order before the Lucknow Bench, did not mean that the order dated 25th July 2001 ceased to operate.

27. We therefore set aside the order of the Learned Chief Justice directing transfer of the appellant's writ petition and leave the matter to the Lucknow Bench which heard the matter to proceed with it in such manner as it may think fit.

28. The appeal is accordingly allowed without any order as to costs.

**Dharma Prathishthanam vs. Madhok Construction Pvt. Ltd. (02.11.2004 - SC)**

2. The appellant-Dharma Prathishthanam is a charitable institution. The respondent is a builder engaged in construction activity. In the year 1985, the appellant proposed to have a building constructed for which purpose it entered into a works contract with the respondent for the construction as per the drawings and specifications given by the appellant. We are not concerned with the correctness or otherwise of the allegations and counter allegations made by the parties which relate to the question who committed breach of the agreement. Suffice it for our purpose to say that disputes arose between the parties. Clause 35 of the agreement which is the arbitration clause reads as under:-

"Settlement of disputes shall be through arbitration as per the Indian Arbitration Act."

3. Obviously and admittedly the reference was to the Arbitration Act, 1940.

4. On 12th June, 1989 the respondent appointed one Shri Swami Dayal as the Sole Arbitrator. It appears that the respondent gave a notice to the appellant of such appointment having been made by the respondent but the appellant failed to respond. The respondent made a reference of disputes to the Arbitrator and the Arbitrator Shri Swami Dayal entered upon the reference. The record of the proceedings of the Arbitrator have neither been produced before the High court nor are they available before us. However, it is not disputed that the appellant did not participate in the proceedings before the Arbitrator. On 14th April, 1990 the Sole Arbitrator gave an award of Rs. 14,42,130.78p. With interest at the rate of 12 per cent per annum from 14th April, 1990 till realization in favour of the respondent against the appellant. The respondent filed an application in the Court under Sections 14 and 17 of the Act for making the Award a Rule of the Court. The notice under Section 14(2) of the Act was published in the Statesman, a daily English newspaper in its edition dated 6th December, 1991. The notice reads as under:-

"Notice to:

Dharma Prathishthanam A, 214, New Friends Colony, New Delhi - 65.

Whereas Shri Swami Dayal the Arbitrator has filed the award dated 14.4.90 delivered by the said Arbitrator with Arbitration proceedings in Court in disputes inter se you respondent and petitioner for being made a rule of the Court. You are hereby called upon to file objections, if any, in accordance with law to the said award within 30 days of the Service of this notice.

And petitioner has filed an application I.A. No. 8446/90 under Section 17 of the Arbitration Act, 1940 on 20.9.91.

AND

Whereas it has been shown to the satisfaction of the Court it is not possible to serve you in the ordinary way, therefore, this notice is given by advertisement directing you to make appearance in Court on 20.2.92 at 11 a.m.

Take notice that in default of your appearance on the day before mentioned, the suit and I.A. will be heard and determined in your absence.

Dated this 18th day of November, 1991."

5. The appellant appeared in the Court on the appointed date i.e. 20th February, 1992. According to the appellant it gathered only on that date a copy of the Award dated 14th April, 1990, from 14th March, 1992 to 20th March, 1992 the Court was closed. On 21st March, 1992 the appellant filed objections to the Award, The objections have been dismissed without any adjudication on merits and only on the ground that the objection petition was filed beyond a period of 30 days from 6th February, 1991 i.e. the date of publication of notice in the Statesman. Having lost before the learned Single Judge of the High Court of Delhi (Original Side) as also in intra-court appeal preferred before the Division Bench, the aggrieved appellant has filed this appeal by special leave.

6. Though the initial submission of the learned counsel for the appellant has been that in the facts and circumstances of the case, the delay in filing the objection petition ought to have been condoned and the objection petition ought to have been held to have been filed within the period of limitation calculated from the date on which copy of the award was made available to the appellant without which the appellant could not have exercised its right to file objections and, therefore, subject to this Court feeling satisfied of the maintainability of the objection petition and its availability for consideration on merits, this Court may remand the objection petition for hearing and decision by the learned Single Judge on merits. However, we do not think that this exercise is at all called for, as we are satisfied that the Award given by the arbitrator is a nullity and hence the proceedings must stand terminated fully and finally at this stage itself. We proceed to record our reasons for taking this view.

7. An arbitrator or an Arbitral Tribunal under the Scheme of the 1940 Act is not statutory. It is a forum chosen by the consent of the parties as an alternate to resolution of disputes by the ordinary forum of law courts. The essence of arbitration without assistance or intervention of the Court is settlement of the dispute by a Tribunal of the own choosing of the parties. Further, this was not a case where the arbitration clause authorized one of the parties to appoint an arbitrator without the consent of the other. Two things are, therefore, of essence in cases like the present one: firstly, the choice of the Tribunal or the arbitrator; and secondly, the reference of the dispute to the arbitrator. Both should be based on consent given either at the time of choosing the Arbitrator and making reference or else at the time of entering into the contract between the parties in anticipation of an occasion for settlement of disputes arising in future. The Law of Arbitration does not make the arbitration adjudication by a statutory body but it only aids in implementation of the arbitration contract between the parties which remains a private adjudication by a forum consensually chosen by the parties and made on a consensual reference.

8. Arbitration Act, 1940 consolidates and amends the law relating to arbitration. According to Clause (a) of Section 2 of the Act, "Arbitration agreement" means a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not. Under Section 3, "arbitration agreement, unless a different intention is expressed therein, shall be

deemed to include the provisions set out in the First Schedule insofar as they are applicable to the reference. The First Schedule consists of 8 paragraphs incorporating implied conditions of arbitration agreements. Para 1 of the First Schedule which only is relevant for our purpose provides - "Unless otherwise expressly provided, the reference shall be to a sole arbitrator". The manner and method of choosing the sole arbitrator and making the reference to him is not provided. That is found to be dealt with in Sections 8, 9 and 20 of the Act.

9. The relevant parts of the provisions relevant in the context of a general clause merely providing for arbitration as in the present case, are extracted and reproduced herein :-

"Section 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) XXX	XXX	XXX
(C) XXX	XXX	XXX

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 the 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."

Section 9 is irrelevant for our purpose as its applicability is attracted to a case where an arbitration agreement provides for a reference to two arbitrators, one to be appointed by each party and procedure to be followed in such cases which is not a situation provided, in by the agreement with which we are dealing.

10. Sections 8 and 9 are placed in Chapter II of the Act Section 20 finds place in Chapter III. According to Section 20 -

Application to file in Court arbitration agreement -

(1) Where any persons have entered into an arbitration agreement before the institution of any suit with respect to the subject-matter of the agreement or any part of it, and where a difference has arisen to which the agreement applies, they or any of them, instead of proceeding under Chapter II, may apply to a Court having jurisdiction in the matter to which the agreement relates, that the agreement be filed in court."

After noticing all the parties and affording them an opportunity of being heard, under Sub-sections (4) and (5) -

"(4) Where no sufficient cause is shown, the Court shall order the agreement to be filed, and shall make an order of reference to the arbitrator appointed by the parties, whether in the agreement or otherwise, or, where the parties cannot agree upon an arbitrator, to an arbitrator appointed by the Court.

(5) Thereafter, the arbitration shall proceed in accordance with, and shall be governed by, the other provisions of this Act so far as they can be made applicable."

11. In the background of the above said provisions, the question which arises for consideration is whether, in the light of a general provision as in Clause 35, the respondent could have unilaterally appointed an arbitrator without the consent of the appellant and could have made a reference to such arbitrator again without the reference of disputes having been consented to by the appellant.

12. On a plain reading of the several provisions referred to hereinabove, we are clearly of the opinion that the procedure followed and the methodology adopted by the respondent is wholly unknown to law and the appointment of the sole arbitrator Shri Swami Dayal, the reference of disputes to such arbitrator and the ex parte proceedings and award given by the arbitrator are all void ab initio and hence nullity, liable to be ignored. In case of arbitration without the intervention of the Court, the parties must rigorously stick to the agreement entered into between the two. If the arbitration clause names an arbitrator as the one already agreed upon, the appointment of an arbitrator poses no difficulty. If the arbitration clause does not name an arbitrator but provides for the manner in which the arbitrator is to be chosen and appointed, then the parties are bound to act accordingly. If the parties do not agree then arises the complication which has to be resolved by reference to the provisions of the Act. One party cannot usurp the jurisdiction of the Court and proceed to act unilaterally. A unilateral appointment and a unilateral reference - both will be illegal. It may make a difference if in respect of a unilateral appointment and reference the other party submits to the jurisdiction of the arbitrator and waives its rights which it has under the agreement, then the arbitrator may proceed with the reference and the party submitting to his jurisdiction and participating in the proceedings before him may later on be precluded and estopped from raising any objection in that regard. According to Russell (Arbitration, 20th Edition, p. 104) -

"An Arbitrator is neither more nor less than a private judge of a private court (called an arbitral tribunal) who gives a private judgment (called an award). He is a judge in that a dispute is submitted to him;.....".

"He is private in so far as (1) he is chosen and paid by the disputants (2) he does not sit in public (3) he acts in accordance with privately chosen procedure so far as that is not repugnant to public policy (4) so far as the law allows he is set up to the exclusion of the State Courts (5) his authority and powers are only whatsoever he is given by the disputants' agreement (6) the effectiveness of his powers derives wholly from the private law of contract and accordingly the nature and exercise of these powers must not be contrary to the proper law of the contract or the public policy of England, bearing in mind that the paramount public policy is that freedom of contract is not lightly to be interfered with."

13. A reference to a few decided cases would be apposite.

14. In *Thawardas Pherumal and Anr. v. Union of India* (1955) 2 SCR 48, a question arose in the context that no specific question of law was referred to, either by agreement or by compulsion, for decision of the Arbitrator and yet the same was decided howsoever assuming it to be within his jurisdiction and essentially for him to decide the same incidentally. It was held that-

"A reference requires the assent of both sides. If one side is not prepared to submit a given matter to arbitration when there is an agreement between them that it should be referred, then recourse must be had to the court under Section 20 of the Act and the recalcitrant party can then be compelled to submit the matter under Sub-section (4), In the absence of either, agreement by both sides about the terms of reference, or an order of the Court under Section 20(4) compelling a reference, the arbitrator is not vested with the necessary exclusive jurisdiction."

15. A Constitution Bench held in *Waverly Jute Mills Co. Ltd. v. Raymond and Co. (India) Pvt. Ltd.* (1963) 3 SCR 203 that

"An agreement for arbitration is the very foundation on which the jurisdiction of the arbitrators to act rests, and where that is not in existence, at the time when they enter on their duties, the

proceedings must be held to be wholly without jurisdiction. And this defect is not cured by the appearance of the parties in those proceedings, even if that is without protest, because it is well settled that consent cannot confer jurisdiction."

16. Again a Three-Judges Bench held in *Union of India v. A.L. Rallia Ram* (1964) 3 SCR 164 that it is from the terms of the arbitration agreement that the arbitrator derives his authority to arbitrate and in absence thereof the proceedings of the arbitrator would be unauthorized.

17. In *Union of India v. Prafulla Kumar Sanyal* [1979] 3 SCC 631, this Court observed that an order of reference can be either to an arbitrator appointed by the parties whether in the agreement or otherwise or where the parties cannot agree upon an arbitrator, to an arbitrator appointed by the Court. If no such arbitrator had been appointed and where the parties cannot agree upon an arbitrator, the Court may proceed to appoint an arbitrator itself. Clearly one party cannot force his choice of arbitrator upon the other party to which the latter does not consent. The only solution in such a case is to seek an appointment from the Court.

18. In *Banwari Lal Kotiya v. P.C. Aaarwal* 1985 (3) SCC 255, the question of validity of a reference came up for the consideration of the Court in the context of the issue - whether an arbitrator could enter upon a reference which was not consensual. The Court explained the law laid down by this Court in *Thawardas Perumal's case* (supra) that though the reference to arbitrator has to be accompanied by consent of the parties but such consent is not necessarily required to be expressed at the time of making the reference if it is already provided by the agreement or is sanctioned by statutory rules, regulations or bye-laws. The Court held that the expression "arbitration agreement" is wider as it combines within itself two concepts - (a) a bare agreement between the parties that disputes arising between them should be decided or resolved through arbitration and (b) an actual reference of a particular dispute or disputes for adjudication to a named arbitrator or arbitrators. When the arbitration agreement is of the former type, namely, a bare agreement, a separate reference to arbitration with fresh assent of both the parties will be necessary and in the absence of such consensual reference resorting to Section 20 of the Arbitration Act will be essential.

19. The Constitution Bench in *Khardah Company Ltd. v. Raymond & Co. (India) Private Ltd.* AIR 1962 SC 1810 decided the issue from the view point of jurisdictional competence and held that what confers jurisdiction on the arbitrators to hear and decide a dispute is an arbitration agreement and where there is no such agreement there is an initial want of jurisdiction which cannot be cured even by acquiescence. It is clearly spelled out from the law laid down by the Constitution Bench that the arbitrators shall derive their jurisdiction from the agreement and consent.

20. Thus, there is ample judicial opinion available for the proposition that the reference to a sole arbitrator as contemplated by para 1 of the First Schedule has to be a consensual reference and not an unilateral reference by one party alone to which the other party does not consent.

21. We are also inclined to make a reference to a few decisions by High Courts.

22. In *India Hosiery Works v. Bharat Woollen Mills Ltd.* AIR 1953 Cal. 488, the Division Bench of the Calcutta High Court observed -

"an arbitration agreement neither specifying the number of arbitrators, nor specifying the mode of appointment, is perfectly effective and valid and the incidents of such an agreement are that it is to take effect as an agreement for reference to a sole arbitrator, to be appointed by consent of the parties or, where the parties do not concur in making an appointment, to be appointed by the Court, except where the operation of Rule 1 of the First Schedule is excluded.

XX                    XX                    XX  
XX                    XX                    XX

Where, therefore, the agreement does not assign the right of appointment distributive to different parties in respect of different arbitrators, it is inherent in the agreement that the appointment of the arbitrator or of each of the several arbitrators must be by the consent of all parties. There may be an express provision to such effect, but even in the absence of any express provision, such a provision must be taken to be necessarily implied. It is for that reason that where the agreement does not specify the number of arbitrators, nor specifies the mode of appointment, the Court first takes the agreement as providing for reference to a single arbitrator by reason of the provisions of Rule 1 of Schedule I, then takes the mode of appointment intended necessarily to be appointed by consent of the parties and next, if it finds that the parties cannot concur in the appointment of an arbitrator, it appoints from itself."

[Emphasis supplied]

23. The view was reiterated by another Division Bench of the same High Court in *Teamco Private Ltd. v. T.M.S. Mani* AIR 1967 Cal. 168.

24. *National Small Industries Corporation Ltd. v. National Metal Craft, Delhi and Ors.* AIR 1981 Del. 189 is very close to the case at hand. An arbitration clause - longish one, in substance provided that on question, dispute or difference arising between the parties to the agreement, "either of the parties may give to the other notice in writing of such question dispute or difference and the same shall be referred to arbitration". One of the parties served a notice on the other appointing one 'K' as arbitrator to adjudicate upon the dispute. The notice ended by saying "you are hereby called upon to agree to the said reference in accordance with the arbitration agreement for the settlement of the said disputes." 'K' then commenced the arbitration proceedings. Following the Division Bench decision of the Calcutta High Court, the learned Single Judge of Delhi High Court held -

"If the agreement merely provides, as here, that the dispute shall be referred to arbitration, the reference shall be made to a single arbitrator. If the agreement does not provide for the number of arbitrators and the mode of their appointment, it will be assumed to be one for reference to a single arbitrator by reason of para I of the First Schedule, and the mode of appointment taken necessarily to be consent of parties, and if the parties do not concur in the appointment as is the case here, the court will make the appointment".

[Emphasis supplied]

Appointment of 'K' as arbitrator was held to be invalid because it was unilateral and was made without any application to the Court either under Section 8 or Section 20 of the Act.

25. A Division Bench of the High Court of Allahabad held in *Om Prakash v. Union of India* AIR 1963 All. 242 that a reference to arbitrator out of Court must be by both the parties together and cannot be by one party alone; failing the consent, the parties or either of them must approach the Court by making an application in writing.

26. Consent, of course, is of the very essence of arbitration said a Division Bench of Madras High Court in *The Union of India v. Mangaldas N. Varma*, Bombay, AIR 1958 Mad, 296.

27. Failure to give consent or to appoint an Arbitrator in response to a notice for appointment of an Arbitrator given by the other party provides justification to the other party for taking action under Sub-section (2) of Section 8 of the Act and then it is the Court which assumes jurisdiction to appoint an Arbitrator as held by High Court of Orissa in *Niranjan Swain v. State of Orissa and Ors.*, AIR 1980 Ori. 142.

28. The view of the law taken by the several High Courts as above appeals to us and we find ourselves in agreement therewith.

29. In the event of the appointment of an arbitrator and reference of disputes to him being void ab initio as totally incompetent or invalid the award shall be void and liable to be set aside de hors the provisions of Section 30 of the Act, in any appropriate proceedings when sought to be enforced or acted upon. This conclusion flows not only from the decided cases referred to hereinabove but also from several other cases which we proceed to notice.

30. In *Chhabba Lal v. Kallu Lal and Ors.*, AIR 1946 P.C. 72 their Lordships have held that an award on a reference presupposes a valid reference. If there is no valid reference, the purported award is a nullity.

31. On this point, there is near unanimity of opinion as amongst the High Courts of the country as well. Illustratively, we may refer to a few cases. In *Union of India v. Ajit Mehta and Associates*, Pune and Ors. AIR 1990 Bom. 45 (para 34), the Division Bench held that the Court has suo motu power to set aside an award on ground other than those covered by Section 30 such as an award made by arbitrators who can never have been appointed under Section 8, as such an award would undoubtedly be ab initio void and nonest. In *Union of India v. South Eastern Railway* AIR 1992 M.P. 47 and *Rajendra Dayal v. Govind* 1970 MPLJ 322, both Division Bench decisions, the High Court of Madhya Pradesh has held that in certain situations the Court may set aside an Award even without there being an application under Section 30 or even if the petition under Section 30 has not been filed within the period of limitation if the Court finds that the award is void or directs a party to do an act which is prohibited by law or is without jurisdiction or patently illegal. We need not multiply the number of authorities on this point as an exhaustive and illuminating conspectus of judicial opinion is found to be contained in *Law of Arbitration and Conciliation - Practice and Procedure* by S.K. Chawla (Second Edition, 2004 at pp. 181-184) under the caption - "Whether the Court has suo motu power to set aside an Arbitral Award - " and the answer given in the discussion thereunder is in the affirmative.

32. Though it has been held in *The Union of India v. Shri Om Prakash* [1976] 4 SCC 32 that an objection on the ground of invalidity of a reference is not specifically covered by Clauses (a), (b) and (c) of Section 30, yet it is included in the residuary expression "or as otherwise invalid" and could have been set aside on such an application being made. However, the above decision cannot be treated as an authority to hold that an award which is void ab initio and hence a nullity consequent upon an invalid appointment and an invalid reference in clear breach of the provisions contained in Sections 8, 9 and 20 of the Act, can still be held to be valid if not objected to through an objection preferred under Section 30 of the Act within the prescribed period of limitation.

33. Three types of situations may emerge between the parties and then before the Court. Firstly, an arbitration agreement, under examination from the point of view of its enforceability, may be one which expresses the parties' intention to have their disputes settled by arbitration by using clear and unambiguous language then the parties and the Court have no other choice but to treat the contract as binding and enforce it. Or, there may be an agreement suffering from such vagueness or uncertainty as is not capable of being construed at all by culling out the intention of the parties with certainty, even by reference to the provisions of the Arbitration Act, then it shall have to be held that there was no agreement between the parties in the eye of law and the question of appointing an arbitrator or making a reference or disputes by reference to Sections 8, 9 and 20 shall not arise.

34. Secondly, there may be an arbitrator or arbitrators named, or the authority may be named who shall appoint an arbitrator, then the parties have already been ad idem on the real identity of the arbitrator as appointed by them before hand; the consent is already spelled out and binds the parties and the Court. All that may remain to be done in the event of an occasion arising for the

purpose, is to have the agreement filed in the Court and seek an order of reference to the arbitrator appointed by the parties.

35. Thirdly, if the arbitrator is not named and the authority who would appoint the arbitrator is also not specified, the appointment and reference shall be to a sole arbitrator unless a different intention is expressly spelt out. The appointment and reference - both shall be by the consent of the parties. Where the parties do not agree, the Court steps in and assumes jurisdiction to make an appointment, also to make a reference, subject to the jurisdiction of the Court being invoked in that regard. We hasten to add that mere inaction by a party called upon by the other one to act does not lead to an inference as to implied consent or acquiescence being drawn. The appellant not responding to respondent's proposal for joining in the appointment of a sole arbitrator named by him could not be construed as consent and the only option open to the respondent was to have invoked the jurisdiction of Court for appointment of an arbitrator and an order of reference of disputes to him. It is the Court which only could have compelled the appellant to join in the proceedings.

36. In the present case, we find that far from submitting to the jurisdiction of the Arbitrator and conceding to the appointment of and reference to the Arbitrator-Shri Swami Dayal, the appellant did raise an objection to the invalidity of the entire proceedings beginning from the appointment till the giving of the Award though the objection was belated. In ordinary course, we would have after setting aside the impugned judgments of the High Court remanded the matter back for hearing and decision afresh by the learned Single Judge of the High Court so as to record a finding if the award is a nullity and if so then set aside the same without regard to the fact that the objection petition under Section 30 of the Act filed by the appellant was beyond the period of limitation prescribed by Article 119(b) of the Limitation Act, 1963. However, in the facts and circumstances of the case, we consider such a course to follow as a futile exercise resulting in needless waste of public time. On the admitted and undisputed facts, we are satisfied, as already indicated hereinabove, that the impugned Award is a nullity and hence liable to be set aside and that is what we declare and also do hereby, obviating the need for remand.

37. For the foregoing reasons, the appeal is allowed. The impugned Award given by the Arbitrator along with the appointment of the Arbitrator and reference made to him are all set aside as void ab initio and nullity. The respondent shall be at liberty to seek enforcement of his claim, if any, by having recourse to such remedy as may be available to him under law and therein pray for condonation of delay by seeking exclusion of time lost in the present proceedings. No order as to the costs.

**[U.P. State Sugar Corporation Ltd. vs. Jain Construction Co. and Anr. \(25.08.2004 - SC\)](#)**

**JUDGMENT**

This appeal is directed against the judgment and order dated 2.12.2003 passed by the High Court of Uttaranchal at Nainital in A.O. No.313 of 2002 whereby and whereunder the appeal filed by the respondents herein purported to be under Section 39(iv) of the Arbitration Act, 1940 (hereinafter referred to as 'the 1940 Act) was allowed, directing :

"Since, the Arbitration and Conciliation Act, 1996 has come into force, therefore, appropriate remedy to relegate is available to the parties to act in accordance with the provisions of the new Act, if there is an arbitration clause in the agreement. It is an open remedy to the party to move to approach to the Chief Justice or His Nominated Judge in the arbitration under the New Act."

3. The basic fact of the mater is not in dispute. The parties hereto had entered into an agreement on or about 11.4.1988 as regard certain civil works in an unit belonging to the Appellant herein. Disputes and differences having arisen between the parties, the respondent herein filed an application under Section 20 of the 1940 Act in the Court of the Civil Judge, Dehradun for

appointment of an arbitrator relying on or on the basis of a purported arbitration agreement contained in clause 34 of the aforementioned contract. The said suit was marked as O.S. No.290 of 1991. The respondent herein, inter alia, pleaded:

"That as per clause no.34 of contract bond all disputes between the parties arising under the contract, arbitrator is to be appointed by Managing Director of the Defendant Corporation. The plaintiff has written so many letters to the M.D. and Secretary of Corporation for appointment of Arbitrator but they did not pay any attention and have not appointed any Arbitrator so far, so the plaintiff is entitled to get the appointment of Arbitrator from the Court."

4. By reason of a judgment and order dated 1.5.1992, the learned Civil Judge, Dehradun rejected the said petition, inter alia, on the ground that the same was not maintainable in view of Section 69 of the Indian Partnership Act, as the plaintiff-firm was not a registered one. The said finding was arrived at despite the fact that the respondent herein had filed an application for amendment of the said petition. As it appears from the judgment of the learned Civil Judge, that the respondent herein had admitted that it failed to make necessary averment in the plaint as regard registration of the firm inadvertently and the application for amendment has been filed having regard to the contentions raised by the Appellant herein in that behalf. The respondent herein being aggrieved by the said judgment filed an appeal before the High Court which was marked as A.O. No.313 of 2002. The said appeal was allowed in the manner as stated hereinbefore.

5. Mr. Vinay Garg, learned counsel appearing on behalf of the appellant, would submit that as the respondent-firm was not a registered one, the application for appointment of an arbitrator both under the 1940 Act and the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the 1996 Act') was not maintainable. Reliance, in this connection, has been placed on Firm Ashok Traders and Another vs. Gurumukh Das Saluja and Others [(2004) 3 SCC 155]. It was also contended that in any event, the impugned judgment is unsustainable in law in view of the provisions contained in Section 85(2)(a) of the 1996 Act, as the arbitral proceeding was initiated as far back as on 1.5.1991, i.e. prior to coming into force of the 1996 Act.

6. The respondent appearing in person, inter alia, submitted that in a similar matter being SLP (C) No.18995 of 1995 arising out of an order in Appeal No.493 of 1995 passed by the Allahabad High Court, this Court directed the Additional Civil Judge, to whom the matter was remitted, to appoint an arbitrator in terms of clause 34 of the contract between the parties and, thus, there is absolutely no reason as to why clause 34 of the present agreement, which contains similar stipulation, should not be acted upon. A written submission has also been filed before us, inter alia, contending that the Appellant herein is guilty of commission of breach of the said agreement dated 11.4.1988.

7. The question as to whether the respondent no.1-firm is registered or not is essentially a question of fact. It is true that the arbitral proceedings would not be maintainable at the instance of an unregistered firm having regard to the mandatory provisions contained in Section 69 of the Indian Partnership Act, 1932. It has been so held in Jagdish Chandra Gupta vs. Kajaria Traders (India) Ltd. [AIR 1964 SC 1882]. We may, however, notice that this Court in Firm Ashoka Traders (supra) despite following Jagdish Chandra Gupta held that Section 69 of the Indian Partnership Act would have no bearing on the right of a party to an arbitration clause under Section 9 of the 1996 Act. As correctness or otherwise of the said decision is not in question before us, it is not necessary to say anything in this behalf but suffice it to point out that in the event it is found by the High Court that the learned Civil Judge was wrong in rejecting the application for amendment of the plaint and in fact the respondent-firm was registered under the Indian Partnership Act, the question of throwing out the said suit on that ground would not arise. There cannot, however, be any doubt whatsoever that the firm must be registered at the time of institution of the suit and not later on. [See Delhi Development Authority vs. Kochhar Construction Work and Another - (1998) 8 SCC 559].

8. The said questions, thus, would fall for consideration before the High Court.

9. The only question which survives consideration is the applicability of the 1996 Act in the fact of the present case. Disputes and differences between the parties arose in the year 1991. The respondent filed an application under Section 20 of the 1940 Act on 1.5.1991. It invoked the arbitration agreement as contained in clause 34 of the contract. The arbitral proceeding was, therefore, set in motion. In terms of Section 21 of the 1996 Act, the arbitral proceedings in respect of a particular dispute commences on a date on which the request for that dispute to be referred to arbitration was received by the respondent.

10. Section 85 (2) (a) of the 1996 Act reads thus :

"85. Repeal and saving.- (1) The Arbitration (Protocol and Convention) Act, 1937 (6 of 1937), the Arbitration Act, 1940 (10 of 1940) and the Foreign Awards (Recognition and Enforcement) Act, 1961 (45 of 1961) are hereby repealed.

(2) Notwithstanding such repeal,-

(a) the provisions of the said enactments shall apply in relation to arbitral proceedings which commenced before this Act came into force unless otherwise agreed by the parties but this Act shall apply in relation to arbitral proceedings which commenced on or after this Act comes into force;

(b) All rules made and notifications published, under the said enactments shall, to the extent to which they are not repugnant to this Act, be deemed respectively to have been made or issued under this Act."

11. This Court in Milkfood Ltd. vs. M/s GMC Ice Cream (P) Ltd. [JT 2004 (4) SC 393] , relying on or on the basis of Shetty's Constructions Co. Pvt. Ltd. vs. Konkan Railway Construction and Another [(1998) 5 SCC 599], Thyssen Stahlunion GMBH vs. Steel Authority of India Ltd. [(1999) 9 SCC 334 = JT 1999 (8) SC 66], Fuerst Day Lawson Ltd. vs. Jindal Exports Ltd. [(2001) 6 SCC 356] and State of West Bengal vs. Amritlal Chatterjee [(JT 2003 (Supp.1) SC 308], held that in respect of the arbitral proceedings commenced before coming into force the 1996 Act, the provisions of the 1940 Act shall apply.

12. In view of the aforementioned pronouncements of this Court, the impugned judgment cannot be sustained. It is set aside accordingly. The matter is remitted to the High Court for consideration of the merit of the matter afresh.

13. Keeping in view the fact that the matter is pending for a long time, we would request the High Court to dispose of the matter as expeditiously as possible, preferably within a period of eight weeks from the date of receipt of a copy of this order.

14. The appeal is allowed with the aforementioned observations and directions. In the facts and circumstances of the case, there shall be no order as to costs

**[The State of Kerala etc. etc. vs. Arya Refrigeration and A/C Co. etc. etc. \(03.08.2004 - SC\)](#)**

## JUDGMENT

1. These two appeals are interlinked and, therefore, taken up together for disposal. Civil appeal No. 2078 of 1984 is by the State of Kerala questioning correctness of the decision rendered by learned Single Judge of the Kerala High Court directing deposit for Rs. 5,75,500/- in Court, upholding the directions of deposit given by Sub Court, Trivandrum in E.P. No. 109 of 1981 in O.P. (Arbitration) No. 4 of 1979. Learned Single Judge held that there was nothing wrong with the

direction to warrant interference under Section 115 of the Code of Civil Procedure 1908 (in short the 'Code'). Civil appeal No. 362 of 1988 has been filed by M/s Arya Refrigeration and Air Conditioning Co. Ltd. (hereinafter referred to as the 'claimant') questioning correctness of the judgment rendered by the Division Bench of the Kerala High Court setting aside the decree in terms of the award given by the two arbitrators appointed by the Court.

2. Though the case has a chequered history, it is not necessary to deal with the factual position in detail, as the same is almost undisputed. Claimant entered into an agreement with the State of Kerala on 18.1.1965 for supply and erection of a 100 tonne, ice-cum-cold storage plant at Wellington Island Cochin. The agreed amount was Rs. 9,40,000/-. Though some plants and machines were supplied, they could not be installed because of non-construction of the building to house them. As time passed, dispute arose between the parties and the matter was referred to arbitrators in terms of Clause 15 of the agreement. There were two arbitrators who passed an award on 2.11.1978. The amount awarded by the arbitrators was Rs. 5,05,500/-. Soon after the award was passed, the State Government cancelled the contract and the same was terminated w.e.f. 17.11.1978. Claimant questioned the cancellation and raised the claims. In view of the cancellation of the contract, the claimant referred the matters to arbitration and nominated the arbitrator under Section 9 of the Arbitration Act 1940 (in short the 'Act'). Notice was served on the State but it did not nominate any arbitrator. Arbitration proceedings continued, State did not participate before the sole arbitrator and finally the award was passed on 17.5.1982 awarding Rs. 22,72,500/- to the claimant. The State questioned correctness of the award. But the trial Court overruled objections of the State and made the award given by the Arbitrator rule of the Court. The State questioned the correctness of the decree passed by the Subordinate Court in terms of the award. By the impugned judgment dated 10.11.1986, a Division Bench of the High Court, as noted above, set aside the award. Before this Court also the matter was taken up. Parties finally agreed to settle the dispute out of the Court, but later on requested for appointment of an arbitrator by this Court to adjudicate the dispute. By order dated 13.12.1999 Mr. Justice B.M. Thulsidas, a retired Judge of the Kerala High Court was appointed as an Arbitrator, though initially another Arbitrator was appointed. As an interim measure, by order dated 16.4.1984 in civil appeal No. 2078 of 1984, it was directed that the appellant-State should deposit Rs. 5,75,500/- as awarded by the Arbitrator with the registry of this Court. The claimant was permitted to withdraw the amount with the stipulation that the claimant shall return the amount together with interest @ 15% p.a. in case the appeal is allowed. Mr. Justice Thulsidas has filed the award before this Court. In the award the Arbitrator has held, after consideration of the claimant's claim and counter-claim of the State, that claimant is liable to pay to the State a sum of Rs. 28,12,554/- with interest @ 15% from the date of award i.e. 11.12.2002 till payment or deposit. The claimant was also directed to pay Rs. 25,666/- by way of Arbitrators' remuneration. The Arbitrator has held that out of the agreed amount of consideration stipulated in the contract i.e. Rs. 9,40,000/-, claimant had received for the material supplied Rs. 6,75,780/- as 80% of the value and sales tax. The cost of material that was actually supplied was Rs. 8,40,730/- leaving balance of Rs. 99,270/- which form cost of labour, service and profit element. It was held that claimant was entitled to receive Rs. 2,83,000/- being the balance amount with interest for 8 years i.e. 1966 to 1974. After adjustment of the sum of Rs. 47,000/- which was deposited as security deposit and has been refunded in 1974, the claimant was finally held to be entitled Rs. 2,36,714/- with interest on the said amount @ 9%. It was further held that the claimant was entitled to Rs. 25,000/- as expenses with interest @ 9% from January 1978 when the first award was given.

3. Arbitrator was of the view that it was no fault of the claimant and, therefore, it was entitled to balance amount of Rs. 99,270/- together with interest @ 9% in 1966 till 10.1.1973 when the claimant gave notice to the State that departmental works of erection would not be taken up. The Arbitrator worked out the entitlement at Rs. 1,66,010/-. On the above basis total claim of the claimant came to Rs. 5,25,774/-.

4. Taking note of the amounts of claimed to have been paid to the claimant, the Arbitrator noted as follows:

- (1) A sum of Rs. 2,68,550/- was paid on 17.7.1979.
- (2) As per order dated 26.2.1982 a sum of Rs. 2,00,000/- was deposited on 23.11.1982.
- (3) A sum of Rs. 5,00,000/- was paid as per order dated 1.12.1983 in MFA No. 515/83.
- (4) In terms of order dated 12.3.85 of this Court, an amount of Rs. 5,75,000/- was paid.

Thus altogether Rs. 15,43,550/- was received by the claimant in course of the proceedings. On this the interest payable was fixed at 9%. Together with interest, the amount was fixed at Rs. 21,29,350/- and with interest @ 15%, it was held that the State was entitled to receive Rs. 28,12,554/- from the claimant. 15% interest was also stipulated keeping in view the order passed by this Court.

5. Learned counsel appearing for the claimant submitted that the award of the arbitrator is liable to be vacated on the following grounds:

- (1) Arbitrator disregarded fundamental terms of contract and exceeded his jurisdiction.
- (2) Arbitrator misdirected himself in law in the sense that he neglected to look into the terms of contract.
- (3) Interest which was to be paid to the claimant was to be fixed on the basis of "The Interest On Delayed Payments to Small Scale and Ancillary Industrial Undertakings Act, 1993". The liability for interest was to be fixed in terms of Sections 3, 5 and 6 of the said Act which has not been taken note of.

It was further pointed out that the arbitrator has failed to notice that there was no payment of Rs. 2,00,000/- as held. Only material which was adduced before the arbitrator was to show that there was a deposit but there was no withdrawal of the amount. The sum of Rs. 47,000/- has been adjusted more than once. The arbitrator did not notice that there were certain special conditions which govern the agreement, which were not taken note of. 15% interest on Rs. 5,75,000/- is included wrongly because it is nowhere directed that 15% was to be paid by the claimant. It was only observed that in case appeal is allowed, the State would be entitled to 15%. In essence, the award was characterized to be outcome of misconduct.

6. In response, learned counsel for the State submitted that award given by the arbitrator is a reasoned award and the scope for interference with the reasoned award is extremely limited. Nothing has been shown to show that the arbitrator overlooked any relevant piece of material or that the award suffered from any patent illegality.

7. Though there was some dispute about the applicability of the Act in view of the accepted position at all stages that the Act applied to the proceedings, such challenge is without any foundation.

8. It has to be noticed that the arbitrator has given a very well reasoned and detailed award. It could not be shown as to in what way the fundamental terms of the contract were disregarded. The arbitrator has referred to various clauses of the contract and the effect thereof. The findings are in no way perverse or unreasonable. We do not find substance in the plea of learned counsel for the claimant that the award suffered from any infirmity. So far as applicability of the Interest On Delayed Payments Act is concerned, it appears that before the arbitrator no claim in that regard was made. In order to attract the provisions of the said Act, the factual aspect like the prevailing bank rate of interest were to be brought on record. This has not been done. So the plea in that regard is also without any substance. We, however, find substance in the plea relating to

computation of the amounts receivable by the claimant. As rightly submitted, there was nothing on record to show that the claimant had withdrawn the amount which was deposited with the Subordinate Court, Trivandrum. Similarly, a sum of Rs. 47,000/- has been adjusted more than once. Necessary adjustment in this regard has to be made. So far as the plea relating to 15% rate of interest is concerned, it has to be noted that this Court directed that in case appeal is allowed, State would be entitled to interest @ 15%. That situation has not come. It would, therefore, be proper to apply 9% rate of interest on the sum of Rs. 5,75,000/-.

9. With the above modifications and computation award of the arbitrator is made rule of the Court and entire respective amounts be worked out and decree drawn up accordingly.

10. The appeals are disposed of on the above terms leaving the parties to bear their respective costs

**[National Aluminium Co. Ltd. vs. Pressteel and Fabrications Pvt. Ltd. and Anr. \(18.12.2003 - SC\)](#)**

**JUDGMENT**

1. The original appeal from which this application arises for our consideration namely, C.A. No. 2522/99 was preferred by the respondent herein questioning the unilateral appointment of an arbitrator made by the present applicant under the Arbitration Act, 1940. This Court in the said appeal after hearing the parties and with the agreement of the parties appointed Hon. Mr. Justice A.M. Ahmadi, former Chief Justice of India as the sole arbitrator. Before the said arbitrator both the parties by consent agreed that the proceedings should be governed by the provisions of the Arbitration & Conciliation Act 1996. It is on that basis the learned arbitrator proceeded and gave a final award.

2. In this application, namely, I.A. No.2 in C.A. No.2522/99 made under Sections 15, 17 and 29 of the Indian Arbitration Act 1940 praying for modification of the said award made by the arbitrator, the applicant contends that since the dispute between the parties and the agreement of the parties to refer such dispute to an arbitrator was prior to the coming into force of the 1996 Act, all further proceedings subsequent to the award should be governed by the 1940 Act and under the said Act an aggrieved party which wants to seek modification has to move the court which appointed the arbitrator, hence, the applicant contends that this is the only Court before which such an application is maintainable.

3. It is to be noted at this stage that the respondent in this application was appellant in C.A. No. 2522/99. The said respondent being aggrieved by this award, itself has filed objections to the said award before the appropriate Civil Court under Section 34 read with Section 2(e) of the 1996 Act.

4. On the facts of this case, 2 primary questions arise for our consideration. They are: (i) whether the proceedings in which an impugned award has come to be made, are governed by the 1940 Act or the 1996 Act? and (ii) whether the appropriate court for the purpose of challenging the said award or seeking modification of the said award is this Court, being the court which appointed the arbitrator or an appropriate court as contemplated under Section 34 of the 1996 Act read with Section 2(e) of the said Act which contemplates said court to be the principal civil court of original jurisdiction?

5. As stated above, the argument of learned counsel appearing for the applicant is that since this Court has appointed the sole arbitrator in the abovesaid civil appeal under the provisions of the 1940 Act, this Court alone has the jurisdiction to modify the impugned award. While the respondent in this application contends that the proceedings before the arbitrator admittedly having proceeded under the provisions of the 1996 Act by consent of parties, for the purpose of

seeking modification of the award in such proceedings, it will only be a court contemplated under the 1996 Act.

6. It is an admitted fact that after the arbitrator was appointed by this Court, the parties by consent agreed before the arbitrator that the proceedings should go on under the provisions of the 1996 Act though the dispute arose prior to coming into force of this Act. Such a procedure is permissible under Section 85(2)(a) of the 1996 Act. In the normal course having agreed to this procedure, the applicant should not be permitted to raise a plea at this stage that the provisions of the 1940 Act would apply for challenging or seeking modification of the award made under the 1996 Act. But the learned counsel placed reliance on two judgments of this Court in *State of M.P. etc. v. Saith & Skeleton (P) Ltd.* (1972 1 SCC 702) and *Guru Nanak Foundation v. Rattan Singh and Sons* (1981 4 SCC 634) wherein according to the applicant, this Court entertained an award for the purpose of making it a rule of the Court because it had appointed the arbitrator hence for the purpose of making an award a rule of the Court it can only be the court which appointed the arbitrator in view of the provisions of Sections 2(e) and 14(2) of the 1940 Act.

7. Before considering the said argument of the applicant and the two decisions referred to hereinabove, it is necessary for us to note the contents of the Order whereby this Court had appointed Hon. Mr. Justice A.M. Ahmadi as the sole arbitrator. That order was made by this Court on 23.4.1999 in the abovesaid civil appeal and the relevant portion of the order reads thus :

"Parties agree that Mr. Justice A.M. Ahmadi, former Chief Justice of this Court, be appointed as an Arbitrator. In view of this agreement between the parties we allow this appeal, set aside the judgment of the High Court and appoint Mr. Justice A.M. Ahmadi as sole Arbitrator. The fees and expenses of the Arbitrator shall be fixed by the Arbitrator in consultation with the parties. The learned Arbitrator is requested to conclude the proceedings within, four months from the day he enters upon the Arbitration. No order as to costs."

8. It is to be noted that as per the above order, this Court has not retained any power or control over the arbitration proceedings while appointing the arbitrator by consent of parties; on the contrary, it seems this Court has merely recorded a submission of the parties as to their agreement in appointing a particular arbitrator. Even the time limit fixed therein is only a request to the learned arbitrator to conclude the proceedings within 3 months from the day he enters upon the arbitration and it is not a mandate in the sense that the failure to do so would have entitled the parties to approach this Court for suitable remedy. On facts, it is admitted that the learned arbitrator has extended the time suo motu a few times before making the award, without reference to this Court therefore, it is clear on facts of this case that it is the arbitrator who had the control over the proceedings and not this Court. Therefore, in our opinion, the two judgments relied on by the applicant do not help the applicant because in those judgments this Court had held that while appointing an arbitrator this Court had retained control over the arbitral proceedings, therefore, under the provisions of the 1940 Act, it was this Court which could entertain an application for making the award a rule of the Court and not any other court.

9. The next question to be considered by us in this application is whether the dispute having arisen prior to the coming into force of the 1996 Act and the proceedings having continued under the provisions of the 1996 Act, would the provisions of the 1940 Act still be applicable for making an application for the modification of the award, and if so, before which court. First part of this issue need not detain us because of the admitted fact that by consent of the parties provisions of 1996 Act have been made applicable to the proceedings which is in conformity with Section 85(2)(a) of 1996 Act, hence, it is futile to contend that for the purpose of challenge to the Award 1940 Act will apply. Hence, we reject this contention. In regard to the forum before which the application for modification or setting aside the award is concerned, we find no difficulty in coming to the conclusion that in view of the provisions of Section 34 read with Section 2(e) of the 1996 Act that it is not this Court which has the jurisdiction to entertain an application for modification of the award and it could only be the principal civil court of original jurisdiction as contemplated

under Section 2(e) of the Act, therefore, in our opinion, this application is not maintainable before this Court.

10. Learned counsel for the applicant then contended that nearly 16 years have gone by since the dispute between the parties arose and since the said dispute was first referred to an arbitrator. After the passage of such a long time, the applicant has been able to get only a partial award in his favor, but still he is unable to enjoy the fruits of that award also because of the proceedings initiated under Section 34 of the 1996 Act. In this factual background, he prays that to do complete justice, we should consider the objections of both the parties to the said award and decide the same in these proceedings. Since we have come to the conclusion that the parties having agreed to the procedure under the 1996 Act to be followed by the arbitrator for the post-award proceedings also, the provisions of the said Act would prevail and the said statute having specifically provided for a remedy under Section 34 of the 1996 Act, it may not be proper for us to exercise our jurisdiction under Article 142 of the Constitution to adjudicate upon the objections filed by both the parties to the award. Learned counsel then prayed that at least the amount representing that part of the award which is in their favor should be directed to be deposited in the competent civil court by the respondents herein so that the applicant could enjoy the fruits of the said award during further proceedings. At one point of time, considering the award as a money decree, we were inclined to direct the party to deposit the awarded amount in the court below so that the applicant can withdraw it on such terms and conditions as the said court might permit them to do as an interim measure. But then we noticed from the mandatory language of Section 34 of the 1996 Act, that an award, when challenged under Section 34 within the time stipulated therein, becomes unexecutable. There is no discretion left with the court to pass any interlocutory order in regard to the said award except to adjudicate on the correctness of the claim made by the applicant therein. Therefore, that being the legislative intent, any direction from us contrary to that, also becomes impermissible. On facts of this case, there being no exceptional situation which would compel us to ignore such statutory provision, and to use our jurisdiction under Article 142, we restrain ourselves from passing any such order, as prayed for by the applicant.

11. However, we do notice that this automatic suspension of the execution of the award, the moment an application challenging the said award is filed under Section 34 of the Act leaving no discretion in the court to put the parties on terms, in our opinion, defeats the very objective of the alternate dispute resolution system to which arbitration belongs. We do find that there is a recommendation made by the concerned Ministry to the Parliament to amend Section 34 with a proposal to empower the civil court to pass suitable interim orders in such cases. In view of the urgency of such amendment, we sincerely hope that necessary steps would be taken by the authorities concerned at the earliest to bring about the required change in law.

12. For the reasons stated above, this application fails and the same is dismissed with a direction to the applicant to file its objections to the award before the court concerned and if the same are filed within 30 days from today, the delay in regard to the filing of the objections as contemplated under Section 34 of the 1996 Act shall be condoned by the said court since the time consumed was in bona fide prosecution of the application in a wrong forum.

13. With the above observations, this application fails and the same is dismissed.

[Sathyanarayana Brothers \(P\) Ltd. vs. Tamil Nadu Water Supply and Drainage Board \(18.11.2003 - SC\)](#)

#### JUDGMENT

2. These appeals are the outcome of an arbitration proceedings initiated at the instance of the appellant M/s. Sathyanarayana Brothers (P) Ltd. raising certain claims against the respondent Tamil Nadu Water Supply & Drainage Board (for short 'the Board'). The claim was ultimately

partly allowed by the Umpire. The objections against the Award preferred by the appellant were allowed by the learned single Judge but the Division Bench set aside the order of the learned single Judge. Hence, this appeal by M/s. Sathyanarayana Brothers (P) Ltd.

3. In view of the acute scarcity of water in the State of Tamil Nadu a project known as Veeranam project was undertaken by the State Government after its clearance by the Planning Commission for bringing the water from the left bank of the Coleroon at Lower Anicut to the city of Madras covering a distance of 155 miles through the pipelines to be laid for the purpose. The work required to be done was for manufacturing, supplying, delivering 1676 mm. (66") Diameter Prestressed Concrete Pipes and fittings including transporting to site, laying, jointing and testing for raw water and clear water conveying mains from Veeranam Tank to Madras city.

4. The tenders submitted by the appellant M/s. Sathyanarayana Brothers (P) Ltd. for carrying on the job detailed above was accepted for a lump sum amount of Rs. 16,55,87,300/- subject to clearance of the foreign collaboration arrangement and release of necessary foreign exchange and also subject to other conditions and issued G.O.Ms.No. 1607 Public (TWAD) Department dated 13.7.1970. While submitting the tender the petitioner had also written a letter dated 22.1.1970 to the Chief Engineer (Buildings) and City Water Supply, Veeranam Project, Public Works Department, Chepauk, Madras with a request for foreign exchange requirement for import of equipments from foreign manufacturers. The contractor had requested the government to give all assistance in procurement of foreign exchange and other necessary central government clearances. Articles of agreement was executed between the State of Tamil Nadu and M/s. Sathyanarayana Brothers specifying the terms and conditions of the contract. The work was required to be completed within 36 months from the date of the entrustment of the site which was to be done within 30 days after the date of acceptance of the tender. It also provided that if there was any delay in handing over the site there should be extension of time for completion of the contract. The time for completion was liable to be extended on the request of the contractor for justifiable reasons.

5. The contractor required Rs. 1.2 crores of foreign exchange for importing necessary equipments for manufacture of Prestressed Concrete Pipes from Switzerland since the exporters insisted on payment in Doutecha Marks. The contractor was advised to approach the Integral Credit and Investment Corporation of India (ICICI) who insisted that the contractor should be in the form of an incorporated company so as to be able to avail facilities of foreign exchange instead of a partnership firm. The contractor, therefore, converted into a private limited company as per the advice on 24.2.1971. The imported equipment landed in Madras in February 1972 whereafter a factory at Thirukalikundram and another factory at Panruti were commissioned by June 1972 and January 1973, respectively. There was thus already a delay of one year four months in commencing production of prestressed concrete pipes. The contractor therefore, requested for extension of time up to 31.12.1975. It was, however, extended up to 30.06.1975 by the Chief Engineer. The contractor wrote a letter dated 11.11.1974 refusing to accept the offer and further indicated that he would be prepared to work on the condition that contractor would be paid at the rate to be worked out taking into account the increase in the cost and which may further increase during the course of the work. It was also indicated that necessary time may be given for completion of the work keeping in mind the capacity of equipment and the rate of production. He also wanted to be compensated for the losses resulting from the delay and default on the part of the government. The contractor stopped the work with effect from June 30, 1975. The Chief Engineer extended time for completion of the work by 31.12.1975 and again upto 31.3.1976 but did not agree to the other conditions as indicated in the letter of the contractor dated 11.11.1974. The dispute thus arose and the work stood stopped with effect from 30.06.1975. The contractor invoked the arbitration clause and appointed one Mr. P.S. Subramaniam, a Chartered Engineer as its Arbitrator. After some litigation at the instance of the Board it also nominated its arbitrator. The arbitrators entered upon the reference on 18.3.1978. The arbitrators disagreed. Mr. P.S. Subramaniam, the arbitrator appointed by the appellant partially awarded the claim to the extent of about Rs. 7.00 crores whereas the arbitrator appointed by the Board only said that he did not

agree with the award. Since there was no agreement between the two arbitrators hence the matter was referred to the Umpire - Justice Palaniswamy, a retired Judge of the High Court who started the proceedings on 2.4.1979. The Umpire gave its award on 10.9.1979 and filed it in the court on 26.11.1979. The appellant contractor filed objections for setting aside of the Award given by the Umpire and challenged the conclusions and findings arrived at by him to the effect that it was not obligatory upon the State Government to get foreign exchange cleared from Government of India for the contractor and that the contractor had abandoned the work on June 30, 1975 despite the extension of time up to March, 1976 as well as the finding that non-production of inter-departmental correspondence and documents as requested by the contractor would not vitiate the award. The Board on the other hand supported the findings of the Umpire and prayed for making the award a rule of the court.

6. The matter was considered by the learned single Judge of the High Court. According to the decision of the learned single Judge the State Government was obliged to get foreign exchange clearance for the contractor for import of equipment from Switzerland for the purposes of manufacturing prestressed concrete pipes. Due to delay in clearance for foreign exchange the time should have been extended by the Board as requested by the contractor. The learned single Judge also found that extension of time after stoppage of the work was of no avail, thus there was no breach on the part of the contractor. Non-production of the documents by the Board as requested by the appellant had the effect of vitiating the award given by the Umpire. The award was thus set aside by the learned single Judge

7. In the appeal preferred by the Board, the Division Bench found that the following points fell for its consideration:

"(1) Whether there is any obligation on the part of the Government of Tamilnadu to get foreign exchange clearance from Government of India as per the terms of contract entered into between the Contractor and the State Government?

(2) Whether the contractor has not committed breach of contract by abandoning the work with effect from 30.06.1975?

(3) Whether the non-production of inter departmental correspondence of confidential nature as required by the contractor will vitiate the Award passed by the Umpire?

(4) To what relief?"

8. The Division Bench held that no such clause in the agreement has been disclosed to indicate that it was the obligation on the part of the State Government to get clearance of Government of India for foreign exchange for the purpose of import of equipment by the contractor from Switzerland. The acceptance of the tender was "subject to Government of India clearance of foreign collaboration arrangement and release of necessary foreign exchange. While arriving at this finding the Division Bench quoted an extract from one of the letter of the contractor dated 22.1.1970 Exh.D-557 to the following effect:

"We understand that the Government should give us all assistance in the procurement of foreign exchange and necessary Central Government clearance".

The Division Bench further observed that the Umpire was right in coming to a conclusion that Government of Tamilnadu had rendered all possible assistance to the contractor for getting the foreign exchange clearance as the Government of Tamilnadu had approached the I.C.I.C.I. for that purpose, whom the contractor had approached on the advice of Government of India. Thus the state shall not be responsible for the delay in getting the foreign exchange. On the other two points the Division Bench held that time cannot be said to be the essence of the contract since the agreement contained a clause for extension of time for justifiable reasons. It has also been found that the contractor could not carry on the work in accordance with its commitment of

manufacturing 28 prestressed concrete pipes per day and laying of 72 pipes per day. Whereas according to the contractor the target could not be achieved due to frequent failures of electricity and dropping of voltage. The Division Bench ultimately came to the conclusion that the contractor alone had committed the breach of contract in executing the work of Veeranam project. In so far it related to non-production of the file containing inter-departmental correspondence including the handing over note by former Chief Engineer, Veeranam project Exh.D-660, it was observed by the learned single Judge that it was a secret document which was not available on the record of the Board. The case of the Board was that the note of the former Chief Engineer while handing over the charge to his successor would not bind the Board in any respect and other inter-departmental correspondence may not be admissible in evidence and it would also not advance the case of the contractor. The Division Bench seems to have agreed with the submissions made on behalf of the Board. The Division Bench, after discussing the case law, came to the conclusion that the Award given by the Umpire cannot be set aside except on the ground that the arbitrator or the umpire had mis-conducted himself or the arbitration proceedings having become invalid or the Award was procured improperly. The Court would not re-appraise the evidence. The Award of the Umpire awarding only a sum of Rs. 2,67,41,079 has been upheld by the Division Bench. Thus it set aside the order passed by the learned single Judge.

9. Shri Deepankar Gupta, learned senior counsel appearing for the appellant has first tried to submit that the Arbitration Tribunal has not been constituted in accordance with the arbitration clause. In that connection he has drawn our attention to Clause 70 of the agreement which provides that the dispute shall be referred to the arbitration of three persons, one of whom shall be nominated by the contractor, the second by the Governor and the third shall be an independent person selected by oilier two persons so nominated and this provision shall be deemed to be a submission to the arbitration within the meaning of Indian Arbitration Act 1940. It is therefore submitted that there should have been three arbitrators instead of two arbitrators and an umpire chosen by the arbitrators, in the present case. It appears that this point was never raised by the appellant before any forum earlier as pointed out by Shri Nageshwar Rao, learned senior counsel appearing for the respondent. It is submitted that such a question cannot be allowed to be raised in this Court for the first time after the appellant had himself submitted to the jurisdiction of the arbitrators and the umpire. There is no dispute about the appointment of two arbitrators and the umpire having been appointed by the arbitrators. The arbitration proceedings concluded before me two arbitrators in which both parties participated without any objection. Thereafter all matters having been referred to the umpire, there too parties submitted to the proceedings before the umpire. No such objection was raised in the objections filed against the award nor before the High Court. That being the position, it is submitted that it is too late in the day to say that the dispute should have been decided by three arbitrators and not by two and then by umpire in the event of difference between the two arbitrators. No good reason could be indicated on behalf of the appellant for having kept silent on this point all throughout the proceedings. They still rely upon the award given by the arbitrator Shri Subramaniam in their favour. It is still their stand that the order passed by the learned Single Judge of the High Court records the correct finding. We find that the stage to have raised such an objection as to whether the dispute was liable to be decided by two arbitrators or a Board of three arbitrators had passed long before. The two arbitrators were appointed in accordance with the provisions of arbitration clause as well as the third arbitrator called umpire. The mode of hearing was adopted in the manner that the dispute was heard by two arbitrators appointed by the respective parties. The matter was referred to inspire since there was no agreement between the two arbitrators. There is no justification now at this stage to raise such an objection that Board of three arbitrators should have decided the matter. Such a plea contradicts their own action, and it seems to be taken now to wriggle out of the award ultimately given by the umpire, but it would not be permissible at this stage. Shri Nageshwar Rao, learned senior counsel, has placed reliance upon Russel on Arbitration "Loss of right to object". It states as under:

"A party who objects to the award on the ground that the tribunal lacks substantive jurisdiction, should not only act promptly, but should also take care not to lose his right to object. A party who

takes part or continues to take part in the proceedings is in a different position from someone who takes no part in the proceedings. The latter cannot lose his right to object as long as he acts promptly to challenge the award once it is published. The former must, however, state his objection to the tribunal's jurisdiction "either forthwith or within such time as is allowed by the arbitration agreement or the tribunal". That statement, which should be recorded in writing and sent to the tribunal and the other parties, should not only mention the jurisdiction objection but also make clear that any further participation in the arbitration will be without prejudice to the objection. If that is not done, the party concerned may not be able to raise that objection before the court "unless he shows that, at the time he took part or continued to take part in the proceedings, he did not know or could not with reasonable diligence have discovered the grounds for the objection". A person, alleged to be a party to arbitral proceedings, but who takes no part in those proceedings may at any time apply to the court for a declaration, an injunction or other relief concerning the validity of the arbitration agreement, the proper constitution of the arbitral tribunal and any matter submitted to arbitration in accordance with the arbitration agreement."

10. In view of the above position, we repel the contention raised on behalf of the appellant pertaining to the jurisdiction of the arbitrators and the umpire to decide the matter.

11. It is next submitted on behalf of the appellant that it is no doubt that period of contract was specified to be 36 months in the agreement itself but it has been rightly held by the learned Single Judge that time was not essence of the contract for the reason that as per the terms of the contract time could be extended for justifiable reasons and it is for this reason that the time was extended by the respondent but they initially extended the time in an unreasonable manner. It is submitted that despite the best efforts made, the equipment could not be imported prior to February 1972 at the first instance. The result was that there was a delay of one year and 4 months as found by the courts also, in starting the work itself. It is submitted that there was clear understanding that the State Government would get the clearance from the Central Government for foreign exchange necessary for import of the equipment. The State Government did not provide proper assistance in the matter and the appellant was referred to ICICI by the Central Government for foreign exchange. As per conditions of ICICI, the appellant had to change its constitution converting into a company as desired. After the clearance of the foreign exchange, duo to other intervening factors, of Pak war etc., the import could not be possible. Therefore, the appellant was not responsible for the delay caused. It is then further submitted that after the factories were installed on receipt of foreign exchange, equipment were installed promptly. There have been problems of availability of electrical energy and low voltage which was so necessary for carrying on the work in the factory. For such difficulties the appellant could not be held responsible. It is also submitted that according to the agreement, trenches etc. were also to be due out by the Board. It is submitted that the finding as recorded by the umpire and the Division Bench that the Board was not responsible for the delay, it will not necessarily lead to the inference that the appellant was responsible for it. For good reasons time was liable to be extended reasonably. It could not be cut short unreasonably. It is further submitted that the Board itself later on extended the time beyond 31.3.1975 but initially it was refused. It indicates that partial extension given by the Board was insufficient and not justified. Time was even thereafter extended but by that time the appellant was compelled to stop the work. The effort therefore which has been made before us by the appellant is that it was not a case of abandonment of contract on the part of the appellant rather the delay occurred for justifiable reasons on account whereof extension of reasonable time as prayed for by the contractor was not allowed by the respondent.

12. Shri Nageshwar Rao, learned counsel for the respondent submits that the Board had extended all possible assistance which was needed for the foreign exchange to import the machinery by the appellant but so far electricity is concerned it was to be arranged by the contract or himself. In this connection learned counsel for the appellant has drawn our attention to the observations made by the umpire in his award where it has been observed that no doubt failure of electricity or low voltage would have caused some dislocation but that cannot absolve the contractors from their contractual liability and certainly the failure of electricity cannot be the

sole reason for the dismally poor performance of the contractors. It is submitted that the case of the appellant is not that the Board failed to arrange for the electricity but there is no denial of the fact that due to interrupted electric supply and low voltage the progress of the work got slowed down, may be Board is not responsible for it but it also cannot be said to be the responsibility of the contractor. Such a reason would be a justifiable reason to be considered for appropriate extension of time to complete the job.

13. Learned counsel for the appellant then submitted that the arbitrator failed to summon the document, namely the inter-departmental correspondence of the Board and the "handing over note" of the Chief Engineer of the Project to his successor. It is submitted that these documents contained relevant and authentic material and facts and provide proper background to correctly appreciate the points regarding obligation of the State Government to get the foreign exchange, late arrival of equipments imported, the interrupted electric supply, digging of trenches etc. by looking into which alone the question could properly be decided as to whether the appellant had abandoned the work or how far the appellant was responsible for the delay and stoppage of the work. It is submitted that there could not be any confidentiality about such documents which related to the work of the project. So far the "handing over note" is concerned, it is a document written by non else but the Chief Engineer of the Project who had first hand knowledge of all that was going on pertaining to the work and he was competent to prepare a record of the same in official discharge of his duties. It is submitted that the arbitrator erred in not allowing the application moved before him for summoning of the "handing over note" and the learned Single Judge, it is submitted, rightly held that it vitiated the award of the arbitrator. It may be mentioned here that the Umpire also refused to get the "handing over note" and place it on record and peruse the same so as to realize the relevance of the note for the purposes of arriving at a just and correct finding on the questions involved. It was necessary to have the proper background as contained in the note prepared by the Chief Engineer of the Project.

14. The learned counsel for the appellant has taken us through some of the parts of the "handover note" just with a view to emphasize the relevance and importance of the said note which is document D-660. A copy of the same has been filed in this Court. In Paragraph 6.1.7 and 6.1.7.1, it is indicated that Department had to carry out the work of trench excavation, the service roads, river, rail and road crossings besides many other things enumerated therein. Para 6.1.10 deals with requirement of foreign exchange and the details thereof. In Paragraph 6.1.10.3 the delay in arrival of the machinery imported due to Indo-Pakistan war is also indicated. Paragraph 6.11 deals with the factors that contributed to delay in execution of the project. Thereunder it is mentioned about the availability of power. Some problem relating to trench excavation by the Board also finds mention in Para 7 onwards. A bare look of some of the parts of the note indicates that it may have some material bearing on the merits relating to the question of delay in execution of the project, and throwing some light on the share of responsibility of the parties to the contract and extent of their responsibility as well.

15. Learned counsel for the appellant has placed reliance upon a decision reported in (1975) 2 S.C.C. 236 -K.P. Poullose v. State of Kerala and Anr. To indicate that where it is a speaking award and the arbitrator fails to take note of the relevant documents or ignores the same, it vitiates the award. It was observed such documents which were ignored were material documents to arrive at a just and fair decision to resolve the controversy between the parties. Our attention has particularly been drawn to the observations made in Paragraph 4 which reads as under:

"We have been taken through all the relevant documents by the learned counsel for both sides and we are satisfied that Ex.P-11 and Ex.P-16 are material documents to arrive at a just and fair decision to resolve the controversy between the Department and the contractor. In the background of the controversy in this case even, if the Department did not produce these documents before the Arbitrator it was incumbent upon him to get hold of all the relevant documents including Ex.P-11 and P-16 for the purpose of a just decision. Ex.P-11 dated

September 8, 1966, is a communication from the Superintending Engineer to the Chief Engineer with regard to the objections raised by audit in connection, with the construction of the reservoirs....."

(Emphasis supplied by us)

Reliance has also been placed upon a decision reported in (2001) 5 S.C.C. 629 - Sikkim Subba Associates v. State of Sikkim, particularly to the observations made in Paragraph 12 of the decision that an award, ignoring very material and relevant documents throwing light on the controversy to have a just and fair decision would vitiate the award as it amounts to misconduct on the part of the arbitrator. The case of K.P. Poulouse (supra) has also been referred to. Yet another decision on the point referred to is reported in 2003 (7) Scale Page 20 - Bharat Cocking Coal Ltd. v. Annapurna Construction where also it has been held that passing award ignoring the material document would amount to mis-conduct in law. In such circumstances the matter was remitted to a retired Judge of the Jharkhand High Court instead of to the named arbitrator since only the question of law was involved and the parties had also agreed for the same.

16. In so far the case in hand is concerned, learned counsel appearing for the respondent first made a submission that no application was moved by the appellant before the arbitrator for summoning the document, namely, the "handing over" note prepared by the Chief Engineer while handing over the charge as Project in-charge; to his successor but after verification he conceded, that such an application was moved before the Arbitrator but no orders had been passed on it. The learned Single Judge has given it as one of the reasons to held that it vitiated the award. We again find that before the umpire also effort was made to get the document on record for perusal of the same but the request was not accepted. We find that there is no question of secrecy or confidentiality so far the "handing over note" of the Chief Engineer is concerned. It is a note prepared by the Chief Engineer of the project in official discharge of his duties. It contains relevant facts and information regarding questions involved in the case. The appreciation of the contents of the 'note' and its effect would of course be a matter to be decided by the appropriate authority/arbitrator/umpire but its perusal or consideration could not be shut out on the meek ground that the department was not bound by it or on the ground of confidentiality in the times when more stress is rather on transparency. In our view, the learned Single Judge was right in inferring that such an infirmity would vitiate the award. That being the position, in our view the order of the Division Bench, reversing the decision of the Single Judge is not sustainable and the matter may be required to be remitted to be considered in the light of the "handing over note" of the Chief Engineer in respect whereof an application was moved by the appellant before the arbitrator as well as before the Umpire which remained unattended to by the forum and later did not accede to the request.

17. Considering the fact that it is an old matter and it being a speaking award the matter having also been considered by the learned single Judge, it would better serve ends of justice to ensure expeditious disposal of the matter, therefore, the Division Bench of the High Court may consider the matter afresh, taking into account the "handing over note" of the Chief Engineer of the Project and other relevant documents in respect of which request may have been made but refused.

18. In the result, these appeals are allowed. The order of the Division Bench of the High Court is set aside and the matter is remitted to the High Court for being decided afresh by the Division Bench in the light of the observations made above. Costs easy.

### [Pure Helium India Pvt. Ltd. vs. Oil and Natural Gas Commission \(09.10.2003 - SC\)](#)

#### JUDGMENT

1. Whether jurisdiction of an arbitrator to interpret a contract can be subject-matter of an objection under Section 30 of the Arbitration Act, 1940 (hereinafter referred to as 'the Act', for the sake of brevity) is in question in this appeal which arises out of the judgment and order dated 24.2.2000

of the High Court of Judicature at Bombay in Appeal No. 612 of 1996 arising out of a judgment and order of a learned Single Judge dated 13.10.1995 dismissing the said objection of the respondent.

**BACKGROUND FACT:**

2. The parties hereto entered into a contract for supply of Helium Diving Gas pursuant to a notice inviting global tender dated 2.5.1989. In terms of the said notice inviting tender, the respondent herein was to take supply of Helium gas, which is one of the rare gases being not chemically produced and is mainly extracted from the natural gas wells in mineral form. The said gas is ordinarily imported from U.S.A., Algeria, Poland and Russia. In terms of the said notice inviting tender, three different categories of rates were to be quoted by the tenderers both foreign and Indian. Whereas the foreign tenderers were to quote their prices in foreign currency, the Indian bidders could indicate the nature of payment, i.e. if a part thereof was recoverable having foreign exchange component. Pursuant to or in furtherance of the said notice inviting tenders, the tenderers submitted their technical bids. The bidding was to be in two stages; in terms whereof the technical bids were to be opened first whereafter only final bids were to be considered. The appellant's bid was found to be the lowest in that the appellant had bid a price of Rs. 150/- per cubic meter out of which US\$ 5 was to be the foreign exchange component. The said bid of the appellant having been found to be the lowest, the parties entered into a negotiation; pursuant to or in furtherance whereof, the appellant lowered its offer to Rs. 149/- per cubic meter, out of which US\$ 4.60 was to be the foreign exchange component.

3. The respondent having felt the need of Helium gas urgently, pending execution of the contract placed an order for ad hoc supply of 52000 cubic meters of Helium gas with the appellant. The respondent again placed an order for supply of 300000 cubic meters of Helium gas on 25.5.1990.

4. The Ministry of Petroleum and Natural Gas, Government of India, vide its letter dated 21.5.1990 released foreign exchange for procurement of Helium gas, by reason of letter addressed to the respondent stating:

"I am directed to refer to your letter No. DIH/BOP/OBG/OS/30/90 dated 19.4.90 on the above subject and to convey the approval of the President to the procurement of 3,00,000 M3 of Helium Gas from M/s Pure Helium India Ltd., Bombay at a cost of Rs. 4.47 crores including a foreign exchange component of Rs. 2.38 crores (US \$ 1,380 million @ US\$ 5.7875 = Rs. 100/-)."

5. The respondent thereafter issued two supply orders on 12.6.1990 to the appellant for supply of 52000 cubic meters and 300000 cubic meters Helium gas respectively at a price of Rs. 149 per cubic meter inclusive of foreign exchange component of US\$ 4.60. Having regard to the increase in price of the US dollar, the appellant herein claimed the difference of price of US dollar as on the date of the contract and the date of supply, The claim of the appellant was recommended by the Secretary, Petroleum and Natural Gas Department as well as by certain other senior officers. The respondent, however, rejected the claim on or about 14.7.1992 whereafter the arbitration agreement was invoked, the arbitrators entered into a reference on 1.3.1993. A non-speaking award was made by the arbitrators on 13.8.1993 holding that the respondent was liable to compensate the appellant for Exchange Rate Fluctuation in the sum of Rs. 1,03,41,309/- with interest at the rate of 18% per annum from the date of the invoices till the date of the award. The respondent herein questioned the validity of the said award by filing a petition under Section 30 of the Act before the Bombay High Court which was marked as Arbitration Petition No. 52 of 1994. A learned Single Judge of the High Court of Judicature at Bombay dismissed the said petition and directed the award to be made a rule of the Court by an order dated 13.10.1995.

6. Aggrieved by and dissatisfied therewith the respondent preferred an appeal thereagainst which by reason of the impugned judgment has been allowed. The appellant is, thus, in appeal before us.

SUBMISSIONS:

7. Mr. Dipankar P. Gupta, learned Senior Counsel appearing on behalf of the appellant, would contend that the Division Bench of the High Court committed a manifest error insofar as it proceeded to determine the dispute on the premise that the claim could not have been preferred under any, clause of the contract. The learned counsel would contend that the arbitrators had, having regard to the scope and purport of the arbitration agreement entered into by and between the parties were entitled to go into the question of the construction of contract and they, thus, having the requisite jurisdiction therefor, the High Court could not have independently construe the same.

8. Drawing our attention to various clauses of the contract as also the claim petition, the learned counsel would contend that the arbitrator had analyzed the terms and conditions of the contract having regard to the facts and circumstances of this case as also keeping in view the pleadings of the parties and in that view of the matter the High Court while exercising its jurisdiction under Section 30 of the Act could not have interfered therewith particularly as the award was a non-speaking one. It was urged that such a claim was also maintainable having regard to a circular letter dated 25.9.1989 issued by the Government of India.

9. Mr. Gupta would submit that the approach of the respondent in denying the just claim of the appellant must be held to be arbitrary and unfair insofar as payments on similar terms as claimed by the appellant had been made not only to the foreign bidders but in fact had been made to the other Indian bidders where the price was payable in the Indian currency. By preferring such a claim, the learned counsel would urge, the appellant had not asked for any escalation in the price but merely claimed damages in terms of the provisions of the contract occasioned by fluctuation in the rate of dollar in terms of the notification issued by the Reserve Bank of India under Section 40 of the Reserve Bank of India Act and such revision was permissible also in terms of Clause 23 of the contract.

10. In support of the said contentions. Mr. Gupta strongly relied upon W.B. State Warehousing Corporation and Anr. v. Sushil Kumar Kayan and Ors. [(2002) 5 SCC 679], K.R. Raveendranathan v. State of Kerala [(1998) 9 SCC 410], P.V. Subba Naidu and Ors. v. Government of A.P. and Ors. [(1998) 9 SCC 4071], H.P. State Electricity Board v. R.J. Shah and Company [(1999) 4 SCC 214], Shyama Charan Agarwala & Sons etc. v. Union of India etc. [(2002) 6 SCC 201].

11. The learned counsel would further argue that for the purpose of interpretation of a contract not only the terms thereof but also the conduct of the parties and surrounding circumstances are relevant. Reliance has been placed on Khardah Company Ltd. v. Raymon & Co. (India) Private Ltd. [(1983) 3 SCR 183]. In any event, the learned counsel would contend that the respondent was bound by the policy decision of the Central Government in the matter of payment of difference in the rupee value owing to fluctuation in the rate of US dollar.

12. Mr. Mukul Rohtagi, learned Additional Solicitor General, on the other hand, would submit that the bid price for supply of Helium gas made by the appellant herein in terms of the contract being firm, the appellant was not entitled to any escalation in the price and, thus, in the event, the contention of the appellant is accepted, the same would run counter to the clause in the contract prohibiting escalation in the price of the goods.

13. Mr. Rohtagi would contend that disclosure of the foreign exchange component in the price to be paid in Indian currency was sought for only for the purpose of evaluation of bids. He would urge that for all intent and purport, the foreign exchange component had nothing to do with the payment of the price for supply of Helium gas to the appellant. In support of his contention, Mr. Rohtagi relied upon Rajasthan State Mines & Minerals Ltd. v. Eastern Engineering Enterprises and Anr. [(1999) 9 SCC 283].

14. The learned counsel would further argue that the notifications issued by the Reserve Bank of India do not constitute 'any change in law' in terms of the provision of Section 40 of the Reserve Bank of India Act or otherwise.

RELEVANT CLAUSES IN THE CONTRACT :

"1.16 Prices:

1.16.1 In cases where payments are required in Indian Rupees, the bidder should clearly indicate if it shall need any foreign exchange for completing the supplies/services that may be ordered on him. For this purpose they should quote the total price along with its breakdown between Indian Currency portion and the foreign currency indicating the specific currency.

The bidder shall also indicate the nature of payments which it intends to cover foreign exchange payments, viz., whether it is towards acquisition/hiring of equipment/services, payments of personnel or acquisition of sub- assemblies, spare parts or purchase of raw materials or for any other purpose.

A bidder who would not need any foreign exchange for completion of the order should state this categorically.

In case the bidder would require any assistance/certification from ONGC to help him secure the required foreign exchanges it should be so stated."

"1.16.3 Price preference for supplies:

Domestic manufactures are entitled to get price preference over the foreign supplier.

The price preference is admissible over the CIF price of the lowest technically acceptable foreign offer received in international competition.

The criteria for giving price preference is domestic value added Domestic value added to an indigenous offer will be as follows:

2.6 Bidder shall quote a firm price and they shall be bound to keep this price firm without any escalation for any ground whatsoever until they compete the work against this tender, or any extension thereof.

2.7 The prices shall be given in the currency of the country of the bidder. If the bidder expects to incur a portion of this expenditure in currencies other than those stated in his bid, and so indicates in his bid payment of the corresponding portion of the prices as so expended will be made in these other currencies.

6.2 In case the price quoted by two or more domestic bidders are within the price preference limits and only Indian bidders remain in contention for award of contract, then the foreign, exchange component of their bid would be loaded by a factor of 25% for the purpose of relative compensation of such domestic bids. Domestic bidders are required to quote the prices in the price schedule and indicate the import content in their offer. If there is no import content in the offer then it should be specifically stated as NIL".

"12. (i) Commission shall pay for Helium at the rate of Rs. 149 per M3 all inclusive for offshore supply as indicated in Anneuxre II.

(ii) The invoice with the following support documents, should be submitted in triplicate immediately after receipt of material by Commission to DGM (F&A) 712 B, Vasudhara Bhavan, Bandra (E), Bombay-400 051.

a) The quantity of gas received duly certified by Commission's representative.

b.) The computer analysis of the gas chromatograph showing the purity of the gas."

#### "21. Arbitration

If any dispute, difference or question shall at any time arise between the parties herein or their respective representative or assignees in respect of these present or concerning anything hereto contained or arising out of these present or as to the rights liabilities or duties of the said parties hereunder which cannot be mutually resolved by the parties, the same shall be referred to arbitration, the proceedings of which shall be held at Bombay, India within thirty (30) days of the receipt of the notice of intention of appointing arbitrators.

Each party shall appoint an arbitrator of its own choice and inform the other party. Before entering upon the arbitration, the two arbitrators shall appoint the Umpires. In case either of the parties fail to appoint its arbitrator within thirty (30) days from the date of receipt of a notice from the other party in this behalf or the two arbitrator fail to appoint the Umpire, the Chief Justice of the Supreme Court of India shall appoint the arbitrator and/ or the Umpire as the case may be.

The decision of the arbitration and in the event of the arbitrators failing to regain an agreed decision then the decision of Umpire shall be final and binding on the parties hereto.

The arbitration proceedings shall be held in accordance with the or provisions of Indian Arbitration Act, 1940 and the rules made thereunder as amended from time to time.

The arbitration or the Umpire as the case may be shall decide by whom and what proportions the arbitrators or Umpire fee as well as costs incurred in arbitration shall be borne.

The arbitrator or the Umpire may with the consent of the parties enlarge the time, from time to time to make and publish their or his award. Arbitration will be conducted in English language and either party may be represented by persons not admitted to practice law in India."

"23. In the event of any change or amendment of any Act or law including Indian Income Tax Acts, rules or regulations of Govt. of India or Public Body or any change in the interpretation or enforcement of any said Act or law, rules or regulations by Indian Govt. or public body which becomes effective after the date as advised by the Commission for submission of final price bid for this contract and which results in increased cost of works under the contract, through increased cost by the Commission subject to production of documentary proof to the satisfaction of the Commission to the extent which is directly attributable to such change or amendment as mentioned above. Similarly, if any change or amendment of any Act or law including Indian Income Tax Acts, Rules or Regulation of any Govt. or Public Body or any change in the interpretation or enforcement of any said Act or law, rules or regulations by Indian Govt. or public body becomes effective after the date as advised by the Commission for submissions of final price bid for this Contract and which results in any decrees in the cost of the project through reduced liability of taxes, (other than personnel taxes) duties, the Contractor shall pass on the benefits of such reduced costs, taxes or duties to the Commission.

Notwithstanding the abovementioned provisions, Company shall not bear any liability in respect of:

i) Personnel taxes, customs, duty and corporate tax".

RELEVANT PARAGRAPHS OF STATEMENT OF CLAIM OF THE APPELLANT:

15. In its statement of claim, the appellant, inter alia, contended:

"...The claimant has reason to believe that the Bombay Regional Office of the respondent had recommended that the respondent be made such payments as they rightly believed that such payments were legitimately due to the claimant under the terms of contract.

That apart from the reason that the said amounts were due to the claimant under the contract terms itself, the same is also supported by virtue of a notification of the Government of India setting out internal guidelines as contained in Notification. No. D-19011/7/87-ONG-UA (EO.) dated 25th of September 1983 issued by the Ministry of Petroleum and Natural Gas. A copy of this notification is placed at Document No. 27 and its relevant contents are reproduced, hereinbelow:-

"It has now been decided that...the Indian bidder's foreign exchange component may be allowed to be quoted in foreign currency for purposes of actual payment and the actual payment made in rupee equivalent to the foreign exchange component as per the BC selling rates on the date of actual payment for the imported supplies."

Subsequently, the respondent issued a circular No. 74/89 dated 8th November, 1989 in compliance of the abovesaid Ministerial Notification, a copy of which is Documents. This Circular was to be implemented in all regions and be applicable to all contracts."

16. The appellant in the said statement of claim, inter alia, made the following submissions before the arbitrator:

"2. It is submitted that the foreign exchange rate fluctuations did not and cannot result into a price variation/increase. It is submitted that the firm price relative to this contract was a composite price stated in Rupees and Dollars and it was that which was and has been held firm, by the claimant. The claimant is not seeking additional benefit or profit but is merely seeking to recover a specified contract consideration.

3. That the ministry notification dated 25.09.1989 has the force of law and the respondent is not entitled to act in violation of the same.

5. That it is further submitted that this very respondent has in other suppliers entered into prior to the conclusion of this contract applied this notification in the manner in which it ought to have been applied and has given due benefit to various other suppliers. It is also significant that the respondent has had no hesitation in applying the said notification to the claimant's benefit in a subsequent contract.

6. That without prejudice to what is stated above, it is further submitted that the contract between the claimant and respondent was concluded subsequent to the issuance of the notification and, therefore, any endeavor on the part of the respondent to construe the effective date of the notification as subsequent thereto is misconceived and factually incorrect.

7. It is submitted that exchange rate fluctuations brought into effect in exercise of powers conferred on the Reserve Bank of India under Section 40 of the Reserve Bank of India Act 1934 and upon directions given by the Government of India has the complete force of law. That being the position, any change arising therefrom is clearly covered under Clause 23 of the Tender Document. Being so, the respondent is bound under the contract to compensate the claimant as to such increased costs arising out of such exchange rate fluctuations. It is further submitted that refusal on the part of the respondent to compensate the claimant without disclosing any reasons itself is arbitrary.

8. ...Any interpretation of the contract wherein foreign suppliers would be paid in foreign currency at the current rate while Indian suppliers would be paid at the rate of exchange prevailing on the date of the submission of the Price Bid would discriminate against the Indian suppliers in as much as any increase in the value of the dollar against the Indian rupee would destroy the costing of the Indian suppliers. The claimant states that this interpretation of the contract is discriminatory against the Indian suppliers, violative of public policy and against stated government guidelines, objectives and intentions."

ISSUES BEFORE THE ARBITRATORS:

17. The respondent in their rejoinder having joined issues with the aforementioned contentions of the appellant, the following issues which were raised by the appellant herein, fell for consideration by the learned arbitrators.

"1. Whether the proper interpretation of terms of the contract entitle the claimant to be compensated for all consequences arising out of exchange rate variations between the date of the submission of the Price Bid and the completion of all supplies.

2. Whether, in addition or in the alternative, the claimant is, under Clause 23 of the Tender Document entitled to be compensated for all exchange rate variations between the date of the submission of the Price Bid and the completion of all supplies.

3. Whether, in the alternative, the respondent is bound to effectuate in favor of the claimant notified State policy as contained in the Ministerial notification dated 25.09.1989.

4. Whether, the respondent's circular No. 74/89 dated 8th November, 1983 estoppes the respondent from any interpretation of the contract contrary thereto."

AWARD:

18. By reason of the Impugned award, the learned arbitrators held:

"1. We hold that the Claimants are entitled to be compensated for increase in cost arising out of Foreign Exchange Rate Fluctuations in respect of payment made by the Respondents to the Claimants on the from the respective dated of devaluation of the Indian Rupee, namely 8.7.1991 and 28.2.1998 and not on payments made before the said dates. Accordingly we direct that the Respondent do pay to the Claimants a sum of Rs. 1,03,41,309/- only (in words Rupee One crore three lakhs forty one thousand three hundred and nine.) Rs. 24,97,905/- under Invoice dt. 9.10.1991, Rs. 25,20,160/- under Invoice dt. 15.1.1998 and Rs. 53,23,241/- under Invoice dt. 22.6.1998) in full and final settlement of their claim under their aforesaid three invoices.

2. Respondents do further pay to the Claimants interest at the rate of 185 per annum on the aforesaid three amounts awarded to them under the said invoices from the respective dates of those invoices till the date of this Award."

OBJECTIONS TO THE AWARD BY THE RESPONDENT:

(1) The subject-matter of the arbitration was not arbitrable in view of the terms of the contract:

(2) The appellant was not entitled to any escalation in price.

IMPUGNED JUDGMENT:

19. The Division Bench of the High Court set aside the award holding that the same was without jurisdiction wherefore two questions were framed.

(a) Whether a claim of the nature preferred by the respondent is specifically barred under the contract?

(b) Whether there is any clause in the contract, under which such a claim could be preferred?

OUR CONCLUSION:

20. The questions framed are self-contradictory and inconsistent. Whereas in framing question (a) a right approach had been adopted by the Division Bench, a wrong one had been adopted in framing question (b). It is not in dispute that there were three different nature of bids; which were required to be made in terms of the notice inviting tenders : (i) by foreign bidders; (ii) by Indian bidders quoting Indian price with the foreign exchange component therefore as import was required to be made; (iii) payable only in Indian rupee without foreign exchange component.

21. Before the arbitrators apart from construction of the contract agreement, the questions which, inter alia, arose were: (a) the effect and purport of circular letter dated 25.8.1989 issued by the Central Government: (b) the conduct of the respondent in making the payments to the persons similarly situated.

22. Construction of a deed sometimes pose a great problem.

23. Justice Frankfurter said: "there is no surer way to misread a document than to read it literally." [Massachusetts B. & Insurance Co. v. U.S. (1956) 352 US 128 at p. 1381.

24. We, however, as discussed in details a little later are strictly not concerned as regard true import and purport of the relevant clauses of the contract agreement. Our concern is merely to see as to whether the learned arbitrators exceeded their jurisdiction in making the award.

25. The learned arbitrators, as noticed, hereinbefore, in making the award took into consideration the documentary as well as circumstantial evidence including riva1 pleadings of the parties. It is trite that the terms of the contract can be express or implied. The conduct of the parties would also be a relevant factor in the matter of construction of a contract.

26. In *Khardah Company Ltd.* (supra), this Court held:

"...We agree that when a contract has been reduced to writing we must look only to that writing for ascertaining the terms of the agreement between the parties but it does not follow from this that it is only what is set out expressly and in so many words in the document that can constitute a term of the contract between the parties. If on a reading of the document as a whole, it can fairly be deduced from the words actually used herein that the parties had agreed on a particular term, there is nothing in law which prevents them from setting up that term, The terms of a contract can be expressed or implied from what has been expressed. It is in the ultimate analysis a question of construction of the contract. And again it is well established that in construing a contract it would be legitimate to take into account surrounding circumstances...."

27. Construction of the contract agreement, therefore, was within the jurisdiction of the learned arbitrators having regard to the wide nature, scope and ambit of the arbitration agreement and they cannot, thus, be said to have misdirected themselves in passing the award by taking into consideration the conduct of the parties as also the circumstantial evidence.

28. A dispute as regard the construction of Clause 23 of the contract vis-a-vis the notification issued under Section 40 of the Reserve Bank of India Act also fell for their consideration. Such a question of law, it is trite, is also arbitrable and was specifically raised by the appellant. The

learned arbitrators were further entitled to consider the question as to whether the appellant had been discriminated against insofar as similar claims have been allowed by the respondent.

#### CASE LAWS ON THE POINT:

29. In *State of U.P. v. Allied Constructions* [2003 (6) SCALE 265], this Court held:

"...Interpretation of a contract, it is trite, is a matter for arbitrator to determine (see *Sudarsan Trading Co. v. The Government of Kerala*, AIR 1989 SC 890). Section 30 of the Arbitration Act, 1940 providing for setting aside an award is restrictive in its operation. Unless one or the other condition contained in Section 30 is satisfied, an award cannot be set aside. The arbitrator is a Judge chosen by the parties and his decision is final. The Court is precluded from reappraising the evidence. Even in a case where the award contains reasons, the interference therewith would still be not available within the jurisdiction of the Court, unless, of course, the reasons are totally perverse or the judgment is based on a wrong proposition of law. As error apparent on the face of the records would not imply closer scrutiny of the merits of documents and materials on record. One it is found that the view of the arbitrator is a plausible one, the Court will refrain itself from interfering..."

30. In *K.R. Raveendranathan* (supra), the law was laid down in the following terms:

"2. The learned counsel for the appellant points out that the question in issue in the present appeals is squarely covered by the decision of this Court in *Hindustan Construction Co. Ltd. v. State of J&K* ((1992) 4 SCC 17). In particular, it drew our attention to para 10 of the judgment and the portion extracted from the decision in *Sudarsan Trading Co. case* (*Sudarsan Trading Co. v. Govt. of Kerala*, (1989) 2 SCC 33) wherein it was said that by purporting to construe the contract the Court could not take upon itself the burden of saying that this was contrary to the contract and, as such, beyond jurisdiction. That is exactly what the Court has done in the instant case..."

31. *K.R. Raveendranathan* (supra) has been followed by this Court in *P.V. Subba Naidu* (supra) stating :

"4. The entire thrust of the judgment is on examining the terms of the contract and interpreting them. The terms of the arbitration clause, however, are very wide. The arbitration clause is not confined merely to any question of interpretation of the contract. It also covers any matter or thing arising thereunder. Therefore, all disputes which arise as a result of the contract would be covered by the arbitration clause. The last two lines of the arbitration clause also make it clear that the arbitrator has power to open up, review and revise any certificate, opinion, decision, requisition or notice except in regard to those matters which are expressly excepted under the contract, and that the arbitrator has jurisdiction to determine all matters in dispute which shall be submitted to the arbitrator and of which notice shall have been given.

5. In the present case all the claims in question were expressly referred to arbitrator and were raised before the arbitrator. The High Court was, therefore, not right in examining the terms of the contract or interpreting them for the purpose of deciding whether these claims were covered by the terms of the contract."

32. The same view has been reiterated in *H.P. State Electricity Board* (supra). Upon taking into consideration a large number of decisions and referring to *K.R. Ravendranathan* (supra), this Court held that the court would not be justified in construing the contract in a different manner and then to set aside the award, by observing that the arbitrator had exceeded the jurisdiction in making the award, when the arbitrator is required to construe a contract, only because another view is possible. It was stated:

"26. In order to determine whether the arbitrator has acted in excess of jurisdiction what has to be seen is whether the claimant could raise a particular dispute or claim before an arbitrator. If the

answer is in the affirmative then it is clear that the arbitrator would have the jurisdiction to deal with such a claim. 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. In order to find whether the arbitrator has acted in excess of jurisdiction the court may have to look into some documents including the contract as well as the reference of the dispute made to the arbitrators limited, for the purpose of seeing whether the arbitrator has the jurisdiction to decide the claim made in the arbitration proceedings."

33. Yet again in *Sushil Kumar Kayan* (supra), it was held :

"...In order to determine whether the arbitrator has acted in excess of his jurisdiction what has to be seen is whether the claimant can raise a particular claim before the arbitrator. If there is a specific term in the contract or the law which does not permit the parties to raise a point before the arbitrator and if there is a specific bar in the contract to the raising of the point, then the award passed by the arbitrator in respect, thereof would be in excess of his jurisdiction...."

34. Some of the aforementioned decisions have been considered by us in *Bharat Coking Coal Ltd. v. Annapurna Construction* [2003 (7) SCALE 20].

35. *Rajasthan State Mines & Minerals Ltd.* (supra) whereupon Mr. Rohtagi placed strong reliance, this Court held that the dispute to the arbitrator could not be termed as without jurisdiction but proceeded to consider the question as to whether he will have authority or jurisdiction to grant damages or compensation in the teeth of the stipulation providing that no escalation would be granted and that the contractor would only be entitled to payment of the composite rate as mentioned and no other or further payment of any kind or item whatsoever shall be due and payable by the Company to the contractor.

36. It was concluded:

"(a) It is not open to the Court to speculate, where on reasons are given by the arbitrator, as to what impelled the arbitrator to arrive at his conclusion.

(b) It is not open to the Court to admit to probe the mental process by which the arbitrator has reached his conclusion where it is not disclosed by the terms of the award.

(c) If the arbitrator has committed a mere error of fact or law in reaching his conclusion on the disputed question submitted for his adjudication then the Court cannot interfere.

(d) If no specific question of law is referred, the decision of the Arbitrator on that question is not final, however much it may be within his jurisdiction and indeed essential for him to decide the question incidentally. In a case where specific question of law touching upon the jurisdiction of the arbitrator was referred for the decision of the arbitrator by the parties, then the finding of the arbitrator on the said question between the parties may be binding.

(e) In a case of non-speaking award, the jurisdiction of the Court is limited. The award can be set aside if the arbitrator acts beyond his jurisdiction.

(f) To find out whether the arbitrator has travelled beyond his jurisdiction, it would be necessary to consider the agreement between the parties containing the arbitration clause. Arbitrator acting beyond his jurisdiction is a different ground from the error apparent on the face of the award.

(g) In order to determine whether arbitrator has acted in excess of his jurisdiction what has to be seen is whether the claimant could raise a particular claim before the arbitrator. If there is a specific term in the contract or the law which does not permit or give the arbitrator the power to

decide the dispute raised by the claimant or there is a specific bar in the contract to the raising of the particular claim then the award passed by the arbitrator in respect thereof would be in excess of jurisdiction."

37. With respect we agree with the conclusions arrived at in Rajasthan State Mines & Minerals Ltd. (supra).

38. Clause (g) of the conclusion in the said case, as quoted supra, is not applicable in the instant case inasmuch as there does not exist any provision which does not permit or give the arbitrator the power to decide the dispute raised by the claimant nor there exist any specific bar in the contract to raise such claim.

39. To the same effect is the decision of this Court in Food Corporation of India v. Surendra, Devendra & Mahendra Transport Co. [(2003) 4 SCC 80].

40. In Shyama Charan Agarwala (supra), this Court observed:

"19. Testing the case on hand on the touchstone of well-settled principles laid down by courts, we are unable to hold that the High Court exceeded its jurisdiction in interfering with the award or failed to exercise the jurisdiction vested in it to set aside the award. The approach of the High Court cannot be said to be contrary to the well-settled principles governing the scope of interference with an award of the arbitrator under the old Act. As regards the first item, the question was whether the contract contemplates the use of stone aggregate and stone metal from the local sources only, the source of supply being silent in the relevant clause. The arbitrator was of the view that the unprecedented situation of the Contractor being put to the necessity of procuring the stone material from far-off places was not visualized and the parties proceeded on the basis that such material was available locally. He further noted that the sample kept in the office of the Engineer concerned, admittedly pertained to the material procured from local sources. A letter addressed by the Chief Engineer in support of the Contractor's claim was also relied on in this context. Hence, in these circumstances, the arbitrator can be said to have taken a reasonably possible view and therefore the High Court rightly declined to set aside the award insofar as the quantity of stone aggregate/stone metal brought to the site up to 24-1-1994 is concerned. The arbitrator acted within the confines of the jurisdiction in making the award on this part of the claim."

#### ANALYSIS OF THE CASE LAWS:

41. The principles of law laid down in the aforementioned decisions leave no manner of doubt that the jurisdiction of the court in interfering with a non-speaking award is limited.

42. The upshot of the above decisions is that if the claim of the claimant is not arbitrable having regard to the bar/prohibition created under the contract; the court can set aside the award but unless such a prohibition/bar is found out the court cannot exercise its jurisdiction under Section 30 of the Act. The High Court, therefore, misdirected itself in law in posing a wrong question. It is true that where such prohibition exists, the court will not hesitate to set aside the award.

43. In the instant case, the appellant did not ask for any enhancement in the price. It only asked for the difference in price occurred owing to fluctuation in the rate of dollar.

44. It is true that by taking recourse to the interpretation of documents, the appellant did not become entitled to claim a higher amount than Rs. 149/- but, thereby the appellant had not unjustly enriched itself. Had the price of the dollar fallen, the respondent would have become entitled to claim the difference therefor.

45. The appellant quoted the foreign exchange component in its bids in terms of the notice inviting tenders. The same was asked for by the respondent itself for a definite purpose. A contract between the parties must be construed keeping in view the fact that the fluctuation in the rate of dollar was required to be kept in mind by the respondent having regard to the fact that the tender was global in nature and in the event the respondent was required to pay in foreign currency, the same would have an impact on the cost factor.

46. Clauses 2.5 and 2.7 aforementioned must be construed in such a manner so that effect to both of them may be given. Whereas Clause 2.6 prohibits escalation: Clause 2.7 makes the bidder liable for exchange fluctuations which does not amount to an escalation of the price or disturb their cost evaluation. The bid of the appellant had two components, namely, Indian currency component and US Dollar component. The appellant claimed \$ 4-.60 within the total price of Rs. 149/- which was to be paid in Indian currency. In any manner, the claim did not violate clause 2.6. The appellant merely claimed foreign exchange component at the rate of \$ 4.80 and no more.

47. The very fact that three different types of quotations were invited from the bidders itself is suggestive of the fact that each one of them was required to be construed in such a manner so as to apply in different situations. The submission of Mr. Rohtagi, the learned Additional Solicitor General to the effect that if such a factor was to be taken into consideration, the person who had quoted only in terms of Indian rupee would be at a disadvantage is stated to be rejected. The question as to whether suppliers quoting their bid in Indian currency alone would face disadvantage or not will depend upon the question as to whether they were similarly situated. One bidder may have to import the raw-materials: other may not have to. This itself will lead to a difference. In fact, those who did not bid with the amount of foreign exchange component cannot be placed on equal footing to those who in their bid pursuant to the notice inviting tender disclosed that they would have to make import wherefor only the foreign exchange component in the price had to be disclosed.

48. Furthermore, the circular letter dated 25.9.1989 issued by the Government of India itself clearly shows that a decision had been taken to make such payments. The contract having not been entered into by the parties herein as on the said date, the decision to include the said term would mean that the same shall be incorporated in the contracts which were to be executed in future.

49. It is further not in dispute that the respondent is bound by the directives issued by the Union of India. In fact from the letter dated 21.5.1990 it is evident that even for the purpose of entering into the contract approval of the Central Government was sought for and granted. Such a directive of the Central Government was not required to be made by way of a notification nor the same was required to have the force of law as the matter involved a contract between the parties.

50. Mr. Rohtagi is not correct in his contention that such condition was required to be incorporated in the NIT inasmuch as from a plain reading of the said letter, it is evident that such a clause was to be incorporated in the notice inviting tenders *ex majori cautela*.

51. As regard the contention as to whether the notification issued under Section 40 of the Reserve Bank of India would be rules or regulations having an impact in the cost factor is concerned, the arbitrator had jurisdiction to decide the same, subject of course to application of correct principles of law in relation thereto.

52. Even assuming that the arbitrators faulted in that regard, it must be borne in mind that such a contention was raised on behalf of the appellant, only for the purpose of showing that several aspects of the matter arose before the learned arbitrators for making the award and any-one of them would be sufficient to uphold the award.

53. The court, having regard to the proposition of law that the jurisdiction of the arbitrator will be ousted only in the event that there exists a specific bar in the contract as regard raising of a particular claim must necessarily hold that the award was sustainable. As in the instant case there did not exist any such bar, it is enforceable in law. Furthermore, in the event the ratio of the decision of the High Court is accepted, the same would amount to re-hearing of the entire arguments once over again by the court as regard construction of a contract which is impermissible in law.

54. The arbitrators were called upon to determine a legal issue which included interpretation of the contract. The arbitrators, therefore, cannot be said to have been traveled beyond jurisdiction in making the award.

**CONCLUSION:**

55. We, for the reasons aforementioned, are of the opinion that the judgment of the High Court is not sustainable.

56. However, one aspect of the matter which requires our consideration. The respondent rejected the claim of the appellant as far back as on 14.7.1992 whereafter the disputes and differences between the parties were referred to the arbitrators. The arbitrators entered into the reference on 1.3.1993 and passed an award on 13.8.1993. The said award was set aside by the High Court. If the award is to be satisfied in its entirety, the respondent will have to pay a huge amount by way of interest.

57. In order to do the complete justice to the parties, in exercise of our jurisdiction under Article 142 of the Constitution of India, we think it appropriate to direct that the award shall carry interest at the rate of 6% per annum instead and in place of 18% per annum. This order shall, however, not be treated as precedent.

58. For the reasons aforementioned, the impugned judgment is set aside. The appeal is allowed with the aforementioned modifications, However, in the facts and circumstances of the case, there shall be no order as to costs