# HANDBOOK
# ON
# ARBITRATION LAW

**RELEVANT FOR**

**DISTRICT JUDGES/ADJS/COMMERCIAL COURTS**


**By**

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**Former Chairman, JTRI, U.P., Lucknow**

**Based on 150 Supreme Court Judgments**

**October 2022**

**(To be read with Bare Act as sections have not been quoted except at few places)**

**(October, 2022)**

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## CHAPTER -1

## GENERAL, INCLUDING SECTIONS 2 & 5

### A. Preamble

The Arbitration and Conciliation Act 1996, herein after referred to as A & C Act has got an unusually long preamble according to which the Act is enacted on the recommendation of General Assembly of United Nations, on the lines of United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration. However, it has been held in *Konkan Railway Corp. v. Rani Construction* 2002 (2) SCC 388: AIR 2002 SC 778(C.B) and quoted with approval in para 64 of another Constitution Bench authority of *Bharat Aluminium Co. v. Kaiser Aluminium Technical Services* 2012(9) SCC 552 (herein after referred to as BALCO v. KATS) "that the Model Law was only taken into account in the drafting of the said Act is, therefore, patent. The Arbitration Act 1996 and the Model Law are not identically drafted".While interpreting different provisions of A & C Act, reference is made to UNCITRAL Model Law, in some of the Supreme Court authorities discussed hereinafter. Some provisions of A&C Act are in verbatim reproduction of corresponding provisions of UNCITRAL Modal Law e.g. sections 24 (3) and 26 (1) & (2) as noticed in para 35 of *Ssangyong Engineering and Construction v. NHAI*, AIR 2019 SC 5041, infra:

> *"35. Section 24 is a verbatim reproduction of Article 24(3) of the*

*UNCITRAL Model Law on International Commercial Arbitration ("UNCITRAL Model Law"). Similarly, Section 26(1) and (2) is a verbatim reproduction of Article 26 of the UNCITRAL Model Law. Subsection (3) of Section 26 has been added by the Indian Parliament in enacting the 1996 Act."*

## B. Difference Between 1940 & 1996 Acts and Section 5

History of arbitration in India, prior to A&C Act 1996, has been traced in paras 29 to 38 of *BALCo v. KATS,* 2012 (9) SCC 552 (CB), supra. In the statement of objects and reasons (SOR) of A&C Act (quoted extensively in paras 39 and 40 of *BALCO,* supra) it was observed that the Arbitration Act 1940 (repealed by it) had become outdated. The purpose of the new Act, as stated in para 3 of SOR, was to consolidate and amend the law relating to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards as also to define the law relating to conciliation and for matters connected therewith or incidental thereto. In para 4 of SOR nine objectives of the A&C Act were enumerated which included (iii) giving of reasons for the award by the arbitrator, (v) to minimise the supervisory role of Courts in the arbitral process and (vii) making award enforceable like a decree (it was a revolutionary change). Within 3 years of passing of A&C Act 1996 it was held by Supreme Court in *M/S Sundaram Finance v. M/S NEPC India* AIR 1999 SC 565 (para 9) that "The 1996 Act is very different from the Arbitration Act 1940. The provisions

of this Act have, therefore, to be interpreted and construed independently and in fact reference to 1940 Act may actually lead to misconstruction. In other words the provisions of 1996 Act have to be interpreted being uninfluenced by the principles underlying the 1940 Act. In order to get help in construing these provisions it is more relevant to refer to the UNCITRAL Model Law rather than the 1940 Act."

New Act (A&C Act) is a complete Code. Section 5 of it provides as under:

> "***5.Extent of judicial intervention. –*** *Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part."*

## C. <u>Applicability of Part 1 and 2; Domestic and International Commercial Arbitrations</u>

Part 1 of the Act consists of sections 2 to 43. According to Section 2(1)(f) International Commercial Arbitration is an arbitration where at least one of the parties is foreign national/body incorporate/ government/body of individuals. Even though domestic arbitration is not defined under the Act [domestic award is defined under Section 2(7)] however, by necessary implication it means an arbitration which is not international commercial arbitration i.e. where both the parties are Indian and arbitration takes place in India. In para 88 of *BALCO*, supra, it is referred as 'purely domestic arbitration'. Even if both the parties are Indian, they may choose a foreign country as place

of arbitration and it will be perfectly legal. The consequent award will be foreign award and not domestic award vide PASL Wind Solutions v. G.E. Power Conversion India, AIR 2021 SC 2517. Part 1 of the Act applies where the place of arbitration is in India [Section 2(2)]. Accordingly, part 1 applies to all domestic and international commercial arbitrations where the place of arbitration is in India. An award made in either of these situations is called domestic award. (Section 2(7) "An award made under this part shall be considered as a domestic award").Part 1 does not apply to foreign seated international commercial arbitrations. However, a contrary view was taken in *Bhatia International v. Bulk Trading S.A.* AIR 2002 SC 1432 (3J) followed in *Venture Global Engg. v. Satyam Computer Services* AIR 2008 SC 1061(2J). In Bhatia International the question was as to whether Indian Court, where cause of action arose, wholly or in part, could entertain pre arbitration temporary relief application u/s 9 of A&C Act in a foreign seated international commercial arbitration? The court held that entire Part 1 was applicable to such international commercial arbitrations. In Venture Global the award was given at London. For setting aside the said award suit/ application u/s 34 of A&C Act had been filed before a court in India, where part of cause of action had arisen, which was held to be maintainable by the Supreme Court. Both these authorities were over ruled by the Constitution Bench authority of *BALCO v. Kaiser Aluminium Technical Services Inc.* (2012) 9 SCC 552, supra, holding that if for an international commercial arbitration, place of arbitration is fixed outside India (foreign seated international commercial arbitration) then Indian Courts would not have any jurisdiction

even for interim matters (para 195). However, overruling was prospective (para 197). Through Amendment of 2015-16, in such situations, Indian Courts have been vested with power to take interim measures, before start of arbitration. A proviso has been added to Section 2(2) of the A&C Act which is as follows:

> *"Provided that subject to an agreement to the contrary, the provisions of sections 9, 27 and clause (b) of sub-section (1) and sub-section (3) of Section 37 shall also apply to international commercial arbitration, even if the place of arbitration is outside India, and an arbitral award made or to be made in such place is enforceable and recognized under the provisions of Part II of this Act."*

In *Mankastu Impex v. Airvisual*, AIR 2020 SC 1297 (3 judges) it was held that as the arbitration was international commercial arbitration and as place of arbitration in the MOU was Hong Kong hence Supreme Court under Section 11 (6) r/w 11(12) of the A&C Act could not appoint arbitrator. However, Delhi High Court had issued certain interim directions on application under Section 9 of A&C Act which were not objected by the Supreme Court. In that case Supreme Court also placed reliance upon different sub clauses of the relevant clause (17) of the MOU. Conversely, in *Perkins Eastman Architects DPC v. HSCC*, AIR 2020 SC 59 it was held that as lead member of the consortium company i.e. Applicant no. 1 was a firm having its

registered office in New York, it was international commercial arbitration hence Supreme Court, and not High Court, was competent to appoint arbitral tribunal under Section 11 (6) by virtue of Section 11(12).

Part 2 consists of sections 44 to 60 and deals with foreign awards particularly their enforcement in India. Both parts 1 and 2 are mutually exclusive. If one part applies to an arbitration/ award, other cannot apply (para 89 of BALCO, supra). However, the exception is the proviso added to section 2(2) through Amendment of 2015/2016, supra.

## D. Interim Award

Arbitral award includes an interim award [Section 2(1)(c)]. The arbitral tribunal may make an interim award on any matter with respect to which it may make a final award [Section 31(6)]. Deciding an issue amounts to making an interim award and application for setting that aside may also be filed under Section 34. In *M/s IFFCO v. M/s Bhadra Products* AIR 2018 SC 627 it has been held that deciding issue of limitation as preliminary issue, by the arbitrator holding the proceedings to be within time is an interim award and application under Section 34 for setting it aside is maintainable. However, in para 9 it was held that "Arbitral Tribunal should, therefore, consider whether there is any real advantage in delivering interim awards or in proceeding with the matter as a whole and delivering one final award, bearing in mind the avoidance of delay and additional expense."

If one of the respondents in an arbitration case before arbitral tribunal contends that it was not party to the agreement hence it has wrongly been impleaded

and prays for its deletion on the ground that the tribunal has got no jurisdiction to pass any order against it and the tribunal accepts the plea, such order is an interim award. It is an order u/s 16(2) and (3) of A & C Act and is appealable u/s 37(2)(a) vide *ONGC v. Discovery Enterprises AIR 2022 SC 2080*.

## CHAPTER - 2

## AMENDMENTS, APPLICABILITY OF 2015/16 AMENDMENT ON PENDING CASES (SECTION 26 OF AMENDING ACT)

The Act has been amended by the Parliament thrice; in 2015-16, 2019 and 2021.

As far as first amendment of 2015-16 is concerned, first an ordinance was passed (no. 9 of 2015) on 23.10.2015 which was later on replaced by Arbitration and Conciliation (Amendment) Act 2015, Act no. 3 of 2016 (herein after referred to as Amendment of 2015/16). The Amending Act was enforced w.e.f. 23.10.2015. It was comprehensive amendment containing 27 Sections and 4 Schedules. Section 26 of the Amendment Act deals with its applicability on pending proceedings, which is quoted below:

**26. Act not to apply to pending arbitral proceedings. -**Nothing contained in this Act shall apply to the arbitral proceedings commenced, in accordance with the provisions of section 21 of the principal Act, before the commencement of this Act unless the parties otherwise agree but this Act shall apply in relation to arbitral proceedings commenced on or after the date of commencement of this Act. (Underlining supplied for clarity).

By virtue of section 21 of the Principal Act arbitration/ arbitral proceedings commence on the date on which a request for the dispute to be referred to arbitration is received by the respondent.

Section 26 of the (Amending) Act no. 3 of 2016 was thoroughly examined in *BCCI v. Kochi Cricket* AIR

2018 SC 1549 and it was held that the section consists of two distinct parts, first part consists of underlined portion from the start till the word 'agree' and the rest, second part starts with the word 'but' and ends with the last word of the section. It was also held that the words 'arbitral proceedings' occurring in first part means proceedings before arbitral tribunal/ arbitrator but the same words occurring in second part refer to Court proceedings arising out of arbitral proceedings. It was therefore ultimately held that in case notice to refer the dispute to arbitration had been served upon the respondent before 23.10.2015, Amending Act 2016 would not apply to proceedings before arbitrator, unless parties agree otherwise. However, as far as Court proceedings are concerned (under Sections 34, 36 etc.) Amending Act 2016 would apply if Court proceedings commenced on or after 23.10. 2015, even though arbitration proceedings might have commenced (by serving notice, as per section 21) much earlier. Concluding sentence of para 25 is quoted below:

> *"The scheme of Section 26 is thus clear that the Amendment Act is prospective in nature, and will apply to those arbitral proceedings that are commenced, as understood by Section 21 of the Principal Act, on or after the Amendment Act, and to Court proceedings which have commenced on or after the Amendment Act came into force."*

As far as second amendment of 2019 is concerned, it's likely contents had been reported in the press much

earlier. The aforesaid BCCI case (decided on 15.3.2018) noticed the same in para 29 and its foot note. In para 56 Statement of objects and Reasons of Amending Act 2016 were quoted extensively emphasizing speedy disposal. In para 57, regarding proposed amendment it was observed in the beginning as follows:

> "57. The Government will be well advised in keeping the aforesaid statement of objects and reasons in the forefront, if it proposes to enact Section 87 on the lines indicated in the Governments' press release dated 7thMarch 2018. The immediate effect of the proposed section 87 would be to put all the important amendments made by the Amending Act (of 2015) on a backburner…" (Words and figures in bracket added for clarification. These are not there in the judgment)

Copy of the judgment was directed to be sent to Ministry of Law and Justice (Para 62).

In spite of the above, Arbitration and Conciliation (Amendment) Act 2019 (Act no. 33 0f 2019) was passed in the same form in which it had appeared in the press release. Section 13 and 15 of Amending Act 2019 are quoted below:

> "13. Insertion of new section 87. - After section 86 of the principal Act, the following section shall be inserted and shall be deemed to have been inserted

with effect from the 23rd October, 2015, namely:—

"87. *Effect of arbitral and related court proceedings commenced prior to 23rd October, 2015* - Unless the parties otherwise agree, the amendments made to this Act by the Arbitration and Conciliation (Amendment) Act, 2015 shall—

(a) 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 arbitral proceedings irrespective of whether such court proceedings are commenced prior to or after the commencement of the Arbitration and Conciliation (Amendment) Act, 2015;

(b) apply only to arbitral proceedings 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."

*15. Section 26 of Arbitration and Conciliation (Amendment) Act 2015 shall be omitted and shall be deemed to have been omitted with effect from the 23rd October, 2015."*

Both the sections completely obliterated what had been done by and held in BCCI case.

Both the sections (13 & 15) of the Amending Act 2019 were struck down as being arbitrary, violative of

Article 14 of the Constitution in Hindustan Const. Co. v. Union of India, AIR 2020 SC 122 (3 Judges). Concluding portion of para 51 is as follows:

> "For all these reasons, the deletion of Section 26 of the 2015 Amendment Act, together with the insertion of Section 87 into the Arbitration Act 1996 by the 2019 Amendment Act is struck down as being manifestly arbitrary under Article 14 of the Constitution of India."

Through 2019 Amendment, Arbitration Council of India has been sought to be established by inserting Part 1A to the Act containing sections 43A to 43M. Arbitral institution has also been recognized and defined. Section 11 has also been suitably amended. However, these provisions of 2019 Amendment [Section 2 (defining arbitral institution), Section 3 (amending Section 11of main Act) and Section 10 (inserting Part 1A)] have not yet been enforced. Rest of the provisions of Amendment Act 2019 have been enforced w.e.f. 30.8.2019. (As noticed in *BSNL v. M/s Nortel Networks,* AIR 2021 SC 2849). Section 43J and Eighth Schedule added by this amendment have been substituted and deleted respectively by Amendment Act No. 3 of 2021.

Through Arbitration and Conciliation (Amendment) Act of 2021 (Act no. 3 of 2021) enforced w.e.f. 4.11.2020, section 36 of A&C Act was amended. (See Chapter 9)

## CHAPTER – 3

## COURT, JURISDICTION and PLACE OF ARBITRATION

(SECTION 2(1), 20 and 42)

Court is defined under Section 2(1)(e) of A&C Act, as amended in 2015/16, as follows:

"Court" means ---

(i) in the case of an arbitration other than international commercial arbitration, the principal Civil Court of original jurisdiction in a district [1] [which shall include the Court of Additional District Judge where so assigned by District Judge], 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;

(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 the High Court;

[1] Portion within brackets [ ] added by U.P. Act no. 18 of 2019

Before the 2015/16 Amendment, for both types of arbitrations, domestic as well as international commercial arbitrations held in India, court was principal civil court of original jurisdiction.

In several States like U.P., High Court does not exercise ordinary original civil jurisdiction. Accordingly, in such states, for domestic arbitrations (where both parties are Indians), High Court will not be included in the definition of Court. However, for international commercial arbitration (where one of the parties is foreign national, government or entity or habitually NRI) Court means only the High Court concerned. Principal Civil Court of original jurisdiction in a district means District Judge. (vide *EX. EN. R.D.D. Panvel v. Atlanta Ltd.* AIR 2014 SC 1093, para 18, under A & C Act and *Messers Griesheim GMBH v. Goyal MG Gases* AIR 2022 SC 696, para 25).

As District Judge has to perform lot of administrative and other judicial functions hence matters under A&C Act particularly under Sections 34 and 36 remain pending for very long time. In order to give impetus to disposal of such matters U.P. has empowered Additional District Judges also to hear the matters under A&C Act.

If **Commercial Courts** at districts level have been constituted under Section 3 of Commercial Courts Act 2015 (C.C. Act in short) then by virtue of its Section 10(3) in most of the cases applications under A&C Act (e.g., under Section 34 & 36) are to be filed before Commercial Court and not D.J./A.D.J. Section 10 (3) of C.C. Act is as follows:

> "10. **Jurisdiction in respect of arbitration matters** – Where the subject matter of an

arbitration is a commercial dispute of a specified value and –

(3) If such arbitration is other than an international commercial arbitration, all applications or appeals arising out of such arbitration under the provisions of the Arbitration and Conciliation Act 1996 (26 of 1996) that would ordinarily lie before any principal Civil Court of original jurisdiction in a district (not being a High Court) shall be filed in and heard and disposed of by the Commercial Court exercising territorial jurisdiction over such arbitration where such Commercial Court has been constituted."

Specified value is defined under Section 2(1)(*i*) as follows:

> "Specified value" in relation to a Commercial Dispute shall mean the value of the subject matter in respect of a suit as determined in accordance with Section 12 which shall not be less than three lakh rupees or such higher value as may be notified by the Central Government."

Formula for determining specified value of the subject matter of the commercial dispute is provided under Section 12 of the C.C. Act and commercial dispute is defined under Section 2(1)(c) of the Act which contains 22 items including construction and infrastructure contracts, including tenders (VI) and partnership agreements (XV). A commercial dispute will remain commercial dispute even if one of the parties is

the State or any of its agencies or instrumentalities or a private body carrying on public functions (Explanation (b) to section 2(1)(c) of C.C. Act). However if the dispute is not covered by section 2(1)(c) then in spite of constitution of commercial court, matters under A & C Act will have to be heard by DJ/ADJ and not commercial court e.g. dispute pertaining to fair market value of land acquired by NHAI (see Chapter 6 ).

In U. P. through notification dated 31.10.2017 issued under section 3(1) of C. C. Act commercial courts have been constituted in 13 districts and rest of the districts (62) have been attached, for the said purpose, with nearby specified district having commercial court.

Territorial Jurisdiction of Court in respect of suit is determined in accordance with sections 16 – 20 C.P.C. For the purpose of A&C Act the most important provision is section 20(c) 'court within the local limits of whose jurisdiction the cause of action, wholly or in part, arises'. For some suits more than one court may have territorial jurisdiction and, in such situation, parties may validly confine the jurisdiction only to one of such courts.

A five judge Constitution Bench authority of Supreme Court in *Bharat Aluminium Co. V. Kaiser Aluminium,* 2012 (9) SCC 552, paras 95-100, has held that the Court of the district where arbitration proceedings are held (place of arbitration as per Section 20 of A&C Act infra) has also got the jurisdiction to entertain applications under A&C Act. If cause of action arises at place X and seat/place/situs of arbitration is at place Y, whether court at Y alone will have jurisdiction or courts at X and Y both will have concurrent jurisdiction? This is a vexed question and

not easy to answer. In this regard para 96 of BALCO, 2012, (C.B.), supra has caused some confusion and subsequent Supreme Court authorities of 2 and 3 judges have attempted to explain it. In para 96 of BALCO, after quoting section 2(1)(e), it was observed as follows:

> *"We are of the opinion; the term "subject matter of the arbitration" cannot be confused with "subject matter of the suit". The term "subject matter" in Section 2(1)(e) is confined to Part I. It has a reference and connection with the process of dispute resolution. Its purpose is to identify the courts having supervisory control over the arbitration proceedings. Hence, it refers to a court which would essentially be a court of the seat of the arbitration process. In our opinion, the provision in Section 2(1)(e) has to be construed keeping in view the provisions in Section 20 which give recognition to party autonomy. Accepting the narrow construction as projected by the learned counsel for the appellants would, in fact, render Section 20 nugatory. In our view, the legislature has intentionally given jurisdiction to two courts i.e. the court which would have jurisdiction where the cause of action is located and the courts where the arbitration takes place. This was necessary as on many occasions the agreement may provide for a seat of*

*arbitration at a place which would be neutral to both the parties. Therefore, the courts where the arbitration takes place would be required to exercise supervisory control over the arbitral process. For example, if the arbitration is held in Delhi, where neither of the parties are from Delhi, (Delhi having been chosen as a neutral place as between a party from Mumbai and the other from Kolkata) and the tribunal sitting in Delhi passes an interim order under Section 17 of the Arbitration Act, 1996, the appeal against such an interim order under Section 37 must lie to the Courts of Delhi being the Courts having supervisory jurisdiction over the arbitration proceedings and the tribunal. This would be irrespective of the fact that the obligations to be performed under the contract were to be performed either at Mumbai or at Kolkata, and only arbitration is to take place in Delhi. In such circumstances, both the Courts would have jurisdiction, i.e., the Court within whose jurisdiction the subject matter of the suit is situated and the courts within the jurisdiction of which the dispute resolution, i.e., arbitration is located."*

Thereafter the point was considered in the following authorities: -

1. Enercon (India) v. Enercon GMBH, AIR 2014SC 3152

2. Reliance Industries v. Union of India, AIR 2014 SC 3218
3. Harmony Innovation Shipping v. Gupta Coal India, AIR 2015 SC 1504
4. Indus Mobile v. Datawind Innovations, AIR 2017 SC 2105
5. M/s Emkay Global Financial Services v. Girdhar Sondhi, AIR 2018 SC 3894
6. Union of India v. Hardy Exploration and Production, AIR 2018 SC 4871 (3J) Held per incuriam in BGS at serial no. 8, infra
7. Brahmani River Pellets v. K. Industries AIR 2019 SC 3658
8. **BGS SGS Soma JV. v. NHPC 2020 (4) SCC 234 (3j)**
9. Mankastu Impex v. Airvisual, AIR 2020 SC 1297 (3j)
10. BBR (India) V. S.P. Singla Construction, AIR 2022 SC 2673

Authorities at serial nos.4, 5, 7, 8 and 10 deal with domestic arbitrations.

Most of these authorities have been discussed in an Article by Vaibhav Niti titled as 'Seat of Arbitration and its relations with jurisdiction of Courts' published in AIR 2021 journal section on page 199.

After discussing almost all the earlier authorities it was held in para 38 of BGS, supra at serial no. 8 as follows:-

> *"38. A reading of paragraphs 75, 76, 96, 110, 116, 123 and 194 of BALCO (supra) would show that where parties have selected the seat of arbitration in their agreement, such selection would*

*then amount to an exclusive jurisdiction clause, as the parties have now indicated that the Courts at the "seat" would alone have jurisdiction to entertain challenges against the arbitral award which have been made at the seat. The example given in paragraph 96 buttresses this proposition, and is supported by the previous and subsequent paragraphs pointed out hereinabove. The BALCO judgment (supra), when read as a whole, applies the concept of "seat" as laid down by the English judgments (and which is in Section 20 of the Arbitration Act, 1996), by harmoniously construing Section 20 with Section 2(1)(e), so as to broaden the definition of "court", and bring within its ken courts of the "seat" of the arbitration."*

Thereafter, in para 39 some contradiction in para 96 of BALCO, 2012 (CB), supra was noticed in the following manner:

"*39. However, this proposition is contradicted when paragraph 96 speaks of the concurrent jurisdiction of Courts within whose jurisdiction the cause of action arises wholly or in part, and Courts within the jurisdiction of which the dispute resolution i.e. arbitration, is located.*

As held in the opening sentence of para 97 of BALCO (CB), supra "The definition of Section 2 (1)(e) includes subject-matter of the Arbitration to give jurisdiction to the Court where the arbitration takes place, which otherwise would not exist" (underlining supplied).

A careful reading of all the above authorities including BALCO makes it clear that if place of arbitration is provided under the agreement or is otherwise agreed upon by the parties, Court at that place **alone** will have exclusive jurisdiction as it would be one of two or more Courts having concurrent jurisdiction (along with Court(s) where cause of action arose) and by virtue of section 28 of the Contract Act parties are at liberty to confer exclusive jurisdiction on one of two or more Courts which may have concurrent jurisdiction. However, if place of arbitration is not provided in the agreement or is not otherwise agreed upon by the parties but is fixed/ determined by the arbitrator under Section 20(2) of A&C Act then Court at such place will have concurrent jurisdiction along with the Court at the place where cause of action arose. This position is strengthened by para 100 of BALCO, supra where question of jurisdiction in respect of international commercial arbitration is considered. Penultimate sentence of the para is as follows:-

> *"**Only** if the agreement of the parties is construed to provide for the "seat"/"place" of arbitration being in India- would Part – 1 of the Arbitration Act 1996 be applicable."*(Word **only** is shown in bold letter in the original judgment itself.)

If in the agreement no place of arbitration is provided, then Section 9 Application at pre-arbitration stage can be filed only at a place where cause of action arises. (See also para 59 of BGS, supra) Relevant paragraphs of BALCO (95 to 100) form part of subheading "party autonomy". Same words are stated in para 44 of BGS, supra. On the basis of party autonomy parties are at liberty to provide exclusive jurisdiction to the Court of a particular place while choosing that place as place of arbitration. However, arbitral tribunal cannot confer exclusive jurisdiction upon the Court of a particular place by holding the proceeding of arbitration at that place/ determining the said place as place of arbitration. In that contingency Court at the place determined to be place of arbitration by the arbitral tribunal will have concurrent jurisdiction along with the courts where cause of action arose. In Indus Mobile, supra, Mumbai was designated as seat of arbitration in the agreement itself. In para 50 of BGS it is stated that "In fact, subsequent Division Benches of this Court have understood the law to be that once the seat of arbitration is chosen, it amounts to an exclusive jurisdiction clause, insofar as the Courts at that seat are concerned." This observation is confined to choosing the seat of arbitration by the parties and not the arbitrator.

Place of Arbitration (Section 20)

Place of arbitration is provided under Section 20 of A&C Act which is quoted below:

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

*(2) Failing any agreement referred to in sub-section (1), the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties.*

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

Place of arbitration is sometime referred as seat or situs also. It has been termed as centre of gravity in various above authorities including BALCO, 2012(CB)(para 75). However, as is evident from Section 20(3) some of the arbitration proceedings may be held at other places also which are termed as venue. The question that what is meant by place of arbitration and how it is distinct from venue / other places also becomes complicated in some cases. It is obvious that any venue other than place/ seat of arbitration does not confer jurisdiction on the Court of the said place. Place/seat of arbitration once fixed does not change even though venue may change. In *BBR v. S.P. Singla Construction,* AIR 2022 SC 2673 an arbitrator was

appointed by the High Court who started arbitration proceedings at Panchkula Haryana. Pleadings were exchanged there. Thereafter the said arbitrator withdrew from the arbitration and High Court appointed another arbitrator. The new arbitrator held all other proceedings at Delhi. However, the new arbitrator did not pass any specific order changing the place of arbitration. The Supreme Court held that place of arbitration remained Panchkula and courts at Delhi had no jurisdiction to entertain any application under A&C Act. Same thing has been held in para 100 of BALCO (CB). In para 44 of BGS, supra it was held that A&C Act has accepted the territoriality principle in section 2(2) following UNCITRAL Model Law. In the said authority tests to determine "seat" have been given in para 60 onward. In BALCO, supra, also it was held that territorial principle has been adopted by A&C Act (para 72). However, the use of any particular word e.g. venue in the agreement is not conclusive. In Brahamani River at serial no. 7, supra the agreement provided that arbitration shall be under A&C Act and the venue of arbitration shall be Bhubneshwar. The Supreme Court held that this amounted to fixation of seat/place of arbitration and arbitrator could be appointed u/s 11(6) of A&C Act by Orissa High Court and not by Madras High Court where cause of action arose. Same thing has been stated in para 82 of BGS, supra in the last sentence of which it was observed that said venue became seat for the purposes of arbitration. Place of arbitration is also referred as juridical seat.

If Courts of more than one district have territorial jurisdiction to hear application under A&C Act then by virtue of its section 42, infra, the Court where first application is filed will have exclusive jurisdiction to

entertain and hear all subsequent applications either by the same party or by the other party and no other Court will have such jurisdiction. This is called the principle of fastest finger first.

> *"**42.Jurisdiction.** —Notwithstanding anything contained elsewhere in this Part or in any other law for the time being in force, where with respect to an arbitration agreement any application under this Part has been made in a Court, that Court alone shall have jurisdiction over the arbitral proceedings and all subsequent applications arising out of that agreement and the arbitral proceedings shall be made in that Court and in no other Court."*

In *State of West Bengal v. Associated Contractors,* AIR 2015 SC 260 (3 J) it has been held that firstly the Court where first application was filed must have jurisdiction and secondly even if the first application was under Section 9 for interim relief before start of arbitration, still subsequent applications like Section 34 application will have to be filed there. However, it was clarified that High Court or Supreme Court while appointing arbitrator under Section 11(6) or the judicial authority/Civil Court which refers the parties to arbitration under Section 8 is not Court as defined under section 2(1)(e) of A&C Act, hence, subsequent applications are not to be filed before such Courts as they are not covered by section 42.

## CHAPTER – 4

## ROLE OF COURT, SECTION WISE

1. Section 9: Interim measures, etc., by Court (See Chapter 5)
2. Section 13(5) and (6)
3. Section 14(2). Decision regarding termination of mandate of arbitrator. See also Chapter 10 C
4. Section 17. Interim order passed by arbitrator. Same powers as of Court. To be deemed order of Court and enforceable as such under CPC. (See Chapter 5 also).
5. Section 27. Court assistance in taking evidence by arbitrator. In *Delta Distilleries v. United Spirits*, AIR 2014 SC 113, the arbitral tribunal directed one of the parties to produce Sales Tax Assessments. As the needful was not done hence the tribunal permitted the other side to file application under Section 27 of A&C Act before Court for production of the requisite documents. The application was filed and the court directed the other side to produce the assessments. The order was upheld by the Supreme Court. It was observed by the Supreme Court that the impugned order could not be faulted on the ground that arbitrator, instead of permitting filing of application under Section 27, should have drawn adverse inference for non production of documents.
6. Section 29A. Award is to be made by the arbitrator within one year or within a further period of 6 months if parties give consent. Under sub-sections (4) to (9) the Court has been given power of further extension of time, beyond one and a half year, on

the application of any of the parties which may be filed even after expiry of the period.

7. Section 31A. Regime of cost. This section deals with costs which may be awarded by Court or arbitral tribunal. Powers of both in this regard are exactly same.
8. Section 34. Setting aside of arbitral award by Court (See chapter 8)
9. Section 36. Enforcement of award (See chapter 9)
10. Section 37. Appealable orders.

    (2) Appeal shall also lie to a court from an order of the arbitral tribunal-

    (a) accepting the plea referred to in sub-section (2) or sub-section (3) of section 16; or

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

    As by virtue of Section 43 of Arbitration and Conciliation Act 1996, Limitation Act applies to arbitration proceedings hence delay in filing appeal may be condoned on sufficient cause under section 5, Limitation Act.

    Section 5 of Arbitration Act clearly states that 'no judicial authority shall interfere except where so provided in this part (Sections 2 to 43). It means that the Act is complete code. Accordingly, no **cross objections by the respondent in appeal** may be filed, vide MTNL v. Applied Electronics 2017 (2) SCC 37.

11. Section 39. Under sub-section (1), arbitral tribunal has got a lien on the award for any unpaid cost. If the tribunal exercises such right then under sub-sections (2) and (3) Court can issue suitable directions as provided there under, after hearing the tribunal. Under sub-section (4) the court may

make appropriate order respecting (unpaid) costs of arbitration where the award does not contain sufficient provision concerning them.

If the arbitral tribunal/arbitrator is demanding excessive, unreasonable fees any party can approach court to review the same u/S 39(2) vide *ONGC v. Afcons Gunanusa JV, AIR 2022 SC 4413 (3J).* In this case it has also been held as to how appropriate fees of arbitrator is to be determined/fixed.

12. Section 42. Jurisdiction (See Chapter 3)
13. Limitation. See item no. 10, supra

## CHAPTER – 5

## SECTION 9 AND 17(2); INTERIM MEASURES BY COURT/ARBITRATOR

Section 17 deals with power of the arbitral tribunal to pass interim orders during pendency of proceedings before it. Section 9 deals with similar power of Court. Section 9 may be and is normally invoked before the arbitral tribunal in Constituted.

Sub-sections (2) and (3) have been added in Section 9 by Amendment of 2015/2016 which are as follows:

> "(2) Where, before the commencement of the arbitral proceedings, a Court passes an order for any interim measure of protection under sub-section (1), 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.
>
> (3) 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."

Section 17 has also been amended through same amendment of 2015-16

Section 17 before its amendment by Amendment Act of 2015-16 was as follows:

> "(1) unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order a party to take any interim measure

of protection as the arbitral tribunal may consider necessary in respect of the subject-matter of the dispute.

(2) the arbitral tribunal may require a party to provide appropriate security in connection with a measure ordered under sub-section (1)"

Under the un-amended provision of Section 17 firstly power to grant interim relief by the arbitral tribunal was quite limited (vide *M.D. Army Welfare Housing Organisation v. Sumangal Services Pvt. Ltd.* AIR 2004 SC 1344 para 56) in comparison to similar power of Court under Section 9; secondly there was no provision of enforcement of interim order passed by arbitral tribunal (vide same para 56 of the aforesaid authority of M.D.A.) while interim order passed by Court under Section 9 could be enforced under Order 39 Rule 2A CPC; thirdly, even during pendency of proceedings before arbitrator/ arbitral tribunal, the Court had unfettered power to grant interim relief, and this was quite unnatural in the sense that main dispute and interim matters simultaneously could be considered by different forums; fourthly interim relief obtained by a party under Section 9 could be made indefinite by him by not initiating arbitration proceedings. (As far as fourthly is concerned the Supreme Court in *Firm Ashok Traders v. G.D. Saluja* AIR 2004 SC 1433 held that if arbitration proceedings were not commenced within reasonable time, interim order passed by Court under Section 9 could be recalled.) To remove these four anomalies both the sections were amended in 2015-16. Now powers to grant interim relief of both Court as well as arbitral tribunal are equal. Sub-section (1) (i) and (ii) (a) to (e) of

both the sections 9 and 17 are word by word same. Both are part of one scheme and mirror images of each other (vide *Amazon.Com NVIHLLC v. Future Retail* AIR 2021 SC 3723, paras 20 and 34). By virtue of its newly added sub-section (2), infra, interim order passed under Section 17 is deemed to be order of the Court and enforceable under CPC (O. 39 R. 2A) by the Court like its own order.

> *"17(2). Subject to any order passed in an appeal under Section 37, any order issued by the arbitral tribunal under this Section shall be deemed to be an order of the Court for all purposes and shall be enforceable under the Code of Civil Procedure 1908 ( 5 of 1908), in the same manner as if it were an order of the court."*

In Amazon, supra, it has been held in paras 54-56 that both the interim orders i.e. either passed by arbitral tribunal under Section 17 or by Court under Section 9 are to be enforced by the Court in accordance with O. 39, R 2-A CPC. In para 74 it has further been held that order of enforcement is not appealable under Section 37. It has also been held in this authority that an "award" delivered by an Emergency Arbitrator under the Arbitration Rules of the Singapore International Arbitration Centre is an order under Section 17(1) of A&C Act and can be enforced by Court in India.

Concurrent powers of arbitrator and Court to grant temporary relief were checked to a great extent by inserting sub-section (3) to Section 9 by Amending Act of 2015-16. Now, after constitution of arbitral tribunal,

application for temporary relief may be entertained by Court in very rare cases where remedy under Section 17 is not efficacious. Remedy before arbitral tribunal may not be efficacious if the tribunal for some reasons is not immediately available vide *Arcelor M.N. Steel v. Essar Bulk Terminal* AIR 2021 SC 4350, 3 Judges (paras 96 and 100). In appropriate cases Court may make the interim order operative only for short, fixed period and direct the party concerned to approach the arbitral tribunal under Section 17. (Para 107 of Arcelor, supra). Section 9(3) uses the word 'entertain'. In *Arcelor*, *supra*, it has been held that entertain means consider / hear and if arguments have already been heard and order reserved, order can and shall be pronounced even if mean while arbitral tribunal has been constituted. Similar will be the position if hearing/ consideration is in progress when arbitral tribunal is constituted. (Paras 93 to 95).

To cure fourth anomaly sub-section (2) to section 9 has been added by Amendment of 2015/16 making it mandatory to commence arbitration proceedings (by giving notice under Section 21) within ninety days from the date of the interim order or such further time as Court may determine.

In view of the above anomalies a vast majority of applications for temporary reliefs were being filed before Courts instead of arbitrators. One of the purposes of the 2015-16 amendments to Sections 9 and 17 was to relieve the Courts (vide *Amazon*, supra, para 102).

The most important and most invoked provision of the sections is first part of (1)(ii) (d) "Interim Injunction".

From an order of arbitral tribunal granting or refusing to grant an interim measure under Section 17, appeal lies to Court under Section 37 (2) (b).

After the Amendment of 2015-16 power regarding interim measures 'after the making of the award but before it is enforced' was concurrent. Both, the arbitral tribunal as well as Court could exercise the same. However, through Amendment of 2019 this power of the tribunal has been taken away. Now, at such stage, only Court has got the requisite power.

Whether a 'Court' in India has got jurisdiction to grant interim relief in case of International Commercial Arbitration if place of arbitration is outside India? Section 2(2) before its amendment, in an unqualified manner provided that part 1 (Sections 2 to 43) shall apply where the place of arbitration is in India. However, in *Bhatia International v. Bulk Trading S.A.,* AIR 2002 SC 1432 it was held that in case of International Commercial Arbitration even if place of arbitration (under the agreement) was outside India, Court concerned in India could grant interim relief under Section 9. In *BALCO v. Kaiser Aluminium Tech Services,* 2012 (9) SCC 552, Bhatia International was overruled prospectively and it was held that in such situation Indian Courts had no jurisdiction to grant interim relief. However, through amendment of 2015-16 a proviso has been added to Section 2(2). Now the sub-section is as follows:

> "*(2) This Part shall apply where the place of arbitration is in India:*
> *Provided that subject to an agreement to the contrary, the provisions of sections 9, 27 and [clause (b)] of sub-*

*section (1) and sub-section (3) of section 37 shall also apply to international commercial arbitration, even if the place of arbitration is outside India, and an arbitral award made or to be made in such place is enforceable and recognized under the provisions of Part II of this Act."*(Portion in brackets [] added in 2019)

Accordingly, *Bhartia International*, supra, stands restored and *BALCO*, supra, is undone only in respect of temporary relief under Section 9.

Same principles which govern grant of temporary injunction under Order 39 Rules 1 & 2 CPC also govern Sections 9 & 17 i.e. *prima facie* case, balance of convenience and irreparable loss & injury. In *State of Orissa v. M.G. Rungta,* AIR 1952 SC 12 (CB) it has been held in para 6 that *"Interim relief can be granted only in aid of and as ancillary to the main relief which may be available to the party on final determinations of his rights in a suit or proceeding."* It was quoted with approval in the above Constitution Bench authority BAL*CO v. KATS,* 2012 (9) SCC 552 (para 176), dealing with Section 9 of A&C Act. In *BAL Co*, it was also quoted from *Cotton Corp. v. U.I. Bank,* AIR 1983 SC 1272 (para 10) 'it is inconceivable that where the final relief cannot be granted, in the terms sought for because the statute bars granting such a relief ipso facto the temporary relief of the same nature cannot (sic. can) be granted.' If a suit/relief is barred by some statute e.g. Section 41 Specific Relief Act or Section 69 Partnership Act, interim relief can never be granted in a suit for such relief.

In U.P. through U.P. Act No. 57 of 1976 (w.e.f. 1.1.1977) a proviso has been inserted in O 39 R 2(2) CPC, containing several clauses, prohibiting grant of injunction in the enumerated cases. Clause (a) to the proviso is "where no perpetual injunction could be granted in view of the provisions of Section 38 and Section 41 of the Specific Relief Act 1963 (47 of 1963)". However, in Firm *Ashok Traders v. G.D. Saluja,* AIR 2004 SC 1433 it was held that even if final relief by the arbitrator could not be granted in view of bar of Section 69 Partnership Act (firm being unregistered) still interim relief under section 9 A&C Act could be granted by the Court. However, regarding this view judges themselves observed in para 12, infra, that it was *prima facie* opinion:

> *"12. In our opinion, which we would term as prima facie the bar enacted by Section 69 of the Partnership Act does not affect the maintainability of an application under Section 9 of A&C Act."*

However in *M/s Arvind Constructions v. M/s Kalinga Mining Corp.* AIR 2007 SC 2144 the Court dissented from the above *prima facie* view and held in para 15 "*We are not inclined to answer that question finally. But we may indicate that we are prima facie inclined to the view that exercise of power under Section 9 of the Act must be based on well recognized principles governing the grant of interim injunction.....*" The Court approved the view of the High Court that main relief being barred by Specific Relief Act, interim relief of status quo could not be granted by District Judge

under Section 9 of A&C Act. Same view, without noticing either of these authorities was taken in *Adhunik Steels. V. O.M. & Minerals,* AIR 2007 SC 2563 and it was held that if final relief of injunction was barred by Section 38 or 39 of Special Relief Act then no interim relief under Section 9 of A&C Act could be granted.

It is important to note that through amendment of 2018 a clause (ha) has been added to section 41 of Specific Relief Act which is as follows:

> "*41. An injunction cannot be granted-*
> *(ha) If it would impede or delay the progress or completion of any infrastructure project or interfere with the continued provision of relevant facility related thereto or services being the subject matter of such project."*

(Quoted in *M/s N.G. Projects v. V.K. Jain,* AIR 2022 SC 1531 para 19 at page 1541)

In *Evergreen Land Mark v. John Tinson & Co.,* AIR 2022 SC 1930 the facts were that in a dispute pending before arbitral tribunal between landlord and tenant with respect to termination of lease agreement, owners/ landlords filed application under Section 17 and allowing the same the tribunal directed the tenant to deposit rent from March 2020 to December 2021. Tennent was running bar and restaurant in the premises. There was a force majeure clause in the agreement. The tenant invoked the said clause due to Lockdowns imposed to check COVID-19 pandemic. The Supreme Court modified the order of the tribunal and

'directed the appellant (tenant) to deposit the entire rental amount for the period other than the period during which there was complete lockdown (due to Covid-19) i.e.22.3.2020 to 9.9.2020 and 19.4.2021 to 28.8.2021 subject to ultimate outcome of the Arbitration Proceedings'(para 7).

It has been held in paras 172-193 of *BALCO*, supra, that a suit for injunction (with temporary injunction application) even for the limited purpose of restraining the respondent from dissipation of assets before start/ conclusion of arbitration is not maintainable.

In two applications under Section 9 of A&C Act, at pre reference stage, between same parties, Commercial Division of Bombay High Court directed the respondent either to deposit Rs. 47.41 Crore and Rs. 35.5 Crore with the Senior Master of the High Court or in the alternative furnish Bank Guarantee for the entire amount along with interest. Supreme Court fully approved the order in Essar House Private Limited v. Arcellor Mittal Nippon Steel Limited, AIR 2022 SC 4249. In Para 49 it has been held as follows:

> *"49. If a strong prima facie case is made out and the balance of convenience is in favour of interim relief being granted, the Court exercising power under Section 9 of the Arbitration Act should not withhold relief on the mere technicality of absence of averments, incorporating the grounds for attachment before judgment under Order 38 Rule 5 of the CPC."*

## CHAPTER – 6

## STATUTORY ARBITRATION

Arbitration is normally contractual, forming part of a contract between two parties. However sometimes arbitration is statutory also, as defined in Section 7(1) of A & C Act, infra:

> *"7. Arbitration agreement. — (1) In this Part, "arbitration agreement" means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not."*

Section 2 (4) infra applies almost entire Part 1 on such arbitrations.

> *"2 (4) This Part except sub-section (1) of section 40, sections 41 and 43 shall apply to every arbitration under any other enactment for the time being in force, as if the arbitration were pursuant to an arbitration agreement and as if that other enactment were an arbitration agreement, except in so far as the provisions of this Part are inconsistent with that other enactment or with any rules made there under."*

One of the instances of statutory arbitration is provided under Section 3G (5) and (6) of **National Highways Act 1956**. Under this Act and National Highways Authority of India (NHAI) Act 1988 land may be acquired for NHAI for the purposes of Highways. For such acquired land compensation is determined by the competent authority under Section 3G (1) and (2) of the 1956 Act. It is provided under sub-section (5) that if the compensation determined by competent authority is not acceptable either to the land holder or NHAI, the amount shall be determined by the arbitrator to be appointed by Central Government on the application by either of the parties. Thereafter, it is provided under sub-section (6) that

> "*Subject to the provisions of this Act, the provisions of the Arbitration and Conciliation Act 1996 (26 of 1996) shall apply to every arbitration under this Act.*"

Accordingly, application before Court under Section 34 of the Arbitration and Conciliation Act 1996 for setting aside award passed under section 3G (5) of National Highways Act 1956 is maintainable and is usually filed.

Exactly similar is the position under Section 20 (F)(6)&(7), chapter 14A, added in 2008 in Railways Act 1989.

The other instance is arbitration under **Micro, Small and Medium Enterprises Development Act 2006** (MSMED Act, in short). Under section 18(3) of this Act it is provided that on failure of Conciliation, the Micro and Small Enterprises Facilitation Council shall

either itself take up the dispute for arbitration or refer it to any institution or center providing alternate dispute resolution services for such arbitration and the provisions of A & C Act 1996 shall then apply to the dispute as if the arbitration was in pursuance of an arbitration agreement referred to in Section 7(1) of A&C Act. Section 19 of MSMED Act provides that no application etc. to set aside the award shall be entertained unless the applicant (not being a supplier) deposits 75% of the awarded amount. In *M/s Silpi Industries v. Kerala SRTC,* AIR 2021 SC 5487, after quoting sections 5 to 19 of MSMED Act it has been held in para 18 that by virtue of Section 43 of A&C Act (Sec. 43(1) "The Limitation Act 1963 shall apply to arbitrations as it applies to proceedings in Court") provisions of Limitation Act 1963 will apply to the arbitrations covered by Section 18(3) of MSMED Act of 2006.

Even though under Section 2(4) of A&C Act, supra, applicability of Section 43 (applying Limitation Act) is excepted but as section 18(3) of MSMED Act applied provisions (all the provisions) of A&C Act to arbitrations, independently of Section 2(4) of A&C Act, hence, section 43 of A&C Act and consequently Limitation Act will apply to arbitration proceedings under MSMED Act. In para 18 of M/S *Silpi Industries,* supra, reliance was placed upon *A.P. Power Coordination Committee v. L.K. Power,* AIR 2016 SC 1925, on the basis of which the High Court had passed the impugned order. In *A.P.PCC* it was held that Limitation Act did not ipso facto, or by virtue of Section 175 of Electricity Act 2003, apply to the proceedings before the Commission under Electricity Act 2003 (para 28). However it was further held that arbitration

proceedings before the Commission or on its reference for recovery of amount which had already become time barred (suit for same had become time barred) were not maintainable as the Electricity Act does not create a right to recover time barred dues (para 29). It was also held that in appropriate case a specified period may be excluded on account of principle underlying statutory provisions like Section 5 or 14 of the Limitation Act (para 30). Accordingly time consumed in the application under Section 11(6) of A & C Act before High Court was excluded.

In the aforesaid authority of *M/S Silpi Industries, 2021,* it has also been held that even though under section 17 & 18 MSMED Act claim may be made only with respect to the amount which the buyer is liable to pay but in arbitration proceedings initiated there under, buyer may file counter claim regarding deficiency in service rendered or goods supplied by supplier, as counter claim under A&C Act is permissible and after commencement of arbitration proceedings under MSMED Act by supplier, buyer can not initiate independent arbitration proceedings against supplier, even if there is arbitration agreement between them.

In para 24 of*M/S Silpi* it was ultimately observed "For the aforesaid reasons and on a harmonious construction of section 18(3) of the 2006 Act and section 7(1) and section 23(2A) of the 1996 Act, we are of the view that counter claim is maintainable before the statutory authorities under MSMED Act."

In para 23 three differences between MSMED Act and A&C Act were noticed (one of the differences being condition of deposit of 75% of awarded amount if award is challenged by buyer) and it was held that "MSMED

Act being a special statute will have an overriding effect vis-à-vis A & C Act 1996 which is a general Act."

Condition of pre deposit of 75% of awarded amount u/s 19 of MSMED Act while challenging the award under Section 34 of A&C Act has been held to be mandatory in *Gujarat SDM Authority v. Aska Equipments* 2022 (1) SCC 61 and *M/S Tripathi Steels v. S.I. Component,* AIR 2022 SC 1939 also. Section 86 (1) (f) of **Electricity Act 2003** is almost similarly worded as Section 18(3) of MSMED Act. While enumerating the functions of State Commission, it is provided in clause (f) "adjudicate upon the disputes between the licensees and generating companies and to refer any dispute for arbitration." In the following authorities it has been held that Electricity Act being special law, it will prevail upon A&C Act which is general law, to the extent of inconsistency i.e. in the matter of method of appointment of arbitrator. Ultimately, it was held that High Court under Section 11(6) of A&C Act had no jurisdiction to appoint arbitrator.

1. C.G.M.(IPC) M.P. Power Trading Corporation v. Narmada Equipment, AIR 2021 SC 2337 (3j)
2. Gujarat Urja Vikas Nigam v. Essar Power, AIR 2008 SC 1921
3. Hindustan Zinc v. Ajmer V.V. Nigam, 2019 (17) SCC 82 (3j)
4. NHAI v. Sayedabad Tea Company 2020 (15) SCC 82

In the first authority of CGM (2021) it was also held that even if such objection was not raised at an earlier available occasion still it could subsequently be raised as it pertained to jurisdiction.

However, other (not inconsistent) provisions of A&C Act apply to statutory arbitrations also. For

example, award under Electricity Act or SMED Act may be challenged only through application under Section 34 of A&C Act before Court (D.J./A.D.J./ Comm. Court) with the rider that award under MSMED Act may be challenged by buyer only on deposit of 75% of the awarded amount as per section 19 of the said Act.

In *State of Gujarat v. Amber Builders*, AIR 2020 SC 454, interpreting **Gujarat Public Works Contracts Disputes Arbitration Tribunal Act, 1992** it has been held that Sections 9 and 34 of A&C Act do not apply to such arbitrations as by virtue of Section 13 of Gujarat Act jurisdiction of Civil Court in such matters is barred, except as provided under Section 12 thereof. Section 12 provides that revision against award of the Tribunal may be entertained by the High Court on the grounds mentioned therein. However, it was held that section 17 of A&C Act, not being inconsistent with any of the provisions of 1992 Act, arbitral tribunal could grant interim relief.

**Section 89 C.P.C.,** inserted in 1999 and enforced w.e.f. 1.7.2002 is an instance of statute sponsored / court encouraged contractual arbitration. Relevant portion of the Section is quoted below:

> *"**89. Settlement of disputes outside the Court.** – (1) Where it appears to the Court that there exist elements of a settlement which may be acceptable to the parties, the Court shall formulate the terms of settlement and give them to the parties for their observations and after receiving the observations of the parties, the Court may reformulate the*

*terms of a possible settlement and refer the same for-*
*(a) Arbitration*
*(2) Where a dispute has been referred –*

*(a) for arbitration or conciliation, the provisions of the Arbitration and Conciliation act, 1996 (26 of 1996) shall apply as if the proceedings for arbitration or conciliation were referred for settlement under the provisions of that Act."*

In *Kerala SEB v. K.E .Kalathil,* AIR 2018 SC 1351 (paras 34-41), after referring to *Afcons Infrastructure v. C.V. Construction Co.,* 2010 (8) SCC 24 and *Shailesh Dhariyawan v. M.B. Lulla*, 2016 (3) SCC 6192 it has been held that under Section 89 C.P.C. dispute may be referred by Court to arbitration only on joint application or joint affidavit of both the parties and not merely on the statements of their counsel.

Some more instances of statutory arbitrations are provided in *BALCO v. KATS,* 2012 (9) SCC 552 (C.B). After referring to Section 2(4) and (5) it was observed in last 3 sentences of para 84 as follows:

*"The two sub-sections merely recognize that apart from the arbitrations which are consensual between the parties, there may be other types of arbitrations, namely, arbitrations under certain statutes like Section 7 of the Indian Telegraph Act, 1886; or bye-*

*laws of certain Associations such as Association of Merchants, Stock Exchanges and different Chamber of Commerce. Such arbitrations would have to be regarded as covered by Part I of the Arbitration Act, 1996, except in so far as the provisions of Part I are inconsistent with the other enactment or any rules made there under. There seems to be no indication at all in Section 2(4) that can make Part I applicable to statutory or compulsory arbitrations, which take place outside India."*

## CHAPTER – 7

## AGREEMENT, JURISDICTION AND DECISION OF ARBITRATOR THEREUPON

(SECTIONS 7 AND 16)

Sine qua non/ condition precedent for initiation of arbitral proceedings and applicability of the A&C Act is existence of an arbitration agreement/ clause, except where arbitration is statutory (see Chapter 6)

Section 7 defines Arbitration agreement. According to its sub-section (1) it is an agreement to submit to arbitration all or certain disputes. Sub-sections (2) and (5) are quoted below:-

> "*(2) An arbitration agreement may be in the form of an arbitration clause in contract or in the form of a separate agreement.*
>
> *(5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract."*

When a clause in an agreement can be said to contain requisite provision of arbitration? This question has been considered in various authorities of Supreme Court including following:

1A. State of U.P. v. Tipper Chand, AIR 1980 SC 1522 (3J) (No)

1. Rukmani Bai Gupta, v. Collector, Jabalpur, AIR 1981 SC 479 (Yes)
2. K K Modi v. K N Modi, AIR 1998 SC 1297 (No)
3. Bihar State Mineral Development Corporation v. Encon Builders, AIR 2003 SC 3688 (No)
4. Jagdish Chander v. Ramesh Chander, 2007 (5) SCC 719 (No)
5. Karnataka Power Transmission Corporation v. Deepak Cables, AIR 2014 SC 1626 (No)
6. Enercon v. Enercon GMBH, AIR 2014 SC 3152 (3J) (Yes)
7. Babanrao Rajaram Pund v. M/s Samarth Builders and Developers, AIR 2022 SC 4161 (Yes), authorities at serial nos. 1 to 6 considered in this case.

The thrust of the authorities is that no particular form or words are required to be used and the intention is to be gathered from the whole clause. The words 'decision shall be final' or their absence is not conclusive. In the State of U.P. (Serial No. 1A) the relevant clause of the agreement provided that on several specified matters decision of Superintending Engineer shall be final, conclusive and binding. It was held that this did amount to arbitration clause. Same view was taken in *M/s P.D. Reddy Complex v. Government of Karnataka, AIR 2014 SC 168 (3J).* In the authority at serial no. 4 it was held that if under the relevant clause consent of both parties was required to refer the dispute to arbitration then it was not arbitration agreement. In the last authority at serial no. 7, disapproving the view of the High Court, it was held

that absence of the words that decision of arbitrator shall be final and binding on the parties was not fatal and the clause (18) fulfilled the criteria of being valid arbitration clause.

If only certain disputes are to be submitted to arbitration, then other disputes cannot be referred. In a fire insurance agreement, it was mentioned that if insurer disputed the quantum of the payable amount, matter would be referred to arbitration but if the insurer denied the liability and repudiated the claim, there would be no arbitration. The goods were damaged/ destroyed in a cyclone. The insurance company denied its liability to pay any compensation. Supreme court in *Oriental Insurance Co. v. N.P. & Steel,* AIR 2018 SC 2295 held that arbitration clause did not apply.

In *IBI Consultancy India Pvt. Ltd. v. DSC Limited*, AIR 2018 SC 2907 it was held that on correct interpretation of the agreement, letter of indent formed part of it and clause of arbitration in the letter of indent was sufficient to invoke arbitration.

In *Ameet Lalchand Shah v. Rishab Enterprises*, AIR 2018 SC 3041 there were several agreements regarding a single commercial project. In the main agreement clause of arbitration was there but in ancillary agreements it was not so. Regarding one ancillary agreement dispute arose. The High Court treating the same to be independent agreement held that there was no arbitration agreement. Supreme Court reversed the view taken by the High Court and held that clause of arbitration in main agreement covered all ancillary agreements.

Supreme Court in *M/s Inox Wind ltd. v. M/s Thermo Cables Ltd.,* AIR 2018 SC 349, disagreeing with

the High Court, held that if along with purchase order Standard Terms and Conditions were attached which contained clause of arbitration, it was sufficient for making the arbitration clause part of the agreement. Reliance was placed upon *M.R. Engineers & Contractors v. Som Dutt Builders,* 2009 (7) SCC 696.

Regarding binding nature of agreement upon **non party** it has been held in *ONGC v. Discovery Enterprises,* AIR 2022 SC 2080 (3J) para 26 as follows:

> *"In deciding whether a company within a group of companies which is not a signatory to arbitration agreement would nonetheless be bound by it, the law considers the following factors:*
>
> *(i) The mutual intent of the parties;*
> *(ii) The relationship of a non-signatory to a party which is a signatory to the agreement;*
> *(iii) The commonality of the subject matter;*
> *(iv) The composite nature of the transaction; and*
> *(v) The performance of the contract.*
>
> *Consent and party autonomy are undergirded in Section 7 of the Act of 1996. However, a non-signatory may be held to be bound on a consensual theory, founded on agency and assignment or on a non-consensual basis such as estoppel or alter ego. These principles would have to be*

*understood in the context of the present case, where ONGC's attempt at the joinder of JDIL to the proceedings was rejected without adjudication of ONGC's application for discovery and inspection of documents to prove the necessity for such a joinder."*

It has been observed in the commentary on Contract Act by Pollock and Mulla 14th edition of 2014 under Section 37 of the Act at page 748 under the sub-heading "Assignment of Contract" that "the Contract Act has no section dealing generally with the assignability of contracts. The topic belongs to the law of property. The right of a contracting party to assign contract, (benefits and burdens) is recognized". Thereafter reference is made to leading Constitution Bench authority of Supreme Court reported in Khardha Co. v. Raymon & Co., AIR 1962 SC 1810. In Para 20 of the said authority it has been held as follows:

*"There was considerable argument before us on the question as to assignability of a contract. The law on the subject is well settled and might be stated in simple terms. An assignment of a contract might result by transfer either of the rights or of the obligations there under. But there is a well-recognized distinction between these two classes of assignments. As a rule obligations under a contract cannot be assigned except with the consent of the promisee, and when such consent is*

*given, it is really a novation resulting in substitution of liabilities. On the other hand, rights under a contract are assignable unless the contract is personal in its nature or the rights are incapable of assignment either under the law or under an agreement between the parties."*

Decision of Arbitrator regarding jurisdiction under Section 16 and remedy against it: -

If the arbitrator, while deciding question of its jurisdiction under Section 16 as preliminary point, holds that he has got no jurisdiction then obviously he will dismiss the claim and such order will be appealable before Court under Section 37 (2)(a). However, if it is decided by the arbitrator, as a preliminary issue, that he has got the jurisdiction, then against such an (interim) order neither appeal is provided nor it can immediately be challenged as an interim award under section 34. Such an order may be challenged only after final award and along with that vide *M/s IFFCO v. M/s Bhadra Products,* AIR 2018 SC 627. Under section 16(5) arbitrator may decide about his jurisdiction as preliminary issue and under Section 16(6) remedy against such order is provided. Both the sub-sections are as follows:

*"(5) The arbitral tribunal shall decide on a plea referred to in sub-section (2) or sub-section (3) and, where the arbitral tribunal takes a decision rejecting the plea, continue with the arbitral*

*proceedings and make an arbitral award.*

*(6) A party aggrieved by such an arbitral award may make an application for setting aside such an arbitral award in accordance with section 34."*

In the aforesaid authority *M/S IFFCO* it has been held that if the arbitrator holds that it has got inherent jurisdiction to decide the dispute then such order cannot be immediately challenged and drill of section 16 (5) & (6) must be completed and only after decision of all issues, issue of jurisdiction may be challenged. However, it has been clarified therein that such course is to be adopted only in the matter of inherent jurisdiction and not in respect of other issues/ points which may have a flavour of jurisdiction like issue of limitation (see Chap[ter 1D). Concluding portion of para 20 of M/s IFFCO is quoted below:

*"These sections make it clear that the Kompetenz principle, which is also followed by the English Arbitration Act of 1996, is that the "jurisdiction" mentioned in Section 16 has reference to three things: (1) as to whether there is the existence of a valid arbitration agreement; (2) whether the arbitral tribunal is properly constituted; and (3) matters submitted to arbitration should be in accordance with the arbitration agreement."*

(Different shades of jurisdiction (not in the context of arbitration) have, thoroughly been examined in *Nusli Neville Wadia v. Ivory Properties,* AIR 2019 SC 5125 (3J), after discussing 106 authorities)

In *Quippo Construction Equipment v. Janardan Nirman,* AIR 2020 SC 2038 it has been held that the respondent by non-participation in proceedings before arbitrator waives his right to object to jurisdiction and scope of authority of the arbitrator (as well as to venue of arbitration).

Agreement Void: Still Arbitration Clause May Survive

Even if an agreement is not valid or enforceable, arbitration clause contained thereunder may survive as provided under section 16 (1), infra:

> *"**16. Competence of arbitral tribunal to rule on its jurisdiction**.—(1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose,—*
> *(a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and*
> *(b) a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause."*

Analyzing on earlier authority of Supreme Court reported in *Union of India v. Kishorilal Gupta, AIR 1959 SC 1362* in the light of Section 16 of A&C Act it has been held in *National Insurance Company v. Boghara Polyfab Pvt Ltd., AIR 2009 SC 170* para 13 as follows:

> *"13. In Union of India v. Kishorilal Gupta & Bros. [1960 (1) SCR 493], this Court considered the question whether the arbitration clause in the contract will cease to have effect, when the contract stood discharged as a result of settlement. While answering the question in the affirmative, a three-Judge Bench of this Court culled out the following general principles as to when arbitration agreements operate and when they do not operate:*
> *(i) An arbitration clause is a collateral term of a contract distinguished from its substantive terms; but none-the-less it is an integral part of it.*
> *(ii) Howsoever comprehensive the terms of an arbitration clause may be, the existence of the contract is a necessary condition for its operation; and the arbitration clause perishes with the contract.*
> *(iii) A contract may be non est in the sense that it never came legally into existence or it was void ab initio. In that event, as the original contract has no legal existence, the arbitration clause*

*also cannot operate, for along with the original contract, it is also void.*

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

*(v) Between the two extremes referred to in paras (c) and (d), are the cases where the contract may come to an end, on account of repudiation, frustration, breach etc. In these cases, it is the performance of the contract that has come to an end, but the contract is still in existence for certain limited purposes, in respect of disputes arising under it or in connection with it. When the contracts subsist for certain purposes, the arbitration clauses in those contracts operate in respect of those purposes.*

*The principle stated in para (i) is now given statutory recognition in section 16(1)(a) of the Act. The principle in para (iii) has to be now read subject to section 16(1)(b) of the Act. The principles in paras (iv) and (v) are clear and continue to be applicable. The principle stated in para (ii) requires further elucidation with reference to*

*contracts discharged by performance or accord and satisfaction."(Underlining supplied)*

Prior to its 2015/16 Amendment, there was lot of controversy regarding Section 11 of A&C Act, as to what points must be decided by the High Court/ Supreme Court while appointing arbitrator under its sub section (6). A seven judge constitution bench reported in M/s. S.B.P. and Co. v. M/s. Patel Engineering Ltd. and anr., AIR 2006 SC 450 settled the matter. It was succinctly summarized in para 17 of the aforesaid authority of NIA, AIR 2009 SC 170. In para 17.1 it was held that two points will have necessarily to be decided by High Court/Supreme Court while appointing arbitrator. The second (b) point is as follows:

(b) Whether there is an arbitration agreement and whether the party who has applied under Section 11 of the Act is a party to such an agreement

Through 2015-16 Amendment sub section (6A) has been added to Section 11 requiring that High Court/Supreme Court, while appointing arbitrator, shall confine to the examination of the existence of an arbitration agreement (even though this sub section was sought to be deleted by 2019 amendment but that part of 2019 amendment has not yet been enforced. See Chapter 2

Accordingly the question as to whether the relevant clause of an agreement is legally an arbitration clause or not can be seen by arbitrator or thereafter by court only if arbitrator is appointed without intervention of court (u/S 11(6) of A&C Act). However if High Court /Supreme Court has appointed the

arbitrator then this question is either expressly decided or is deemed to have been decided by the High Court/Supreme Court and the arbitrator or the court cannot relook into the matter. In this regard first sentence of para 16 of the aforesaid authority of NIA (AIR 2009 SC 170) is quoted below:

> *"16. It is thus clear that when a contract contains an arbitration clause and any dispute in respect of the said contract is referred to arbitration without the intervention of the court, the Arbitral Tribunal can decide the following questions affecting its jurisdiction: (a) whether there is an arbitration agreement; (b) whether the arbitration agreement is valid; (c) whether the contract in which the arbitration clause is found is null and void and if so whether the invalidity extends to the arbitration clause also."*

Para 9 of APS Kushwaha v. Muncipal Corporation, Gwalior, AIR 2011 SC 1935, infra, is also relevant in this regard.

> *"9. In SBP & Co. v. Patel Engineering Ltd. [2005 (8) SCC 618]: (AIR 2006 SC 450), a Constitution Bench of this Court held that once the Chief Justice or his designate appoints an Arbitrator in an application under Section 11 of the Act, after satisfying himself that the conditions for exercise of power to*

*appoint an arbitrator are present, the Arbitral Tribunal could not go behind such decision and rule on its own jurisdiction or on the existence of an arbitration clause. Therefore, the contention of the respondents that the arbitrator ought to have considered the objection relating to jurisdiction and held that he did not have jurisdiction, cannot be accepted."*

In *A. Ayyasamy v. A. Parema Sivam,* AIR 2016 SC 4675, it has been held that mere allegation of fraud by one party against the other would not nullify the effect of the agreement and this point can be decided by the arbitrator. This authority was followed *in Ameet Lalchand Shah v. Rishabh Enterprises,* AIR 2018 SC 3041 and Zenith Drugs v. M/s Nicholas Piramal, AIR 2019 SC 3785. In Zenith Drugs it was further held that if subsequently a compromise decree is passed between the parties which does not contain arbitration cause, for disputes subsequently arising due to breach of compromise decree, arbitration clause in the agreement cannot be invoked as after compromise decree arbitration agreement does not survive. Moreover, the allegation that the compromise decree was obtained by inducement and fraud should be decided by Civil Court and not arbitrator.

In *Deccan Paper Mills v. Regency Mahavir Properties,* AIR 2020 SC 4047, agreement between the parties containing arbitration clause was sought to be cancelled on the serious allegation of fraud. However, it was held that merely because a particular transaction may have criminal overtones it does not mean that the

dispute arising thereunder cannot be subject matter of arbitration. In this regard reference may also be made to an article *decoding the Test to Determine 'Complex Fraud' and Arbitrability of Disputes* by Vaibhav Niti, Advocate on Record, Supreme Court published in AIR 2021 Journal page 60.

## CHAPTER – 8

## SECTION 34, SETTING ASIDE AWARD BY COURT.

### A. Scope:

For definition of Court and territorial jurisdiction see Chapter 3.

Provision of stay of award is provided under Section 36 (Enforcement) which is discussed under next synopsis.

An award requires stamp as per Article 12 of Schedule 1 to Stamp Act. Some awards may also require registration. However, these questions are to be looked into in proceedings for enforcement of Award under Section 36. Whether the 'impugned award is unstamped or insufficiently stamped or unregistered (if registration required) is none of the concerns of Court while hearing application under Section 34 vide *M. Anasuya Devi v. M.M. Reddy* 2003 (8) SCC 565. Arbitrators normally either fix no stamp or fix nominal stamp of Rs. 100/- or Rs. 500/- on the award. The requisite stamp is to be fixed by the party who seeks its enforcement under Section 36.

### B. Nature of Proceedings and Fresh Evidence:

Proceedings initiated by filing application under Section 34 are not like suit. These are summary in nature and no issues are to be framed. Normally no fresh evidence is to be taken and all the objections are to be decided on the basis of the evidence on record of the arbitral tribunal. Through 2015-16 Amendment sub sections (5) and (6) were inserted in section 34

requiring prior notice to the other party before filing application and requiring expeditious disposal of the application and in any event within one year. (The prior notice and time limit have been held to be directory and not mandatory in *State of Bihar v. Bihar RBVB Samiti Bihar, Jharkhand AIR 2018 SC 3862).* Initially sub section (2)(a) used the words (if the applicant) 'furnishes proof'. Through Amendment Act No. 33 of 2019 these words were substituted by 'establishes on the basis of the record of the arbitral tribunal'.

In an earlier authority reported in *Fiza Developers v. AMCI (India)* 2009 (17) SCC 796 it was held that written statement by the opposite party and evidence (oral and documentary) by both the parties must be permitted to be filled in proceedings u/S. 34. However, in *M/S Emkay Global Finance Services v. GirdharSondhi,* AIR 2018 SC 3894, after placing reliance upon the insertion of sub-sections (5) and (6) in Section 34 by Amendment of 2015-16 it was held as follows:

> *"We are constrained to observe that Fiza Developers (supra) was a step in the right direction as its ultimate ratio is that issues need not be struck at the stage of hearing a Section 34 application, which is a summary procedure. However, this judgment must now be read in the light of the amendment made in Section 34(5) and 34(6). So read, we clarify the legal position by stating 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."(Underlining supplied)*

This authority also took note of recommendations of Law Commission for changes in sub-section (2)(a). On the basis of the recommendations the sub-section was amended by Act no. 33 of 2019 as mentioned above.

The judgment in *M/S Emkay Global* supra was followed by another Bench in *M/s Canara Nidhi v. M. Shashikala,* AIR 2019 SC 4544.

The above quoted portion of *M/S Emkay* was quoted in para 17 of Canara Nidhi. In para 9 of Canara Nidhi it was held as follows:

"*The proceedings under Section 34 of the Act are 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 for expeditious disposal of cases 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."*

**C. Whether Award may be modified U/S 34:**

The application under Section 34 is not like a regular appeal under Section 96 CPC or section 37 A&C Act.If the court finds that within the parameters of Section 34 the award requires interference, then either it may be set aside, or matter may be remanded to the arbitrator. The Supreme Court in *Project Director… NHAI v. M. Hakeem,* AIR 2021 SC 3471, after discussing 39 authorities, has held that power to set aside award under Section 34 does not include power to modify the same. The matter related to the compensation for the land acquired for National Highways Authority of India (NHAI). The court (District Judge) under Section 34 had enhanced the compensation which had been awarded by the arbitrator. The Supreme Court held that even though the compensation which had been determined by the competent authority and affirmed by the arbitrator was abysmally low (para 3) however the Court under Section 34 could not directly enhance the same; it should have remanded the matter to the arbitrator. Para 40 is quoted below:

> *"It can, therefore, be said that this question has now been settled finally by at least 3 decisions of this Court. Even otherwise, to state that the judicial trend appears to favor an interpretation that would read into Section 34 a power to modify, revise or vary the award would be to ignore the previous law contained in the 1940 Act; as also to ignore the fact that the 1996 Act was enacted based on the UNCITRAL Model Law on International Commercial Arbitration, 1985 which, as has been pointed out in Redfern and Hunter on International Arbitration, makes it clear that, given the limited judicial interference on extremely limited grounds not dealing with the merits of an award, the 'limited remedy' under Section 34 is co-terminus with the 'limited right', namely, <u>either to set aside an award or remand the matter</u> under the circumstances mentioned in Section 34 of the Arbitration Act, 1996."* (Underlining supplied)

It is interesting to note that even after finding the order of the court under section 34 to be erroneous in law, the Supreme Court dismissed the appeal holding that the enhancement by the court was just and several other similarly situate land holders had received the similarly enhanced compensation and, in

such situation Supreme Court could dismiss the appeal under Article 136 of the Constitution (paras 57 & 58)

If the court finds that the relief granted by the arbitrator to a party could not be granted, then award is to be set aside. However, if Court finds that the arbitrator wrongly rejected the claim of a party or granted lesser relief than warranted then it cannot by itself grant the relief/higher relief. It has to remand the matter.

If the Court finds that higher relief than deserved has been granted by the arbitrator, it can set aside the award in part, to that extent, and there is no need to remand the matter for that purpose also, vide *State of Chhattisgarh v. Sal Udyog,* AIR 2021 SC 5503 and *Parsa Kenta Collieries v. Rajasthan Rajya Vidut Utpadan Nigam,* AIR 2019 SC 2908

**D. <u>Sub-section (2)(a) (i) to (v)</u>:**

Initially sub-section (2)(a) used the words (if the applicant) 'furnishes proof' regarding the grounds mentioned in its sub-clauses (i) to (v). Through Amendment Act No. 33 of 2019 these words were substituted by 'establishes on the basis of the record of the arbitral tribunal'. This has been done to prevent the applicant from filing fresh evidence for the first time before the Court in respect of the grounds mentioned under the aforesaid clauses, as of right, converting the case under Section 34 to be in the nature of original proceedings.

The sub-clauses (a)(i) to (v) relate to incapacity of the applicant, invalidity of the arbitration agreement, absence of notice, inability to present the case, award

dealing with disputes not submitted to arbitration and composition of the arbitral tribunal or procedure not being agreed upon by the parties. Sub-clause (a)(v) uses words composition of arbitral tribunal in accordance with this part. The part (part-1) consists of sections 2 to 43. Section 11(3) to (6) provides for appointment of arbitrator by High Court or Supreme Court in case parties fail to agree to the choice of arbitrator. (Amendment in Section 11 by Act no. 33 of 2019 providing for designation of the arbitral institutions not yet enforced as noticed in *BSNL v. M/s Nortel Networks*, AIR 2021 SC 2849, para 27.)These grounds are sort of preliminary objections relating to initial jurisdiction of the arbitral tribunal. In *Ssangyong Eng. & Const. v. NHAI,* AIR 2019 SC 5041, paras 36 and 37 quoted in part in note G, hereinafter it has been held that denial of full opportunity to a party is covered by Section 34 (2)(a)(iii) (unable to present his case).

Arbitration agreement is defined in section 7. Its invalidity referred to in sub-clause (a) (ii) supra has to be decided in accordance with Contract Act. (Paras 21, 22, 23 & 26 of *Vidya Drolia v. Durga Trading*, 2021 (2) SCC 1.)

Regarding invalidity of arbitration agreement on the ground of **non-payment of stamp duty**, there are conflicting views of different benches of the Supreme Court and the matter has been referred to Constitution Bench in *N.N. Global v. Indo Unique Flame* 2021 (4) SCC 379, as noticed in *International Hotel Group v. Waterline Hotels* AIR 2022 SC 797 (para 20).

Overruling *M.S.P. Infrastructure v. M.P. Road Development Corporation,* AIR 2015 SC 710, it was held in *M/s Lion Eng. Consultant v. State of M.P.* AIR 2018 SC 1895 as follows:

> "*We do not see any bar to plea of jurisdiction being raised by way of an objection under Section 34 of Act even if no such objection was raised under Section 16"* (para 6)

However, if the arbitrator accepts the plea of bar of jurisdiction on the ground of invalidity of the agreement under Section 16(2) and consequently dismisses/rejects the claim, instead of application under Section 34, appeal will be maintainable before the Court under Section 37 (2). Similar will be the position if plea of 'exceeding the scope of its authority' is accepted by the arbitrator under Section 16(3). (See Chapter 7)

### *E.* Non-arbitrable matters, sub-section (2)(b)(i):

'Subject matter of the dispute is not capable of settlement by arbitration' means a dispute which cannot be subject matter of arbitration. In *Booz Allen v. SBI Home Finance,* AIR 2011 SC 2507: 2011 (5) SCC 532 (para 22 last sentence of AIR and para 36 of SCC) 6 non-arbitrable matters have been enumerated; thus,

> "*The well-recognized examples of non-arbitrable disputes are: (i) disputes relating to rights and liabilities which give rise to or arise out of criminal offences; (ii) matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights, child custody; (iii) guardianship matters; (iv) insolvency and winding up matters; (v)*

*testamentary matters (grant of probate, letters of administration and succession certificate); and (vi) eviction or tenancy matters governed by special statutes where the tenant enjoys statutory protection against eviction and only the specified courts are conferred jurisdiction to grant eviction or decide the disputes."*

It has been quoted with approval in para 37 of *Vidya Drolia v. Durga Trading Company, 2021 (2) SCC 1.*

Regarding landlord tenant matters, in the last example (VI) given in *Booz Allen,* supra, it was held that such matters were not arbitrable if Rent Control Act applied. However, in *Himangni Enterprises v. K.S. Ahluwatial,* AIR 2017 SC 5137, it was held that even if Rent Control Act did not apply, there could not be any arbitration in landlord - tenant matter. The controversy was referred to larger Bench and a three Judge Bench in *Vidya Drolia,* supra, overruled *Himangni Enterprises* and held that if relationship of landlord and tenant was governed by Transfer of Property Act only and Rent Control Act did not apply then any dispute was arbitrable, if agreed by the parties. If in a lease deed, containing provision for arbitration, there is renewal clause then application under section 9 of A&C Act by lessee seeking to restrain lessor (State) from disturbing his possession after expiry of lease is maintainable vide *Brioj Raj Oberi v. Secretary Tourism and Civil Aviation Department,* AIR 2022 SC 3815. Dispute for share of rent is arbitrable vide *M/s Avinash Hitech v. B.M. Malini,* AIR 2019 SC 4142.

It has also been held in *Vidya Drolia,* supra, that matters covered by Recovery of Debts Due to Banks etc. Act 1993 are not arbitrable (para 58) but there is no principle of law or provision that bars an arbitrator from deciding whether dissolution of a partnership is just and equitable. (para 45).

Regarding relief of specific performance and cancellation of registered deeds, it was held in *Vidya Drolia,* supra, (paras 44 & 75), placing reliance upon *Olympus Superstructures v. M.V. Khetan*, *AIR 1999 SC 210* and *Deccan Paper Mills v. Regency Mahavir Properties,* AIR 2020 SC 4047, that such reliefs can very well be granted by arbitrator hence such disputes are arbitrable. *Vidya Drolia* exhaustively deals with various aspects of non-arbitrability. In *V. Sreenivasa v. B.L. Rathnamma,* AIR 2021 SC 1792 also it has been held that dispute regarding cancellation of agreement for sale of immovable property and forfeiture of advance amount is arbitrable.

To the list of six non-arbitrable matters enumerated in *Booz Allen,* supra, a seventh item has been added by *Vimal Kishor Shah v. J.D. Shah,* AIR 2016 SC 3889 viz. disputes relating to private trust, trustees and beneficiaries of the trust and the Trusts Act. The view has fully been approved in *Vidya Drolia,* supra, para 41.

If in an agreement, containing arbitration clause, it is provided that certain matters will not be referred to arbitration then these matters are 'excepted matters' and non-arbitrable vide *M/s Harsha Constructions v. UOI,* AIR 2015 SC 270 arising out of Railway Contract.

## F. Award in conflict with Public Policy of India (2)(b)(ii) and vitiated by patent illegality (2A):

By virtue of section 34 (2) of A&C Act, "An arbitral award may be set aside by the Court only if –

> (*b)(ii) - The award is in conflict with the public policy of India"*

Prior to the Amendment of 2015-16, it was the only ground to set aside the award (apart from the grounds of initial lack of jurisdiction as mentioned in the earlier part of sub section (2) of Section 34, discussed in the previous sub-headings). Prior to the passing of A&C Act 1996, the words Public Policy (contrary to the Public Policy) were there in Foreign Awards (Recognition and Enforcement) Act 1961, repealed by the former Act. Said words were interpreted in a narrow manner by the Supreme Court in *Renusagar Power Co. v. General Electric Co.,* AIR 1994 SC 860. It was held that Public Policy includes three things:

i) Fundamental Policy of Indian Law
ii) The Interest of India
iii) Justice or Morality

However, in *ONGC v. Saw Pipes,* AIR 2003 SC 2629, the concept of Public Policy of India (PPI in short) and scope of interference on this ground under Section 34(2) (b)(ii) was expanded. It was held that patent illegality is included therein. In *ONGC v. Western Geco International,* AIR 2015 SC 363 three more grounds were added to PPI :

i) Judicial approach is not adopted by the arbitral tribunal
ii) Principles of natural justice, including opportunity of hearing are not followed by the tribunal
iii) Perversity and irrationality.

In *Associate Builders v. DDA,* AIR 2015 SC 620 a further ground to the effect that '*binding effect of the judgment of a superior Court is disregarded by the tribunal',* was also added to PPI.

All the three cases related to domestic arbitrations where both the parties were Indian.

Thereafter section 34 was amended by the Amendment of 2015-16. The most important amendment was insertion of sub-section (2A), infra

> *"(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.* (underlining supplied)

The other Amendment was that following two clauses were added to the existing Explanation to section 34(2)(b)(ii), clarifying when award is in conflict with PPI.

(ii) it is in contravention with the fundamental policy of Indian Law

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

A new Explanation was also added which is as follows:

*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 purpose of the Amendment was explained by the Law Commission in its 246th report quoted in paras 18 to 20 of *Ssangyong Eng. & Const. v. NHAI,* AIR 2019 SC 5041. The main report had been given in August 2014, on the basis of the judgment in *ONGC v. Saw Pipes* 2003, supra. After the judgment in *ONGC v. Western Geco* dated 4.9.2014, supra, and *Associate Builders v. DDA* dated 25.11.2014, supra a supplementary report was given by the Law Commission on the basis of which Explanation 2 was inserted in Section 34 (2) (b)(ii).

Amended section 34 applies to the applications under the said section filed on or after 23.10.2015, irrespective of the fact that the arbitration proceedings may have commenced prior to that date, vide para 12 of *Ssangyong, 2019,* supra.

As explained by the Law Commission in its report, there was need for wider scope of interference in the awards given in domestic arbitrations (where both the parties are Indian) as was done by the Supreme Court in *ONGC v. Saw Pipes,* 2003, supra. However, Law Commission did not extend this enlarged scope of interference to the awards made in India seated international commercial arbitrations (where one of the

parties is foreign national or entity and place of arbitration is in India). Now the position is that sub-section (2) of section 34 applies to both the awards, made in domestic arbitrations as well as international commercial arbitrations held in India. However, sub-section (2A), patent illegality clause, applies only to awards made in domestic arbitrations. A Note of the Report of Law Commission quoted in para 19 of Ssangyong, 2019, supra (second note in that para) is quoted below:

> "*NOTE: The proposed S. 34 (2A) provides an additional, albeit carefully limited, ground for setting aside an award arising out of a domestic arbitration (and not an international commercial arbitration). The scope of review is based on the patent illegality standard set out by the Supreme Court in ONGC Ltd. v. Saw Pies Ltd., (2003) 5 SCC 705. The proviso creates exceptions for erroneous application of the law and re-appreciation of evidence, which cannot be the basis for setting aside awards.*"

As per proviso to sub-section (2A) erroneous application of law is not patent illegality. However, erroneous interpretation of law will certainly be patent illegality.

The four grounds added by *ONGC v. Western Geco,* supra (three) and *Associate Builders v.DDA*, supra (one) have been done away with (para 25 of *Ssangyong,* 2019, supra). The Supreme Court in

*Ssangyong* has thoroughly examined the position of scope of interference with award by Court under Section 34 before and after the 2015-16 Amendment. This judgment is almost like an exhaustive commentary on the topic.

It has also been held in the above case that perversity is included in patent illegality and is a ground to set aside award; and that non-consideration of relevant evidence or consideration of irrelevant evidence amounts to perversity (para 30).

## G. **Specific Instances:**

It is always safer to see what the Court has done than what it has said.

In the above mentioned case of *Ssangyong,* 2019, application under Section 34 had been filed after 23.10.2015 hence section 34 as amended in 2015 – 16 applied, but as it was a case of international commercial arbitration therefore sub - section (2A) did not apply. The majority award took into consideration a circular which was not on record until conclusion of arguments but was searched thereafter by the arbitrators on internet. Supreme Court held that it amounted to inability of the aggrieved party to present his case and the award was liable to be set aside under Section 34 (2)(a)(iii) "unable to present his case". First portions of paras 36 and 37 are quoted below:

> *"36. Sections 18, 24(3), and 26 are important pointers to what is contained in the ground of challenge mentioned in Section 34(2(a)(iii). Under Section 18, each party is to be given a full*

*opportunity to present its case. Under Section 24 (3), all statements, documents, or other information supplied by one party to the arbitral tribunal shall be communicated to the other party, and any expert report or document on which the arbitral tribunal relies in making its decision shall be communicated to the parties.*

*37. Under the rubric of a party being otherwise unable to present its case, the standard textbooks on the subject have stated that where materials are taken behind the back of the parties by the Tribunal, on which the parties have had no authority to comment, the ground under Section 34 (2)(a)(iii) would be made out."*

Same thing was stated in para 46.

In para 48 it was further held that the approach of the arbitrators was in conflict with, 'most basic notions of justice' [Explanation 1(iii)] 'a fundamental principle of justice has been breached, namely, that a unilateral addition or alteration of a contract can never be foisted upon an unwilling party, nor can a party to the agreement be liable to perform a bargain not entered into with the other party'. Ultimately, the majority award was set aside.

**2.** *ONGC v. Discovery Enterprises,* AIR 2022 SC 2080. It is a pre 2015-16 Amendment Case. For scope of interference under Section 34 reliance was placed upon Ssangyong, supra, and *M/s Dyna Technologies v.*

*M/s Crompton Greaves,* 2019 (20) SCC1. The Arbitral Tribunal without deciding claimant's (ONGC) application for discovery and inspection had held through impugned interim award that one of the respondents in the claim, not being party to the agreement, should be deleted from the array of the parties. In para 50 it was held as follows:

> *"50. Based on the above discussion, the interim award of the first Arbitral Tribunal stands vitiated because of:*
> *(i) The failure of the arbitral tribunal to decide upon the application for discovery and inspection filed by ONGC;*
> *(ii) The failure of the arbitral tribunal to determine the legal foundation for the application of the group of companies doctrine; and*
> *(iii) The decision of the arbitral tribunal that it would decide upon the applications filed by ONGC only after the plea of jurisdiction was disposed of."*

**3.** *Gyan Prakash Arya v. M/s Titan Industries*, AIR 2022 SC 625. The arbitrator initially made award directing payment of the value of pure gold at a particular rate. Thereafter award was modified under section 33 and rate of pure gold was changed. The Supreme Court held that such modification was not permissible and modified award deserved to be set aside under Section 34.

**4**. *State of Haryana v. M/s Shiv Shanker Construction,* AIR 2022 SC 95. It was a pre 2015-16 Amendment Case. It was firstly held that if the claimant was also entitled to damages for the period beyond the date on which arbitrator entered into reference then the same could very well be awarded by the arbitrator and it would not amount to exceeding the scope of reference [Section 16(3)]. As against the agreed amount of Rs. 1000/- per month per k.m. as maintenance/ repairs of the constructed road the arbitrator had awarded Rs. 45000 per month per k.m. on the ground that due to closure of an adjoining road, traffic load on the road in question had enhanced enormously. The Supreme Court held that it did not amount to rewriting the contract. However, the Supreme Court held that award of enhanced amount for the entire period of contract (till 31.5.2010) was wrong, it should have been only till the closure of the adjoining road (till January 2008). Accordingly, Supreme Court maintained the award in respect of enhanced damages till January 2008 and quashed the award in respect of enhanced damages from February, 2008 till May, 2010. (Section 34 application had been rejected by the Court and High Court had also dismissed the appeal).

**5.** *Welspun Specialty Solutions Ltd. v. ONGC* AIR 2022 SC 1. The arbitrator held that time was not essence of the contract, hence, stipulated, liquidated damages were not warranted. It granted only actual, un-liquidated damages. Section 34 application was rejected but High Court allowed appeal under Section 37. The Supreme Court placing reliance upon *M/s Dyna Technologies v. M/s Crompton Greaves,* 2019 (20) SCC1 (in para 25) held that the view taken by the

arbitrator was a plausible view and there was no such error in the award which could be corrected under Section 34. The judgment of the High Court was reversed.

**6.***Punjab State Civil Supplies Corp. v. Ramesh Kumar,* AIR 2021 SC 5758. The arbitrator after discussing the evidence rejected the claim of the contractor on the ground that the goods supplied by him were of inferior quality. Section 34 application was rejected. High Court allowed the appeal and decreed the claim. The Supreme Court reversed the High Court holding that neither Section 34 application nor an appeal against order passed on Section 34 application is to be heard like regular first appeal. Moreover, the approach of the High Court in directly allowing the claim (instead of remanding the matter) was also deprecated.

**7.***PSA SICAL Terminals v. Board of Trustees of V.O.C.P.T Tuticorin,* AIR 2021 SC 4661. Appellant requested the respondent for amending the agreement which was not accepted. However, the Arbitral Tribunal, holding that there was a change in law, passed award in favour of SICAL and granted reliefs prayed for by it. It directed conversion of 'Container Terminal of TPT from royalty model to revenue share model' (para 18). Section 34 application was rejected by District Judge but High Court allowed the appeal. The Supreme Court approved the view of the High Court holding that the arbitral tribunal had re-written the contract for the parties which was breach of fundamental principles of justice. (It was a pre 2015-16 Amendment case)

**8.** *Patil Engineering v. North Eastern Electric Power Corporation, AIR* 2020 SC 2488 (3j). This is post

2015-16 Amendment case. In this case award was held to have rightly been set aside on the newly added ground of patent illegality [Section 34(2A)]. Both the parties were Indian entities. Even though the High Court after holding the award to be perverse did not refer to sub-section (2A), instead it relied upon *ONGC v. Saw Pipes,* AIR 2003 SC 2262 and *ONGC V. Western Geco,* AIR 2015 SC 363 for the said purpose, however, Supreme Court held that the matter was squarely covered by sub-section (2-A). The High Court had held the view taken by the arbitrator to be so irrational and perverse that no reasonable person would have arrived at that while interpreting different provisions of the contract. The High Court had also held, and Supreme Court approved, that the impugned award resulted in unjust enrichment of the contractor and huge loss to Government Corporation which was contrary to the Fundamental Policy of Indian Law. (para 25). (Underlining Supplied)

**9.** *Southeast Asia Marin Engineering and Constructions v. ONGC,* AIR 2020 SC 2323 (3j). The contract contained a term that if due to change in law contractor suffered loss, it would be reimbursed by ONGC. By notification price of diesel was increased. Contractor claimed and arbitral tribunal awarded the balance diesel price as damages to the contractor. Section 34 application was rejected but High Court allowed appeal under Section 37 and set aside the award. Supreme Court approved the verdict of the High Court. The Supreme Court held that the interpretation of the agreement by the arbitrator was not a possible view, hence, the award was liable to be set aside under Section 34.

**10.** *Parsa Kenta Collieries v. Rajasthan Rajya Vidyut Utpadan Nigam,* AIR 2019 SC 2908. In this case

Section 34 application had been rejected by the Court, however, High Court allowed the appeal and set aside the award. Supreme Court partly approved and partly set aside the High Court Judgment. It held that High Court was not justified in setting aside the award in part on the ground that evidence in regard to the claim in question was not sufficient. However, the view of the High Court setting aside award in respect of another claim on the ground that there was no evidence in support thereof was approved. The view of the High Court that the arbitrator could not permit the claimant to withdraw the money under Escrow account as the reasoning therefor given by the arbitrator was perverse or so irrational that no reasonable person could have arrived at that on the material / evidence on record, was also approved at by the Supreme Court. (It appears to be pre-2015-16 Amendment case)

**11.** *NHAI v. M/s Progressive MVR (JV),* AIR 2018 SC 1270. Pre 2015-16 Amendment case. The matter related to interpretation of a clause of agreement for determining cost (price adjustment) of bitumen. Supreme Court held that the view taken by the arbitral tribunal was a possible view hence no interference was called for. However, in another similar matter between NHAI and another contractor, involving exactly similar agreement, another arbitral tribunal had taken a contrary view. Accordingly, Supreme Court thoroughly examined the formula of determination of cost of bitumen given in the agreement and interpreted that in a particular manner, and in consequence thereof set aside the award (in respect of price adjustment of bitumen) which had been confirmed by Court and in appeal under Section 37.

**12.***State of Chhattisgarh versus Sal Udyog,*AIR 2021 SC 5503. In this case it was held that under the agreement State was entitled to realize supervision charges from the other party hence arbitrator illegally directed the State to refund the said realized amount. This error was held to be covered by 'patent illegality'. Award to that extent was set aside. Reliance was also placed upon section 28(3) "in all cases the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction".

## H. Limitation: -

By virtue of section 34 (3) Limitation to file application is three months from the date on which the applicant has received the award which may be extended by 30 days on sufficient cause but not thereafter. The court has got no jurisdiction to grant further time by condoning delay under any circumstances vide *Union of India Versus Popular construction*, AIR 2001 SC 4010, *Simplex Infrastructure Versus Union of India*, AIR 2019 SC 505 and *Dakshin Haryana Bijli Vitran Nigam versus N. Technologies*, AIR 2021 SC 2493 [para 4(xviii)].

However, an application under section 34 filed within time may be permitted to be amended for adding further ground(s) of challenge even after expiry of period of limitation vide *State of Maharashtra Versus Hindustan Construction*, AIR 2010 SC 1299 followed in *Venture Global Eng. Versus Satyam Computer Services*, AIR 2010 SC 3371 (paras 18-22) and referred in paras 10 and 24 of *State of Chhattisgarh v. Sal Udyog,* AIR 2021 SC 5503.

For the purposes of limitation service of Award on the advocate of the party is no service under section 31(5) and 34(3) vide *Benarsi Krishna Committee v. Karmyogi Shelters*, 2012 (9) SCC 496 [31(5) signed copy (of award) shall be delivered to each party.]

However, if award is served on one family member who receives it on behalf of other family members also then for the purposes of limitation under section 34(3) it is service on all family members (if there is no conflict of interest between them) vide *Anil Kumar J. Patel versus P. J. Patel*, AIR 2018 SC 1627. Reliance was also placed in para 15 on *Union of India versus Tecco Trichy Eng. and Contractors*, AIR 2005 SC 1832 (three judges) emphasizing valid delivery of award.

Service of draft award is not service of award for the purposes of limitation. In *Dakshin Haryana BVN v. N. Technologies, AIR 2021 SC 2493*, Supra Arbitral Tribunal consisted of three members. Two members gave majority award on a particular date and fixed a future date for the third member to file his dissenting (minority) award and parties were also directed to point out on the next date any clerical or arithmetical error in the majority award. This 'award' was held by the Supreme Court to be only draft award and not final award. Accordingly, it was held that limitation did not start to run form the service of the aforesaid 'award', which was only draft award.

## I. <u>Sub Sections (5) and (6), Directory</u>

Sub section (5) requires prior notice of application to the other side. Subsection (6) requires the court to decide the application within one year. Both these sub sections have been held to be directory and not

mandatory in *State of Bihar v. BRBV Bank samiti Bihar, Jharkhand*, AIR 2018 SC 3862

## J. Compromise/Settlement

Under Section 30 of A&C Act, arbitral tribunal may encourage the parties to settle the dispute amicably. If settlement is arrived at, award on that basis must be passed which will have same status and effect as award on merit. It is like Order 23, Rule 3 of CPC.

Similarly in proceedings under Section 34 for settling aside contested award, parties may compromise the matter and in such situation application will be disposed of/decided in terms of the compromise vide *Y. Sleebachen v. Superintending Engineer WRO/PWD, 2015 (5) SCC 747*. In this case it has also been held that like compromise under Order 23, Rule 3, CPC, advocate (government advocate in the case in hand) can also enter into compromise in Section 34 proceedings on behalf of its party (government in the case in question). In Munshi Ram v. Banwari Lal, AIR 1962 SC 903, under old Arbitration Act, 1940 it was held that by virtue of Section 141, CPC, provisions of CPC relating to suit applied to arbitration proceedings in court hence in proceedings before court for settling aside award parties might compromise the matter as could be done in suit under Order 23, Rule 3, CPC. There is no reason as to why this proposition will not apply to new Act of 1996.

## K. Dismissal in Default and Restoration

As discussed in previous note, by virtue of its section 141 provisions of CPC relating to suits apply to arbitration proceedings also. As per Order 9, Rule 3, CPC suit may be dismissed in default if both the parties do not appear and as per Rule 8 of the same Order suit shall be dismissed in default if defendant appears and the plaintiff is absent. Both the orders may be set aside if sufficient cause of absence is shown. Same procedure shall be followed in proceedings under Section 34 of A&C Act. There is no warranty for the proposition that even if applicant does not appear, Section 34 application shall be decided on merit and not dismissed in default. Regarding Revision under Section 115 CPC (which does not contain details regarding procedure) Allahabad High Court has held that it can be dismissed in default and restored as it is not criminal appeal which cannot be dismissed in default vide Ram Murti Singh v. Gyanendra Kumar, AIR 1982 ALL 185. In this regard reference may also be made to Muneshwar Singh v. District Judge, 1996 (1) ARC 340. Same Principle will apply to Section 34 A&C Act applications.

In Grindlays Bank v. Central Government Industrial Tribunal, AIR 1981 SC 606 it has been held that if in an industrial dispute one of the parties does not appear, the tribunal has got jurisdiction to decide the matter and give award on the basis of evidence adduced by the party which is present and set aside the said order if afterwards the other party appears and shows good cause of his absence notwithstanding the fact that the award was on merit. Para 6 is quoted below:-

*6. "We are of the opinion that the Tribunal had the power to pass the impugned order, if it thought fit in the interest of justice. It is true that there is no express provision in the Act or the rules framed there under giving the Tribunal jurisdiction to do so. But it is a well known rule of statutory construction that a Tribunal or body should be considered to be endowed with such ancillary or incidental powers as are necessary to discharge its functions effectively for the purpose of doing justice between the parties. In a case of this nature, we are of the view that the Tribunal should be considered as invested with such incidental or ancillary powers unless there is any indication in the statute to the contrary. We do not find any such statutory prohibition. On the other hand, there are indications to the contrary.*

## CHAPTER – 9

## SECTION 36, ENFORCEMENT/ EXECUTION OF AWARD

The provision of enforcement of award like a decree of the Court under Section 36 of A & C Act 1996 was a novel idea but it was bogged down by simultaneous provision of automatic stay until decision of objection/ application under Section 34 of the Act. Section 36 prior to its amendment in 2015-16 was as follows:

> "*36. Where the time for making an application to set aside the arbitral award under section 34 has expired, or such application having been made, it has been refused, the award shall be enforced under the Code of Civil Procedure, 1908 (5 of 1908) in the same manner as if it were a decree of the Court."*

Until the decision of *Hindustan Construction Co. v. UOI,* AIR 2020 SC 122 (3j) even the Supreme Court was of the view that old section 36 contained the provision of automatic stay. This situation was criticised by the Supreme Court.

Accordingly, in 2015-16 section 36 was amended and it was provided that filing of application under section 34 shall not by itself render the award unenforceable unless the Court grants stay order for which provisions of CPC requiring deposit of decretal amount or its security while granting stay in appeal (O

41 R 5 CPC) shall be given due regard. In *Pam Developments V. State of West Bengal*, AIR 2019 SC 3937 it has been held that normally awarded amount or security for it must be directed to be deposited / filed while granting stay u/S 36 but it is not mandatory; and in this regard Government is not to be given special treatment.

Section 26 of Amendment Act 2015-16 dealing with applicability of the Amendment on pending cases was thoroughly examined in *BCCI v. Kochi Cricket*, AIR 2018 SC 1549 (See Chapter 2)

The Court in para 18 of *BCCI*, supra, also referred to the 246th report of Law Commission which led to (Amending) Act no. 3 of 2016. The report in turn had noted the strong criticism of Supreme Court of automatic stay in *National Aluminium Co. v. Pressteel & Fabrications*, AIR 2005 SC 1514.

Thereafter, in paras 39 to 42 of the judgment the question "But what is to happen to Section 34 petitions that have been filed before the commencement of the Amendment Act, which were governed by Section 36 of the Old Act? Would section 36, as substituted, apply to such petitions" (para 39) was considered.

It was answered at the end of para 42 as follows: -

> *"Since it is clear that execution of decree pertains to the realm of procedure, and that there is no substantive vested right in a judgment debtor to resist execution, section 36, as substituted, would apply even to pending section 34 applications on the date of commencement of the Amending Act."*

Through Second (2019) Amendment of A&C Act, Section 26 of Amending Act of 2015-16 was omitted. To that extend the 2019 Amendment was struck down in *Hindustan Construction Co. v. UOI*, AIR 2020 SC 122, supra (discussed in detail in Chapter 2)

In paras 18 to 30 of Hindustan Const. Co., supra it was held that even prior to its amendment in 2015 / 16 section 36 did not warrant automatic stay of enforcement of award on mere filing of section 34 application. Contrary view taken in three earlier authorities of the Supreme Court including *National Aluminium Co. v. Pressteel & Fabrications,* AIR *2005 SC 1514* was overruled in para 30.

Through Arbitration and Conciliation (Amendment) Act, 2021 (Act no. 3 of 2021), w.e.f. 4.11.2020 restricted provision of unconditional stay has been provided. Section 2 of Act no. 3 of 2021 is quoted below:-

> *"Amendment of section 36.- In section 36 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the principal Act), in sub-section (3), after the proviso, the following shall be inserted and shall be deemed to have been inserted with effect from 23rd day of October, 2015, namely:-*
>
> *"Provided further that where the Court is satisfied that a prima facie case is made out-*
>
> *(a) That the arbitration agreement or contract which is the basis of the award; or*

*(b) The making of the award,*

*Was induced or effected by fraud or corruption, it shall stay the award unconditionally pending disposal of the challenge under section 34 to the award,".*

*Explanation.- For the removal of doubts, it is hereby clarified that the above proviso shall apply to all court cases arising out of or in relation to arbitral proceedings, irrespective of whether the arbitral or court proceedings were commenced prior to or after the commencement of the Arbitration and Conciliation (Amendment) Act, 2015."*

Where application may be filed:

In *Sundaram Finance v. A. Samad*, AIR 2018 SC 965 it has been held that enforcement/ execution application u/S. 36 may be filed anywhere in India where the assets of the other side /Judgment Debtor (J.D.) are situate and there is no need to seek transfer of decree for execution under Sections 38 and 39 CPC.

Execution of Award through Arrest and Detention, and Attachment and Sale of Property of J.D.:

Under C.P.C. two modes of execution of money decree are provided. One is by attachment and sale of property of Judgment Debtor (JD) and the other is through his arrest and detention or both (O. 21, R. 30). Decree holder has got complete liberty/ option

regarding the mode of execution. However u/O 21 R 21 court may refuse simultaneous execution. For execution of arbitral award directing payment of money also same mode is to be followed. However, for arrest and detention in execution of money decree certain additional safeguards have been provided which are as follows: (Exactly same safeguards will apply in case of enforcement/ execution of award under Section 36 of A&C Act)

Under O. 21 R 22 CPC issuance of notice on execution application is not necessary if the application is filed within two years of the date of the decree. However, by virtue of O. 21, R. 37 such notice is mandatory in case of execution through arrest and detention. Accordingly, on filing of such application, order of arrest and detention cannot be passed forthwith. First notice to Judgment Debtor has to be issued.

Moreover, unlike other applications for execution, application for arrest and detention requires grounds under O. 2, R. 11A CPC, infra:

> "*11A. where an application is made for the arrest and detention in prison of the judgment-debtor, it shall state, or be accompanied by an affidavit stating, the grounds on which arrest is applied for.*"

As far as grounds are concerned, they are provided under Section 51 C.P.C. relevant portion of which is quoted below:

> ***51. Powers of Court to enforce execution*** *-Subject to such conditions*

*and limitations as may be prescribed, the Court may, on the application of the decree-holder, order execution of the decree –*

*(c) by arrest and detention in prison for such period not exceeding the period specified in section 58, where arrest and detention is permissible under that section;*

*Provided that, where the decree is for the payment of money, execution by detention in prison shall not be ordered unless, after giving the judgment-debtor an opportunity of showing cause why he should not be committed to prison, the Court, for reasons recorded in writing, is satisfied—*

*(a) that the judgment-debtor, with the object or effect of obstructing or delaying the execution of the decree,--*
*(i) is likely to abscond or leave the local limits of the jurisdiction of the Court, or*
*(ii) has, after the institution of the suit in which the decree was passed, dishonestly transferred, concealed, or removed any part of his property, or committed any other act of bad faith in relation to his property, or*

*(b) that the judgment-debtor has, or has had since the date of the decree. the*

*means to pay the amount of the decree or some substantial part thereof and refuses or neglects or has refused or neglected to pay the same, or*

*(c) that the decree is for a sum for which the judgment-debtor was bound in a fiduciary capacity to account.*

*Explanation. In the calculation of the means of the judgment-debtor for the purposes of clause (b), there shall be left out of account any property which, by or under any law or custom having the force of law for the time being in force, is exempt from attachment in execution of the decree.*

*STATE AMENDMENT*

*Uttar Pradesh – In section 51, after clause (b), insertthe following clause, namely.-*
*"(bb) by transfer other than sale, by attachment or without attachment of any property."*
*[Vide Uttar Pradesh Act 24 of 1954, sec. 2 and Sch. I, Item 5, Entry 4 (w.e.f.30.11.1954).]"*

In view of the above, first the decree holder is required to show at the initial stage that J.D. has the means to pay but has not paid (or has sold the property), secondly, after service of notice J.D. may file

objections that he has no means to pay. Mere non-payment is no ground to arrest J.D. Order 21 Rule 40 is also relevant in this respect. In this regard, reference may also be made to *Jolly George Verghese v. Bank of Cochin,* AIR 1980 SC 470 holding that mere non-payment is no ground to arrest. It was a case on general principles and not under C.P.C.

For execution through attachment and sale of property of J.D., under Order 21 Rule 41, D.H. may request the court to direct the J.D. to supply details of his property.

Applicability of Section 47 and O 21 CPC: -

As award is to be executed like decree under section 36 of A&C Act hence relevant provisions of CPC i.e. section 47 and O 21 fully apply vide *Punjab State Civil Supplies Corp. V. M/s Atwal Rice and General Mills,* AIR 2017 SC 3756. If the award is completely without jurisdiction or nullity then such plea may be raised as defence to enforcement application under Section 36. Para 21 of this authority is quoted below:

> *"21. It is a well-settled principle of law that the executing Court has to execute the decree as it is and it cannot go behind the decree. Likewise, the executing Court cannot hold any kind of factual inquiry 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 (see-Kiran Singh & Ors. v. Chaman Paswan & Ors., AIR 1954 SC 340)."*

It has further been held in this authority that if judgment debtor pleads payment after award, then requirements of O. 21 R1 and 2 CPC (payment in Court or recording of payment by Court) should be satisfied otherwise plea of payment/satisfaction of award cannot be entertained (paras 34 to 37).

Execution by Sending R. C. to Collector

There is no provision in C.P.C. under which for recovery of money in execution of money decree, recovery certificate may be issued/ sent to the collector for recovery of the decreetal amount like arrears of land revenue, or in any other manner.

# CHAPTER – 10

# MISCELLANEOUS

## A. Reasons:

Under the old, repealed Arbitration Act, 1940, it was not necessary for the arbitrator to give reasons in the award, unless the agreement provided otherwise vide *Raipur development Authority v. M/s Chokhamal Contractors,* AIR 1990 SC 1426 (C.B.). In the said authority it was strongly suggested that in government contracts or contracts between Government agencies/ instrumentalities and private persons, containing arbitration clause it must be provided that the arbitrator should give reasons. In *M/s Anand Brothers v. Union of India,* AIR 2015 SC 125 (3 j), under the Arbitration act 1940 it was held that if the contract provided that arbitrator in the award should indicate his findings, it meant reasons and unreasoned award pursuant to the said agreement was liable to be set aside. In this authority new Act, A&C Act 1996, requiring the arbitrator to give reasons was also noticed.

As far as new A&C Act is concerned, it was specifically stated in SOR that requirement of reasons in the award was one of its special features (see Chapter 1B). Section 31(3), infra, deals with this aspect.

> *"**31.** (3) The arbitral award shall state the reasons upon which it is based, unless –*

*(a) The parties have agreed that no reasons are to be given, or*
*(b) The award is an arbitral award on agreed terms under section 30."*

An unreasoned award is liable to be set aside under Section 34(2) and (2A).Further, under Section 34 (4), on a request by one of the parties, Court may adjourn the case and require the arbitrator to give reasons (or supply the gaps in the reasoning) for the findings vide *I-Pay Clearing Services v. ICIC Bank,* AIR 2022 SC 301. However, it has also been held in this authority that if no finding on a particular point has been recorded by the arbitrator in the award, then recourse to Section 34(4) cannot be had. In M/S Dyna Technologies v. M/S Crompton Greaves 2019(20) SCC1 it has been held that reasons must be proper, intelligible and adequate. The reasons given by the arbitrator were found to be so defective that the award was held to be unreasoned.

Strangely, even under the new Act of 1996 parties may agree for unreasoned award. When one party is not on equal bargaining terms, the other, dominant party may provide in the agreement for unreasoned award, as is often done in loan agreements particularly loan for vehicles (Hire Purchase Agreements). An unreasoned award, under any contingency, is shocking to judicial conscience. If an application under Section 34 to set aside an unreasoned award is filed, it is very difficult to decide whether the impugned award is in conflict with Public Policy of India or is vitiated by patent illegality. It is suggested that clause (a) to sub-section (3) of Section 31 might be deleted.

**B. <u>Interest</u>:**

Section 31(7) of A&C Act dealing with interest is as follows: -

> ***"31*** *(7) (a) Unless otherwise agreed by the parties, where and in so far as an arbitral award is for the payment of money, the arbitral tribunal may include in the sum for which the award is made interest, at such rate as it deems reasonable, on the whole or any part of the money, for the whole or any part of the period between the date on which the cause of action arose and the date on which the award is made.*
>
> *(b) A sum directed to be paid by an arbitral award shall, unless the award otherwise directs, carry interest at the rate of two per cent, higher than the current rate of interest prevalent on the date of award, from the date of award to the date of payment.*
>
> *Explanation. –The expression "current rate of interest" shall have the same meaning as assigned to it under clause (b) of section 2 of the Interest Act, 1978 (14 of 1978)."*

Prior to 2015/16 Amendment section 31(7)(b) provided for payment of 18% future interest. Regarding future interest (after the award) a two judge bench authority reported in *State of Haryana v. S. L. Arora, AIR 2010 SC 1511* was overruled in *Hyder Consulting (U.K.) Limited v. Governor, AIR 2015 SC 856 (3J)*. In the

later authority all the three judges wrote different judgments. In *Morgan Securities & Credits v. Videocon Industries, AIR 2022 SC 4091* all the three judgments have thoroughly been discussed and the position has been summarized in para 22 as follows:

> *"22. In view of the discussion above, we summarize our findings below:*
> *(i) The judgment of the two-Judge Bench in SL Arora (supra) was referred to a three-Judge Bench in Hyder Consulting (supra) on the question of whether post-award interest could be granted on the aggregate of the principal and the pre-award interest arrived at under Section 31(7)(a) of the Act;*
> *(ii) Justice Bobde's opinion in Hyder Consulting (supra) held that the arbitrator may grant post-award interest on the aggregate of the principal and the pre-award interest. The opinion did not discuss the issue of whether the arbitrator could use their discretion to award post-award interest on a part of the 'sum' awarded under Section 31(7)(a);*
> *(iii) The phrase 'unless the award otherwise directs' in Section 31(7)(b) only qualifies the rate of interest;*
> *(iv) According to Section 31(7)(b), if the arbitrator does not grant post-award interest, the award holder is entitled to post-award interest at eighteen percent;*

*(v) Section 31(7)(b) does not fetter or restrict the discretion that the arbitrator holds in granting post-award interest. The arbitrator has the discretion to award post-award interest on a part of the sum;*

*(vi) The arbitrator must exercise the discretionary power to grant post-award interest reasonably and in good faith, taking into account all relevant circumstances; and*

*(vii) By the arbitral award dated 29 April 2013, a post-award interest of eighteen percent was awarded on the principal amount in view of the judgment of this Court in SL Arora (supra). In view of the above discussion, the arbitrator has the discretion to award post-award interest on a part of the 'sum'; the 'sum' as interpreted in Hyder Consulting (supra). Thus, the award of the arbitrator granting post award interest on the principal amount does not suffer from an error apparent."*

Payment of interest under clause (a) is subject to contract to the contrary. Clause (a) deals with interest at two stages; one is pre reference i.e. before arbitration commences by notice under Section 21 of the Act and the second stage is pendentilite i.e. from the date on which arbitration commences till the award is made. What will be the position if the agreement prohibits grant of interest, without specifying the stage (i.e. the agreement only providing that no interest would be

payable) e.g. clause 16.3 of General Contract Clauses (GCC) of Railways.

It has been held in the following authorities that if the matter is governed by old Arbitration Act 1940, then the aforesaid clause of GCC or a like stipulation does not prevent the arbitrator from awarding *pendentilite* interest as the same is not specifically prohibited in the agreement/GCC.

1. *Union of India v. M/s Ambika Const.*, AIR 2016 SC 1441, para 24 (3 j; on reference)
2. *Ambika Construction v. Union of India*, AIR 2017 SC 2586 (in *Garg Builders v. BHEL,* AIR 2021 SC 4751, it has been held that it is not clear whether this authority (Ambika Const.) was under old Act or new Act)
3. *M/s Raveechee v. Union of India,* AIR 2018 SC 3109
4. *Reliance Cellulose* v. *Union of India,* AIR 2018 SC 3707

However, in the following authorities (and in U.O.I, supra, and *Reliance Cellulose,* supra) it has been held that under new A&C Act 1996 a general prohibition like the aforesaid clause of GCC covers both stages and arbitrator cannot award even *pendentilite* interest.

1. *Saeed Ahmad v. State of U.P.,* 2009 (12) SCC 26
2. *Jai Prakash Associates v. Tehri Hydro Development Corp.,* AIR 2019 SC 5006 (3 j)
3. *Garg Builders v. BHEL,* AIR 2021 SC 4751
4. *U.O.I. v. Bright Power Projects,* AIR 2015 SC 2749 (3j)

In *M/s Arun Kumar Kamal Kumar v. M/s Selected Marble House,* AIR 2020 SC 4629 (3j) arbitrator had

awarded 16% per annum interest. The Supreme Court while dismissing the appeal, directed in last para i.e. para 19 that in case the entire awarded amount was paid within 3 months then 9% interest would be payable failing which 16% interest as awarded would be payable. Even though the case was under old Arbitration Act, 1940 but similar direction may be issued under new A&C Act also.

In *M/s Oriental Structural Engineers v. state of Kerala,* AIR 2021 SC 2031 under A&C Act a specific term of the agreement provided for payment of interest on delayed payment. However, in the 'appendix to the bid', the entry against item 'rate of interest' was left blank. The Supreme Court held that it (blank space) did not amount to cancellation of clause of interest in the main agreement, and interest was payable.

In *Delhi Airport Metro Express v. Delhi Metro Rail Corp,* AIR 2022 SC 2165, it has been held that under A&C Act parties are at liberty to decide about interest hence the rate of interest given in the agreement (SBI PLR+2%) is payable and the arbitral tribunal has got no jurisdiction to vary (decrease) the rate.

## C. **Independence, Neutrality and Impartiality of Arbitrator:**

In most of the agreements between Government or governmental agency/ instrumentality and private person clause of arbitration is included and it is further provided there under that some particular officer of the government/agency/instrumentality should be the arbitrator.

In some other contracts also, particularly between financer and debtor where loan is advanced for

purchase of some commodity e.g. vehicle, (Hire Purchase agreement) it is provided that the arbitrator should be appointed by the dominant party (e.g. financer/ creditor). Before the Amendment of 2015-16 in A&C Act such clause was perfectly valid and binding. However, it was felt that such arbitrator might not be impartial. In any case, such situation creates a doubt about the impartiality of the arbitrator in the mind of the other side. Not only justice must be done but it must also appear to be done.

Accordingly through Amendment of 2015/16 w.e.f. 23.10.2015 this situation was taken care of. Sub-section (5) was inserted to section 12, as follows:-

> "***12*** *(5) 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:*
>
> *Provided that parties may, subsequent to disputes having arisen between them, waive the applicability of this sub-section by an express agreement in writing."*

Suitable changes were made in sub-section (1) also. Seventh Schedule enumerating 18 prohibited relationships was also inserted, first item of which is as follows:

*1. The arbitrator is an employee, consultant, advisor or has any other past or present business relationship with a party.*

As held in various authorities including *BCCI v. Kochi Cricket,* AIR 2018 SC 1549 the Amendment of 2015-16 applies to proceedings before arbitrator if proceedings have commenced after 23.10.2015, even though agreement may be of a prior date (See Chapter 2 also).

In view of the 2015-16 Amendment, it has been held in the following authorities that Government employee cannot be arbitrator and even if he has started the proceedings, his mandate terminates under Section 14 of A&C Act.

1. *Voestalpine Schienen GMBH v. Delhi Metro Rail Corp.,* AIR 2017 SC 939. Under the relevant clause of the agreement the respondent was entitled to prepare a panel of serving or retired engineers of Government departments or public sector undertakings and in case of dispute, respondent was to give 5 names from the panel out of which appellant and respondent both were to select one arbitrator each and then both the arbitrators were to select third arbitrator from the panel. The Supreme Court held that the clause was not hit by section 12(5) as the panel did not include employees etc. of the respondent. (Para 24) However, for future disputes the respondent was directed to prepare broad based panel.
2. *TRF v. Energo Engineering Projects,* AIR 2017 SC 3889(3j). Under the relevant clause of the agreement relating to arbitration it was provided that either the M.D. of the respondent or his nominee should be the arbitrator. The M.D.

appointed a retired High Court Judge to be arbitrator. The Supreme Court held that after insertion of section 12(5) M.D. became ineligible to act as arbitrator and on this ground of ineligibility, he was also precluded from nominating any arbitrator.

3. *Bharat Broad Band Network v. United Telecoms,* AIR 2019 SC 2434. Exactly same facts and same principle as in the previous case.
4. *Union of India v. Parmar Construction Company,* AIR 2019 SC 5522. In this case arbitration commenced by notice dated 23.12.2013 i.e., much before 2015-16 Amendment. Under the agreement [clause 64(3)(a)(i)] arbitrator was to be gazetted officer of Railway, one of the parties to the agreement, to be nominated by General Manager. High Court under Section 11(6) appointed an independent arbitrator in view of Section 12(5). The Supreme Court held that it could not be done as arbitration proceedings had commenced before 23.10. 2015 and the 2015-16 Amendment was not applicable and High Court should have appointed the arbitrator in accordance with the agreement.
5. In *Perkins Eastman Architects DPC v. HSCC,* AIR 2020 SC 59 the agreement under consideration provided that sole arbitrator would be appointed by one party (C.M.D. of respondent). Placing reliance upon the authorities at Sr. Nos. 1, 2 and 3 (particularly TRF, at serial no. 2) it was held that after insertion of Section 12(5) in 2015-16 such provision lost its validity, and such nominee could not act as arbitrator. (paras 15 &16)
6. In *Haryana Space Application Centre v. M/s Pan India Consultants,* AIR 2021 SC 653 it has been

held that Principal Secretary to Government cannot be said to be impartial hence after 2015/16 Amendment he cannot be appointed as arbitrator. The appellant was a nodal agency of State (Haryana).

7. In *Jaipur Zila Dugdh Utpadak Sahkari Sangh v. Ajay sales and Supplies*, AIR 2021 SC 4869 it has been held that chairman who is elected member and director of Sahkari Sangh is ineligible to be appointed as arbitrator in view of Section 12(5). In this case agreement was of a date prior to 23.10.2015 but arbitration commenced thereafter.
8. *Ellora Paper Mills v. State of M.P.,* AIR 2022 SC 280. In this case arbitral tribunal was constituted in 2000 which consisted of Stationary Purchase Committee comprising the officers of the respondent. However, no progress in the case before the arbitral tribunal was made as its appointment was challenged on various grounds. After 23.10.2015 the appellant filed application before High Court under Section 14 read with Sections 11 and 15 of A&C Act seeking termination of the mandate of the arbitral tribunal. The High Court declined the prayer on the ground that arbitration had commenced before 23.10.2015. However, Supreme Court held that as no further steps had been taken by the tribunal hence technically it could not be said that arbitration proceedings had commenced. Accordingly, it was held that the tribunal had lost its mandate under Section 12(5). A former Judge of Supreme Court was appointed arbitrator by the Supreme Court.
9. *Vinod B. Jain v. W.P. Cold Storage,* AIR 2019 SC 3538 is a pre-Amendment of 2015-16 case. The

award was made in 2006. The arbitrator had been a counsel in another case, of one of the parties. The Supreme Court placing reliance on unamended Section 12 of A&C Act held that on this ground alone award was liable to be set aside under Section 34.

**D. <u>Applicable law</u>: -**

Sub-Sections (1)(a), (2) and (3) of Section 28 are quoted below:-

> *"**28. Rules applicable to substance of dispute.—**(1) Where the place of arbitration is situate in India,—*
> *(a) in an arbitration other than an international commercial arbitration, the arbitral tribunal shall decide the dispute submitted to arbitration in accordance with the substantive law for the time being in force in India;*
> *(2) The arbitral tribunal shall decide ex aequo et bono or as amiable compositeur only if the parties have expressly authorized it to do so.*
> *(3) While deciding and making an award, arbitral tribunal shall, in all cases, take into account the terms of the contract and trade usages applicable to the transaction."*

In this regard, it has been observed in para 29 of *Ssangyong Engineering & Construction Co. Ltd. v. N.H. Authority of India,* AIR 2019 SC 5041 as follows:

*"29. The change made in Section 28(3) by the Amendment Act really follows what is stated in paragraphs 42.3 to 45 in Associate Builders (supra), namely, that the construction of the terms of a contract is primarily for an arbitrator to decide, unless the arbitrator construes the contract in a manner that no fair-minded or reasonable person would; in short, that the arbitrator's view is not even a possible view to take.*

*Also, if the arbitrator wanders outside the contract and deals with matters not allotted to him, he commits an error of jurisdiction. This ground of challenge will now fall within the new ground added under Section 34(2A)."*