NOTES ON SOME OF THE RELEVANT PROVISIONS OF THE ARBITRATION AND CONCILIATION ACT, 1996 & SOME IMPORTANT CASE LAWS

For the Webinar on "Salient features of arbitration, recent amendments and effect of COVID-19 lockdown on arbitration proceedings"

BY

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An arbitral award may be set aside on an application by a party defined under section 2(h) of the Arbitration and Conciliation Act, 1996 which provides that 'party' means a party to an arbitration agreement.

- **Application for setting aside an arbitral award can be filed only in the court defined under section 2(1)(e) of the Act which provides as under :-**

> ***'(e) "Court" means—***
>
> ***(i) in the case of an arbitration other than international commercial arbitration, 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;***
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> ***(ii) in the case of international commercial arbitration, 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, and in other cases, a High Court having jurisdiction to hear appeals from decrees of courts subordinate to that High Court.'***

- Supreme Court in case of ***Brahmani River Pellets Limited v/s. Kamachi Industries Limited, 2019 SCC OnLine SC 929*** has held that where the contract satisfies the jurisdiction of the Court at a particular place then only such Courts will have the jurisdiction to deal with the matter and an inference be drawn that parties intended to exclude the other Courts. In that matter, it is held that since the parties had agreed that the venue of arbitration shall be at Bhubaneswar, the intention of parties was to exclude all other Courts. The Madras high Court did not have jurisdiction under Section 11(6) of the Arbitration Act to entertain an application for appointment of an arbitrator.

- Supreme Court in the case of **Indus Mobile Distribution Private Limited Vs. Datawind Innovations Private Limited and Ors. (2017) 7 SCC 678** has held that if the juridical seat of arbitration is chosen by parties in terms of the arbitration agreement, such designated seat of arbitration is akin to an exclusive jurisdiction clause as the Court has supervisory powers over the arbitration. It is held that the Mumbai Courts alone thus have jurisdiction to the exclusion of all other courts in the country as the juridical seat of arbitration was at Mumbai.

- Supreme Court in the case of ***Emkay Global Financial Services Ltd. Vs. Girdhar Sondhi- 2018 (9) SCC 49*** has held that an application for setting aside an arbitral award will not ordinarily require anything beyond the record that was before the Arbitrator. However, if there are matters not contained in such record, and are relevant to the determination of issues arising under Section 34(2)(a), they may be brought to the notice of the Court by way of affidavits filed by both parties. Cross-examination of persons swearing to the affidavits should not be allowed unless absolutely necessary, as the truth will emerge on a reading of the affidavits filed by both parties.

- Supreme Court in the case of ***M/s.Canara Nidhi Limited Vs. M. Shashikala & Ors.*** 2019 SCC OnLine SC 1244 has held that proceedings under Section 34 of the Act is summary in nature. The scope of enquiry in the proceedings under Section 34 of the Act is restricted to a consideration whether any of the grounds mentioned in Section 34(2) or Section 13(5) or Section 16(6) are made out to set aside the award. The grounds for setting aside the award are specific. It is imperative that the arbitration cases under Section 34 of the Act should be decided only with reference to the pleadings and the evidence placed before the Arbitral Tribunal and the grounds specified under Section 34(2) of the Act. Legal position is clarified that an application for setting aside an arbitral award will not ordinarily require anything beyond the record that was before the arbitrator. cross-examination of persons swearing in to the affidavits should not be allowed unless absolutely necessary. It is held that High Court did not keep in view that respondents had not made out grounds that it is an exceptional case to permit them to adduce evidence in the application under Section34 of the Act. The said directions of the High Court amount to retrial on the merits of the issues decided by the arbitrator.

➢ Bombay High Court in the case of **United India Insurance Company Limited Vs. Eastern Bulk Company Limited, 2019 SCC OnLine Bom 1404** has held that the concept of seat of arbitration with the venue of arbitration cannot be mixed up. Learned arbitrator fixing the venue only for the purpose of conducting some of the arbitral proceedings could not be considered as seat of arbitration for the purpose of conferring jurisdiction on the Courts. There cannot be two or more seats of arbitration whereas the venue of arbitration may be more than one and may be fixed by the parties as well as the learned arbitrator considering the convenience of the learned arbitrator and the parties. The venue decided by the learned arbitrator to suit his convenience or convenience of the parties for the purpose of hearing of the arbitration proceedings cannot confer the supervisory jurisdiction of such Court within whose territorial jurisdiction such arbitral tribunal were held at the venue decided under Section 20(3) of the Arbitration Act.

Section 4 of the Arbitration Act provides that a party who knows that any provision of Part-I from which parties may derogate or any requirement under the arbitration agreement has not been complied but still 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.

- **Section 5 of the Arbitration Act provides that notwithstanding contained in any other law for the time being in force, in matters governed by Part-I, no judicial authority shall intervene except where so provided in Part-I. Part-I provides for judicial intervention by the Court in the proceedings under Sections 8, 9, 11, 14, 15, 27, 29-A, 34, 36 and 37.**

- Supreme Court in the case of ***Municipal Corporation of Greater Mumbai & Anr. Vs. Pratibha Industries Limited & Ors., (2019) 3 SCC 203*** has held that High Court has inherent powers under Article 215 of the Constitution of India to recall its own order being a superior Court of record. Section 5 of the Arbitration Act is inapplicable in absence of arbitration agreement itself.

Section 7 provides as to what the arbitration agreement means. The arbitration agreement shall be in writing. The arbitration agreement is in writing if it is contained in the documents signed by the parties, exchange of letters, telex, telegrams, or other means of telecommunication including communication through electronic means which provide a record of the agreement or an exchange of statement of claim and defence wherein the existence of the agreement is alleged by one party and not denied by the other. If there is a reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and reference is such as to make that arbitration clause part of the contract. Unless there is arbitration agreement between the parties, dispute cannot be referred to arbitration. An arbitration agreement however can be arrived at even in the pending court proceedings. If the parties have arrived at the arbitration agreement under Part-I, all rights and obligations of the parties would be governed by the provisions of the Part-I of the Arbitration & Conciliation Act, 1996.

- In case of ***Booz Allen Hamilton vs. SBI Home Finance (2011) 5 SCC 532,*** it is held by Supreme Court that if the subject matter of dispute is not capable of settlement by arbitration under the law for the time being in force, such award is liable to be set aside. Supreme Court has enumerated some of such non arbitrable disputes and has held that such action would be an action in *rem* and not in *personam* and are thus not arbitrable even if parties agreed to refer such dispute by consent.

  (1) Disputes relating to criminal offence
  (2) Matrimonial disputes
  (3) Guardianship matters
  (4) Insolvency and winding up matters
  (5) Testamentary matters
  (6) Eviction or tenancy matters
  (7) Suit for enforcement of mortgage by sale of property.
  (8) Intellectual Property Dispute.

➢ Supreme Court in the case of ***Reckitt Benckiser (India) Private Limited Vs. Reynders Label Printing India Private Limited & Anr., (2019) 7 SCC 62*** has held that

the party who is not a signatory to the arbitration agreement cannot be subjected to the arbitral proceedings. The burden is on the applicant to establish that such third party had an intention to consent to the arbitration agreement and be party thereto.

➢ Supreme Court in the case of ***Caravel Shipping Services Private Limited Vs.Premier Sea Foods Exim Private Limited, (2019) 11 SCC 461*** considered an arbitration clause recorded in bill of lading. Under Section 7(4) of the Arbitration Act, an arbitration agreement would be found in the circumstances mentioned in the three sub-clauses that make up Section 7(4). This would not mean that in all cases an arbitration agreement needs to be signed. The only pre-requisite is that it shall be in writing, as has been pointed out in Section 7(3).

➢ Supreme Court in the case of ***South Delhi Municipal Corporation Vs.SMS AAMW Tollways Private Limited, (2019) 11 SCC 776*** has held that agreement/clause providing for a decision of a competent officer of a party and providing for an appeal against decision of competent officer is clearly an appeal in the nature of a departmental appeal commonly provided in several department rules including service rules and cannot be construed as an arbitration agreement. Purpose of such clause is to vest the competent officer with supervisory control over the execution of work and administrative control over it to prevent disputes. No arbitrator can be appointed under such clause.

➢ Supreme Court in case of ***Vidya Drolia and Others v/s. Durga Trading Corporation, 2019 SCC OnLine SC 358*** has held that there is nothing in the Transfer of Property Act to show that a dispute as to determination of a lease arising under Section 111 of Transfer of Property Act cannot be decided by arbitration. It is held that public policy requires that parties cannot be permitted to contract out of the legislative mandate which requires certain kind of disputes to be settled by special Courts constituted by the Act. The disputes arising under the Indian Trusts Act cannot be referred to arbitration.

➢ Supreme Court in case of ***Mahanagar Telephone Nigam Ltd. v/s. Canara Bank and Others, 2019 SCC OnLine SC 995*** has held that an arbitration agreement is a commercial document *inter partes*, and must be interpreted so as to give effect to the intention of the

parties, rather than to invalidate it on technicalities. The intention of the parties must be inferred from the terms of the contract, conduct of the parties and correspondence exchanged to ascertain the existence of a binding contract between the parties. It would be the duty of the Court to make the arbitration agreement workable within the permissible limits of the law. The parent or the subsidiary company, entering into an agreement, unless acting in accord with the principles of agency or representation, will be the only entity in a group, to be bound by that agreement. A non-signatory can be bound by an arbitration agreement on the basis of the "Group of Companies" doctrine, where the conduct of the parties evidences a clear intention of the parties to bound both the signatory as well as the non-signatory parties.

- Supreme Court in the case of ***Vimal Kishor Shah & Ors. Vs. Jayesh Dinesh Shah & Ors. - (2016) 8 SCC 788*** has held that disputes relating to trust, trustees and beneficiaries arising out of trust deed and Trust Act, 1882 are not capable of being decided by the arbitrator despite existence of arbitration agreement to that effect between the parties. Such disputes have to be decided by the Civil Court as specified under Trust Act, 1882.

- Supreme Court in the case of ***Himangni Enterprises Vs. Kamaljeet Singh Ahluwalia (2017) 10 SCC 706*** has held that dispute relating to eviction of a tenant from premises falling within the jurisdiction of the Tenancy Court cannot be referred to arbitration. The parties cannot be referred to arbitration under Section 8 of the Arbitration and Conciliation Act, 1996 in an application filed in such eviction suit inspite of there being an arbitration agreement between the parties.

- Supreme Court in the case of ***Chiranjilal Shrilal Goenka (deceased) through LRs. Vs. Jasjit Singh & Ors.- (1993) 2 SCC 507*** has held that consent of the parties cannot confer jurisdiction nor an estoppel against statute. Jurisdiction could be conferred by statute and the Court cannot confer jurisdiction or authority on the tribunal. It is held that a decree passed by a court without jurisdiction on the subject matter or on the grounds on which the decree is made which goes to the root to its jurisdiction or lacks inherent jurisdiction is a *corum non judice.* Such decree passed by such a court is a nullity and is *non est.*

➢ Bombay High Court in the case of ***Altus Uber Vs.Siem Offshore Rederi AS, 2019 SCC OnLine Bom 1327*** has held that Court's power to arrest of ships under admiralty jurisdiction of High Court is not circumvented by arbitration agreement, if any, subject to satisfaction of parameters of maritime claim which confers admiralty jurisdiction on High Court. The Admiralty Act only deals with what constitutes a maritime claim and arrest of ships to secure maritime claims. The said Admiralty Act does not provide for what is required to be done after a ship is arrested to secure a maritime claim and the owner enters appearance and submits to jurisdiction. The Act is silent on the procedure to be followed in the event the disputes are to be referred to arbitration. The Court rejected the submission that once there is an arbitration agreement and arbitration has been invoked, the Court has no jurisdiction to arrest a ship in exercise of the Admiralty jurisdiction.

● Bombay High Court in the case of **The *Indian Performing Right Society Ltd. vs. Entertainment Network (India) Ltd.- (2016) SCC OnLine Bom 589*** has held that declaration granted by the arbitral tribunal in respect of the copyright of the parties which was an action in *rem* and was not arbitrable. It is held that since the arbitral tribunal inherently lacked the jurisdiction to adjudicate upon such claim made by the claimant, it would not amount to a waiver under Section 4 of the Arbitration Act. It is held that a party even by consent cannot confer jurisdiction on the arbitral tribunal in case of action in *rem* which jurisdiction the arbitral tribunal did not have.

➢ Supreme Court in the case of ***Kerala State Electricity Board and Anr. Vs. Kurien E. Kalathil & Anr., (2018) 4 SCC 793*** has held that reference of a dispute to arbitration under Section 89 of the Code of Civil Procedure, 1908 can be done only with written consent of the parties either by way of a joint memo or joint application and not by oral consent given by the counsel without written memo of instructions.

● Supreme Court in the case of ***United India Insurance Co. Ltd. & Anr. Vs. Hyundai Engineering and Construction Co. Ltd. & Ors. - AIR 2018 SC 3932*** has held that Arbitration clause has to be interpreted strictly. Supreme Court considered the arbitration clause while considering the application for appointment of arbitrator and held that the claim was not arbitrable and refused to appoint an arbitrator.

- Supreme Court in the case of ***M/s. Inox Wind Ltd. V/s. M/s. Thermocables Ltd. – 2018 SCC OnLine SC 3*** has adverted to the judgment of the Supreme Court in the case of **M.R. Engineers and Contractors (P) Ltd. – (2009) 7 SCC 696** and has held that a general reference to a consensual standard form is sufficient for incorporation of an arbitration clause. It is held that the Court in agreement with the judgment in ***M.R. Engineer's case*** with a modification that a general reference to a standard form of contract of one party along with those of trade associations and professional bodies will be sufficient to incorporate the arbitration clause. It is held that if the document sought to be incorporated is a bespoke contract between the same parties, the courts have accepted this as a "single contract" case where general words of incorporation will suffice, even though the other contract is not on standard terms and constitutes an entirely separate agreement. Supreme Court considered the rationale for this approach that the parties have already contracted on the terms said to be incorporated and are therefore even more likely to be familiar with the term relied on than a party resisting incorporation of a standard term.

- Supreme Court in the case of ***Hema Khattar Vs. Shiv Khera – (2017) 7 SCC 716*** held that the arbitration clause contained in agreement would remain operative even if agreement stands terminated by mutual consent of the parties.

- Supreme Court in the case of **Duro Felguera, S.A. Vs. Gangavaram Port Limited -- (2017) 9 SCC 729** has adverted to the judgment in the case of ***M.R. Engineers and Contractors (P) Ltd. – (2009) 7 SCC 696*** and has held that when reference is made to the priority of documents to have clarity in execution of the work, such general reference to the Tender Document will not be sufficient to hold that the arbitration clause 20.6 contained in the Tender Documents is incorporated in the contract.

- Supreme Court in the case of ***Master Tours and Travels Vs. Chairman, Amarnath Shrine Board and Ors. (2016) 16 SCC 661*** observed that arbitration agreement providing for final adjudication of all disputes by officer of one party having jurisdiction over subject-matter of the contract/disputes, cannot amount to an arbitration clause.

- Supreme Court in the case of the ***Umesh Goel Vs. Himachal Pradesh Cooperative Group Housing Society Ltd. - AIR 2016 SC 3116*** has held that since the arbitral proceedings do not come under the expression "other proceeding" as specified in Section 69(3) of the Partnership Act, 1932, ban imposed under the said Section 69 can have no application to the arbitral proceedings as well as the arbitration award.

- Supreme Court in the case of ***Union of India & Anr. Vs.Premco-DKSPL (JV) & Ors.-(2016)14 SCC 651*** has held that the period prescribed in the arbitration agreement for making an application for appointment of an arbitrator would be binding between the parties and has to be followed for making an application for appointment of an arbitrator. Application for appointment of arbitrator before expiry of time prescribed in the arbitration agreement. It is held that the appointment of arbitrator made by the High Court is illegal and is set aside by the Supreme Court. Agreed procedure and time limit for appointment of arbitrator has to be considered.

Under section 8(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 to the arbitration agreement or any person claiming through or under him, so applies not later than the date of submitting his first statement on the substance of the dispute, then, notwithstanding any judgment, decree or order of the Supreme Court or any Court, refer the parties to arbitration unless it finds that prima facie no valid arbitration agreement exists. Rights and remedy of the parties in that event would be then governed by the provisions of the Arbitration and Conciliation Act, 1996. An order passed by the Judicial Authority under Section 8 refusing to refer the parties to the arbitration is now made appealable under Section 37(1)(a) w.e.f. 23rd October 2015.

- **The judicial authority or the Court, however, may appoint an arbitrator by consent of the parties while referring the parties to arbitration under Section 8 of the Arbitration and Conciliation Act, 1996. After disposal of the suit under Section 8 by referring the parties to the arbitration, all rights and remedies of the parties would**

be thereafter governed by the provisions of the Arbitration and Conciliation Act, 1996 and in accordance with the arbitration agreement arrived at between the parties. A party aggrieved by the arbitral award can challenge such an arbitral award not before the judicial authority who had passed an order under Section 8 but can file proceedings under Section 34 before the Court as defined under Section 2(1)(e) of the Arbitration and Conciliation Act, 1996.

A proviso is added to Section 8 which provides that where the original arbitration agreement or a certified copy thereof is not available with the party applying for reference to arbitration under sub-section (1), and the said agreement or certified copy is retained by the other party to that agreement, then, the party so applying shall file such application along with a copy of the arbitration agreement and a petition praying the Court to call upon the other party to produce the original arbitration agreement or its duly certified copy before that Court.

Section 8(1) is substituted by the amendment of 2015. Under the amended Section 8(1), a judicial authority is bound to refer the parties to arbitration if the subject matter of dispute is subject of arbitration agreement notwithstanding any judgment, decree or order of the Supreme Court or any Court. In view of substitution of Section 8(1) by another provision, a judicial authority has to confine its scope to the existence of valid arbitration agreement. If the judicial authority refuses to refer the parties to the arbitration under Section 8, such order is appealable order under Section 37(1)(a) inserted by an amendment to Section 37 with effect from 23rd October 2015. If the parties are referred to arbitration under Section 8 of the Act by the judicial authority, such an order is not appealable under Section 37 of the Act.

The judicial authority or the Court, however, may appoint an arbitrator by consent of the parties while referring the parties to arbitration under Section 8 of the Arbitration and Conciliation Act, 1996. After disposal of the suit under Section 8 by referring the parties to the arbitration, all rights and remedies of the parties would be thereafter governed by the provisions of the Arbitration and Conciliation Act, 1996 and in accordance with the arbitration agreement arrived at between the parties. A party aggrieved by the arbitral award can challenge such an arbitral award not before the judicial authority who had passed an

order under Section 8 but can file proceedings under Section 34 before the Court as defined under Section 2(1)(e) of the Arbitration and Conciliation Act, 1996.

If the defendant does not make an application under Section 8 before the judicial authority before the date of submitting his first statement on the substance of the dispute, such suit has to be proceeded with.

Whether the allegations of fraud, fabrication, malpractice etc. can be referred to arbitration :-

- A three Judges Bench of Supreme Court in case of ***Rashid Raza v/s. Sadaf Akhtar, 2019 SCC OnLine SC 1170*** has held that there is a distinction between serious allegations of forgery/fabrication in support of the plea of fraud as opposed to "simple allegations". Supreme Court held that as there were no allegation of fraud which would vitiate the partnership deed as a whole or in particular the arbitration clause concerned in the said partnership deed, since the allegations pertain to the affairs of the partnership and siphoning of funds therefrom and not to any matter in the public domain, disputes raised between the parties were arbitrable and application under Section 11 of the Arbitration Act would be maintainable.

- A two Judges Bench of Supreme Court in case of ***Zenith Drugs & Allied Agencies Pvt. Ltd. v/s. Nicholas Piramal India Ltd., 2019 SCC OnLine SC 946*** has held that the parties can be referred to arbitration in an application filed under Section 8 of the Arbitration Act only if the subject matter of the action before the judicial authority relates to dispute which is the subject matter of the arbitration agreement. The conditions prescribed in Section 8 have to be satisfied for referring the parties to arbitration. Such an application can be made only if the subject matter of the suit is also the same as the subject matter of arbitration. Only those disputes which are specifically agreed to be resolved through arbitration can be the subject matter of the arbitration and upon satisfaction of the same, the Court can refer the parties to arbitration. Supreme Court held that in view of a party challenging the compromise decree alleging that it has been obtained by inducement and fraud, parties cannot be referred to arbitration. The merits of such a plea could be decided only by the Civil Court upon consideration of the evidence adduced by the parties.

- Supreme Court in the case of ***Ameet Lalchand Shah & Ors. Vs. Rishabh Enterprises & Anr. - AIR 2018 SC 3041*** has held that reference of the disputes between the parties to the arbitration agreement cannot be refused on mere allegation of fraud against one party by another party made in the plaint.

- Supreme Court in the case of ***A. Ayyasamy Vs. A. Paramasivam & Ors. - (2016) 10 SCC 386*** has held that when case of fraud is set up and on that basis, party wants to wriggle out of arbitration agreement, strict and meticulous inquiry into allegations of fraud is needed. Hence, the Court has to pronounce upon arbitrability or non-arbitrability of disputes. Only when Court is satisfied that allegations are of serious and complicated nature that it would be appropriate for Court to deal with subject matter rather than relegating parties to arbitration, then alone such an application under Section 8 should be rejected. It is held that if the allegations of fraud are so serious which make a virtual case of criminal offence or allegations of fraud are so complicated, it cannot be decided by an arbitrator, only such allegations of fraud can be decided by the Civil Court and not by the arbitral tribunal.

- The Supreme Court in case of ***N. Radhakrishnan vs. Maestro Engineers, (2010) 1 SCC 72,*** has held that the allegations of fraud and serious malpractice on the part of the respondent can be settled in a Court through furtherance of detailed evidence by either parties and such a situation cannot be properly gone into by the arbitrator. It is held that in the facts of that case such allegations should be tried in a Court of law which would be more competent and have means to decide such applicable matter involving various questions and issues raised in the said petition.

- Bombay High Court in the case of ***M/s.Microvision Technologies Pvt. Ltd. Vs. Micro & Small Enterprises Facilitation Council & Anr.-(2016) SCC OnLine Bom 10039*** has considered the allegations that the contractor had not supplied the materials as per the approved specification agreed in the contract entered into between the parties and had alleged to have committed fraud upon the Government. It is held that the Court cannot conclusively draw any conclusion about the allegations of fraud or fabrication as canvassed

by the Government and such allegations did not fall in the category of serious allegations of fraud which make a virtual case of criminal offence or is so complicated or complex issue that it cannot be decided by an arbitrator but can be decided only by a Civil Court on appreciation of voluminous evidence.

- The Bombay High Court in case of ***HSBC PI Holdings (Mauritius) Ltd. vs. Avitel Post Studioz Ltd. & Ors. – 2014 SCC OnLine Bom 929*** by learned single Judge has held that it is at the discretion of the Court to refer the matter to arbitration or whether the same can be decided by the Court appropriately when there are allegations of fraud, fabrication or malpractice. It is held that there is no bar provided under the Arbitration & Conciliation Act, 1996 against the arbitrator from entertaining and/or deciding the issue of fraud, forgery, malpractice etc.

- The Division Bench of the Bombay High Court in case of ***Avitel Post Studioz Ltd. & Ors. vs. HSBC PI Holdings (Maurities) Ltd. delivered on 31st July, 2014 in Appeal No.196 of 2014,*** has upheld the judgment of the learned single Judge in case of ***HSBC PI Holdings (Mauritius) Ltd. vs. Avitel Post Studioz Ltd. & Ors. -- 2014 SCC OnLine Bom 929.***

- The Division Bench of the Bombay High Court in case of ***Maharashtra Stage and Cultural Development Corporation Limited vs. Multi Screen Media Pvt. Ltd., (2013) 11 LJSOFT 101,*** after adverting to the judgment of the Supreme Court in the case of ***N. Radhakrishnan vs. Maestro Engineers, (2010) 1 SCC 72***, has held that mere allegations of fraud or malpractice would not be sufficient to divest the arbitral tribunal of jurisdiction nor does the judgment of the Supreme Court in the case of ***N. Radharksihanan*** supports such a proposition. It is held that if a mere allegation of fraud however vague and bereft of material particulars were to oust the jurisdiction of the arbitral tribunal, the efficacy of arbitration as an alternate dispute resolution mechanism would be eroded and undermined.

WHEN DISPUTE ARISES

- Supreme Court in the case of ***Mcdermott International Inc. Vs. Burn Standard Co. Ltd. & Ors. -(2006) 11 SCC 181*** has held that once a claim was made prior to

invocation of the arbitration agreement, it became a dispute within the meaning of the provisions of the 1996 Act. It is further held that while claiming damages, the amount therefore was not required to be quantified. Quantification of a claim is merely a matter of proof.

- Supreme Court in the case of ***Sangamner Bhag Sahakari Karkhana Limited vs. M/s.Krupp Industries Limited - AIR 2002 SC 2221*** has held that the arbitration agreement recorded between the parties was of widest amplitude wherein the expression such as 'arising out of' or 'in respect of' or 'in connection with' or 'in relation to' or 'in consequence of' or 'concerning' or 'relating to' the contract which are interpreted and it is held that it was the substance of the claim made before the arbitration which has to be seen. It is held that the Court would not construe the nature of claim by adopting too technical an approach or by indulging into hair-splitting, otherwise the whole purpose behind holding the arbitration proceedings as an alternate to civil Court's forum would stand defeated.

- Bombay High Court in the case of the ***Board of Trustees, Port of Mumbai vs. Afcons Infrastructure Limited - 2016 SCC OnLine Bom 10037*** has held that since the claimant had demanded various claims from time to time which were not considered by the opponent or were not specifically rejected and a silence was maintained in respect thereto, the dispute/difference had arisen between the parties which were referred to the arbitration pursuant to the arbitration agreement arrived at between the parties.

- Bombay High Court in the case of ***Patel Engineering Co. Limited vs. B.T. Patil & Sons Belgaum (Construction) Private Limited & Ors. - 2016(3) Arb.L.R. 162 (Bom)*** has held that cause of action had arisen in view of notice of additional claims after the arbitral tribunal is constituted and if the arbitration agreement provides for following the procedure for appointment of an arbitral tribunal, such additional claims cannot be made directly before the arbitral tribunal in the statement of claim without following the requisite procedure for referring the dispute to the arbitration prescribed under the arbitration agreement. However, the parties can by consent refer such additional claims before the same arbitral tribunal by way of successive reference.

- Bombay High Court in the case of ***M/s.Chadalavada Infratech Ltd. Vs. Tata Capital Financial Services Limited- (2013) SCC OnLine Bom 1490*** has held that when there is non-payment of demand having been raised, disputes between the parties arise and such disputes are required to be referred to the arbitration under the Arbitration Agreement. This Court construed the arbitration agreement in that matter and held that even claim of a party also could have been referred to the arbitration. In that matter, an arbitration clause provided that disputes, differences and/or claims arising out of those presents or as to the construction, meaning or effect thereof or as to the rights and liabilities of the parties therein shall be settled by arbitration in accordance with the provisions of the Arbitration and Conciliation Act, 1996. Bombay High Court rejected the submission of the opponent that there is no denial of the claim and thus there was no dispute between the parties and an arbitrator could not have been appointed under the Arbitration Agreement.

How to initiate arbitration - Notice invoking Arbitration, precautions to be taken, Section 21

Before initiating arbitration, a party must examine arbitration agreement and to see whether such arbitration agreement provides for any procedure to be followed before invoking arbitration agreement. If any procedure is required to be followed as a condition precedent before invoking arbitration agreement, such procedure has to be followed before invoking arbitration agreement. If such mandatory procedure is not followed before invoking arbitration agreement, the opponent may raise an objection about non-compliance of the mandatory procedure provided in the agreement before invoking arbitration agreement. If no such mandatory procedure is followed by the party who seeks to invoke arbitration agreement but no objection is raised by the opponent before the arbitral tribunal, it would amount to waiver under Section 4 of the Arbitration and Conciliation Act, 1996. A party who seeks to invoke the arbitration agreement has to be careful in drafting notice invoking arbitration agreement.

When disputes and differences arise between the parties, a party to the arbitration agreement as defined under Section 2(1)(h) has to issue notice invoking arbitration agreement and has to call upon the opponent to appoint an arbitrator in accordance with the

arbitration agreement. If the arbitration agreement provides for appointment of sole arbitrator or if the arbitration agreement is silent about the number of arbitrators, the arbitral tribunal shall consist of a sole arbitrator. A party who invokes the arbitration agreement can suggest the name of few arbitrators and may call upon the opponent to agree to one of the names suggested by that party or to suggest any other names if the names suggested by that party is not agreeable by the other party within thirty days from the date of receipt of the said notice. Section 43(2) provides that for the purposes of Section 43 of the Arbitration and Conciliation Act, 1996 and the Limitation Act, 1963, arbitration proceedings shall be deemed to have commenced on the date referred in Section 21.

Section 21 of the Arbitration and Conciliation Act, 1996 provides that 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. Limitation in respect of which a request is made by one party to other party to refer such dispute to the arbitration stops when such notice is received by other party.

- Bombay High Court in the case of ***Bhanumati J. Bhuta Vs. Ivory Properties and Hotels Private Limited, 2020 SCC OnLine Bom 157*** has held that the arbitral proceedings commences in respect of dispute when notice invoking arbitration agreement is received by other side and not when such notice is only served upon the arbitral Tribunal. The onus is on the applicant who had issued such notice to prove the delivery of such notice upon the other side.

- Supreme Court in the case of ***Andhra Pradesh Power Coordination Committee & Ors. Vs. Lanco Kondapalli Power Ltd. & Ors.-(2016) 3 SCC 468*** has held that notice of arbitration amounted to initiation of the arbitral proceedings as contemplated under Section 21 of the Arbitration and Conciliation Act, 1996.

- Supreme Court in the case of ***Voltas Limited Vs. Rolta India Limited- (2014) 4 SCC 516*** has adverted to the judgment of the Supreme Court in the case of ***State of Goa***

Vs. Praveen Enterprises -(2012) 12 SCC 581 and has held that the counter claim filed before the arbitral tribunal was barred by law of limitation.

- Supreme Court in the case of ***State of Goa Vs. Praveen Enterprises - (2012) 12 SCC 581*** has held that the limitation for counter claim should be computed, as on the date of service of notice under Section 21 of the Arbitration and Conciliation Act, 1996 of such claim on the claimant and not on the date of filing of the counter claim.

- Division Bench of the Bombay High Court in the ***Jethmal Mulji Thakkar Vs. Maharashtra State Co-operative Marketing Federation Ltd. - (2017) SCC OnLine Bom 144*** has held that if there is no dispute and the denial to the amount so claimed and demand is made from time to time, but the opponent has delayed the payment, the request of the claimant made for the first time should have been treated as first communication to refer the dispute to arbitration as contemplated under Section 21 of the Arbitration and Conciliation Act, 1996. Merely because the claimant invoked the Arbitration Agreement at second time, that in no way be treated and/or interpreted to mean that the earlier invocation of arbitration clause was superseded and/or required to be overlooked. Once the arbitration clause is invoked, the mandate of Arbitration Act needs to be followed and noted by all the concerned. Mere sending another notice in no way should have been taken as foundation to deny the undisputed claims of the claimant. Division Bench has set aside the judgment of the learned Single Judge holding that limitation would stop when second notice invoking arbitration agreement under Section 21 of the Arbitration and Conciliation Act, 1996 was issued.

- Bombay High Court in the case of ***M/s.Anacon Process Control Pvt. Ltd. Vs. Gammon India Limited - 2016 SCC OnLine Bom 10076*** has held that a party to an Arbitration Agreement is bound to invoke arbitration in terms of Section 21 of the Arbitration and Conciliation Act, 1996 which is *sine qua non* for commencement of the arbitration proceedings. An application made under Section 8 of the Act or any order passed thereunder does not mean that the applicant has already invoked arbitration in terms of Section 21 of the Act. Section 21 and Section 8 of the Act completely operate in different spheres. Bombay High Court adverted to the judgment of the Supreme Court in the case of

State of Goa Vs. Praveen Enterprises -(2012) 12 SCC 581. Supreme Court judgment in the said judgment has held that in view of section 21 of the Act providing that the arbitration proceedings shall be deemed to commence on the date on which "the request for that dispute to be referred to arbitration is received by the respondent" the said confusion is cleared. Therefore the purpose of section 21 of the Act is to determine the date of commencement of the arbitration proceedings and is relevant mainly for deciding whether the claims of the claimant are barred by limitation or not.

- Bombay High Court in the case of ***Board of Trustees of Jawaharlal Nehru Port Trust Vs. Three Circles Contractors - (2015) SCC OnLine Bom 951*** has held that the arbitration proceeding commences in respect of the disputes which are referred in the notice invoking arbitration agreement on the date on which such notice is received by the respondent in respect of such disputes. In that case, the claimant had made a claim of specific amount for specific quantity at particular rate in the notice invoking arbitration agreement. It is held that the arbitration proceedings thus commenced in respect of those specific disputes which were raised in the said notice invoking arbitration agreement. The limitation stopped only in respect of such disputes which were referred to in the said notice invoking arbitration agreement. It is held that the limitation in respect of the additional claims/disputes would stop only on the date of application for such amendment and will not relate back. It is held that merely because the respondent had reserved their right to amend the statement of claim in future, such plea would not extend the period of limitation till the date of filing the amendment application whenever they apply in future.

- Supreme Court in the case of ***Emaar MFG Land Limited & Anr. Vs. Aftab Singh - 2018 SCC OnLine SC 2771*** after considering the provisions of Consumer Protection Act, 1986 and after considering the amended Section 8 of the Arbitration Act has held that in the event a person entitled to seek an additional special remedy provided under the statutes does not opt for the additional/special remedy and he is a party to an arbitration agreement, there is no inhibition in disputes being proceeded in arbitration. It is only the case where specific/special remedies are provided for and which are opted by an aggrieved person that judicial authority can refuse to relegate the parties to the arbitration. Supreme Court did not interfere with the decision of the National Consumer Disputes Redressal Commission

rejecting the application filed by the respondent under Section 8 of the Arbitration Act for referring the parties to the arbitration holding that the dispute which can be resolved under the provisions of the Consumer Protection Act, 1986 cannot be referred to arbitration under Section 8 of the Act in terms of the arbitration agreement. National Consumer Disputes Redressal Commission had held that Certain disputes which are to be adjudicated and governed by the statutory enactments, established for specific public purpose and to sub-serve a particular public policy are not arbitrable. It is held that the Law Commission 246th Report, the Statement and Objects of Bill and the notes on clauses do not indicate that amendments were made for overriding special/additional remedies provided under different statutes. In the said judgment, after considering Section 11(6-A) inserted by 2015 Amendment Act, it is held that the intention of the legislature is crystal clear that the court should and need only look into one aspect i.e. the existence of an arbitration agreement.

➢ The Supreme Court in case of ***Ananthesh Bhakta & Ors. vs. Nayana S. Bhakta--(2017) 5 SCC 185*** has construed section 8(2) providing that the Judicial authorities shall not entertain the application or referring the disputes to arbitration unless the said application is accompanied by the original arbitration agreement or duly certified copy thereof and held that section 8(2) has to be interpreted to mean that the court shall not consider any application filed by the party under section 8(1) unless it is accompanied by the original arbitration agreement or duly certified copy thereof. The filing of the application without such original or certified copy, but bringing original arbitration agreement on record at the time when the court is considering the application shall not entail rejection of the application under section 8(2).The Supreme Court refused to accept the contention that the said application filed under section 8(1) was not maintainable since the same was not accompanied by the original arbitration agreement or certified copy thereof.

➢ Supreme Court in the case of ***Greaves Cotton Limited Vs. United Machinery and Appliances - (2017) 2 SCC 268*** has held that merely moving an application seeking further time to file the written statement would not amount to making first statement on the substance of the dispute. It is held that filing of an application without reply to the allegations of the plaint does not constitute first statement on the substance of the dispute. It is held that it does not appear from the language of sub-section (1) of Section 8 of the 1996

Act that the Legislature intended to include such a step like moving simple application for seeking extension of time to file written statement as first statement on the substance of the dispute. Supreme Court in the said judgment has held that by moving an application for extension of time to file written statement will not amount to waiver of right to object to the jurisdiction of judicial authority under Section 4 of the Arbitration and Conciliation Act, 1996.

- Supreme Court in the case of ***Sundaram Finance Limited and Anr. Vs. T. Thankam - (2015) 14 SCC 444*** has held that once there is an agreement between the parties to refer the disputes or differences arising out of the agreement to arbitration, and in case either party, ignoring the terms of the agreement, approaches the civil court and the other party, in terms of the Section 8 of the Arbitration Act, moves the court for referring the parties to arbitration before the first statement on the substance of the dispute is filed, in view of the peremptory language of Section 8 of the Arbitration Act, it is obligatory for the court to refer the parties to arbitration in terms of the agreement. It is held that once an application in due compliance of Section 8 of the Arbitration Act is filed, the approach of the civil court should be not to see whether the court has jurisdiction. It should be to see whether its jurisdiction has been ousted. Supreme Court in the said judgment followed the judgment in the case of ***Sukanya Holdings (P) Ltd. Vs. Jayesh H. Pandya & Anr.- 2003 (5) SCC 531.***

- Supreme Court in the case of ***Rastriya Ispat Nigam Ltd. Vs. Verma Transport Company -- 2006 (7) SCC 275*** has held that filing of reply to interim injunction application would not amount to filing of first statement on the substance of dispute and thus an application under Section 8(1) of the Arbitration and Conciliation Act, 1996 in a pending suit in respect of the dispute covered by arbitration agreement can be made even after filing of reply in the interlocutory proceedings. Restrictions contained in sub-section (1) of Section 8 in such a situation would not attract.

- Supreme Court in the case of ***Sukanya Holdings (P) Ltd. Vs. Jayesh H. Pandya & Anr.- 2003 (5) SCC 531*** has held that a matter is not required to be referred to the arbitration if no application is made before the judicial authority seeking such reference. Application under Section 8 is mandatory. The judicial authority or the Court has no *suo*

motu jurisdiction to refer the disputes between the parties to the arbitration. Application under Section 8 has to be filed before the first statement on the substance of the dispute is filed. It is held that if the subject matter of the dispute includes the subject matter of the arbitration agreement as well as the other disputes, the Court has no power under Section 8 to bifurcate either the causes of action and/or parties and in such event, Court cannot entertain an application under Section 8.

➢ Bombay High Court in the case of ***Indapur Dairy and Milk Products Limited Vs. Global Energy Private Limited 2019 SCC OnLine Bom 1678*** has held that the judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement, would have jurisdiction, to mandatorily refer the parties to arbitration unless it finds that prima facie there does not exist any valid arbitration agreement. An application under Section 8 has to be made by the defendant being a party to the arbitration praying for reference of the disputes in the suit to arbitration, before filing his first statement on the substance of the disputes. The Court has power to consider an application of the plaintiff for withdrawal of the suit when there is an arbitration agreement before the defendant submitting the first statement on the substance of the dispute and to refer the parties to the arbitration.

➢ Bombay High court in the case of ***M/s.Anacon Process Control Pvt. Ltd. Vs. Gammon India Limited - 2016 SCC OnLine Bom 10076*** has held that "referring the parties to arbitration" cannot amount to constitution of an arbitral tribunal. Once a judicial authority under Section 8(1) of the Act refers the parties to arbitration, the suit or the other proceedings comes to an end before the said judicial authority and it becomes functus officio after referring the parties to arbitration.

➢ Bombay High Court in the case of ***National Spot Exchange Ltd., Applicant, In the matter of Lotus Refineries Private Ltd. Vs. National Spot Exchange Ltd. -2014 SCC OnLine Bom 1060*** has held that a party making an application under Section 8 of the Arbitration and Conciliation Act, 1996 has to fulfil various conditions such as (i) there is an arbitration agreement; (ii) a party to the agreement brings an action against the other party to the agreement; (iii) the subject-matter of the action is the same as the subject-matter of

the arbitration agreement; and (iv) the other party moves the court for referring the parties to arbitration before submission of its first statement on the substance of the dispute. It is for the Court to decide whether those conditions have been satisfied or not.

Section 9 provides for interim measures which can be granted by a Court before or during the arbitral proceedings or any time after making of the arbitral award but before it is enforced in accordance with Section 36. In view of amendment w.e.f. 23rd October 2015, if an order of interim measures for protection is granted by a Court before commencement of the arbitral proceedings, the arbitral proceedings shall be commenced within a period of ninety days from the date of such order or within such further time as the Court may determine. However, once the arbitral tribunal has already been constituted, the Court shall not entertain an application under Section 9, unless the Court finds that circumstances exist which may not render the remedy provided under Section 17 efficacious.

- The Supreme Court in case of ***S.B.P. & Co. vs. Patel Engineering AIR 2006 SC 450,*** has held that when a party raises a plea that the dispute involved was not covered by the arbitration clause or that the Court which was approached had no jurisdiction to pass any order under section 9 of the Arbitration Act that Court has necessarily to decide whether it has jurisdiction, whether there is an arbitration agreement which is valid in law and whether the dispute sought to be raised is covered by that agreement. It is also held that when an application under section 8 is made before the judicial authority or Court that the subject matter of the claim is not covered by an agreement or existence of the valid arbitration agreement is disputed, the Court or the judicial authority has to decide the said issue before referring the parties to arbitration.

- When an application under section 9 is filed before the commencement of the arbitral proceedings, there has to be manifest intention on the part of the applicant to take recourse to arbitral proceedings. In case of ***Firm Ashok Traders vs. Gurumukh Das Saluja (2004) 3 SCC 155,*** the Supreme Court held that a party invoking section 9 may not have actually commenced the arbitral proceedings but must be able to satisfy the Court that the arbitral proceedings are actually contemplated or manifestly intended and/or positively going to commence within a reasonable time.

- Bombay High Court in ***Minochar A. Irani vs. Deenyar S. Jehani 2014 (6) Bom.C.R. 504,*** has held that a party who has no intention to ultimately refer the dispute to arbitration and seek final relief cannot be permitted to seek interim relief. Interim relief is in aid of final relief.

- The Bombay High Court held in the case of ***Welspun Infrateck Ltd. vs. Ashok Khurana--2014 (3) Bom.C.R. 624*** that the parties not parties to the arbitration agreement can still be impleaded in an application under section 9 if they are likely to be affected by the reliefs claimed in the application under section 9.

- The Bombay High Court held in the case of ***Rameshkumar N. Chordiya vs. Principal District Judge -- AIR 2014, Bombay 1*** that the application for stay of the arbitration proceedings not maintainable under section 9 of the Arbitration Act read with section 151 of the Code of Civil Procedure.

- The Division Bench of the Bombay High Court in case of ***Deccan Chronicle Holdings Ltd. vs. L & T Finance Limited – 2013 SCC OnLine Bom 1005*** has held that when the Court decides the petition under section 9, the principles which have been laid down in the Code of Civil Procedure, 1908 for grant of interlocutory reliefs furnish a guide to the Court. Similarly in an application for attachment, underlined basis of order XXXVIII Rule 5 would have to be kept in mind.

- The Bombay High Court held in the case of ***Ratnam Ayer vs. Jacki K. Shroff 2013(5) B.C.R. 144*** that the Court should be satisfied while granting interim measures under section 9 read with Order XXXVIII Rule 5 that there are reasonable chances of decree in favour of the petitioner and grant of just or valid claim is not sufficient.

- The Bombay High Court held in the case of ***Konkola Copper Mines (PLC) vs. Stewarts and Lloyds of India Ltd. -- 2013 (5) Bom.C.R. 29*** that if the place of arbitration is in India, Part-I of the Arbitration Act, including section 9 would be applicable.

- The Bombay High Court held in the case of ***Tata Capital Services Ltd. vs. Ramasarup Industries Limited -- 2013 (6) Bom.C.R. 230*** that the steps taken to enforce the consent order passed under section 9 are not barred under section 22 of the Sick Industrial Companies (Special Provisions) Act, 1985. The proceedings under section 9 cannot be equated with a suit contemplated under section 22 of the said Act.

- The Bombay High Court held in the case of ***Rockwood Hotels Resort Ltd. vs. Starwood Asia Pacific Hotels & Resort Ltd. -- (2013) 4 LJ SOFT 48*** that the parties agree to have seat of arbitration at Singapore and governed by SIAC Rules - Section 9 cannot be resorted to. Bombay High Court has no jurisdiction to entertain the petition under section 9 in this circumstances.

- Bombay High Court in case of ***Tata Capital Financial Services Limited vs. Deccan Chronicles Holdings Ltd. 2013 (3) Bom.C.R. 205*****,** has held that the Court can grant interim measures under section 9 (2) (b), (d) and (e) even if the properties or things are not the subject matter of the dispute in arbitration. It is held under Order XXXIV Rule 14 of the Code of Civil Procedure, 1908 that there is no bar in filing a money claim even by the mortgagee notwithstanding contained under Order II Rule 2 of the Code of Civil Procedure. It is for the claimant to decide whether to file a money claim before the Arbitral Tribunal and file a separate suit for enforcement of the mortgage after complying with the provisions of Order II Rule 2 of the Code of Civil Procedure. Proceedings under section 9 for interim measures cannot be equated with the proceedings filed in a pending suit for referring the parties to arbitration under section 8 of the Arbitration & Conciliation Act, 1996.

- The Bombay High Court held in the case of ***Goldstar Metal Solutions vs. Dattaram Gajanan Kavtankar (2013) 3 AIR Bombay R-529*** that the Court is bound to decide the existence of the arbitration agreement before proceeding with the application under section 9 on merits.

- The Bombay High Court held in the case of ***Spice Digital Ltd. vs. Vistaas Digital Media Pvt. Ltd., (2012) 114 -- Bombay Law Reporter 3696*** No injunction can be

granted under section 9 if the specific relief cannot be granted in terms of section 41(e) of the Specific Relief Act. The contract which is determinable cannot be specifically enforced .

Section 9 of the principal Act is also amended. Sub-section (2) of Section 9 provides that where, before the commencement of the arbitral proceedings, a Court passes an order for any interim measure of protection under sub-section (1) of section 9, the arbitral proceedings shall be commenced within a period of ninety days from the date of such order or within such further time as the Court may determine. Once the arbitral tribunal has been constituted, the Court shall not entertain an application under sub-section (1), unless the Court finds that circumstances exist which may not render the remedy provided under section 17 efficacious.

Whether the Court can grant interim measures under section 9 though the claim is rejected by the Arbitral Tribunal :-

- The Division Bench of the Bombay High Court in case of ***Dirk India Private Limited vs. Maharashtra State Electricity Generation Company Limited – 2013(7) Bom.C.R. 493*** has held that the interim measures or protection within the meaning of section 9 (ii) is intended to protect through measure, fruits of the successful conclusion of the arbitral proceedings and the party whose claim has been rejected in the courts of the arbitral proceedings cannot obviously have an arbitral award enforced in accordance with section 36.

Whether interim measure under section 9 can be granted if a document is required to be stamped, is not stamped

- Full Bench of the Bombay High Court in the case of ***Gautam Landscapes Private Limited Vs. Shailesh S. Shah & Anr.***, ***2019 SCC OnLine Bom 563*** has held that the Court under the Arbitration and Conciliation Act can entertain and grant any interim or ad-interim relief on an application under Section 9 when an arbitration agreement is contained in a document, i.e. unstamped or insufficiently stamped. The part of the said judgment holding that in view of Section 11 (6A) of the Act, it would not be necessary for

the Court before considering and passing final orders on an application under Section 11(6) of the Act to await the adjudication by the stamp authorities, in a case where the document objected to, is not adequately stamped is overruled by the Supreme Court in the case of ***Garware Wall Ropes Ltd. Vs. Coastal Marine Constructions & Engineering Ltd., 2019 SCC OnLine Bom 515***.

- The Bombay High Court in case of ***Black Pearl Hotels Private Limited Vs. Planet M. Retail Limited (2017) 4 SCC 498*** that the Court has to consider the nature of agreement to decide whether the documents require stamp duty before appointment of arbitrator.

- The Bombay High Court in case of ***Jairaj Devidas & Ors. vs. Nilesh Shantilal Tank & Anr. -- 2014 (6) Bom.C.R. 92***, has after adverting to the judgment of the Division Bench in case of ***Lakadawala Developers Pvt. Ltd. vs. Badal Mittal in Appeal (L) No.272 of 2013 delivered on 25th June, 2013*** and the judgment of the Supreme Court in case of ***SMS Tea Estates Pvt. Ltd. vs. Chandmari Tea Company Pvt. Ltd. -- 2011 (4) Arb.L.R. 265***, has held that insufficiently paid instrument cannot be acted upon before the Court including arbitration agreement and till such time such document is properly stamped, no relief under section 9 can be granted. Such document can be impounded and can be sent to the Collector of Stamps for adjudication under the provisions of the Maharashtra Stamp Act.

Section 10 provides that the parties are free to determine the number of arbitrators, provided that such number shall not be an even number, failing which the arbitral tribunal shall consist of a sole arbitrator.

- **Section 11 provides that if a party does not appoint an arbitrator within 30 days from the date of receipt of a request to do so, the other party may apply for appointment of an arbitrator by filing an application under section 11(6). Even if two arbitrators nominated by the parties do not appoint a presiding officer, an application can be made to the Court for appointment of the presiding arbitrator.**

- **In view of amendment to Section 11 by insertion of Sub-section (6-A), the powers of the Court while appointment of arbitrators is confined to the examination**

of the existence of an arbitration agreement notwithstanding any judgment, decree or order of any Court. Even if powers of any person or institution designated by the Supreme Court or High Court under Section 11 to appoint arbitrators shall not be regarded as a delegation of judicial power by the Supreme Court or the High Court. The order passed by the Supreme Court or the High Court or person or institution designated by such Court is final. No appeal including Letters Patent Appeal shall lie against such decision. The proceedings however under Article 136 of the Constitution of India can be filed. Under Section 11(8), the Court or the person or institution designated by such Court has to seek a disclosure in writing from the prospective arbitrator before appointing arbitrators having due regard to any qualifications required for the arbitrator by the agreement of the parties and the contents of the disclosure and other considerations which are likely to secure the appointment of an independent and impartial arbitrator.

- **Under Section 11(13), an application for appointment of an arbitrator or arbitrators shall be disposed of by the Supreme Court or the High Court or the person or institution designated by such Court, as the case may be, as expeditiously as possible and an endeavour shall be made to dispose of the matter within a period of sixty days from the date of service of notice on the opposite party.**

Under Section 11(14), Bombay High Court has framed Rules determining the fees of the Arbitral Tribunal after considering the rates specified in the Fourth Schedule. Section 11 is amended by **The Arbitration and Conciliation (Amendment) Act, 2019.**

Under Section 43B the Central Government is empowered to establish a Council to be known as Arbitration Council of India to perform the duties and functions under the Act. Such Council shall be a body corporate and shall have perpetual succession and a common seal with power, subject to the provisions of the Act. The Council shall consist of various members. A person who has been a Judge of Supreme Court or Chief Justice of High Court or a Judge of High Court or an eminent person having special knowledge and experience in the conduct or administration of arbitration to be appointed by the Central Government in consultation with Chief Justice of India, would be Chairperson of the said Council.

Council is empowered to make grading of the arbitration institution defined under Section 2(ca), which means a arbitral institution designated by the Supreme Court or a High Court under the Arbitration Act. Under Section 11(3), the Supreme Court and the High Court has power to designate, arbitration institution from time to time, which have been graded by the Council under Section 43(i) for the purpose of Arbitration Act. It is provided that where no graded arbitration institutions are available then the Chief Justice of concerned High Court may maintain a panel of arbitrators for discharging the functions and duties of arbitral institution and any reference to the arbitrator shall be deemed to be a arbitral institution for the purposes of the said Section. The arbitrator appointed by the party shall be entitled to such fee at the rate specified in the Fourth Schedule.

Section 11(4) provides that the appointment shall be made on an application of the party by the arbitral institution designated by the Supreme Court in case of International Commercial Arbitration or by the High Court in case of an Arbitration other than International Commercial Arbitration as the case may be. Section 11(6A) and 11(7) are deleted.

Such arbitration institution has to dispose of an application for appointment of an arbitrator within a period of 30 days from the date of service of notice on the opposite party. The arbitration institution shall determine the fees of the Arbitral Tribunal and the manner of its payment to the Arbitral Tribunal, subject to the rates specified in the Fourth Schedule. Section 11(11) to (14) does not apply to International Commercial Arbitration and in Arbitration (other than International Commercial Arbitration) where parties have agreed for determination of fees as per the rules of an arbitral institution. **Section 2 and 3 of the Arbitration and Conciliation (Amendment) Act, 2019, which inserts Section 2(1)(ca) and amend Section 11, has not been notified by the Central Government and have not come into effect as on today.**

- Supreme Court in the case of ***Perkins Eastman Architects DPC & Anr. Vs. HSCC (India) Ltd., 2019 SCC OnLine SC 1517*** has held that in a case where only one party has a right to appoint a sole arbitrator, its choice will always have an element of exclusivity in determining or charting the course for dispute resolution. The person who has an interest in the outcome or decision of the dispute must not have the power to appoint a

sole arbitrator. That has to be taken as the essence of the amendments brought in by the Arbitration and Conciliation (Amendment) Act, 2015. Supreme Court has set aside the appointment of an arbitrator appointed by one of the parties having exclusive right to appoint and appointed an independent arbitrator in the application filed under Section 11(6) of the Arbitration Act.

- Supreme Court in case of ***Garware Wall Ropes Ltd. v/s. Coastal Marine Constructions & Engineering Ltd., 2019 SCC OnLine SC 515*** has held that the introduction of Section 11(6A) does not, in any manner, deal with or get over the basis of the judgment in ***SMS Tea Estates v/s. Chandmari Tea Co. (P) Ltd., (2011) 14 SCC 66***. When an arbitration clause is contained "in a contract", it is significant that the agreement only becomes a contract if it is enforceable by law under Indian Stamp Act. An agreement does not become a contract, namely that it is not enforceable in law, unless it is duly stamped. After construing Section 11(6A) read with Section 7(2) of the Arbitration Act and Section 2(h) of the Contract Act, it is held that an arbitration clause in an agreement would not exist when it is not enforceable by law. While proceeding with Section 11 application, the High Court must impound the instrument which has not borne stamp duty and hand it over to the authority under the Maharashtra Stamp Act, who will then decide issues *qua* payment of stamp duty and penalty, if any, as expeditiously as possible and preferably within a period of 45 days from the date on which the authority receives the instrument. As soon as stamp duty and penalty, if any, are paid on the instrument, any of the parties can bring the instrument to the notice of the High Court, which will then proceed to expeditiously hear and dispose of the Section 11 application. The Supreme Court rejected the argument in the facts of that case that the appellant who had to pay the stamp duty cannot take advantage of his own wrong, on the ground that there was an issue of application of mandatory provision of law.

- Supreme Court in case of ***Union of India v/s. Parmar Construction Company, 2019 SCC OnLine SC 442*** has held that the Court has to put emphasis to act on the agreed terms and to first resort to the procedure as prescribed and open for the parties to the agreement to settle differences/disputes arising under the terms of the contract through appointment of a designated arbitrator but emphasis should always be on the terms of the arbitration

agreement to be adhered to or given effect as closely as possible. Where the impartiality of the arbitrator in terms of the arbitration agreement is in doubt or where the Arbitral Tribunal appointed in terms of the arbitration agreement has not functioned or has failed to conclude the proceedings or to pass an award without assigning any reason and it became necessary to make a fresh appointment, Chief Justice or his designate in the given circumstances after assigning cogent reasons in appropriate cases may resort to an alternative arrangement to give effect to the appointment of independent arbitrator under Section 11(6) of the Act.

- Supreme Court in case of ***Duro Felguera, S.A. Vs. Gangavaram Port Limited -- (2017) 9 SCC 729*** that after the amendment of 2015, the Court has to only see whether the arbitration agreement exists and nothing more. Powers of Court are limited, notwithstanding the order or decree passed by the Supreme Court or High Court.

- In case of ***SBP vs. Patel Engineering Ltd. (2005) 8 SCC 618,*** it is held by the Supreme Court that order passed by the Chief Justice or his designate is a judicial order and not an administrative order. Chief Justice or his designate has to decide whether conditions under section 11(6) are satisfied or not. This judgment is delivered considering the unamended provisions of Section 11.

- Bombay High Court in case of ***Earnest Business Services Private Limited v/s. Government of the State of Israel, 2019 SCC OnLine Bom 1793*** has held that parties can agree for appointment of an arbitrator in any proceedings in Court without filing the application under Section 11(6) or 11(9) as the case may be including in petition under Section 9 or even without intervention of Court. If the parties had already agreed to the appointment of the sole arbitrator in accordance with the procedure prescribed under the arbitration agreement, there is no occasion to file an application under Section 11(6) or Section 11(9) of the Arbitration Act. This Court also held that the claim for set-off for the period prior to 3 years of the date of filing statement of claim by the claimant, which would be the date for filing plea of set-off, in view of Section 3(ii)(b)(i) of the Limitation Act, 1963 would be time barred.

- Bombay High Court in the case of ***Porwal Sales Vs. Flame Control Industries, 2019 SCC OnLine Bom 1628*** has held that there is no bar under Section 18(4) of the Micro, Small and Medium Enterprises Development Act, 2006 to the institution of any proceedings other than under Section 18(1) of the said Act to seek appointment of arbitral tribunal. It is held that Section 18(1) of the said Act would be applicable when any amount is due under section 17 to a supplier and when there is a liability of the buyer to make payment to the supplier. Bombay High Court accordingly exercised powers under Section 11(6) of the Arbitration and Conciliation Act, 1996 and appointed an arbitrator.

SECTION 11(6A)

In view of the amendment to Section 11(6) and 11 (6-A) of the Arbitration and Conciliation Act, 1996, since a request for appointment of arbitrator/s has to be made before the Supreme Court or as the case may be, the High Court or any person or institution designated by such Court, those proceedings which are for appointment of arbitrator/s before the Supreme Court or the High Court, the orders passed by the Supreme Court or the High Court, as the case may be, would have precedentiary value.

If the arbitration clause entered into between the parties refers to a particular rules of arbitration providing for a particular method or procedure for reference to the arbitration, the parties will have to follow such method or procedure for reference to the arbitration and if inspite of such procedure having been follwed, the arbitral tribunal is not appointed, the application under Section 11(6) and 11(9) can be made before the High Court or the Supreme Court as the case may be, or any person or institution designated by such Court.

Since the proceedings under Section 11 are now before the Court, the provisions of the Limitation Act,1963 or the other provisions which were applicable to the Court like Contempt of Courts Act, 1971 etc. are applicable to the proceedings under Section 11 of the Arbitration and Conciliation Act, 1996.

- Supreme Court in case of ***Mayavti Trading Pvt. Ltd. v/s. Pradyuat Deb Burman, 2019 SCC OnLine SC 1164*** has held that law prior to the 2015 Amendment that

has been laid down by the Supreme Court, which would have included going into whether accord and satisfaction has taken place, has now been legislatively overruled. It is held that Section 11(6A) is confined to the examination of the existence of an arbitration agreement and is to be understood in the narrow sense as has been laid down in the judgment ***Duro Felguera, S.A. v/s. Gangavaram Port Limited, (2017) 9 SCC 729***. Supreme Court overruled the judgment delivered by two Judges Bench in case of ***United India Insurance Company Limited v/s. Antique Art Exports Private Limited, (2019) 5 SCC 362***.

- Supreme Court in the case of ***M/s.ONGC Mangalore Petrochemicals Ltd. Vs. M/s. ANS Constructions Ltd. & Anr. – 2018 SCC OnLine Sc 99*** has held that if the Court finds while dealing with an application under Section 11 of the Act that the applicant had given “No Dues/No Claim Certificate” and had accepted the final payment in full and final satisfaction of all its claims and there was accord and satisfaction, no arbitrable dispute exists and thus the dispute was not referred to the arbitration. Supreme Court did not consider Section 11(6-A) in this judgment.

- Supreme Court in the case of ***Walter Bau AG, Legal Successor of the Original Contractor, Dyckerhoff & Widmann A.G. Vs. Municipal Corporation of Greater Mumbai & Anr. - (2015) 3 SCC 800*** has held that appointment of an arbitrator by the Municipal Corporation beyond the period of 30 days from the date of receipt of the notice from other party was contrary to the agreed procedure contemplated in the arbitration agreement which contemplated appointment made by the Municipal Corporation from the panel submitted by the Indian Council of Arbitration and was thus *non est* in law. Supreme Court appointed a retired Judge of this Court on behalf of the Municipal Corporation in the application filed under Section 11(9) by other party before the Supreme Court for appointment of nominee arbitrator of the Municipal Corporation.

- Bombay High Court in the case of ***Deepdharshan Builders Pvtt. Ltd. Vs. Saroj w/o Satish Sunderrao Trasikar – 2018 SCC OnLine Bom 4885*** has held that the judgment of the Hon'ble Supreme Court in the case of ***Board of Control for Cricket in India Vs. Kochi Cricket Pvt. Ltd. and Ors.- (2018) 6 SCC 287*** is not a precedent on the proposition that the expression "arbitral proceedings" prescribed in second part of Section 26 of the Arbitration and Conciliation (Amendment) Act, 2015 would include the arbitral

proceedings filed under Section 11(6) of the Arbitration Act before the High Court. It is held that the arbitral proceedings filed under Section 11(6) of the Arbitration Act are the proceedings before the Court in view of the amendment to various sub-sections of Section 11 of the Arbitration Act and thus Article 137 of the Schedule to the Limitation Act, 1963 would apply to the application under Section 11(6). It is held that whether the application under Section 11(6) is within the time prescribed under Article 137 of the Schedule to the Limitation Act, 1963 or not has to be decided by the Court while considering such application under Section (6) of the Act. Such issue cannot be left open to be decided by the arbitral tribunal. It is held that Section 5 of the Limitation Act, 1963 is applicable to the application under Section 11(6) of the Arbitration Act. Limitation period applicable to the application under Sections 11(6) or 11(9) of the Arbitration Act cannot be mixed up with the period of limitation applicable to the claim prescribed in various other Articles of the Schedule to the Limitation Act, 1963. Both the periods of limitation are different and cannot be made applicable to each other.

- Bombay High Court in the case of ***Padmini C. Menon vs. Vijay C. Menon and Ors. – 2018 SCC OnLine Bom 9*** has held that in view of the agreement between the parties that the statutory amendment or repeal of the provisions of the Arbitration and Conciliation Act, 1996 also would be applicable to the parties, even if such agreement was entered into prior to 23rd October 2015, the parties would be governed by the provisions of the Arbitration and Conciliation (Amendment) Act, 2015, even if the proceedings were pending in Court as on 23rd October 2015 or even thereafter. It is also held that powers of Courts are confined to the examination of the existence of an arbitration agreement notwithstanding any judgment or decree or order of any Court in view of Section 11(6-A) of the Arbitration and Conciliation (Amendment) Act, 2015.

<u>Whether the order passed under Section 11 is judicial or administrative, ramifications of the judgments holding it to be judicial</u>

- Supreme Court in the case of ***S.B.P. & Co. Vs.Patel Engineering Ltd. & Anr.- 2005(8) SCC 618*** has held that the powers exercised by the Chief Justice or his designate under Section 11(6) of the Arbitration and Conciliation Act, 1996 are judicial powers. It is

held that the Chief Justice or his designate has to decide (i) whether the party approaching the Court had approached the right High Court; (ii)the Applicant had satisfied the conditions for appointing an arbitrator; (iii) the existence of the arbitration agreement, and whether the Applicant was a party thereto; (iv) whether the claim was a dead and/or a long barred one; and (v) to determine the foregoing, the Chief Justice could either proceed on the basis of affidavits and documents, or record such evidence as may be necessary. Supreme Court in the said judgment however held that the proceedings before the Chief Justice or his designate were not before the Court.

Under Section 12, when a person is approached in connection with his possible appointment as an arbitrator, is bound to disclose in writing any circumstances, such as the existence either direct or indirect, of any past or present relationship with or interest in any of the parties or in relation to the subject-matter in dispute, whether financial, business, professional or other kind, which is likely to give rise to justifiable doubts as to his independence or impartiality; and which are likely to affect his ability to devote sufficient time to the arbitration and in particular his ability to complete the entire arbitration within a period of twelve months. Various grounds are set out in the Fifth Schedule as a guide in determining whether circumstances exist which give rise to justifiable doubts as to the independence or impartiality of an arbitrator. The disclosure shall be made by such person in the form specified in the Sixth Schedule. An arbitrator may be challenged by the parties only if any circumstances referred to Section 12 (3) subject to Sub-section (4) of Section 13 which provides for an agreement between the parties for such procedure for challenge. If such challenge is unsuccessful, the party may make an application for setting aside an arbitral award in accordance with Section 34.

- Supreme Court in the case of ***S.P. Singla Constructions Private Limited Vs. State of Himachal Pradesh & Anr., (2019) 2 SCC 488*** while dealing with amended Section 12(5) has held that provisions of Amendment Act, 2015 w.e.f. 23rd October 2015 cannot have retrospective operation in arbitral proceedings already commenced unless parties otherwise agree. Termination of arbitration proceedings is not permissible owing to default of claimant/failure of claimant in communicating his statement of claim unless the arbitrator indicates that no adjournments would be given.

- Supreme Court in the case of the Government of ***Haryana PWD Haryana (B and R) Branch Vs. M/s.G.F. Toll Road Pvt. Ltd. & Ors. - 2019(1) Scale 134*** after considering the 2015 amendment has held that since the appointment of the arbitrator was made prior to the 2015 Amendment Act when the Fifth Schedule was not inserted, the objection raised by a party that an arbitrator was an ex-employee of a party could not be entertained. It is held by the Supreme Court that the Arbitration Act does not disqualify a former employee from acting as an arbitrator, provided that there are no justifiable doubts as to his independence and impartiality. The Supreme Court after considering entry 1 of Fifth and Seventh Schedule has held that an arbitrator who has "any other" past or present "business relationship" with the party is also disqualified. The word "other" used in entry 1 would indicate a relationship other than an employee, consultant or an advisor. The word "other" cannot be used to widen the scope of entry to include past/former employees. It is held that the entry 1 indicates that a person, who is related to a party as an employee, consultant or an adviser is disqualified to act as an arbitrator. The words "as an" indicate that the person so nominated is only disqualified if he/she is the present/current employee, consultant or adviser of one of the parties.

- Supreme Court in case of ***Bharat Broadband Network Limited v/s. United Telecoms Limited, AIR 2019 SC 2434*** after construing Section 12(5) of the Arbitration Act read with Fifth, Sixth and Seventh Schedule held that the Managing Director of the party, who was a named arbitrator, could not act as arbitrator nor could be allowed to appoint another arbitrator. The disclosure of a prospective arbitrator has to be made in the form specified in the Sixth Schedule and the ground stated in the Fifth Schedule are to serve as a guide in determining whether circumstances exist which give rise to justifiable doubts as to the independence or impartiality of an arbitrator. Any prior agreement to the contrary is wiped out by the non-obstante clause in Section 12(5) the moment any person whose relationship with the parties or the counsel or the subject matter of the dispute falls under the Seventh Schedule. The sub-section then declares that such person shall be ineligible to be appointed as arbitrator. Such ineligibility can be removed by an express agreement in writing. It is held that learned arbitrator had become *de jure* inability to perform his function as an arbitrator.

➢ Supreme Court in the case of **Rajasthan Small Industries Corporation Ltd. Vs. M/ s. Ganesh Containers Movers Syndicate – 2019 SCC OnLine SC 65** held that after the amendment to the Arbitration and Conciliation Act, 1996 in 2015, Section 12(5) prohibits the employee of one of the parties from being an arbitrator. Supreme Court interpreted Section 26 of the Amendment Act and held that the provision of the Amendment Act, 2015 shall not apply to the arbitration proceedings commenced in accordance with the provision of Section 21 of the principle Act, before the commencement of the Amendment Act, 2015 unless the parties otherwise agree. Mere neglect of an arbitrator to act or delay in passing the order by itself cannot be the ground to appoint any arbitrator in deviation from the terms agreed to by the parties. After termination of the mandate of the arbitrator, the appointment of substitute arbitrator shall be in accordance with the rules applicable to the appointment of an arbitrator who is being replaced. Section 11(6) has application only when the party or the person concerned had failed to act in terms of the arbitration agreement. The Supreme Court also considered the fact that the arbitration proceedings were started in the year 2009 i.e. much prior to the 2015 amendment came into force and thus 2015 amendment was not applicable to the case in hand. The statutory provisions that would govern the matter are those which were then in force before the Amendment Act.

● Supreme Court in the case of ***M/s.Voestalpine Schienen GMBH Vs. Delhi Metro Rail Corporation Ltd.- (2017) 4 SCC 665*** has construed Section 12(5) of the Arbitration and Conciliation (Amendment) Act, 2015 and also the Seventh Schedule to the Arbitration Act and has held that under Section 12(5) of the Act, notwithstanding any prior agreement to the contrary, any person whose relationship, with the parties or counsel or the subject matter of the dispute, falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as an arbitrator. It is held that in such an eventuality, when the arbitration clause finds foul with the amended provisions i.e. Section 12(5), the appointment of an arbitrator would be beyond pale of arbitration agreement, empowering the Court to appoint such arbitrator(s), as may be permissible. Other party cannot insist for appointment of an arbitrator in terms of the arbitration agreement. In such situation, that would be the effect of *non-obstante* clause contained in Section 12(5) of the Act.

- The Supreme Court in case of ***T.R.F. Limited vs. Energo Engineering Projects Limited, 2017(7) SCALE 162*** has held that by virtue of section 12(5) of the Arbitration & Conciliation Act, 1996, if any persons, who falls under any of the category specified in the Seventh Schedule shall be ineligible to be appointed as an Arbitrator. It is held that the amended law under Section 11(6-A) requires the Court to confine examination of the existence of an arbitration agreement notwithstanding in the judgment of the Supreme Court or the High Court while considering an application under section 11(6) of the Arbitration & Conciliation Act, 1996. The designated arbitrator whose ineligibility to act as an arbitrator by virtue of amendment to Section 12 of the Arbitration and Conciliation (Amendment) Act, 2015 does not have power even to nominate any other person as arbitrator. The Court in certain circumstances have exercised jurisdiction to nullify the appointments made by the authority in such situation.

- Bombay High Court in the case of **Mangalam Chaudhary Company Vs. Hindustan Construction Company Ltd.** decided on 11th September 2019 in Arbitration Petition No.319 of 2019 has held that the arbitral proceedings having been commenced prior to 23rd October 2015, Section 12(5) of the Arbitration Act duly amended by the Arbitration and Conciliation (Amendment) Act 2019 read with 5th and 7th Schedule would not apply in view of Section 87 inserted by the Arbitration and Conciliation (Amendment) Act 2019 which states that unless otherwise parties agree, the amendments made to the Arbitration Act by the Arbitration (Amendment) Act, 2015 would not apply to the arbitral proceedings commenced before the commencement of the Arbitration & Conciliation (Amendment) Act, 2015.

- Bombay High Court in the case of **S*awarmal Gadodia Vs. Tata Capital Financial Services Limited, 2019 SCC OnLine Bom 849*** has held that under Section 12, an arbitrator is bound to make the necessary disclosure in the event of him having been appointed as an Arbitrator on two or more occasions by one of the parties, or an affiliate of one of parties, within the past three years, against Item 4 of his Disclosure in the form set out in the Sixth Schedule. He is bound to disclose the "circumstances disclosing any past or present relationship with or interest in any of the parties or in relation to the subject-matter in dispute, whether financial, business, professional or other kind, which is likely to

give rise to justifiable doubts as to your independence or impartiality." Learned arbitrator is bound to specify the exact number of the ongoing arbitrations before him and not an 'approximate number'. Learned arbitrator not having disclosed that he was appointed by the respondent company in 252 arbitration petitions where the respondent company was the claimant in view of Item No.22 of the Fifth Schedule, the said fact constitutes a ground giving rise to justifiable doubts as to the independence or impartially of the arbitrator. The arbitral awards are accordingly set aside on that ground.

➢ Bombay High Court in the case of ***Roadways Solution India Pvt. Ltd. & Anr. Vs. L & T Finance Ltd.*** delivered on 5th March 2018 in Commercial Arbitration Petition No.133 of 2018 has construed the arbitration agreement recording that the provisions of not only the Arbitration and Conciliation Act, 1996 would apply but also the amendment thereto from time to time would apply and has held that since the parties have agreed to such clause, the parties would be thus governed by the provisions of Arbitration and Conciliation (Amendment) Act, 2015 though such arbitration agreement was entered into prior to 23rd October 2015. This Court accordingly directed the learned arbitrator to file affidavit of disclosure under Section 12(1) read with Fifth Schedule of the Arbitration and Conciliation Act, 1996 though notice invoking arbitration agreement was issued prior to 23rd October 2015.

➢ Supreme Court in case of ***HRD Corporation (Marcus Oil and Chemical Division) vs. Gail (India) Limited (Formerly Gas Authority of India Ltd.), 2017 SCC OnLine SC 1024*** has held that if the learned arbitrator fails to file disclosure in terms of section 12(1) read with Fifth Schedule of the Arbitration and Conciliation Act, 1996, the remedy of the party in that event would be to apply under section 14(2) of the Arbitration and Conciliation Act, 1996 to the court to decide about the termination of the mandate of the arbitral tribunal on that ground.

Section 14 provides that the mandate of an arbitrator shall terminate and he shall be substituted by another arbitrator if he becomes *de jure* or *de facto* unable to perform his functions or for other reasons fails to act without undue delay and he withdraws from his office or the parties agree to the termination of his mandate.

- The Bombay High Court in case of ***Wanbury Ltd. vs. Candid Drug Distributors – 2015 SCC OnLine Bom 3810*** has held that the power of the arbitral tribunal to issue directions to file pleadings and documents, includes the power to grant extension of time. Such orders passed by the arbitral tribunal are procedural and can be recalled if sufficient case is made out.

Section 15 provides that the mandate of arbitrator is also terminated if he withdraws from office for any reason or by or pursuant to agreement of the parties. In such an event, the substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced. If such an arbitrator is replaced, any hearing previously held may be repeated at the discretion of the arbitral tribunal unless otherwise agreed by the parties. The earlier order or ruling of the arbitral tribunal made prior to the replacement of an arbitrator shall not be invalid unless otherwise agreed by the parties.

- Supreme Court in the case of ***Shailesh Dhairyawan Vs. Mohan Balkrishna Lulla- (2016) 3 SCC 619*** has held that where the mandate of an arbitrator is terminated, an appointment of a substitute arbitrator may be in accordance with the arbitration agreement unless such arbitration agreement, either expressly or by necessary implication excludes the substitution of an arbitrator, whether named or otherwise. The learned arbitrator named, in that matter, in the consent order passed by the Bombay High Court had resigned. Supreme Court upheld the judgment of the Bombay High Court appointing substituted arbitrator.

Under section 16, the arbitral tribunal is empowered to rule on its own jurisdiction including ruling on any objection with respect to the existence or validity of arbitration agreement. Such plea shall be raised not later than the submission of the statement of defence. If such plea is rejected by the arbitral tribunal, it has to proceed with the arbitral proceedings and declare an award. If plea of jurisdiction is accepted by the arbitral tribunal, the respondent may file an appeal under section 37. If plea of jurisdiction is not accepted, the respondent may challenge such ruling along with award under section 34.

- Supreme Court in the case of ***Bharat Petroleum Corporation Limited Vs. Go Airlines (India) Limited, (2019) 10 SCC 250*** has held that plea of jurisdiction in respect of counter claim being not arbitrable and falling beyond the scope of reference to the arbitration and such other related questions are to be determined only during enquiry by the arbitral Tribunal and counter claim cannot be rejected at the threshold on the ground that the arbitral Tribunal has no jurisdiction.

- Supreme Court in case of ***National Aluminium Company Limited v/s. Subhash Infra Engineers Pvt. Ltd. and another, 2019 SCC OnLine SC 1091*** has held that any objection with respect to existence or validity of the arbitration agreement can be raised only by way of an application under Section 16 of the Arbitration Act. Such party who seeks to raise such objection cannot maintain a suit for declaration and injunction with such plea before the Civil Court.

- Supreme Court in the case of ***Indian Farmers Fertilizer Cooperative Limited Vs. Bhadra Products, (2018) 2 SCC 534*** has held that ruling on issue of limitation is not a ruling on issue of jurisdiction of arbitrator. It is held that plea of the limitation rejected by the Arbitral Tribunal at the threshold is an interim award and can be challenged under Section 34 and not under Section 37(2)(a) of the Arbitration and Conciliation Act, 1996. The jurisdiction to make an interim arbitral award extends to "any matter" with respect to which it may make a final arbitral award. Any point of dispute between the parties which has to be answered by the Arbitral Tribunal can be the subject matter of an interim arbitral award.

Section 17 duly amended w.e.f. 23rd October 2015 now empowers the arbitral tribunal with the identical powers that of Court to order interim measures. The arbitral tribunal is also empowered to grant interim measures during the arbitral proceedings or at any time after making of the arbitral award but before it is enforced in accordance with Section 36. Under Section 17(2), subject to any order in appeal under Section 37, any order issued by the arbitral tribunal under Section 17(1) shall be deemed to be an order of the Court for all purposes and shall be enforceable under the Code of Civil Procedure, 1908 in the same manner as if it were an order of the Court.

➢ Bombay High Court in the case of **Yusuf Khan Vs. Prajita Developers Pvt. Ltd., 2019 SCC OnLine Bom 505** has held that before granting any interim relief by the Arbitral Tribunal, atleast in relation to granting any injunction or securing the claim in the arbitration or for appointing a receiver, the Tribunal has to be satisfied that a prima facie case has been made out for grant of interim relief. The Arbitral Tribunal has to examine that there is a serious question to be tried at the hearing and there is a probability that the party seeking the interim relief is entitled to it; that the interference of the Tribunal is necessary to protect the party from that species of injuries which the Tribunal feels are irreparable before its legal rights are established at the trial; and see that the comparative mischief or inconvenience which is likely to arise from withholding the grant of interim relief will be greater than which is likely to arise from granting it.

● Bombay High Court in the case of **M/s.Shakti International Pvt. Ltd. Vs. M/s.Excel Metal Processors Pvt. Ltd.-(2017) 3 ABR 388** has held that the arbitral tribunal cannot appoint a Court Receiver, Bombay High Court under Section 17 of the Act.

Under section 18, the arbitral tribunal has to treat both parties equally.

Section 19 provides that the arbitral tribunal shall not be bound by the Code of Civil Procedure, 1908 or Indian Evidence Act, 1872. The arbitral tribunal has power to determine the admissibility, relevance, materiality and weight of any evidence subject to section 19(3).

Under Section 23, the claimant has to state the facts supporting his claim, the points at issue and the relief or remedy sought whereas the respondent has to state his defence in respect of those particulars, unless the parties have otherwise agreed as to the required elements of those statements. The parties are also allowed to submit their statements and all documents which they considered to be relevant. In view of the amendment to Section 23, the respondent is also permitted to submit a counter claim or plead a set-off which also shall be adjudicated upon by the arbitral tribunal, if such counter claim or set off falls within the scope of the arbitration agreement. The parties are also permitted to amend or supplement his claim or defence during the

course of arbitral proceedings, unless otherwise agreed by the parties and unless the arbitral tribunal considers it inappropriate to allow the amendment or supplement having regard to the delay in making it.

Section 23 of the Act is amended. After sub-section (2) of Section 23, sub-section (2-A) is inserted. It provides that the respondent is entitled to submit a counterclaim or plead a set-off, which shall be adjudicated upon by the arbitral tribunal, if such counterclaim or set-off falls within the scope of the arbitration agreement.

Under Section 23(4), the Statement of claim and defence shall be completed within a period of six months from the date the arbitrator or all the arbitrators, as the case may be received notice in writing of their appointment.

Section 24 provides that the arbitral tribunal shall, as far as possible, hold oral hearings for the presentation of evidence or for oral argument on day-to-day basis, and shall not grant any adjournments unless sufficient cause is made out, and may impose costs including exemplary costs on the party seeking adjournment without any sufficient cause. It is for the arbitral tribunal to decide oral hearings for the presentation of evidence or for oral argument unless otherwise agreed by the parties. 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. 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.

Section 24 of the Act is amended. Proviso to sub-section (1) of Section 24 is inserted. It is provided that the arbitral tribunal shall, as far as possible, hold oral **hearings for the presentation of evidence or for oral argument on day-to-day basis, and not grant any adjournments unless sufficient cause is made out, and may impose costs including exemplary costs on the party seeking adjournment without any sufficient cause.**

Section 25 of the Act is also amended. In view of amendment in clause (b) of Section 25, the arbitral tribunal has discretion to treat the right of the respondent to file such statement of defence as having been forfeited in case of failure of the respondent to communicate his statement of defence in accordance with sub-section (1) of Section 23.

Section 27 provides for Court assistance in taking evidence. Under Section 27(5), if any person fails to attend in accordance with such process issued by the Court under Section 27(1) or commits any other default or refuses to give their evidence or guilty of any contempt to the arbitral tribunal during the conduct of arbitral proceedings, such person 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.

Section 28 (1) of the Act provides that the where the place of arbitration is situate in India, in an arbitration other than an international commercial arbitration, the arbitral tribunal shall decide the dispute submitted to arbitration in accordance with the substantive law for the time being in force in India. Section 28(3) provides that in all cases the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the trade usages applicable to the transaction. Section 31 provides for form and contents of an arbitral award. Section 32 provides for termination of arbitral proceedings.

Section 28 of the Act is amended. Sub-section (3) of Section 28 is substituted which provides that the arbitral tribunal shall, in all cases, take into account the terms of the contract and trade usages applicable to the transaction.

Sub-section (1) of Section 29-A of the Arbitration and Conciliation Act, 1996 provides that the award shall be made within a period of twelve months from the date the arbitral tribunal enters upon the reference. The explanation to the said provision provides that an arbitral tribunal shall be deemed to have entered upon the reference on the date on which the arbitrator or all the arbitrators, as the case may be, have received notice, in writing, of their appointment. Sub-section (2) of Section 29-A of the Arbitration and Conciliation Act, 1996 provides that if the award is made within a

period of six months from the date the arbitral tribunal enters upon the reference, the arbitral tribunal shall be entitled to receive such amount of additional fees as the parties may agree. Sub-section(3) of Section 29-A of the Arbitration and Conciliation Act, 1996 provides that the parties may, by consent, extend the period specified in sub-section (1) for making award for a further period not exceeding six months. Sub-section (4) of Section 29-A of the Arbitration and Conciliation Act, 1996 provides that if the award is not made within the period specified in sub-section (1) or the extended period specified under sub-section (3), the mandate of the arbitrator(s) shall terminate unless the Court has, either prior to or after the expiry of the period so specified, extended the period. If the Court finds that the proceedings have been delayed for the reasons attributable to the arbitral tribunal, then, the Court may pass an order for reduction of fees of arbitrator(s) by not exceeding five per cent for each month of such delay. Sub-section(5) of Section 29-A of the Arbitration and Conciliation Act, 1996 provides that the extension may be granted only for sufficient cause and on such terms and conditions as may be imposed by the Court. Pleadings have to be filed within six months from the date the arbitrator or all the arbitrators, as the case may be, received notice, in writing, of their appointment as per Section 23(4) of the Arbitration Act.

➢ Bombay High Court in the case of ***Cabra Instalaciones Y. Servicios, S.A. Vs. Maharashtra State Electricity Distribution Company Limited, 2019 SCC OnLine Bom 1437*** has held that Section 29A is a substantive and a comprehensive provision inter alia dealing with the time limits for making of an arbitral award and extension of such time limits. Such extension of time may be granted only for sufficient cause and/or on such terms and conditions, as may be imposed by the Court. It is held that since the arbitral tribunal was appointed by the Supreme Court exercising powers under Section 11(5) read with Section 11(9) of the Act, Bombay High Court will not have jurisdiction to pass any orders under Section 29A of the Act.

➢ Bombay High Court in the case of ***Sanjay R. Dhote & Anr. Vs. Karla Farms & Ors.*** delivered on 4th April 2018 in Commercial Arbitration (L) No.323 of 2018 has held that even if the arbitral proceedings are terminated under Section 29-A(4) of the Arbitration and Conciliation Act, 1996, arbitration agreement which is entered into between the parties does not come to an end.

➢ Bombay High Court in the case of ***FCA India Automobiles Pvt. Ltd. Vs. Torque Motor Cars Pvt. Ltd. & Anr.- 2018 SCC OnLine Bom 4371*** has held that the application under Section 29-A(4) can be made not only before expiry of the period prescribed under Section 29-A(1) and before expiry of period of six months extension agreed by and between the parties but may also be made after expiry of such extended period.

Under Section 31, the arbitral award has to be made in writing and has to be signed by the members of the arbitral tribunal. In case of arbitral tribunal, the signatures of the majority of all the members of the arbitral tribunal shall be sufficient if the reason of any omitted signature is stated. The arbitral award shall state the reasons upon which it is based, unless otherwise agreed by the parties or unless the award is an arbitral award on agreed terms under section 30. Under Section 31(5), a signed copy of the arbitral award has to be delivered to each party by the arbitral tribunal. The arbitral tribunal is empowered to make an interim arbital award on any matter with respect to which it may make a final arbitral award. The arbitral tribunal is empowered to award interest at such rate as he 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 unless otherwise agreed by the parties. In view of amendment to Section 31(7)(b) w.e.f. 23rd October 2015, if the arbitral award is silent, in so far as the interest is concerned, from the date of the award to the date of payment, a sum directed to be paid by an arbitral award shall, unless the award otherwise directs, carry interest at the rate of two per cent higher than the current rate of interest prevalent on the date of award.

'Current rate of interest' shall have the same meaning as assigned to it under clause 2(b) of the Interest Act, 1978. The arbitral tribunal has to fix costs of an arbitration under Section 21(8) in accordance with Section 31-A.

● Supreme Court in case of ***National Highways Authority of India v/s. Gayatri Jhansi Roadways Limited, 2019 SCC OnLine SC 906*** has held that parties having agreed to pay fees of the Arbitral Tribunal under an agreement, Arbitral Tribunal would be entitled to charge their fees in accordance with the said agreement and not in accordance with the

Fourth Schedule to the Arbitration Act. Supreme Court upheld the order passed by Delhi High Court holding that the change in language of Section 31(8) read with Section 31A, which deals only with the costs generally and not with arbitrator's fees. Arbitrator's fees may be a component of costs to be paid but it is a far cry thereafter to state that Section 31(8) and 31A would directly govern contracts in which a fees structure has already been laid down.

- Supreme Court in the case of ***Post Graduate Institute of Medical Education and Research, Chandigarh Vs. Kalsi Construction Company, (2019) 8 SCC 726*** has held that in absence of agreement to contrary between the parties, Section 31(7)(a) confers jurisdiction upon arbitral Tribunal to award interest unless otherwise agreed by parties, at such rate as Arbitral Tribunal considers reasonable, on whole or any part of money, for whole or any part of period between date of cause of action and date of award.

- The Supreme Court held in the case of ***Chittaranjan Maity Vs. Union of India (2017) 9 SCC 611*** Section 31(7)(a) that interest cannot be awarded by the arbitrator if the agreement prohibits the award of interest for the pre-award

- The Supreme Court in case of ***Hyder Consulting (UK) Ltd. vs. Governor, State of Orissa – (2015) 2 SCC 189*** has held that under section 31(7)(a) of the Arbitration Act, the arbitral tribunal has power to award interest for pre-award period, interest *pendente lite* and interest post award on whole or part of the money and 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 however, subject to the contract to the contrary.

- Bombay High Court in the case of ***Ashesh Busa Vs. Atul Gandhi 2019 SCC OnLine Bom 1102*** has considered Section 31(2) of the Arbitration Act and has held that though one of the three arbitrators had not signed the arbitral award, in view of such arbirator confirming the award by sending a separate e-mail confirming his participation jointly with the other two arbitrators and concurring with the views taken by the other two arbitrators, it would amount to substantial compliance under section 31(2) of the

Arbitration and Conciliation Act, 1996 and thus the impugned award cannot be set aside on that ground.

- Bombay High Court in the case of ***Sphere International Vs. Ecopack India Paper Cup Pvt. Ltd., 2019 SCC OnLine Bom 1490*** has held that the interim award under Section 31(6) of the Arbitration Act can be made by the arbitral tribunal only if the alleged admission or acknowledgment of the liability on the part of the respondent before the arbitral tribunal is clear, unambiguous and definite and does not require any evidence to prove such admission at the stage of trial. If there are serious disputed questions raised by the respondent in the arbitral proceedings about the claim made by the claimant which requires detailed evidence at the stage of trial, the arbitral tribunal can not exercise its discretion under Order XII Rule 6 of the Code of Civil Procedure, 1908 and to make any interim award.

- Bombay High Court in the case of ***Arvind V. Sheth & Anr. Vs. Mahendra Mohanlal Jain*** decided on 11th September 2019 in Commercial Arbitration Petition No.343 of 2019 has held that the arbitral tribunal cannot award compound interest in absence of the provision in the Contract. The Court has power to modify the arbitral award under section 34 of the Arbitration Act if bad portion of the award can be severed from good portion of the award. There is no bar in law for applying the doctrine of severability of the award which are severable.

- The Bombay High Court in case of ***Haresh Advani vs. Suraj Jagtiani*** **– (2015) 7 Bom CR 887** has held that the power of the arbitrator under section 31(7) is not restricted to award interest on principal only and has also power to award interest on damages prior to the date of the award even if no notice under section 3(b) of the Interest Act, 1978 is issued by the claimant.

After Section 31, Section 31-A is inserted. The arbitral tribunal, notwithstanding anything contained in the Code of Civil Procedure,1908, shall have the discretion to determine the amount of costs.

Section 32 provides for Termination of proceedings. If the claimant withdraws his claim, unless the respondent objects to the order and the arbitral tribunal recognises a legitimate interest on his part in obtaining a final settlement of the dispute or the parties if agrees on the termination of the proceedings or the arbitral tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible.

- Supreme Court in case of ***Sai Babu v/s. M/s. Clariya Steels Pvt. Ltd., in Judgment dated 1st May, 2019 in Civil Appeal No. 4956 of 2019*** has held that there is a distinction between the mandate terminated under Section 32 and proceedings coming to an end under Section 25. Arbitral Tribunal has no power to entertain an application for recall order under Section 32(3) of the Arbitration Act, which was passed under Section 32(2)(c) of the Arbitration Act.

Under Section 33, the arbitral tribunal is empowered to correct and interpret the award and has to make an additional award within the time prescribed therein, to correct any computation errors, any clerical or typographical errors or any other errors of a similar nature occurring in the award, to give an interpretation of a specific point or part of the award.

- Supreme Court in the case of ***State of Arunachal Pradesh Vs. Damani Construction Co., (2007) 10 SCC 742*** has held that since an application under Section 33 for seeking review of the interim award itself was misconceived and was not within the parameters of Section 33, there is no fresh cause of action to move an application under section 34(3) for challenging an award and taking it as the starting point of limitation from the date of reply given by the arbitrator to such misconceived application filed under Section 33.

- Bombay High Court in the case of ***Dr.Writers Food Products Pvt. Ltd. & Ors. Vs. The Cosmos Co-operative Bank Ltd.*** decided on 20th September 2019 in Commercial Arbitration Petition No.486 of 2017 has held that limitation of 30 days in filing an application under Section 33(1) of the Arbitration and Conciliation Act, 1996 cannot be extended unless both the parties agree for another period of time for making such

application for correction and interpretation of the award or additional award. Application filed by a party under Section 33(1) for correction of the award beyond period of limitation and the order passed by the arbitrator on such application would not extend the period of limitation prescribed under Section 34(3) of the Arbitration and Conciliation Act, 1996. Time prescribed under Section 34(3) to challenge the original award already having expired, belated application made under Section 33(1)(a) and the order passed by the learned arbitrator on such application therefore, would be of no significance. The challenge to the original arbitral award thus held as barred by limitation prescribed under Section 34(3) of the Act.

An arbitral award can be set aside on the grounds set-out in section 34 (2) (a) and (b) and if an application for setting aside such award is made by a party not later than three months from the date from which the party making such 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. 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 30 days but not thereafter.

Section 34 of the Act reads as under :-

<u>34. Application for setting aside arbitral award :</u>-

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).

(1) An arbitral award may be set aside by the Court only if —

(a) the party making the application furnishes proof that

— a party was under some incapacity, or

the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration: -

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

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 1.— For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if, —

(i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or

(ii) it is in contravention with the fundamental policy of Indian law; or

(iii) it is in conflict with the most basic notions of morality or justice.

Explanation 2.— For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute.]

The words "***furnishes proof that***" prescribed under Section 34(2) is substituted by the words "***establishes on the basis of the record of the arbitral tribunal that***".

[(2A) An arbitral award arising out of arbitrations other than international commercial arbitrations, may also be set aside by the Court, if the Court finds that the award is vitiated by patent illegality appearing on the face of the award:

Provided that an award shall not be set aside merely on the ground of an erroneous application of the law or by reappreciation of evidence.]

(2) 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.

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.

An application under this section shall be filed by a party only after issuing a prior notice to the other party and such application shall be accompanied by an affidavit by the applicant endorsing compliance with the said requirement.

(6) An application under this section shall be disposed of expeditiously, and in any event, within a period of one year from the date on which the notice referred to in sub-section (5) is served upon the other party.

➢ Supreme Court in case of ***Ssangyong Engineering & Construction Co. Ltd. v/s. National Highways Authority of India, 2019 SCC OnLine SC 677*** has held that under Section 34 (2A) of the Arbitration Act, a decision which is perverse while no longer being a ground for challenge under "public policy of India", would certainly amount to a patent illegality appearing on the face of the award. A finding based on the documents taken behind the back of the parties by the arbitrator would also qualify as a decision based on no evidence inasmuch as such decision is not based on evidence led by the parties and therefore would also have to be characterised as perverse. It is held that a finding based on no evidence at all or an award which ignores vital evidence in arriving at its decision would be perverse and liable to be set aside on the ground of patent illegality.

➢ Supreme Court in the case of ***Parsa Kente Collieries Limited Vs. Rajasthan Rajya Vidyut Utpadan Nigam Limited, (2019) 7 SCC 236*** has held that an arbitral Tribunal must decide in accordance with the terms of the contract. If an arbitrator construes a term of the contract in a reasonable manner and if such interpretation is possible or plausible interpretation, award cannot be set aside. The construction of the terms of a contract is primarily for an arbitrator. The Court does not act as a court of appeal when a court is applying the "public policy" test to an arbitration award. It is held that if the arbitral award is contrary to the evidence on record, it can be set aside by the Court under Section 34.

➢ Supreme Court in the case of ***Simplex Infrastructure Limited Vs. Union of India, (2019) 2 SCC 455*** has held that Section 5 of the Limitation Act, 1963 has no application to an application challenging an arbitral award under Section 34 of the Arbitration Act. Section 14 of the Limitation Act does not provide for fresh period of limitation but only provide for exclusion of certain period.

➢ The Supreme Court in case of ***Associate Builders vs. Delhi Development Authority – (2015) 3 SCC 49,*** has held that the interference with an arbitral award is permissible only

when the findings of the arbitrator are arbitrary, capricious or perverse or when conscience of the Court is shocked or when illegality is not trivial but goes to the root of the matter. It is held that once it is found that the arbitrator's approach is neither arbitrary nor capricious, no interference is called for on facts. The arbitrator is ultimately a master of the quantity and quality of evidence while drawing the arbitral award. Patent illegality must go to the root of the matter and cannot be of trivial nature.

- Supreme Court in case of ***MMTC Limited v/s. Vedanta Limited, (2019) 4 SCC 163*** has held that the Court does not sit in appeal over the arbitral award and may interfere on merits on limited ground provided under Section 34(2)(b)(ii) i.e. if the award is against the public policy of India. It is only if one of these conditions set out in Section 34(2)(b)(ii) is met that the Court may interfere with an arbitral award under the said provision but such interference does not entail a review on the merits of the dispute and is limited to situations where the findings of the arbitrator are arbitrary, capricious or perverse or when the conscience of the Court is shocked or when the illegality is not trivial but goes to the root of the matter. An arbitral award may not be interfered with if the view taken by the arbitrator is a possible view based on facts. It is held that interference under Section 37 cannot travel beyond the restrictions laid down under Section 34. Under Section 37, the Court cannot undertake an independent assessment of the merits of the award and must only ascertain that the exercise of power by the Court under Section 34 has not exceeded the scope of the provision.

- Supreme Court in case of ***Tulsi Narayan Garg v/s. M.P. Road Development Authority and Others*** **(2019) SCC OnLine 1158** after adverting to the judgment in case of ***State of Karnataka v/s. Shree Rameshwara Rice Mills Thirthahalli, (1987) 2 SCC 160*** has held that a party cannot become an arbiter in its own cause and unless the dispute is settled by a procedure prescribed under the law, such party would not be held to be justified in initiating recovery proceedings invoking the procedure under the Land Revenue Act though the matter is before the arbitrator and no adjudication has taken place.

➢ In case of ***Jaiprakash Associates Ltd. v/s. Tehri Hydro Development Corporation India Ltd., 2019 SCC OnLine SC 143*** has held that Arbitral Tribunal cannot award interest if such claim is prohibited under the terms of the contract entered into between the parties.

➢ Supreme Court in case of ***National Highways Authority of India and Anr. v/s. Subhash Bindlish and Ors. dated 14th August, 2019 in Special Leave Petition (Civil) Diary No. 17812 of 2019*** has held that what is provided under Section 34(3) is the outer limit within which the application can be preferred for setting aside the arbitral award. It is held that the subsequent amendment in 2015 would not change the character of the mandate under Section 34(3) of the Arbitration Act. Supreme Court did not interfere with the order passed by the High Court refusing to interfere in an application for setting aside arbitral award, which was preferred beyond 120 days in view of specific bar under Section 34(3) of the Arbitration Act.

➢ Supreme Court in the case of ***A.S. Patel Trust & Ors. Vs.Wall Street Finance Limited, 2019 SCC OnLine Bom 1328*** has held that since there was no prayer for recovery of possession of the premises under Leave and License Agreement made by the claimant and the prayer was only for refund of security deposit made by the licensee in the arbitral proceedings, such prayer was within the jurisdiction of the arbitral tribunal and was not within the jurisdiction of Small Cause Courts under section 41 of the Presidency Small Cause Courts Act. Bombay High Court has held that since there was no bar under the contract entered into between the parties from making claim for payment of interest, in view of Section 31(7)(a) of the Arbitration and Conciliation Act, the arbitrator has power to award interest on payment of money, 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. It is also held in the said judgment that since the findings rendered by the arbitral tribunal are rendered ignoring vital evidence produced by the petitioner, it would fall under the ground of patent illegality.

➢ The Supreme Court in the case of ***Northern Railway Vs. Pioneer Publicity Corpn. (P) Ltd. (2017) 11 SCC 234*** held that re-filing of application after curing defects in

application does not amount to fresh filing of application for counting limitation under Section 34(3).

➢ Section 14 of the Limitation Act, 1963 is applicable to Section 34(3) of the Arbitration and Conciliation Act, 1996. Supreme Court has held in the case of ***M.P. Housing Board Vs. Mohanlal and Co. (2016) 14 SCC 199*** that exclusion of time spent proceeding bona fide in Court without jurisdiction is excluded while computing the limitation under Section 34(3).

➢ Supreme Court in the case of ***Oriental Insurance Company Limited Vs. Tejparas Associates and Exports Private Limited, (2019) 9 SCC 435*** has held that Section 5 to the Limitation Act, 1963 is not applicable beyond the statutory period under Section 34(3) of the Arbitration Act. When the arbitration petition is returned to be re-presented before the Court of competent jurisdiction under Order VII Rule 10 and 10-A of the Code of Civil Procedure, re-presentation of the petition in Court which is indicated in order for return cannot be considered as a fresh filing in all circumstances when it is returned to the plaintiff for such re-presentation.

➢ Supreme Court in the case of ***P. Radha Bai & Ors. Vs. P. Ashok Kumar & Anr., (2019) 13 SCC 445*** has held that once the respondents received the award, the time under Section 34(3) commenced and any subsequent disability was immaterial. Even if the appellant had committed some fraud, it would not affect the right of the respondents to challenge the award if the facts entitling the filing of a Section 34 application were within their knowledge.

➢ The Supreme Court in case of ***O.N.G.C. vs. Western Geco International Ltd. (2014) 9 SCC 263,*** has held that in every determination whether by a Court or other authority that affects the rights of a citizen or leads to any civil consequences, the Court or the authority concerned is bound to adopt what is in legal parlance “judicial approach” in the matter. The duty to adopt a judicial approach arises from the very nature of power exercised by the Court or the authority does not have to be separately or additionally enjoined upon the fora concerned. The Court, Tribunal or Authority exercising such powers cannot act in an

arbitrary, capricious or whimsical manner. The Courts or quasi judicial authority while determining the rights and application of the parties before it has to act in accordance with the principles of natural justice. It is held that a decision which is perverse or so irrational that no reasonable person would have arrived at the same, will not be sustainable in Court of law.

- In case of ***Sachin Gupta vs. K.S.Forge Matel (Pvt.) Ltd. -- (2013) 10 SCC 540,*** it is held that an award rendered without notice and without hearing the party is illegal and liable to be set aside.

- In case of ***P.R. Shah, Shares and Stock Brokers Pvt. Ltd. vs. B.H.H. Securities Pvt. Ltd. & Ors. – 2012 (3) Mh.L.J. 737,*** it is held by the Supreme Court that the Court does not sit in appeal over the award of an arbitral tribunal by reassessing or re-appreciating the evidence and the award can be challenged only under the grounds mentioned in section 34(2) of the Arbitration & Conciliation Act, 1996 and in the absence of any grounds under the said provision, it is not possible to re-examine the facts to find out whether a different decision can be arrived at. It is held that the arbitral tribunal cannot make use of their personal knowledge of the facts of the dispute which is not part of the record, to decide the issue but can use their expert or technical knowledge or general knowledge about the particular trade in deciding the matter.

- In case of ***Rashtriya Ispat Nigam Limited vs. Dewan Chand Ram Saran --(2012) 5 SCC 306***, it is held by the Supreme Court that if the view taken by the arbitrator is clearly possible, if not plausible, and it is not possible to say that the arbitrator had travelled outside his jurisdiction, the Court cannot substitute its views in place of the interpretation accepted by the arbitrator.

- Supreme Court in the case of ***Assam Urban Water Supply and Sewerage Board Vs. Subash Projects and Marketing Limited – (2012) 2 SCC 624*** has held that "Prescribed period" of limitation for making an application for setting aside the arbitral award is 3 months and not 3 months and 30 days. The period of 30 days is beyond the period of 3 months. Benefit of Section 4 of the Limitation Act, 1963 will not be available if 30th

day expires on a day when the Court is closed. Since the arbitration petition was filed on next working day after expiry of 30 days after 3 months period, the arbitration petition was dismissed as time barred and upheld by Supreme Court.

➢ In case of ***Satyanarayan Construction Co. vs. Union of India – (2011) 15 SCC 101,*** it is held that an arbitrator cannot rewrite the contract and if rate higher than agreed in the contract is awarded, it would be beyond his competency & authority and such award is liable to be set aside.

➢ In case of ***Ravindra And Associates vs. Union of India-- (2010) 1 SCC 80*****,** it is held that court cannot interfere with findings of fact rendered by the arbitrator. It is held that if a clause in the contract or any issue is outside the purview of arbitration, it is necessary to comply with such restriction strictly. An arbitrator cannot decide contrary to the terms of the contract.

➢ The Supreme Court in case of ***State of Maharashtra vs. Hindustan Construction Co. Ltd. -- AIR 2010 SC, 1299*****,** held that incorporation of additional grounds by way of amendment in the application under section 34 does not tantamount to filing of fresh application in all situations and circumstances. If an application under section 34 has been made within prescribed time, to grant leave to amend such application if the very peculiar circumstances of the case so warrant and it is so required in the interests of justice, amendment to the petition can be allowed.

➢ In case of ***Fiza Developers and Inter-Trade Private Limited vs. AMCI (India) Private Limited and another -- (2009) 17 SCC 796***, Supreme Court has held that applications under section 34 are summary proceedings. The scope of enquiry in a proceeding under section 34 is restricted to consideration whether any one of the grounds mentioned in section 34 (2) exists for setting aside the award which grounds are specific. It is held that issues under order 14 and order 18 need not be framed in applications under section 34 of the Act. An application under section 34 of the Act is a single issue proceeding. Provisions of Civil Procedure Code will be applicable only to the extent considered necessary or appropriate by the court. There is no wholesale or automatic import

of all the provisions of the Code of Civil Procedure into proceedings under section 34 of the Act as that would defeat the very purpose and object of the Act.

- In case of ***Oil & Natural Gas Limited vs. Garware Shipping Corporation Limited – AIR 2008 SC 456,*** it is held by the Supreme Court that there is no proposition that the courts could be slow to interfere with the arbitrator's award even if the conclusions are perverse and even when very basis of the arbitrator's award is wrong.

- In case of ***Numaligarh Refinery Ltd. vs. Daelim Industrial Co. Ltd. -- (2007) 8 SCC 466***, it is held that in case it is found that the arbitrator has acted without jurisdiction and has put an interpretation on the clause of the agreement which is wholly contrary to law, then in that case there is no prohibition for the court to set things right.

- The Supreme Court in case of ***Mcdermott International Inc. vs. Burn Standard Co. Ltd. and others -- (2006) 11 SCC 181,*** has held that the intervention of the Court under the provisions of the Arbitration Act, 1996 is envisaged in few circumstances, like in case of fraud or bias by the arbitrator, violation of natural justice etc. The Court cannot correct the errors of the arbitrators. It can only quash the award leaving the parties free to begin arbitration again if it is desired. It is held that "patent illegality" must go to the root of the matter. Public policy violation indisputably should be so unfair and unreasonable as to shock conscience of the Court. If the arbitrator has gone contrary to or beyond express law of contract or granted relief in the matter not in dispute would come within the purview of section 34 of the Act.

- In case of ***M.Anasuya Devi and another vs. M.Manik Reddy and others – (2003) 8 SCC 565,*** it is held by the Supreme Court that an award cannot be set aside under section 34 for want of stamping and registration. Question as to whether there was any deficiency in stamping or registration are not within the purview of section 34 and such question falls within the ambit of section 47 of CPC and such questions can be agitated only at the stage of enforcement of award under section 36.

➢ In case of ***Oil and Natural Gas Corporation Ltd. vs. Saw Pipes Ltd. -- (2003) 5 SCC 705***, it is held that award has to be in accordance with the terms of the contract. Phrase 'public policy of India' referred in section 34(2) (b) (ii) should be given a wider and not a narrower meaning. Court can set aside the award if it is (1) contrary to (a) fundamental policy of Indian law or (b) the interest of India or (c) justice or morality or (ii) is patently illegal or (iii) is so unfair and unreasonable that it shocks the conscience of the court. Supreme Court has interpreted section 34 and has enumerated various grounds of challenge to an arbitral award.

➢ Bombay High Court in the case of ***Bharat Sanchar Nigam Limited Vs. Unity Telecom Infrastructure Ltd., 2019 SCC OnLine Bom 1675*** has considered a situation where the signed copy of the award was personally collected by the authorized representative of the party from the arbitral tribunal and thus time taken in obtaining instructions from the higher authority or on opinion from a lawyer would not extend the period of limitation. The Court has no power to condone delay beyond 30 days after expiry of the period of limitation i.e. from the date of service of signed copy of the award by the arbitral tribunal upon the party.

➢ Bombay High Court in case of ***Bombay Slum Redevelopment Corporation Limited v/s. Samir Narain Bhojwani, (2019) SCC OnLine Bom 1853*** has held that Arbitral Tribunal cannot grant any relief against a third party i.e. not a party to the arbitration agreement. Relief granted against a third party in the arbitral proceedings, who was not claiming through the party to the arbitration agreement or was not a nominee of a party to the arbitration agreement amounted to exceeding the jurisdiction of the Arbitral Tribunal and shows patent illegality. The Arbitral Tribunal cannot rely upon unproved disputed documents. Principles of Evidence Act and natural justice applies to the arbitral proceedings also. If the Arbitral Tribunal overlooks the material evidence and renders findings based on documents taken behind the back of the parties, such award would be based on no evidence and would be perverse falling under a ground of “patent illegality”.

➢ Bombay High Court in the case of ***Union of India Vs. Richa Constructions, 2019 SCC OnLine Bom 917*** has held that the arbitral tribunal has no jurisdiction to award any

claim contrary to the terms of the contract and more particularly the claims which are prohibited under the contract.

- Bombay High Court in the case of ***Dinesh Jaya Poojary Vs. Malvika Chits India Pvt. Ltd., 2019 SCC OnLine Bom 1121*** has held that the Chit Funds Act, 1982 is a self-contained Code which provides for remedy of adjudication of dispute under the said Act which remedy cannot be varied by an agreement of parties by referring the dispute to private arbitral forum contrary to Section 3 of the said Chit Funds Act.

- Bombay High Court in the case of ***Mohammed Kader Hassan Vs. Sree Gokulam Chit & Finance Co.(P) Ltd., 2019 SCC OnLine Bom 1285*** has construed the provisions of Chit Funds Act, 1982 and has held that the said Act provides for a self-contained machinery for the settlement of the disputes between a foreman and the subscribers by means of an arbitration before the authority provided under the said Act which cannot be varied by a private agreement between the parties.

- Bombay High Court in the case of ***Star Track Fasteners Private Limited Vs. Union of India, 2019 SCC OnLine Bom 1453*** has held that the Court has no power to allow any claim which is rejected by the arbitral tribunal as the Court cannot correct errors made by the learned arbitrator. Court can either set aside the award or can upheld the award or in appropriate case, modify the award if such part is severable.

- Bombay High Court in the case of ***Abhudaya Co-operative Bank Ltd. Vs. M/s. Rainproof and Anr.,*** decided on 6th August 2019 in Commercial Arbitration Petition No.119 of 2016 has held that if the arbitral tribunal has decided beyond the scope of reference, it would amount to exceeding jurisdiction conferred on the arbitral tribunal and such award can be set aside.

- Bombay High Court in the case of ***Schokhi Industries Pvt. Ltd. Vs. Maharashtra State Power Generation Co. Ltd., 2019 SCC OnLine Bom 1513*** has held that time prescribed under Section 34(3) has to be read with time prescribed in Section 33(1) of the Arbitration and Conciliation Act, 1996. Since, the application filed under Section 33(1)

itself was not within the time prescribed under the said provision, limitation for filing an arbitration petitioner under Section 34(3) would not commence from the date of disposal of the request made by such party under Section 33(1) but would commence from the date of service of signed copy of the original award. It is held that the arbitrator has no power to condone delay in filing application under Section 33(1) after 30 days from the date of getting the signed copy of the arbitral award.

➢ Bombay High Court in case of ***Fermenta Biotech Limited Vs. K.R. Patel in Arbitration Petition No.545 of 2017*** delivered on 11th October 2018 after considering the amended Section 34 and more particularly explanation 1 to clause (b) of Sub-section (2) of Section 34 and Sub-section (2-A) has held that -

(A) the ground of conflict with public policy is restricted to -

(i) inducement or affectation by fraud or corruption or violation of section 75 or section 81 in making of the award,

(ii) contravention of the fundamental policy of Indian Law,

(iii) conflict with the most basic notions of morality or justice.

(B) Under Sub-section (2-A) of Section 34 for making out the case of patent illegality, it must be shown that the award contravenes -

(i) the substantive law of India on an aspect which goes to the root of the matter and which is not of a trivial nature or

(ii) the Arbitration and Conciliation Act, 1996 itself or

(iii) the contract between the parties, as explained in Associate Builders case.

(iv) It must further be shown that such illegality appears on the face of the award.

(v) The illegality, in other words, must be so self-evident and plain as not to admit of any dichotomy of opinions; it should not be necessary to, firstly, refer to any document or matter which is not made part of the award to assess such illegality and, secondly, it should be obvious and not require any elaborate or intricate explanation.

(vi) It is not good enough to say that the Arbitrator has wrongly applied the law or has not properly appreciated the evidence. If the arbitrator note or acts on a correct principle or provision of law, but makes a mistake in applying it to the facts

of the case, such error is not amenable to a challenge under Section 34. That is now clarified by the explanation to sub-section (2-A) of Section 34 of the Act.

➢ Bombay High Court in a judgment dated 2nd April 2016 in the case of ***M/s.Tirumala Roadways Vs. Indian Oil Corporation Ltd. and Anr. – 2016(5) Mh.L.J. 679*** has adverted to the judgment of the Supreme Court in the case of ***Assam Urban Water Supply and Sewerage Board Vs. Subash Projects and Marketing Limited, reported in (2012) 2 SCC 624*** and has held that the period of 30 days after expiry of 3 months prescribed in Section 34(3) of the Arbitration and Conciliation Act, 1996 would not be the period of limitation and thus Section 4 read with Section 2(j) of the Limitation Act, 1963 would not apply to such application filed under Section 34 of the Arbitration and Conciliation Act, 1996 beyond a period of 3 months.

➢ It was held in the case of ***Siddhivinayak Realty Pvt. Ltd. vs. V. Hotels Ltd. --(2013) 7 LJ SOFT 22*** that the award if contrary to the terms of the contract, in violation of the statutory provisions and ignoring the material piece of evidence can be set aside.

➢ It was held in the case of ***Pradyuman Kumar Sharma vs. Jaysagar M.Sancheti (2013) 5 Mh.LJ 86*** Principles of natural justice applies to arbitration. Disputed documents not proved cannot be considered by the Arbitrator as a piece of evidence.

Whether a person not a party to the arbitration agreement can file an arbitration petition under section 34 :-

- Bombay High Court in the case of ***Mukesh Nanji Gala and Ors. Vs. M/s.Heritage Enterprises & Anr. – 2015(2) Bom.C.R. 123*** has held that a third party who is not a party to the arbitration agreement cannot be allowed to be impleaded as a party to the arbitral proceedings. However if a person is wrongly impleaded as party to the arbitral proceedings and is aggrieved by arbitral award, such person can invoke section 34 of the Arbitration and Conciliation Act, 1996 and can challenge such arbitral award. A similar view has been taken by the Bombay High Court in the case of ***Smt.Prema A.Gera Vs. The Memon Co-operative Bank Ltd. and Anr. – 2017 (2) Bom CR 800*** and has allowed a third party to file a petition under Section 34 for challenging the arbitral award in which he was erroneously

impleaded as a party and an adverse order was passed against him by the learned arbitrator.

Limitation in filing petition under section 34 –
Power of condonation of delay – Applicability of section 14 of the Limitation Act, 1963 :-

- Supreme Court in case of ***Coal India Ltd. vs. Ujjal Transport Agency (2011) 1 SCC 117*** and in case of ***State of Goa vs. M/s.Western Builders, AIR 2006 SC 2525*** has held that section 14 of Limitation Act is applicable while considering application under section 34 and if time taken in prosecuting the matter before a wrong court having no jurisdiction bonafide and with due diligence, such time taken can be excluded while computing limitation under section 34(3).

- Supreme Court in case of ***State of Maharashtra vs. M/s.Ark Builders Pvt. Ltd. -- AIR 2011 SC 1374***, has held that the period of limitation prescribed under section 34(3) would start running only from the date of a signed copy of award is delivered to/received by a party making the application for setting aside the award under section 34(1).

- Supreme Court in case of ***Venture Global Engineering vs. Satyam Computer Services Ltd. & Anr. -- AIR 2010 SC 3371*** has held that when an award is induced or affected by fraud or corruption, the same would fall within the ground of excess of jurisdiction and a lack of due process and can be set aside. It is held that concealment of relevant and material facts which should have been disclosed before the arbitrator is an act of fraud and if the concealed facts disclosed after the passing of the award have a causative link with the facts constituting or inducing the award, such facts are relevant in a setting aside proceeding and award may be set aside as affected or induced by fraud.

- Supreme Court in case of ***Union of India vs. Popular Constructions-- AIR 2001 SC 4010*** and in case of ***Consolidated Engineering Pvt. Ltd. vs. Irrigation Department -- (2008) 7 SCC 169*** has held that section 5 of the Limitation Act is not applicable to section 34 (3) of the Arbitration and Conciliation Act, 1996 in view of express inclusion within the meaning of section 29(2) of the Limitation Act, 1963. It is held that court cannot condone

delay beyond a period of 30 days and that also only if sufficient cause is shown as to how the applicant was prevented from making application within the period of three months and not thereafter.

- Bombay High Court in case of ***E-square Leisure Pvt. Ltd. vs. K.K. Jani Consultants and Engineering Company -- (2013) 2 Bom.C.R. 689*****,** has held that the limitation for making an application under section 34(3) for setting aside an arbitral award would commence only after a signed copy of the award is received by a party from the arbitral tribunal under section 31(5) of the Arbitration Act.

Whether the Court under section 34 can allow the claim rejected by the arbitrator

- The Supreme Court in case of ***Mcdermott Inc. vs. Burn Standard Co. Ltd. and others -- (2006) 11 SCC 181***, has held that the Court cannot correct the errors of the arbitrator. It can only quash the award leaving the parties free to begin the arbitration again if it is desired.

- The Bombay High Court in ***BMA Commodities Pvt. Ltd. vs. Kaberi Mondal & Anr. -- (2015) 2 Bom.C.R. 457*** has held that the Court cannot correct the errors of the arbitral tribunal under section 34 of the Act. It can set aside the award wholly or partly and cannot make an award under section 34.

Whether the Court has power to remand the proceedings back to the Arbitral Tribunal once the award is set-aside under section 34

- Supreme Court in the case of ***Kinnari Mullick & Anr. Vs. Ghanshyam Das Damani – AIR 2017 SC 2785*** has construed Section 34(4) and has held that the Court can defer the hearing of the application filed by the petitioner for setting aside the award on a written request made by a party to the proceedings to facilitate the arbitral tribunal by resuming 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. The Court has not

been invested with power to remand the matter to the arbitral tribunal except to adjourn the proceedings for the limited purpose mentioned in Section 34(4).

- The Supreme Court in case of ***Som Datt Builders Ltd. vs. State of Kerala -- (2009) 10 SCC 259,*** has held that if the arbitral tribunal does not give reasons under section 31(3), the Court can pass an order under section 34(4) and can give an opportunity to the arbitral tribunal to give reasons. It is held that by remitting the award to the arbitral tribunal for recording of reasons in support of its award would be fair and reasonable.

- Bombay High Court in the case of ***Store One Retail India Ltd. Vs. I.R. C. Limited, 2019 SCC OnLine Bom 1281*** has held that there is a presumption in law that the Judge deals with all the points which have been pressed before him. It will be presumed that the appellant gave up the other points, otherwise, he would have dealt with them also. If such party contends that he had pressed that point also which has not been dealt with in the impugned judgment, it is open to him to file an application before the same Judge who delivered the impugned judgment.

- The Division Bench of the Bombay High Court in case of ***Geojit Financial Services Ltd. vs. Kritika Nagpal – 2013(8) LJSOFT 24*** has held that section 34(4) does not contemplate or vest power in Court to remand the proceedings back to the arbitral tribunal once the Court has set-aside the award.

- ***The Full Bench of the Bombay High Court in R.S. Jiwani vs. Ircon International Ltd. – 2010 (1) Bom.C.R. 529*****,** has held that the Court has discretion under section 34 of the Arbitration Act which takes within its ambit power to set-aside the award partially or wholly depending upon the facts and circumstances of each case. Section 34(2) do not admit of interpretation which will divest the Court of the competent jurisdiction to apply the principle of severability to the award by the arbitral tribunal, legality of which is questioned before the Court. It is held that the Court vests powers under section 34 to set-aside the award and even to adjourn the matter and to do such act and deeds by the arbitral tribunal at the instance of the party which would help in removing the grounds of attack for setting aside the arbitral award.

- Supreme Court in the case of ***State of Bihar & Ors. Vs. Bihar Rajya Bhumi Vikas Bank Samiti-(2018) 9 SCC 472*** has held that requirement of issuance of prior notice to other party and filing of an affidavit endorsing compliance with the requirement under Section 34(5) is directory and not mandatory.

- Provision of sub-section (5) of Section 34 has been held as directory by the Bombay High Court in the case of ***Global Aviation Services Private Limited Vs. Airport Authority of India – 2018 SCC OnLine Bom 233.*** Bombay High Court after construing the provisions of Section 26 of the Arbitration and Conciliation (Amendment) Act, 2015 and Sections 34(5) and 34(6) of the Arbitration and Conciliation Act, 1996 has held that if the notice invoking arbitration agreement is received by other party prior to 23rd October 2015, the arbitration proceedings would commence prior to 23rd October 2015. The provisions of the Arbitration and Conciliation Act, 1996 in force prior to 23rd October 2015 would be applicable in such matters for all the purposes. It is held that if the notice invoking arbitration clause is received by other party after 23rd October 2015, the parties will be governed by the provisions of the Arbitration and Conciliation (Amendment) Act, 2015 for all the purposes. The date of filing of the arbitration petition under Section 34(1) is not relevant for the purpose of deciding the applicability of the provisions of the Arbitration and Conciliation Act, 1996 i.e. pre-amendment or post amendment. In view of sub-section (5) of Section 34, an application has to be disposed of expeditiously, and in any event, within a period of one year from the date on which the notice referred to in sub-section (5) is served upon the other party.

Whether the Court is bound to pass an order of deposit of the awarded sum u/s 34 of the Arbitration & Conciliation Act, 1996 to the matters prior to 23rd October 2015

- The Supreme Court in ***National Aluminium Co. Ltd. vs. Pressteel & Infrastructure (P) Ltd., (2004) 1 SCC 540,*** has held that there is automatic stay of the award during the period of pendency of the arbitration petition under section 34 and the award becomes un-executable until the challenge under section 34 is refused. This judgment was delivered prior to the amendment to Section 36. This judgment was delivered considering unamended Section 36.

- Bombay High Court in an order dated 13th September, 2019 in case of ***Godrej Industries Limited v/s. Darius Rutton Kavasmaneck and Ors., in Commercial Arbitration Petition No. 1021 of 2019*** has held that in view of Section 87 inserted by the Arbitration and Conciliation (Amendment) Act, 2019, since the arbitral proceedings commenced prior to 23rd October, 2015, Section 36 of the Arbitration and Conciliation Act amended by Arbitration and Conciliation (Amendment) Act, 2015 would not apply. The arbitral award thus would not enforceable during the pendency of the arbitration petition.

- The Bombay High Court in case of ***AFCONS Infrastructure Ltd.vs.Board of Trustees of Port of Mumbai -- 2014 (1) Bom.C.R. 794***, has held that the Court cannot pass an order for deposit of the arbitral award since the award remains un-executable and not enforceable during the pendency of the arbitration petition under section 34.

Under section 36, when the time for making an application under section 34 for setting aside an arbitral award has expired then subject to the provisions of Sub-section (2) of Section 36, such award shall be enforced under the provisions of the Code of Civil Procedure, 1908 in the same manner as if it were a decree of the court. In view of amendment to Section 36 w.e.f. 23rd October 2015, there is no automatic stay merely on filing of an application under Section 34 for challenging the arbitral award. The applicant has to make a separate application for seeking an order of stay of operation of the arbitral award in accordance with the provisions of Section 36(3). It is provided that while considering the application for grant of stay of arbitral award for payment of money, the Court shall have due regard to the provisions for grant of stay of a money decree under the provisions of the Code of Civil Procedure, 1908.

Section 87 is inserted by 2019 Amendment. It is provided that unless the parties otherwise agree, the amendment made to the Arbitration Act by the Arbitration and Conciliation (Amendment) Act, 2015 shall not apply to (i) arbitral proceedings commenced before the commencement of the Arbitration and Conciliation (Amendment) Act, 2015, (ii) Court proceedings arising out of or in relation to such arbitration proceedings irrespective of whether such court proceedings are commenced prior to or after commencement of the Arbitration and Conciliation (Amendment) Act, 2015 and (iii) apply only to arbitration

proceeding commenced on or after the commencement of the Arbitration and Conciliation (Amendment) Act, 2015 and to Court proceedings arising out of or in relation to such arbitral proceedings.

In view of insertion of Section 87, which is inserted with retrospective effect, all proceedings where notice for appointment of an arbitrator was received by the other party prior to 23rd October, 2015, arbitration proceedings in respect of particular dispute would commence before commencement of the Arbitration and Conciliation (Amendment) Act, 2015 and such proceedings would be governed by the provision of the Arbitration Act prior to the enactment of Arbitration and Conciliation (Amendment) Act, 2015. Section 87 is deemed to have been inserted w.e.f. 23rd October, 2015. Section 26 of the Arbitration and Conciliation (Amendment) Act, 2015 is omitted w.e.f. 23rd October, 2015.

Eighth Schedule is inserted so as to provide the qualifications and experience of an arbitrator required for appointment of any person as an arbitrator. The said schedule also provides for general norms applicable to an arbitrator. This section has not been brought into effect till date.

- Supreme Court in the case of ***Hindustan Construction Company Limited and Anr. Vs.Union of India & Ors., 2019 SCC OnLine Sc 1520*** has struck down Section 87 of the Arbitration Act as violative of Article 14 of the Constitution of India and has restored Section 26 of the 2015 Amendment Act. It is is held that deletion of Section 26 of 2015 Amendment Act together with insertion of Section 87 under the Arbitration Act, 1996 by the 2015 Amendment Act is manifestly arbitrary under Article 14 of the Constitution of India. Judgment of the Supreme Court in the case of ***Board of Control for Cricket in India Vs. Kochi Cricket Pvt. Ltd. and Ors.- (2018) 6 SCC 287*** would continue to apply so as to make applicable the salutary amendments made by 2015 Amendment Act to all the Court Proceedings after 23rd October 2014.

- Supreme Court in case of ***Pam Developments Private Ltd. v/s. State of West Bengal, 2019 SCC OnLine SC 852*** has construed Section 36 of the Arbitration Act and Order XXVII Rule 8A of Civil Procedure Code, 1908 and has held that the Arbitration Act

is a self-contained Act. The provisions of CPC will apply only insofar as the same are not inconsistent with the spirit and provisions of the Arbitration Act. Mere reference to CPC in Section 36 cannot be construed in such a manner that it takes away the power conferred in the Arbitration Act itself. It is to be taken as a general guideline, which will not make the main provision of the Arbitration Act inapplicable. The provisions of CPC are to be allowed as a guidance, whereas the provisions of the Arbitration Act are essentially to be first applied. Provisions of the CPC are to be taken into consideration while considering an application for stay under Section 36 in case of stay of money decree however they are not mandatory but in essence directory.

- Bombay High Court in a judgment delivered on 16th December 2016 in the case of ***M/s.PFS Shipping (India) Limited Vs. Capt. V.K. Gupta & Anr.-- 2016 SCC OnLine 10048*** has construed Section 36 of the Arbitration and Conciliation Act, 1996 amended by the Arbitration and Conciliation (Amendment) Act, 2015 and has held that while considering an application for grant of stay in the case of an arbitral award for payment of money, the Court has been granted discretion to consider security required to be furnished by the petitioner seeking stay or whether stay has to be granted unconditionally or on furnishing such security so as to secure part of the claim depending upon the facts and circumstances of each case. It is held that while considering an application for grant of stay under Section 36(3) inserted by the Arbitration and Conciliation (Amendment) Act, 2015, due regard to the provisions for grant of stay of a money decree under the provisions of the Code of Civil Procedure, 1908 has to be given. However, in appropriate cases, the Court can grant stay even on the petitioner furnishing security to secure part of the awarded amount or may grant unconditional stay depending upon the facts and circumstances of each case. If the award is prima facie perverse and is contrary to the provisions of law, the Court is not bound to direct the petitioner to deposit the entire amount of the arbitral award for payment of money.

Execution proceedings for executing an arbitral award to be filed in which Court :-

- The Supreme Court in the case of ***Sundaram Finance Limited v. Abdul Samad & Anr., (2018) 3 SCC 622*** that execution application can be filed in any Court in India

where such decree can be executed. There is no requirement for obtaining transfer of decree from Court which would have jurisdiction on the arbitral proceedings.

- The Supreme Court held in the case of ***Centrotrade Minerals and Metal Inc. Vs. Hindustan Copper Limited (2017) 2 SCC 228*** that even if the award is not enforced, it is not a waste paper. Once the award is made on a subject matter, no action can be started again on the original claim.

- The Supreme Court held in the case of ***Punjab State Civil Supplies Corpn. Ltd. Vs. Atwal Rice and General Mills – (2017) 8 SCC 116*** that the Executing Court cannot hold any kind of factual enquiry which may have the effect of nullifying the decree itself but it can undertake limited inquiry regarding jurisdictional issues which goes to the root of the decree and has the effect of rendering the decree nullity.

- In case of ***Leela Hotels Pvt. Ltd. vs. Urban Development Corporation Ltd. – (2012) 1 SCC 302*** it is held that an arbitral award has to be enforced under CPC in the same manner as if it were a decree of the court.

Section 37 provides for orders which are appealable under the Arbitration and Conciliation Act, 1996 i.e. -

refusing to refer the parties to arbitration under section 8;

(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.

An appeal is also maintainable against the 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.

No second appeal is maintainable from an order passed in appeal u/s 37.

The right to appeal to the Supreme Court is however not taken away under the said provisions.

- Cross objection under Order XLI Rule 21 of the Code of Civil Procedure cannot be filed in Appeal under Section 37 of the Arbitration and Conciliation Act, 1996. – ***MTNL Vs. Applied Electronics Ltd. – (2017) 2 SCC 37.***

- Division Bench of Bombay High Court in case of ***Kakade Construction Company Ltd. v/s. Vistra ITCL (India) Ltd., 2019 SCC OnLine Bom 1521*** has held that an appeal under Section 37 of the Arbitration Act is not maintainable against the order passed by the Executing Court appointing receiver while exercising power under Section 36 of the Arbitration Act since the said order is not being under the Code of Civil Procedure. Only those orders are appealable, which are described under Section 37 and not other orders.

- Bombay High Court in the case of ***Prabhat Steel Traders Pvt. Ltd. Vs. Excel Metal Processors Pvt. Ltd. 2018 SCC OnLine Bom 2347*** after interpreting the amended Section 17 of the Arbitration Act has held that an aggrieved third party who is not a party to arbitration agreement can file an appeal under Section 37 of the Arbitration Act arising out of interim measures granted by the learned arbitrator after obtaining leave from the Court.

Section 38 provides for fixing the amount of deposit or supplementary deposit, as an advance for the costs which it expects will be incurred in respect of the claim fix separate amount of deposit for the claim and counter- claim. Both the parties are required to make such deposit an equal share. If one party failed to pay his share of deposit, the other party may pay that share. If other party does not pay share in respect of opponent or in respect of his claim, the Arbitral Tribunal may suspend or terminate the arbitral proceedings in respect of such claim or counter claim as the case may be.

Under Section 39, the Arbitral Tribunal has lien on the arbitral award for any unpaid costs on the arbitration. The Court may make an order 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.

Under section 40, arbitration agreement is not discharged by death of any party thereto, but shall be enforceable by or against the legal representative of the deceased. **The**

mandate of an arbitrator shall not be terminated by the death of any party by whom he was appointed.

Section 41 makes the provision for insolvency and for continuation of the arbitral proceedings by the receiver as well as the official assignee.

Section 42 provides that where with respect to an arbitration agreement any application under Part-I 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.

Section 42A and 42B are inserted by virtue of The Arbitration and Conciliation (Amendment) Act 2019 to maintain confidentiality of all arbitral proceedings except where its disclosure is necessary for the purpose of implementation and enforcement of the award notwithstanding anything contained in any other law for the time being in force. No suit or other legal proceedings can be filed against the arbitrator for anything which is done in good faith or intended to be done in good faith under the Arbitration Act or the rules or regulations made thereunder. **Sections 2, 3 and 10 of the Arbitration and Conciliation (Amendment) Act, 2019 are not brought into effect till date though Central Government has already issued a notification dated 30th August, 2019 appointing 30th August, 2019 as the date on which the other provisions of the Amendment Act 2019 such as Sections 1, 4 to 9, 11 to 13 and 15 are brought into force.**

Section 43 provides that the Limitation Act, 1963 shall apply to arbitrations as it applies to proceedings in Court. An arbitration shall be deemed to have commenced on the date referred to in section 21. If an arbitral award is set aside, the period between the commencement of the arbitration and date of order of the Court shall be excluded in computing the time prescribed by the Limitation Act, 1963 for commencement of proceedings including arbitration with respect to the dispute so submitted.

ARTICLE 227 OF THE CONSTITUTION OF INDIA

- Supreme Court in case of ***Sterling Industries v/s. Jayprakash Associates Ltd. and Others, 2019 SCC OnLine SC 1154*** after adverting to the judgment in case of ***SBP and Co. v/s. Patel Engineering Ltd., (2005) 8 SCC 618*** has set aside the judgment of High Court entertaining a writ petition under Article 227 of Constitution of India against an order of the learned District Judge passed under Section 20 of the Arbitration Act, 1940 read with Section 19 of Micro, Small and Medium Enterprises Development Act, 2006 on the ground that the application made to the District Judge by the respondent against a partial award made under Section 16 itself was not tenable vide Section 16(6) of the Arbitration Act.

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