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ARBITRATION LAW

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I INTRODUCTION

ARBITRATION LAW in India is on the verge of undergoing reform. The recent consultation paper by the Ministry of Law and Justice, Government of India on the proposed amendment to Arbitration and Conciliation Act, 1996 (1996 Act) is a welcome measure. The proposals for amendment cover important areas of Indian arbitral jurisprudence.[1] Even though the purpose of this survey is not to make any detailed appraisal of the proposal of the Ministry of Law, if one looks at the main reason for most of the amendments, it is to plug the loopholes caused by various decisions of the Supreme Court while interpreting the provisions of the Act. Thus, most of the proposed amendments are in the nature of reactions to the Supreme Court judgements and not pro-active amendments. In this regard, the global trend today is to make arbitral law more litigant-friendly. For that purpose,

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1 The salient features of the proposal are as follows:

(1) Amendment to s.2 (2) making Part I of the Act inapplicable to awards where the place of arbitration is to s. 11 by substituting the High Court and Supreme Court respectively for the Chief Justice of High Courts and Chief Justice of India, arbitral Institution has to make appointment in the case of "Commercial dispute of specified value" and fixing 6 month time limit for making appointments.

(3) Amendment to s.12 of the Act by clarifying the duty of the arbitrators to disclose conflict of interest and enabling the Central Government to prescribe guidelines in this regard.

(4) Amendment to s.28 so that the Arbitral Tribunal instead of deciding in accordance with the terms of the contract has only to take into account the terms of the contract.

(5) Amendment to s.31 (7) by making the interest payment on the award from the date of award to date of payment at 1percent higher than the current rate of interest.

(6) Amendment to s.34 by introducing a new explanation limiting the scope of the expression "an award is in conflict with the public policy of India'.

(7) Amendment to s.34 by introducing s.34(2)(b)(iii) providing for challenging the award on the ground of bias of the arbitrator or want of jurisdiction to the arbitral tribunal which was rejected at the interlocutory stage.

(8) Introduction of new s.34A providing for challenge of the award on the ground of patent and serious illegality resulting in substantial injustice to the applicant.

(9) Amendment to s.36 providing for enforcement of the award once the period for setting aside expires unless there is a stay order.

(10) Creation of Arbitration Division in the High Court to deal with arbitration cases.

(11) Provision for default arbitration.

the focus of the reform efforts should be to make the Act more litigant-friendly, by removing the bottle necks, to have smooth arbitral process and a speedy resolution of disputes.

The survey of the arbitration cases of 2009 shows that there has been considerable delay at the early stages of arbitration. The majority of cases pertain to the pre-arbitration stages such as the mandatory reference and appointment of arbitrators. Efforts should, therefore, be made to reduce the time period at pre-arbitration stage, such as referring a dispute for arbitration, and constitution of arbitration tribunal so as to set the arbitral process in motion. Only by fixing the time period alone, at each segment of the arbitral process, delay can be avoided.

The survey shows that the Supreme Court has delivered a record number of cases laying down new principles in the area of arbitral jurisprudence in India. The notable among them relate to the power of courts to deviate from an arbitration agreement in the appointment of arbitrators when the competent authority fails to act in time, the principles on the incorporation by reference of arbitration agreements, and the principles on the appointment of employee arbitrators in contracts involving the government or its entities. The Supreme Court has also diluted the mandatory requirement of reference under section 8 of the Act by holding that when complicated facts were involved and detailed evidence required to be taken, the court need not refer the dispute for arbitration.

II ARBITRATION AGREEMENTS

The existence of a written arbitration agreement is a pre-requisite for referring a dispute for arbitration. Section 7 of the Act deals with arbitration agreements. It specifically provides for the basic requirements of a valid arbitration agreement. The existence and validity of arbitration agreements have been a fertile area of litigation in arbitral jurisprudence. These issues have arisen in different contexts before courts in arbitration proceedings, such as when a party files a suit on the ground that there is no arbitration agreement, when the existence of an arbitration agreement is challenged at the stage of appointment of arbitrators, and when at the final stage of challenging, the validity of an award on the ground that there is no valid arbitration agreement and therefore the award is invalid. Each time, the court has to decide the validity or existence of an arbitration agreement.

Principles of incorporation by reference of arbitration agreements

Incorporation by reference is often adopted as a method to avoid repetition of the terms and conditions in contracts. Though for the sake of simplicity, better understanding and avoidance of any misunderstanding such practice has been adopted, this simple exercise has often created complications and lead to disputes. One of the most litigated areas in the Indian arbitral jurisprudence is on the scope and interpretation of incorporation by reference of clauses which purports to import arbitration

clauses from another contract. Section 7 of the Act permits such incorporation by reference of an arbitration agreement. The relevant provisions of Act reads as follows:

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

In a landmark judgement in *M.R. Engineers & Contractors Pvt. Ltd.* v. *Som Datt Builders Ltd.*,[2] the Supreme Court laid down the principles of incorporation by reference while considering the question as to whether incorporation of the terms of the main contract in a sub-contract will automatically incorporate the arbitration clause in the main contract into the sub-contract. The matter involved the determination of the scope of sub-section (5) of section 7 of the Act. In this case, the sub-contract provided that it shall be carried out "on the terms and conditions as applicable to the main contract." The Supreme Court, after an analysis of the legal position, expressed its approval of the following passage in *Russell on Arbitration:*

> The current position therefore seems to be that if the arbitration agreement is incorporated from a standard form a general reference to those terms is sufficient, but at least in the case of reference to a non-standard form contract in the context of construction and reinsurance contracts and bills of lading a specific reference to the arbitration agreement is necessary.

The court further pointed out as follows:

> 22. A general reference to another contract will not be sufficient to incorporate the arbitration clause from the referred contract into the contract under consideration. There should be a special reference indicating a mutual intention to incorporate the arbitration clause from another document into the contract. The exception to the requirement of special reference is where the referred document is not another contract, but a standard form of terms and conditions of trade associations or regulatory institutions which publish or circulate such standard terms and conditions for the benefit of the

2 (2009) 7 SCC 696.

members or others who want to adopt the same.

23. The standard forms of terms and conditions of trade associations and regulatory institutions are crafted and chiselled by experience gained from trade practices and conventions, frequent areas of conflicts and differences, and dispute resolutions in the particular trade. They are also well known in trade circles and parties using such formats are usually well versed with the contents thereof including the arbitration clause therein. Therefore, even a general reference to such standard terms, without special reference to the arbitration clause therein, is sufficient to incorporate the arbitration clause into the contract.

The court summarized the scope and intent of section 7(5) as follows:

(i) An arbitration clause in another document would get incorporated into a contract by reference, if the following conditions are fulfilled:

(1) The contract should contain a clear reference to the documents containing arbitration clause,

(2) The reference to the other document should clearly indicate an intention to incorporate the arbitration clause into the contract,

(3) The arbitration clause should be appropriate, that is capable of application in respect of disputes under the contract and should not be repugnant to any term of the contract.

(ii) When the parties enter into a contract, making a general reference to another contract, such general reference would not have the effect of incorporating the arbitration clause from the referred document into the contract between the parties. The arbitration clause from another contract can be incorporated into the contract (where such reference is made), only by a specific reference to arbitration clause.

(iii) Where a contract between the parties provides that the execution or performance of that contract shall be in terms of another contract (which contains the terms and conditions relating to performance and a provision for settlement of disputes by arbitration), then, the terms of the referred contract in regard to execution/performance alone will apply, and not the arbitration agreement in the referred contract, unless there is special reference to the arbitration clause also.

(iv) Where the contract provides that the standard form of terms and conditions of an independent trade or professional institution (as for example the standard terms and conditions of a trade association or architects association) will bind them or apply to the contract, such standard form of terms and conditions including any provision for arbitration in such

standard terms and conditions, shall be deemed to be incorporated by reference. Sometimes the contract may also say that the parties are familiar with those terms and conditions or that the parties have read and understood the said terms and conditions.

(v) Where the contract between the parties stipulates that the conditions of contract of one of the parties to the contract shall form a part of their contract (as for example the general conditions of contract of the Government where Government is a party), the arbitration clause forming part of such general conditions of contract will apply to the contract between the parties.

On the facts of the case, the Supreme Court held that even assuming that the arbitration clause from the main contract had been incorporated into the sub-contract by reference, the appellant could not have claimed the benefit of the arbitration clause. This inference, according to the court, was in view of the principle that when the document to which a general reference had been made, which contained an arbitration clause, whose provisions were clearly inapt or inapplicable with reference to the contract between the parties, then it would be assumed or inferred that there was no intention to incorporate the arbitration clause from the referred document.

Institutional arbitration: agreement valid without naming the arbitral institution

Most of the arbitrations in India are conducted through *ad hoc* arbitrations. The number of arbitrations conducted through arbitral institutions is comparatively very less. When parties specifically do not state in the arbitration agreement that the arbitration should be conducted through an arbitral institution, the arbitration is conducted by way of *ad hoc* arbitration. But when parties mention in the arbitration agreement specifically that the arbitration is through a named arbitral institution, then the arbitration would be conducted as per the rules of the named arbitral institution. In this regard an interesting question arose before the Supreme Court, whether there was a valid arbitration agreement when the arbitration agreement, without naming any arbitral institution, mentioned that the arbitration was through institutional arbitration?

In *M/s Nandan Biomatrix Limited* v. *D 1 Oils Limited*[3] the designated judge of the Supreme Court in an application for appointment of arbitrator under the Act in a dispute involving international commercial arbitration held that there existed a valid arbitration agreement when the arbitration clause without naming the arbitral institution mentioned that the disputes should be referred to institutional arbitration in India. The Supreme Court held that the fact needed to be ascertained was whether the parties had the intention to

3 (2009) 4 SCC 495.

go for arbitration. If the intention to adopt arbitration could be inferred, then the arbitration agreement would be valid.

In this case, the parties entered into a supply agreement which contained an arbitration clause. Subsequently, they also entered into a joint venture agreement and a research and development agreement. In between the joint venture and research and development agreements, they entered in to a termination agreement. Dispute arose whether in view of the specific clauses mentioned in the termination agreement, the supply agreement got terminated and all claims ceased to exist. When the applicant's effort to refer the matter to arbitration failed, it approached the Chief Justice of India by way of an application under section 11(5) and (9) of the Act for the appointment of arbitrator. The application was opposed by the non-applicant on the ground that the supply agreement neither provided for arbitration by referring to any particular institution nor any rules of any particular institution and the expression "institutional arbitration" used in the agreement was vague and uncertain and, therefore, there was no valid arbitration agreement.

At the outset, relying on *M/s. S.B.P. & Co.* v. *M/s. Patel Engineering Ltd.*,[4] the designated judge of the Supreme Court observed that it was well-settled that the power exercised by the Chief Justice of India or the designated judge under section 11(6) of the Act was not an administrative but a judicial power. On the issue whether there existed a valid arbitration agreement between the parties, the designated judge relying on earlier decisions in *Rukmanibai Gupta* v. *Collector, Jabalpur*[5] and *M. Dayanand Reddy* v. *A.P. Industrial Infrastructure Corporation Limited*[6] observed that what required to be decided was whether the existence of an agreement to refer the dispute to arbitration could be clearly ascertained on the facts and circumstances of the case, which according to the learned judge, would depend upon the intention of the parties to be gathered from the correspondence exchanged between the parties, the agreement in question and the surrounding circumstances. The designated judge rejected the contention of the non-applicant and stated that in the absence of a reference to any particular institution providing for arbitration or in the absence of rules framed by it, the expression "institutional arbitration" used in the arbitration clause in the supply agreement was vague and/or uncertain and/or incapable of being made certain. The learned judge held as follows:

> 32. I do not find any merit in the above contentions raised on behalf of the non-applicant. The questions which need to be asked are: What did the parties intend at the time of execution of the supply agreement dated 10.8.04? What did the parties intend when clause

4 (2005) 8 SCC 618.
5 (1980) 4 SCC 556.
6 (1993) 3 SCC 137.

> 15.1 came to be incorporated in the said supply agreement? The answer to the said questions undoubtedly is that any dispute that may arise between the parties shall be resolved by submitting the same to the institutional arbitration in India under the provisions of the 1996 Act. It may be mentioned that the name of a specific institution is not indicated in clause 15.1.
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> 33. The 1996 Act does not prescribe any form for an arbitration agreement. The arbitration agreement is not required to be in any particular form. See *Bihar Mineral Development Corpn.* v. *Encon Builders (I) (P) Ltd.*[7] What is required is to gather the intention of the parties as to whether they have agreed for resolution of the disputes through arbitration.

The designated judge held that the parties had unequivocally agreed for resolution of the disputes through institutional arbitration and not through an *ad hoc* arbitration and, therefore, held that there existed a valid arbitration agreement between the parties and, consequently, referred all disputes and differences between the parties to Singapore international arbitration centre so that the said centre could nominate an arbitrator from its panel.

When a dispute resolution clause is not an arbitration agreement

Even when parties have the necessary intention to go for arbitration to resolve their disputes, it is very important that the said intention should be translated into waiting while drafting the arbitration clauses. Even though the Act does not prescribe any form for an arbitration agreement, the arbitration clause should specifically state that the disputes should be resolved only through arbitration.

In *Eastern Coalfields Ltd.* v. *Sanjay Transport Agency*,[8] **t**he Supreme Court in the context of appointment of an arbitrator had to decide a clause in a contract though captioned settlement of disputes/arbitration was not an arbitration clause, but only covered a mechanism for settlement of disputes between government and its entities and not between the government and a private party. In this case, the parties entered into an excavation contract whereby the respondents undertook to carry out certain works on behalf of the appellant. A clause in the contract was titled as settlement of disputes/ arbitration, the relevant portion of which read as follows:

> It is incumbent upon the contractor to avoid litigations and disputes during the course of execution. However, if such disputes take place between the contractor and the department, effort shall be made first

7 (2003) 7 SCC 418.
8 (2009) 7 SCC 345.

> to settle the disputes through committees at different levels made for this purpose by the company.

When disputes arose between the parties, an application was filed by the respondents under section 11(6) of the Act before the designated judge, who appointed an arbitrator. The appellant approached the Supreme Court challenging the said appointment. The Supreme Court pointed out that in the contract signed by the parties, there was a clause with the caption settlement of disputes/arbitration and that clause related to disputes of commercial nature arising between the public sector enterprises *inter se* and between the public sector enterprises and government departments. The court further pointed out that the text that followed also made the said position clear by providing that after the award was given by the arbitrator in the department of public sector enterprises, reference for setting aside or revision of the award was to be made to the law secretary, department of legal affairs, ministry of law & justice, Government of India. The Supreme Court further held that the said clause would have no application to an agreement which was entered into between the appellant and the respondents, one of whom was a private party.

In this regard, the court laid down the following principles of interpretation of an arbitration clause:[8a]

> 6. It is well settled rule of interpretation that the section heading or marginal note can be relied upon to clear any doubt or ambiguity in the interpretation of any provision and to discern the legislative intent. The section heading constitutes an important part of the Act itself, and may be read not only as explaining the provisions of the section, but it also affords a better key to the constructions of the provisions of the section which follows than might be afforded by a mere preamble. The said interpretation can well be applied to understand and construct the various classes of an arbitration agreement also, which is in the realm of commercial contract. While interpreting so, the court may not depend only on the text but context as well in order to fully comprehend the context and the meaning of the clause.

Since that arbitration clause was held not to be applicable, the appointment of the arbitrator by the Calcutta High Court exercising jurisdiction under section 11(6) of the Act was held improper.

Government contracts and arbitration agreements

It is common that when parties enter into contracts they sign several documents. One among the documents often contains the arbitration clause.

8a. *Id.* at 347-348.

This is very common in contracts entered into with governments, government entities and local bodies, especially in regard to works and supply contracts. Normally, in such cases there will be documents containing standardized terms and conditions containing arbitration clauses. The governments often take policy decisions with regard to the non-applicability of the arbitration clause on the particular types of contracts or even to contracts by particular departments. Such policy decisions are implemented by issuing general government orders (GOs). Often, while such GOs are in operation, private parties enter into contracts with the governments or public bodies and local authorities, by signing several documents pertaining to the contract including the standardized documents containing arbitration clauses. The issue of the existence of valid arbitration agreement due to the impact of the GOs deleting or striking out such an arbitration clause has come up before courts, especially when the governments or public or local bodies claim that there was no arbitration agreement between the parties in view of the deletion of the clause by GO.

Two such cases came up before the Supreme Court involving the arbitration clause in Madras detailed standard specifications (MDSS) which was signed by the parties. In both cases from the state of Kerala, the state government before the said agreement had issued a GO deleting the arbitration clauses in the contracts entered into by the public works department (PWD). In the first case, a works contract was entered into between a contractor and a local body, and in the second case, a private party and the state government. In both cases, the Supreme Court upheld the arbitration agreement, but for different reasons.

No deletion of arbitration agreement by implication

In *H. Lathakumari* v. *Vamanapuram Block Panchayat*,[9] the Supreme Court held that a GO of the state government would by implication delete an arbitration clause in a contract entered between a local authority and a private party. In this case, the respondent, Vamanapuram block *panchayat*, a local authority, awarded a works contract for road improvement to the appellant. One of the documents signed by the parties as part of the contract documents was the MDSS, which thus became a part of the contract between the parties and provided for settlement of disputes by arbitration. When disputes arose between the parties, the appellant sought the appointment of an arbitrator under section 11 of the Act. The respondent raised an objection that the arbitration clause in MDSS stood deleted because of the GO issued by the state government that arbitration clauses in all tender documents in PWD contracts should be deleted or scored off. The learned designated judge accepted the said contention of the respondents and rejected the application for appointment of the arbitrator. Against the said order, the appellant approached the Supreme Court. The issue before the

9 (2009) 7 SCC 230.

Supreme Court was whether there existed an arbitration agreement between the parties in view of the GO deleting the arbitration clause in the tender documents of the public works department contracts.

The Supreme Court took note of the fact that the respondent did not deny the existence of an arbitration clause in MDSS, which was admittedly a part of the agreement and that the deletion of the arbitration clause was directed only in regard to the public work department contracts. The court also took note of the fact that since the question whether other governmental or quasi- governmental agencies should delete such a provision, was left to the individual decision/discretion of the respective authorities and neither the respondent municipality nor the *panchayati raj* department decided to delete the arbitration clause, and that the respondent municipality and the appellant entered into the agreement long after the said GO and the arbitration clause of the MDSS was made part of the agreement. The court then stated as follows:

> 11. In fact, in PWD contracts, to which the bar on arbitration was applied, the printed form of articles of agreement was amended to include a clause which confirmed that the "contractor has also signed the copy of the Madras Detailed Standard Specifications *excluding Clause 73 and other clauses relating to arbitration*….". (Emphasis supplied).

Significantly such exclusion was not made in the articles of agreement entered into by the first respondent *panchayat*. It is thus clear that the arbitration clause was intended to form a part of the contract between the parties. Therefore, the disputes between the parties were referable to arbitration in terms of the said arbitration agreement. No other objection to the arbitration was raised. Thus, since specific deletion of the arbitration clause was not done and the arbitration clause was specifically made part of the contract, the court held that it was clear that the arbitration clause was intended to form a part of the contract between the parties and that, therefore, the disputes between the parties were referable to arbitration in terms of the said arbitration agreement. The court, accordingly, directed the respondent municipality to refer the disputes for arbitration in accordance with the arbitration clause.

Conflicting clauses on arbitration in multilayered agreements

In *M.K. Abraham & Co.* v. *State of Kerala,*[10] **t**he appellants who were contractors entered into a national highway project contract with the respondent, state of Kerala. The contract contained several documents including MDSS, which contained the arbitration clause. In view of the state government's decision to delete the provisions of arbitration from PWD

10 (2009) 7 SCC 636.

contracts, the standard form of 'notices inviting tenders for works' and the standard form of agreement contained specific printed conditions which barred arbitration. However, a cyclostyled slip signed by both parties contained an arbitration clause. A dispute arose between the parties and the contractor called upon respondent state to refer the matter for arbitration. When the respondent state failed to appoint arbitrator, the contractors approached the designated judge of the High Court for the appointment of an arbitrator to adjudicate the dispute in view of the arbitration agreement. However, the designated judge dismissed the said application on the ground that there was specific clause in the agreement prohibiting any arbitration. Against the said dismissal, the contractors approached the Supreme Court. The question before the Supreme Court was whether there existed a valid arbitration agreement between the parties when the printed clause barred any arbitration.

The court took note of the fact that the contract in that case consisted of a type-written contract with a cyclostyled attachment slip and that while the printed clauses barred arbitration, the cyclostyled attachment slip signed by both parties contained an arbitration clause. The court then applied the well settled rules on the construction of the terms of a contract and held that (i) the terms of the articles of agreement would prevail over the terms of notice inviting tenders for works and (ii) the term contained in the cyclostyled attachment to the printed form of articles of agreement would prevail over the terms of the printed articles of agreement. Consequently, the court held that the contents of the attachment slip to the printed form of the articles of agreement providing for arbitration would prevail over the bar on arbitration contained in the notice inviting tenders for works and the articles of agreement and, as a result, there was a provision for arbitration in regard to the disputes between the parties.

The court also made certain general observations expressing its anguish and concern over the parties signing multi-layered agreements with several printed annexure, each with cyclostyled amendments, typed and handwritten additions and deletions which had led to confusion in the present case. The court observed as follows:[10a]

> On account of such confusion, several efficient and honest contractors stay away from participating in such tenders. The vagueness and confusion give unwarranted discretion and freedom to officers, leading to corruption and nepotism. Clear, simple and straight forward agreement is the need of the hour. Tens of thousands of engineering contracts are being entered all over the country everyday in regard to infrastructural works, without the necessary clarity, leading to avoidable disputes and considerable strain on the exchequer. With use of computers, with user friendly editing

10a. *Id*. at 646.

> procedures with cut and paste facilities, it is fervently hoped that contract forms appropriate to the work would be prepared, to avoid redundancy, confusion, vagueness and inconsistency and to increase efficiency, expedition, reduction of disputes and saving of fund.

The court therefore remitted the matter to the High Court to appoint an arbitrator after considering other objections of the respondent government.

Modification of an arbitration agreement by subsequent circular of government

In *Deepak Kumar Bansal* v. *Union of India*,[11] the Supreme Court held, on the facts of the case, that the government's circular had no retrospective operation in its applicability to the dispute and that therefore, it had not modified the arbitration clause in the contract. In this case, an agreement was executed between the parties under which the appellant had undertaken certain construction works. There was an arbitration clause in the agreement. A dispute arose between the parties and the appellant requested the respondent for appointment of an arbitrator in terms of the arbitration clause of the general conditions of contract. When the respondent failed to appoint an arbitrator in terms of the said arbitration clause, the appellant filed an application under section 11(6) of the Act before the designated judge of the High Court of Rajasthan for appointment of an arbitrator. The application for appointment of an arbitrator was rejected by the designated judge of the High Court on the ground that since the value of the claim was more than 20 per cent of the value of the work, the disputes could not be referred to arbitrator in view of the subsequent circular issued by the respondent limiting arbitration to only such claims, which were less than 20 per cent of the value of the contract. Against the said order, the appellant approached the Supreme Court.

The court found on facts that the High Court had mis-directed itself in holding that the claim was in excess of 20 per cent of the total cost of the work. The court also held that the circular, which came into effect from 11.06.2003, would not be applicable in that case since the said circular came into force subsequent to the date of contract and not before that, and that, in the absence of any subsequent insertion of that clause in the original contract, namely, clause 64 of the general conditions of contract, the said clause cannot amend the earlier arbitration clause.

Survival of arbitration agreement after the termination of the contract

The issue before the Supreme Court in the *Branch Manager, Magma Leasing and Finance Limited* v. *Potluri Madhavilata*[12] was whether, on the termination of contract, the arbitration agreement would survive for the purpose of resolution of disputes arising out of a contract even if its

11 (2009) 3 SCC 223.
12 (2009) 10 SCC 103.

performance had come to an end. In this case, a hire purchase agreement was entered into between the parties which contained an arbitration clause. Since the respondent/hirer committed default, the appellant finance company terminated the hire-purchase agreement. Ignoring the arbitration clause, the respondent/hirer filed a civil suit in which the appellant took out an application under section 8 of the Act to refer the dispute for arbitration. Both the trial court and the High Court refused to refer the dispute for arbitration on the ground that, with the termination of the hire-purchase agreement, the arbitration agreement had come to an end. The appellant approached the Supreme Court. The Supreme Court in principle endorsed the test prescribed in the classic book *Russell on Arbitration*, for the purpose of determining whether the arbitration clause survived after the termination of the contract which was as follows:[12a]

> The test in such cases has been said to be whether the contract is determined by something outside itself, in which case the arbitration clause is determined with it, or by something arising out of the contract, in which case the arbitration clause remains effective and can be enforced.

The Supreme Court then held that the arbitration clause survived for the purpose of their resolution although the contract had come to an end on account of its termination. The court has summed up the legal position as follows:[12b]

> 14. The statement of law expounded by Viscount Simon, L.C. in *Heyman*[13] as noticed above, in our view, equally applies to the situation where the contract is terminated by one party on account of the breach committed by the other particularly where the clause is framed in wide and general terms. Merely because the contract has come to an end by its termination due to breach, the arbitration clause does not get perished nor is rendered inoperative; rather it survives for resolution of disputes arising "in respect of" or "with regard to" or "under" the contract. This is in line with the earlier decisions of this court, particularly as laid down in *Kishorilal Gupta*.[14]
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> 15. In the instant case, clause 22 of the hire purchase agreement provides for arbitration has been couched in widest possible terms as can well be imagined. It embraces all disputes, differences, claims and questions between the parties arising out of the said

12a. *Id.* at 107.
12b. *Id.* at 113-114.
13 *Heyman* v. *Darwins Ltd.*, 1942 AC 356 : (1942)1 All ER 337 (HL).
14 *Union of India* v. *Kishorilal Gupta & Bros.*, AIR 1959 SC 132 : (1960) 1 SCR 493.

> agreement or in any way relating thereto. The hire purchase agreement having been admittedly entered into between the parties and the disputes and differences have since arisen between them, we hold, as it must be, that the arbitration clause 22 survives for the purpose of their resolution although the contract has come to an end on account of its termination.

The court, having thus found that the arbitration clause survived, considered the question whether the trial court must refer the parties to arbitration and held as follows:[14a]

> 23. Section 8 is in the form of legislative command to the court and once the pre-requisite conditions as afore stated are satisfied, the court must refer the parties to arbitration. As a matter of fact, on fulfillment of conditions of Section 8, no option is left to the court and the court has to refer the parties to arbitration.

The matter was finally remitted to the trial court for passing appropriate orders.

III MANDATORY REFERENCE

As seen in the above case, under section 8 of the Act, when a party to an arbitration agreement disregards it and approaches a civil court for settlement of disputes, the civil court has a duty to refer the dispute to arbitration at the request of the opposite party.[15] This principle of mandatory reference has been well recognised in the modern arbitral jurisprudence in the global context. However, section 8 has imposed certain restrictions so as to enable the court to refer the dispute to arbitration at the earliest point of time. Therefore, under section 8, the opposite party which wants to refer the matter to arbitration has to make his request before filing its first statement on the substance of the dispute in the court. Regarding the procedure to be adopted by the arbitral tribunal in deciding the dispute, the Code of Civil Procedure, 1908 is not applicable, but much flexibility has

14a. *Id*. at 114-115.

15 S. 8 of the Act is as follows:

"*8*. Power to refer parties to arbitration where there is an arbitration agreement.-

(1) A judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration.

(2) The application referred to in sub-s. (1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof.

(3) Notwithstanding that an application has been made under sub-s. (1) and that the issue is pending before the judicial authority, arbitration may be commenced or continued and an arbitral award made."

been given to the tribunal and the parties to decide on the arbitral procedure which should be based on the principles of fairness and equality. Under the principle of mandatory reference, the complexity of the subject matter of the dispute where detailed evidence needed to be taken is not one of the grounds for a court to refuse to refer a dispute covered by an arbitration agreement to an arbitral tribunal. However, the Supreme Court in the present case took a different view. The court for that purpose equated section 8 of the Act with that of the power of the court under section 34 of the 1940 Act, wherein the court had a discretion to refer or not.

No mandatory reference when complicated question of facts or law is involved

The Supreme Court in *N. Radhakrishnan* v. *M/s. Mastero Engieers*[16] has held that under section 8, a court can refuse to refer a dispute for arbitration when detailed evidence is required to decide the dispute. In this case, the appellant entered into an agreement with the respondents to constitute a partnership firm for the purpose of carrying on the business of engineering works. When differences arose between the parties regarding certain payments, the appellant called upon the respondents to settle the arrears of amount within 15 days and to make arrangements for his retirement failing which he had put them on notice to refer the matter to arbitration. Thereafter, the respondents filed a suit before the *munsif* court for a declaration that the appellant was no more a partner of the firm from the date of the notice, and for a permanent injunction to prevent him from causing any disturbance to the respondents for peaceful running of the firm. The appellant filed an application in the suit under section 8 Act for referring the dispute for arbitration, which was rejected. Against the said order, the appellant filed a civil revision petition before the High Court which was also dismissed. Against this order, the appellant approached the Supreme Court.

Before the Supreme Court, the appellant contended that the dispute was relatable to the *factum* of retirement of the appellant from the partnership firm and its reconstitution by the respondents by creating a new partnership firm excluding the appellant. The respondents, on the other hand, contended that the offer of the appellant to retire from the firm was an unequivocal one and the same was accepted by the respondents after a meeting amongst themselves. The main issue, before the Supreme Court was whether the suit should be referred for arbitration. The Supreme Court held that it was clear from a perusal of the documents that there was a clear dispute regarding the reconstitution of the partnership firm and the subsequent deed framed to that effect. The court further held that the dispute was relating to the continuation of the appellant as a partner of the firm, and that when the respondents having prayed for a declaration to the effect that the appellant had ceased to be a partner of the firm after his retirement, there was no doubt

16 (2010) 1 SCC 72.

that the dispute squarely fell within the purview of the arbitration clause of the partnership deed. Therefore, the court found that arbitrator was competent to decide the matter relating to the existence of the original deed and its validity to that effect. The court thus having found that the subject matter of the suit was within the jurisdiction of the arbitrator, proceeded to decide whether the arbitrator was competent to deal with the dispute raised by the parties. The court, following its earlier decision in *Abdul Kadir Shamsuddin Bubere* v. *Madhav Prabhakar Oak*[17] under the 1940 Act, observed that the appellant had made serious allegations against the respondents of committing malpractices in the account books and manipulating the finances of the partnership firm, which in the opinion of the court, could not be properly dealt with by the arbitrator and as such, the High Court was justified in dismissing the petition of the appellant to refer the matter to an arbitrator. In this regard, the court approved the following *ratio* laid down by the Madras High Court in *H.G. Oomer* v. *O. Aslam Sait.*[18]

> Power of civil court to refuse to stay in view of the arbitration clause on existence of certain grounds available under the 1940 Act continues to be available under the 1996 Act as well and the civil court is not prevented from proceeding with the suit despite an arbitration clause if dispute involves serious questions of law or complicated questions of fact adjudication of which would depend upon detailed oral and documentary evidence.
>
> The civil court can refuse to refer matter to arbitration if complicated question of fact or law is involved or where allegation of fraud is made.

The Supreme Court stated its conclusion as follows:[18a]

> 26. In the present dispute faced by us, the appellant had made serious allegations against the respondents alleging them to commit malpractices in the account books and manipulate the finances of the partnership firm, which, in our opinion, cannot be properly dealt with by the arbitrator. As such, the high court was justified in dismissing the petition of the appellant to refer the matter to arbitration.

This decision for first time gave discretion to a civil court to refuse mandatory reference when the dispute involves serious questions of law or complicated questions of fact for adjudication of which would depend on detailed oral and documentary evidence. The Supreme Court by this decision

17 AIR 1962 SC 406.
18 (2001) 3 CTC 269 (Mad).
18a. *Supra* note 16 at 78.

equated the mandate of a civil court under section 8 of the 1996 Act with that of a civil court under section 34 of the 1940 Act. This has thus diluted the well recognized principle of mandatory reference of a dispute by a civil court while restricting the scope of the principle of party autonomy in dispute resolution. This decision thus has taken a different view from a series of decisions under the Act which have taken the view that once there is an arbitration clause, the court has a mandatory duty to refer the dispute for arbitration.

IV INTERIM RELIEF

Court cannot decide the issues to be decided by the arbitrator

Section 9 of the Act empowers civil courts to grant *interim* relief to a party to an arbitration agreement before or during the arbitral proceedings or at any time after making the arbitral award. However, when a party approaches a civil court seeking *interim* relief even before initiating arbitration proceedings, the courts are often called upon to decide contentious issues between the parties. The question would then arise as to the extent of civil court's jurisdiction to decide such contentious issues.

In *N. Srinivasa* v. *M/S. Kuttukaran Machine Tools Ltd.*,[19] the appellant and respondents entered into an agreement for the sale of an immovable property, which contained an arbitration clause. The appellant paid a certain amount as advance at the time of execution of the agreement for sale and promised to pay the balance amount on the day of execution and registration of sale deed subject to the condition that the respondent should keep the property free of all encumbrances and charges. Dispute arose between the parties when the respondents refused to sell the property to the appellant. He approached the civil judge, Bangalore under section 9 of the Act for an injunction restraining the respondent from alienating, altering or creating any third-party interest in respect of the property. The civil judge allowed the application for injunction directing the parties to maintain *status quo*. An appeal was preferred under section 34 of the Act before the High Court which set aside the order of civil judge, Bangalore and vacated the order of *status quo* granted by the trial court on condition that the respondent should deposit a sum of money within the time specified in the order. The appellant, therefore, approached the Supreme Court. Meanwhile, an application was made by the appellant before the High Court under section 11 of the Act for the appointment of an arbitrator in pursuance of the arbitration clause in the agreement and a sole arbitrator was appointed.

The only ground urged by the respondent before the Supreme Court was that since time was the essence of the contract and the appellant had failed to perform his part of the contract within the time specified in the said agreement for sale, the question of grant of injunction from transferring,

19 (2009) 5 SCC 182.

alienating or creating any third party interest in respect of the property in dispute would not arise at all. The Supreme Court took note of the fact that by vacating the interim relief, the High Court had made the entire arbitration proceedings infructuous and that the respondent would be in a position to transfer or alienate the property in dispute to a third party by which a third-party right would be created and the appellant would suffer enormous injury. The court also held that by the impugned order, the High Court had failed to appreciate that in the contract relating to immovable property, time should not be the essence of the contract, but left the question whether the time was the essence of the contract or not to be decided by the arbitrator in the arbitration proceeding. The court also took note of the settled legal position that even if an agreement ceased to exist, the arbitration clause would remain in force and any dispute pertaining to the agreement ought to be resolved according to the conditions mentioned in the arbitration clause. The court, therefore, held that the High Court was not justified in setting aside the order of the trial court directing the parties to maintain *status quo* in the matter of transferring, alienating or creating any third party interest in the same till the award was passed by the sole arbitrator.

V APPOINTMENT OF ARBITRATOR

Section 11 confers on the power to appoint arbitrators on the Chief Justice of the High Courts in the event of a failure or disagreement between the parties or the institution named by parties to appoint the arbitrators. In the case of an international commercial arbitration, this power has been given to the Chief Justice of India. Consequently, the appointment of an arbitrator is one of the increasing functions of High Courts (designated judges appointed by the Chief Justices) in the arbitral process in India. Though Parliament while enacting the Act intended to minimize the role of courts in the arbitral process, and conferred the said power on the Chief Justices instead of courts, the said intention of Parliament has been defeated by the increased role played by the courts in the appointment of arbitrators. Section 11 which confers the said power has been the subject matter of judicial interpretation in a number of cases decided by the Supreme Court. The court has laid down various principles relating to the number of arbitrators constituting the arbitral tribunal when the arbitration agreement was silent, the validity of appointing employees of government and its entities as arbitrators, the power the designated judge to deviate from the agreed procedure and the power of court to appoint an arbitrator.

Number of arbitrators

Section 10 of the Act deals with the number of arbitrators who would constitute the arbitral tribunal. It gives the parties to the dispute the freedom to determine the number of arbitrators who should constitute the arbitral tribunal, but has imposed a condition that the number should not be an even number. The section also states that when the parties had failed to

determine the number of arbitrators of the arbitral tribunal, it should consist of a sole arbitrator.

Consistent with section 10 of the Act, in *Sime Darby Engineering Sdn, Bhd* v. *Engineers India Ltd.*,[20] the Supreme Court held that in the absence of the arbitration agreement providing for any specific number of arbitrators as constituting the arbitration tribunal, the dispute should be resolved by a sole arbitrator**.** In this case, pursuant to a sub-contract between the petitioner and the respondent, the petitioner carried out its work in terms of its contractual obligations. The petitioner did not receive the full payment from the respondent. The sub-contract contained an arbitration clause which was silent on the number of arbitrators to be appointed. When the disputes between the parties remained unresolved despite some joint negotiations between them, the subject matter being an international commercial arbitration, the petitioner approached the Chief Justice of India by way of a petition under section 11(6) of the Act. The respondent, while agreeing for the appointment, contended that the arbitration panel must consist of three arbitrators, one was to be nominated by each party and the third arbitrator was to be chosen by the nominated arbitrators. The petitioner, on the other hand, did not accept the said stand of the respondent and contented that in terms of the agreement in this case, the dispute should be decided only by the sole arbitrator.

The designated judge noted that the arbitration agreement had specifically stated that if the disputes and differences were not resolved mutually, the same should be referred to arbitration in accordance with the provisions of the Act. The designated judge, relying on definition of "arbitration tribunal" under section 2(d) of the Act as meaning "a sole arbitrator or a panel of arbitrators", observed that under section 10(2) of the Act, where the number of arbitrator was not determined, the arbitral tribunal should consist of a sole arbitrator which was also in accordance with the UNCITRAL model law on international commercial arbitration. The designated judge also drew support for its conclusion from various treatises on the subject. The designated judge thus appointed a former retired judge of the Supreme Court as the sole arbitrator.

Public contracts and employee arbitrators

It has been a common practice to incorporate provisions in the arbitration clauses in contracts with governments, statutory corporations and public sector undertakings (public contracts) to make appointment of the their officials as arbitrators. A private party who is a party to a public contract often in his eagerness to get the contract awarded may not object to such an arbitration clause. However, when dispute arises and the matter goes for arbitration, the private party may like to get a neutral arbitrator and not an official of the opposite party in terms of the arbitration clause.

20 (2009) 7 SCC 545.

However, the arbitral process being a substitute for court proceeding, it is proper that the members of the arbitral tribunal should be neutral persons and not the employee of one of the parties; otherwise suspicion of bias can always defeat the impartiality of the arbitration process. This vexed issue has come up before the Supreme Court in two cases.

Rules on the appointing employee arbitrators

In *Indian Oil Corp. Ltd.* v. *M/S Raja Transport (P) Ltd.*,[21] the question before the Supreme Court was whether as per the arbitration agreement, the appointment of a person who was an employee of one of the parties which was a government entity was valid. In this case, under an agreement, the appellant, a public sector undertaking, appointed the respondent as its dealer for retail sale of petroleum products. The arbitration clause in the said agreement provided that in case of any dispute the same should be settled by the director, marketing of the appellant or his nominee officer. The arbitration clause also provided that the respondent would not be entitled to raise any objection to any such arbitrator on the ground that the arbitrator was an officer of the appellant. When dispute arose between the parties, the respondent approached the designated judge of the High Court for appointment of a sole arbitrator under 11(6) of the Act. The appellant opposed the application on the ground that an arbitrator should be appointed only in terms of the arbitration clause. The designated judge appointed a retired judge of the High Court as arbitrator. The appellant challenged the said appointment by way of a special leave petition before the Supreme Court.

The Supreme Court had to consider the question whether an employee of one of the parties to the dispute appointed as an arbitrator would act independently or impartially and under what circumstances, the Chief Justice or the designated judge could ignore the appointment procedure or the named arbitrator in the arbitration agreement, to appoint an arbitrator of his choice. The Supreme Court held that arbitration was a binding voluntary alternative dispute resolution process and that if a party, with open eyes and full knowledge and comprehension of the said provision, entered into a contract with a government/statutory corporation/public sector undertaking containing an arbitration agreement providing that one of its secretaries/ directors should be the arbitrator, he could not subsequently turn around and contend that he was agreeable for settlement of disputes by arbitration, but not by the named arbitrator who was an employee of the other party. The court also held that no party could say that he would be bound by only one part of the agreement and not the other part, unless such other part was impossible of performance or was void being contrary to the provisions of the Act. The court also pointed out that the arbitration clause was a package which had provided for what disputes were arbitrable and at what stage and

21 (2009) 8 SCC 520.

who should be the arbitrator, what should be the venue and what law would govern the parties, *etc.* and that a party to the contract could not claim the benefit of arbitration under the arbitration clause ignoring the appointment procedure relating to the named arbitrator contained in the arbitration clause.

The Supreme Court also took note of the law settled in a series of decisions of the court holding that arbitration agreements in government contracts providing that an employee of the department (usually a high official unconnected with the work or the contract) would be the arbitrator were neither void nor unenforceable. In this regard, the court also compared the provisions of both the 1940 Act and 1996 Act and pointed out that what was implicit under the old Act was made explicit in the new Act in regard to impartiality, independence and freedom from bias of arbitral tribunal and that there was no bar under the new Act for an arbitration agreement providing for an employee of a government/statutory corporation/ public sector undertaking (which is a party to the contract), acting as arbitrator.

The court, however, carved out an exception to the above general rule only in a case when there could be a justifiable apprehension about the independence or impartiality of an employee-arbitrator, such as when the person was the controlling or dealing authority in regard to the subject contract or if he was a direct subordinate (as contrasted from an officer of an inferior rank in some other department) to the officer whose decision was the subject matter of the dispute. According to the court, this exception was not applicable if the named arbitrator, though a senior officer of the government/statutory body/government company, had nothing to do with execution of the subject contract, and that there should not be any justification for anyone doubting his independence or impartiality, in the absence of any specific evidence and that therefore, senior officer/s (usually heads of department or equivalent) of a government/statutory corporation/public sector undertaking, not associated with the contract, were considered to be independent and impartial and were not barred from functioning as arbitrators merely because their employer was a party to the contract.

The court also summarised the scope of section 11 of the Act, containing the scheme of appointment of arbitrators, as follows:

(i) Where the agreement provides for arbitration with three arbitrators (each party to appoint one arbitrator and the two appointed arbitrators to appoint a third arbitrator), in the event of a party failing to appoint an arbitrator within 30 days from the receipt of a request from the other party (or the two nominated arbitrators failing to agree on the third arbitrator within 30 days from the date of the appointment), the Chief Justice or his designate will exercise power under sub-section (4) of section 11 of the Act.

(ii) Where the agreement provides for arbitration by a sole arbitrator and the parties have not agreed upon any appointment procedure, the Chief Justice or his designate will exercise power under sub-section (5) of section 11, if the parties fail to agree on the arbitration within thirty days from the receipt of a request by a party from the other party.

(iii) Where the arbitration agreement specifies the appointment procedure, then irrespective of whether the arbitration is by a sole arbitrator or by a three-member tribunal, the Chief Justice or his designate will exercise power under sub-section (6) of section 11, if a party fails to act as required under the agreed procedure (or the parties or the two appointed arbitrators fail to reach an agreement expected of them under the agreed procedure or any person/institution fails to perform any function entrusted to him under that procedure).

(iv) While failure of the other party to act within 30 days will furnish a cause of action to the party seeking arbitration to approach the Chief Justice or his designate in cases falling under sub-sections (4) & (5), such a time bound requirement is not found in sub-section (6) of section 11. The failure to act as per the agreed procedure within the time limit prescribed by the arbitration agreement, or in the absence of any prescribed time limit, within a reasonable time, will enable the aggrieved party to file a petition under section 11(6) of the Act.

(v) Where the appointment procedure has been agreed between the parties, but the cause of action for invoking the jurisdiction of the Chief Justice or his designate under clauses (a), (b) or (c) of sub-section (6) has not arisen, then the question of Chief Justice or his designate exercising power under sub-section (6) does not arise. The condition precedent for approaching the Chief Justice or his designate for taking necessary measures under sub-section (6) is that (i) a party failing to act as required under the agreed appointment procedure; or (ii) the parties (or the two appointed arbitrators), failing to reach an agreement expected of them under the agreed appointment procedure; or (iii) a person/institution who has been entrusted with any function under the agreed appointment procedure, failing to perform such function.

(vi) The Chief Justice or his designate while exercising power under sub-section (6) of section 11 shall endeavour to give effect to the appointment procedure prescribed in the arbitration clause.

(vii) If circumstances exist, giving rise to justifiable doubts as to the independence and impartiality of the person nominated, or if other circumstances warrant appointment of an independent arbitrator by ignoring the procedure prescribed, the Chief Justice or his designate may, for reasons to be recorded ignore the designated arbitrator and appoint someone else.

The Supreme Court on the above reasoning allowed the appeal and set aside the order of the High Court and appointed the director (marketing) of the appellant corporation as the sole arbitrator to decide the disputes between the parties.

Power of court to deviate from agreed procedure

In the previous case, the Supreme Court upheld the appointment of an officer of a government entity as an arbitrator on the ground that while exercising the power to appoint an arbitrator under section 11(6) of the Act, the Chief Justice had to give effect to the appointment procedure prescribed in the arbitration clause. However, in *Union of India* v. *M/S. Singh Builders Syndicate,*[22] the Supreme Court has held that when the arbitration clause provided for appointment of arbitrators from a panel of serving government officials, the Chief Justice was entitled to deviate from the agreed procedure when the arbitral tribunal virtually became non-functional because there was considerable delay in constituting the tribunal and frequent transfer of the appointed arbitrators caused further delay in reconstituting the tribunal.

In this case, a dispute arose between the appellant, which was the railways, and the respondent in a construction contract, which contained an arbitration clause. The arbitration clause required two serving railway officers to be appointed as arbitrators, one by the contractor from a panel made available by the general manager of northern railways and the other by the northern railways. The two arbitrators so appointed, in turn, would appoint an umpire. Since the appellant was delaying the constitution of the panel, the respondent on three occasions earlier had approached the High Court for direction for the constitution of the panel of arbitrators. When the respondent appointed an arbitrator out of the panel, the appointed arbitrator either resigned or was transferred, which again led the respondent to approach the High Court under section 11 for reconstitution. The High Court, after noting several years of delay occasioned by such manner of constitution of the arbitration tribunal, appointed a retired judge of the High Court as the sole arbitrator contrary to the agreed procedure for appointment of arbitrator. The appellant approached Supreme Court questioning the said appointment on the ground the same was contrary to the arbitration agreement.

The issue before the Supreme Court was whether the power of appointment of arbitrator under the Act included the power of appointment of a sole arbitrator in contravention of procedure for constitution of arbitral tribunal agreed between the parties in an arbitration clause forming part of contract out of which dispute arose. Relying on its earlier decision in *Northern Railway Administration, Ministry of Railway, New Delhi* v. *Patel Engineering Company Ltd.*,[23] the Supreme Court held that the appointment

22 (2009) 4 SCC 523.
23 (2008) 10 SCC 240.

of arbitrator/s named in the arbitration agreement was not mandatory or a must, but the emphasis should be on the terms of the arbitration agreement being adhered to and/or given effect, as closely as possible and that the Chief Justice or his designate should first ensure that the remedies provided under the arbitration agreement were exhausted, but at the same time, also ensure that the twin requirements of sub-section (8) of section 11 of the Act were kept in view.[23a] The court further held that it would invariably mean that the court should first appoint the arbitrators in the manner provided for in the arbitration agreement, but where the independence and impartiality of the arbitrator/s appointed/nominated in terms of the arbitration agreement was in doubt, or where the arbitral tribunal appointed in the manner provided in the arbitration agreement had not functioned and it became necessary to make fresh appointment, the Chief Justice or his designate was not powerless to make appropriate alternative arrangements to give effect to the provision for arbitration. The court particularly observed as follows:[24]

> 15. The object of the alternative dispute resolution process of arbitration is to have expeditious and effective disposal of the disputes through a private forum of parties' choice. If the arbitral tribunal consists of serving officers of one of the parties to the dispute, as members in terms of the arbitration agreement, and such tribunal is made non-functional on account of the action or inaction or delay of such party, either by frequent transfers of such members of the arbitral tribunal or by failing to take steps expeditiously to replace the arbitrators in terms of the arbitration agreement, the Chief Justice or his designate, required to exercise power under section 11 of the Act, can step in and pass appropriate orders.

The Supreme Court, therefore, after taking into account the passage of time and the repeated delay in reconstituting the tribunal in terms of the arbitration clause, upheld the appointment of a retired judge by the designated judge. The court, however, expressed its anguish when the arbitrator was not appointed in terms of the arbitration agreement, but a retired judge of the High Court was appointed. The court expressed its serious concern on the fees being charged by retired judges when appointed as arbitrators, which was an unexpected burden on the parties leading to exorbitant cost of arbitration and also put one of the parties at a serious disadvantage, when he could not afford to pay such high fees. The court also pointed out the need for finding urgent solution to deal with such situations. The court suggested that one method was to go for institutional arbitration, another was to fix a fee while appointing an arbitrator, and the third

23a. *Supra* note 22 at 527.

24 The twin requirements are those relating to qualifications and other considerations as are likely to secure the appointment of an independent and impartial arbitrator.

alternative was for every retired judge willing to act as an arbitrator to file his fee schedule in advance in the registry of the respective High Courts.

Absence of a live claim

In *Union of India* v. *M/S Onkar Nath Bhalla*,[25] the Supreme Court held that the Chief Justice of India could not appoint an arbitrator without deciding first as to whether there existed a live claim to arbitrate. In this case, the appellant had entered into a contract with the respondent, which was executed. The contract contained an arbitration clause. Two years after settling the payments, the respondent submitted a fresh list of claims to the appellants, which the appellants rejected. When the respondent failed to get an arbitrator appointed, it filed a petition under section 11(6) of the Act and the designated judge of the High Court appointed a retired judge as the arbitrator. Aggrieved by the said order, the appellants approached the Supreme Court. Relying on *P. K. Ramaiah & Co.* v. *N.T.P.C.*,[26] the court held that the appellant having acknowledged the settlement and also accepted the measurements and having received the amount in full and final settlement of the claim, there was accord and satisfaction. The court further reiterated the principle that while appointing an arbitrator under section 11 of the Act, two things must be kept in mind: (i) That there existed a dispute between the parties to the agreement and that the dispute was alive and (ii) An arbitrator must be appointed as per the terms and conditions of the agreement and as per the need of the dispute. In view of this, the court held that when it was the specific case of the appellants that the respondent could not have raised yet another claim after signing the final bill without any protest or reservation and it had waived its right as per the conditions of the contract, the designated judge could not have appointed an arbitrator without considering whether any dispute existed between the parties. Consequently, the appointment made by the designated judge was set aside.

Appointment in the absence of procedure

In *Om Construction Co.* v. *Ahmedabad Municipal Corp.*,[27] the Supreme Court held that even if the arbitration agreement was silent on the procedure for appointment of an arbitrator, the Chief Justice had the power to appoint in terms of section 11(5) of the Act. In this case, the appellant a contractor entered into a works contract with the respondent municipality. The contract contained an arbitration clause under which all disputes were to be referred to the arbitration tribunal constituted under the Gujarat Tribunal Act, 1992. However, for the applicability of that Act, a notification by the government declaring a municipality as a "Public Authority" under the Act was required and no such declaration had been made in the case of the respondent municipality. Therefore, when dispute arose between the

25 (2009) 7 SCC 350.
26 (1994) 3 SCC 126.
27 (2009) 2 SCC 486.

parties, the appellant approached the High Court for appointment of an arbitrator under section 11(6) of the Act to which the respondent municipality raised an objection on the ground that in the absence of any procedure for appointment of arbitrators in the arbitration clause, the designated judge could not appoint any arbitrator and the remedy was to file a suit. The High Court accepted this contention and refused to appoint any arbitrator. The appellant challenged the same before the Supreme Court.

The main question before the Supreme Court was whether the absence of the procedure for appointment of an arbitrator in the arbitration agreement would constitute a bar for the appointment of an arbitrator under section 11 (6)or any other provision of the Act. The court held that since the parties had agreed to the resolution of their disputes by arbitration, the provisions of sub-section (5) of the Act could be pressed into service to enable the parties to invoke the powers of the Chief Justice to appoint an arbitrator.[28] The court also pointed out that section 11 of the Act dealt exclusively with the appointment of arbitrators and that sub-section (2) provided that the parties were free to agree on the procedure for appointing the arbitrator or arbitrators but subject to sub-section (6) which provided that if an agreed procedure had not been acted upon, the parties could approach the Chief Justice or his designate for appointment of an arbitrator. Since sub-sections (3), (4) and (5) contemplated different situations in which the Chief Justice or his designate could be requested to appoint an arbitrator, the court observed that in the facts of the case, the answer to the question lay in sub-clause (5) of section 11 of the Act, which provided that failing any agreement referred to in sub-section (2), in an arbitration with a sole arbitrator, if the parties fail to agree on the arbitrator within thirty days from receipt of a request by one party from the other party to so agree, the appointment should be made, upon request of a party, by the Chief Justice or any person or institution designated by him. Accordingly, the Supreme Court appointed a retired judge of the Supreme Court as the sole arbitrator.

Appointment by competent authorities

In *Union of India* v. *M/S Premier Files Ltd.*,[29] the Supreme Court has held that the Chief Justice had no power to appoint an arbitrator when under the arbitration agreement the said power was given to another authority. In this case, a works contract was entered into by the respondent and the appellant, which contained an arbitration clause providing for settlement of disputes. The work was completed and final bill for the said work was paid

28 Sub-s.(5) of s. 11 provides as follows:
Failing any agreement referred to in sub-section (2), in an arbitration with a sole arbitrator, if the parties fail to agree on the arbitrator within thirty days from the receipt of a request by one party from the other party to so agree the appointment shall be made, upon request of a party, by the Chief Justice or any person or institution designated by him.

29 (2009) 9 SCC 384.

along with incentive for one week early completion of work. Some disputes in relation to the said work arose between the parties. The respondent requested the appellant to appoint an arbitrator as per arbitration clause to adjudicate the dispute between the parties. The appellant appointed an arbitrator to adjudicate the said dispute. The said arbitrator entered into reference and thereafter resigned. After his resignation, the respondent filed an application under section 11 of the Act for appointment of an arbitrator in the High Court at Calcutta. While the application for appointment of arbitrator was pending, the appointing authority appointed another arbitrator. However, by the impugned order, the High Court disposed of the said application filed by the respondent by appointing a senior advocate of the Calcutta High Court as an arbitrator in terms of section 11(6) of the Act. Against the said appointment, the appellant approached the Supreme Court.

The Supreme Court took the view that in the facts and circumstances of the case and in view of the specific clause in the arbitration agreement, the impugned order appointing a lawyer arbitrator in the aforesaid matter was in violation of the arbitration agreement which clearly said that the arbitrator must be appointed by the competent authority. The court also took note of the fact that the arbitrator had already been appointed by the competent authority in terms of the arbitration agreement before the final order was passed in the petition under section 11 and, therefore, the appointment of a lawyer arbitrator under section 11 of the Act was not correct. In view of this, the court set aside the order of the High Court and restored the order of the competent authority in appointing a sole arbitrator to decide the disputes between the parties.

Forefeiture of right by competent authority

In *Bharat Sanchar Nigam Ltd.* v. *Dhanurdhar Champatiray*,[30] the parties entered into a contract which contained an arbitration clause under which the chief engineer of the appellant *Nigam* was the authority to appoint the sole arbitrator. The respondent, by letters, requested the appellant to appoint an arbitrator to adjudicate dispute between them to which the appellant failed to comply. The respondent, therefore, filed petitions under section 11(6) of the Act for appointment of an arbitrator. The appellants meanwhile appointed an arbitrator in terms of the arbitration clause. The High Court, however, allowed the application under section 11(6), and appointed an arbitrator instead of departmental nominee. The appellant approached the Supreme Court. The Supreme Court relying on its earlier decisions in *Punj Lloyd Ltd.* v. *Petronet MHB Ltd.*,[31] and *Ace Pipeline Contracts Private Ltd.* v. *Bharat Petroleum Corporation Ltd.*,[32] held:[32a]

30 (2009) 14 SCALE 545.
31 (2006) 2 SCC 638.
32 (2007) 5 SCC 304.
32a. *Supra* note 30 at 548.

> A plain reading of Section 11[5] of the Act would show that if one party demands appointment of an arbitrator and the other party does not appoint any arbitrator within thirty days of such demand, the right to appointment at the instance of one of the parties does not get automatically forfeited. If the appellant makes an appointment even after thirty days of demand but the first party has not moved the court under section 11, that action on the part of the appellant would be sufficient. In other words, in cases arising under section 11(6), if the respondent has not made an appointment within thirty days of demand, right to make an appointment of an arbitrator is not forfeited but continues, but such appointment shall be made before the other party files the application under section 11 seeking appointment of an arbitrator before the high court. It is only then the right of the respondent ceases.

Thus, even though the Supreme Court upheld the jurisdiction of the High Court to appoint the sole arbitrator relying on the decision of the court in *Northern Railway Administration, Ministry of Railway* v. *Patel Engineering Company Ltd.*,[33] it observed that while making such appointment, the High Court should have taken into account the agreement between the parties on the competence and qualification of the arbitrators and that since that was not done the appointment was set aside and remanded the matter to the High Court to decide the issue afresh and appoint an arbitrator keeping in mind the agreement between parties.

Appointment when foreign law was law of the contract

In *Citation Infoware Limited* v. *Equinox Corporation*,[34] the Supreme Court has held that in the case of international commercial arbitration unless part I of the Act was excluded by agreement between the parties either expressly or by implication, part I of the Act including section 11 would be applicable even where the law governing the contract chosen by the parties was that of another country. This case arose out of an application under section 11(5) of the Act for the appointment of an arbitrator in an international commercial arbitration. The applicant was a company registered under the Companies Act, 1956 carrying on business in USA and also in Gurgaon, India. The respondent was a company registered within the appropriate laws of USA, having its office there. The respondent company had entered into an outsourcing agreement with the applicant which contained an arbitration clause. Two more agreements were subsequently entered into between the parties. All the three agreements were signed at Kolkata, India and the services were being provided and rendered under the said agreement by the applicant at Gurgaon, India. The subsequent agreement

33 (2008) 10 SCC 240.
34 (2009) 7 SCC 220.

provided that it should be governed by, and interpreted in accordance with, the laws of California, USA.

When disputes arose between the parties, the applicant invoked the arbitration clause informing the respondent about appointment of an arbitrator and requested the respondent to agree to the said appointment. The respondent did not agree within the period of 30 days provided in section 11(5) of Act and, therefore, approached the Chief Justice of India for the appointment of an arbitrator. According to the applicant, it was only the Chief Justice of India who would have the jurisdiction to appoint the arbitrator, while, according to the respondent, the Chief Justice of India did not have the jurisdiction to appoint the arbitrator as the provisions of the Act would necessarily stood excluded in view of the clause in the contract that the governing law would be the law of California, USA.

The question before the designated judge was whether he had jurisdiction to appoint the arbitrator under section 11(5) of the Act, when the parties had agreed that the governing law would be that of California, USA. The designated judge, relying on the earlier decisions of the Supreme Court in *Indtel Technical Services Private Ltd.* v. *W.S. Atkins Rail Limited;*[35] *Bhatia International* v. *Bulk Trading S.A.*;[36] and *Venture Global Engineering* v. *Satyam Computer Services Ltd.*,[37] held that unless the language of the provisions of part I was excluded by agreement between the parties either expressly or by implication, part I of the Act including section 11 would be applicable even where the international commercial agreements was governed by the laws of another country. The learned judge distinguished the earlier decision of the Supreme Court in *National Thermal Power Corporation* v. *Singer Company*[38] on the ground that though in that case the court undoubtedly expressed the view that the proper law of arbitration was normally the same as the proper law of contract, it was only in exceptional cases it was so, and that even where the proper law of contract was expressly chosen by the parties, the scope of the expressions must be held to be limited. It was further held that there may be presumption that where the parties had agreed to hold arbitration in a particular country, the law of that country would apply as a law of contract and that there was, in absence of any contrary intention, a presumption that the parties had intended that the proper law of contract as well as the law governing arbitration agreement were the same as the law of the country in which the arbitration was agreed to be held. The court then pointed out that:[38a]

35 (2008) 10 SCC 308.
36 (2002) 4 SCC 105.
37 (2008) 4 SCC 190.
38 (1992) 3 SCC 551.
38a. *Supra* note 34 at 227-228.

> Here again the stress is on the agreement about the country where the arbitration is agreed to be held and precisely this situation is absent in the present case. Here the substantive law of contract governing the contract is specifically agreed upon. However, the place where arbitration would be held is not to be found in the language of clause 10.1. Therefore, the situation in *National Thermal Power Corporation's* case was not applicable to the present case.

The designated judge of the Supreme Court, therefore, appointed a former Chief Justice of India as a sole arbitrator under section 11(6) of the Act.

Power to appoint a substitute arbitrator under section 15(2)

Section 15 of the Act provides for termination of the mandate and substitution of the arbitrators. According to this section, the mandate of the arbitrator terminates when he withdraws from office or by or pursuant to agreement of the parties. The section also states that when the mandate of an arbitrator terminates, a substitute arbitrator should be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced. The exact meaning of the words 'withdraws from office' came up for consideration before the Supreme Court in *M/s. S.B.P. & Co.* v. *M/S. Patel Engineering Ltd.*[39] In this case, the parties entered into two agreements, one sub-contract agreement and another piece work agreement, both containing identical arbitration clauses. When dispute arose between the parties, the appellants invoked the arbitration clauses enshrined in the agreements and appointed respondent no.2 as an arbitrator on their behalf. The respondent no.1 also appointed an arbitrator who declined to arbitrate in the matter by stating that he had remained associated with the project. Thereafter, respondent no.1 appointed another arbitrator. However, the appellants opposed the appointment of substitute arbitrator on the ground that it was contrary to the terms of the agreements. In the meanwhile, the respondent no.2 *suo motu* sent letter informing the parties that he had become the sole arbitrator. At that stage, respondent no.1 filed an arbitration application under section 11 for appointment of the presiding arbitrator on the ground that respondent no.2 was not entitled to act as the sole arbitrator. The designated judge of the Bombay High Court appointed a retired judge as the presiding arbitrator. Against that order, the appellants approached the Supreme Court.

The appellants contented before the Supreme Court that the arbitration clauses contained in the two agreements were binding on the parties and in view of refusal of the arbitrator appointed by respondent no.1, the arbitrator appointed by the appellants, *i.e.* respondent no.2, became the sole arbitrator

39 (2009) 10 SCC 293.

and that, therefore, the learned designated judge did not have jurisdiction, power or authority to appoint the presiding arbitrator. The appellant, relying on section 15, contended that the provision contained in section 15(2) could be invoked for appointment of a substitute arbitrator only if the mandate of an arbitrator got terminated on account of his withdrawal from office or by or pursuant to an agreement of the parties and not in a case where the arbitrator appointed by either party refused to act as such and that, in any case, the provision contained in that section should not be invoked for nullifying the agreement between the parties which did not provide for appointment of a substitute arbitrator. The respondent no.1, on the other hand, contented that the appointment of an arbitrator became effective only after he consented for the same and if he refused to accept the appointment, the party appointing such person as an arbitrator had the freedom to appoint another arbitrator, even though there was no express provision to that effect in the agreement.

The Supreme Court, after analyzing the provisions in the Act relating to the appointment of arbitrator, observed that what was significant to be noticed in the provisions was that the legislature had repeatedly laid emphasis on the necessity of adherence to the terms of agreement between the parties in the matter of appointment of arbitrators and the procedure to be followed for such appointment. The court noted that even section 15(2) of the Act, which regulated appointment of a substitute arbitrator, required that such an appointment should be made according to the rules which were applicable to the appointment of an original arbitrator and that the term 'rules' used in this sub-section was not confined to statutory rules or the rules framed by the competent authority in exercise of the power of delegated legislation but also included the terms of agreement entered into between the parties.

The court then pointed out that the arbitration clause also specified the consequence of failure of either party to the dispute to appoint an arbitrator within 30 calendar days counted from the date of notice in writing given by the other side or refusal of the arbitrator appointed by either party to accept such appointment or act upon the same and that in that event, the arbitrator appointed by the other party became entitled to proceed with the reference as the sole arbitrator and make an award. The court further noted that there was nothing in arbitration clause from which it could be inferred that in the event of refusal of an arbitrator to accept the appointment or arbitrate in the matter, the party appointing such arbitrator had an implicit right to appoint a substitute arbitrator and that, therefore, in terms of the agreement entered into between the parties, respondent no.1 could not appoint a substitute arbitrator simply because the earlier arbitrator declined to accept the appointment as an arbitrator. Therefore, according to the court, the only consequence of the first arbitrator's refusal to act as an arbitrator on behalf of respondent no.1 was that respondent no.2, who was appointed as an arbitrator by the appellants, became the sole arbitrator for deciding the disputes or differences between the parties.

The court also relied on the dictionary meaning of the words 'refuse' and 'withdraw' and stated that while the word 'refuse' denoted a situation before acceptance of an invitation, offer, office, position, privilege and the like, the word 'withdraw' meant to retract, retire or retreat from a place, position or situation after acceptance thereof and that, therefore, section 15(2) did not *per se* apply to a case where an arbitrator appointed by a party to the agreement declined to accept the appointment or refused to arbitrate in the matter. Consequently, the Supreme Court set aside the order of the High Court and directed the arbitrator appointed by the appellant to act as a sole arbitrator.

VI ARBITRAL TRIBUNAL

Pre- deposit of cost

At times, the arbitration agreement requires the party who raises a claim and initiates proceedings to deposit cost in advance as a percentage of claim. This is intended mainly to prevent frivolous claims and to ensure that in case of ultimate rejection of his claim, the opposite party will be reimbursed of the expenses which he had to incur in defending his stand. In *S.K.Jain* v. *State of Haryana*,[40] **t**he appellant was allotted work of constructing Haryana government office building and the arbitration clause in the agreement between the parties contained a stipulation that no reference to arbitration would be maintainable unless the contractor furnished a security deposit of 7 per cent of the claim towards cost. When a dispute was referred to a three members tribunal at the instance of the appellant, the respondent-state filed its objection to the claim by principally submitting that the contractor had to comply with the mandatory requirements to deposit of 7 per cent of the total claim towards the cost. The tribunal sustained the objection, which was challenged before the High Court which held that the challenge to the legality of the said clause of the agreement was without any substance. Against the said decision, the appellant approached the Supreme Court. The main contention of the appellant before the Supreme Court was that the mandatory deposit of cost clause was unconscionable as it was based on unequal bargaining power. The Supreme Court, however, relying on its earlier decision in *Central Inland Water Transport Corporation Ltd.* v. *Brojo Nath Ganguly*[41] rejected the said contention on the ground that the said principle of unequal bargaining power would not be applicable in the case of commercial contracts. The appellants also relied on sections 31(8) and 38 of the Act and contended that the mandatory deposit clause was contrary to the above provisions. The court rejected the said contention also on the ground that a bare perusal of the aforesaid provisions clearly showed

40 (2009) 4 SCC 357.
41 (1986) 3 SCC 156.

that those provisions were to operate in the absence of agreement with regard to cost and that those provisions could not be pressed into service to get over the mandatory deposit clause.

VII CHALLENGE OF AN AWARD

Section 34 of the Act deals with recourse to court against an arbitral award which has to be done by filing an application for setting aside the arbitral award. The court is vested with the power to set aside the award. The court which is vested with the jurisdiction or authority to set aside an award is defined in section 2(e) of the Act as the principal civil court of original jurisdiction in the district and includes the High Court having original civil jurisdiction.

Court having jurisdiction

In *Hindustan Copper Limited* v. *Nicco Corporation Ltd.*,[42] the Supreme Court has held that an application under section 34 of the Act challenging an award was to be filed before a court which had the power and jurisdiction to entertain and decide such objection filed under section 34 of the Act and expression "court" had to have the same meaning as given in section 2(1)(e) of the Act. In this case, the appellant filed an application to set aside an award before the Jharkhand High Court at Ranchi on the ground that earlier an application under section 11(6) was filed before the High Court in which an arbitrator was appointed and that, therefore, the High Court had jurisdiction to entertain the application. The learned single judge of the High Court dismissed the petition on the ground that the same was not maintainable since the petition was not filed before the "court" as defined under section 2(1)(e) which alone had jurisdiction. On appeal filed, the division bench held that such an appeal was also not maintainable as it was not filed before the appellate court as provided under section 37. The appellant approached the Supreme Court.

Before the Supreme Court, the appellant contended that the appeal which the appellant had filed was an appeal under section 37 against an order passed under section 34 and that it should have been entertained and decided by the division bench. The Supreme Court rejected the said contention on the ground that the application under section 34 had to be filed before a court which was empowered and had jurisdiction to entertain and decide such objection. In this regard, the court took note of the meaning of the expression "court" as defined under the provision of section 2(1)(e) of the Act, the principal civil court of original jurisdiction in a district, and included the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction, to decide the questions forming the subject-matter of the arbitration. The court stated as follows:[42a]

42 (2009) 6 SCC 69.
42a. *Id*. at 71.

> 10. The said application under section 34 is to be filed before a court which is empowered and has the jurisdiction to entertain and decide such objection filed under section 34 of the Act. The expression "court" is defined under the provision of section 2(1)(e) of the Act, meaning the principal civil court of original jurisdiction in district, and included the high court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration.
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> 11. Section 37 of the Act on which emphasis was given by the counsel for the appellant applies only when the pre-conditions mentioned therein are satisfied. The submission of the learned counsel appearing for the appellant is that since the learned single judge refused to set aside the arbitration award, therefore an appeal could be preferred by the appellant as envisaged under section 37(1)(b) of the Arbitration and Conciliation Act, 1996.

The Supreme Court, therefore, held that section 37 of the Act would apply only when the pre-conditions mentioned in the Act were satisfied. The court, however, remitted the petition filed by the appellant under section 34 of the Act to the civil court competent to hear and decide the same as envisaged under section 2(1)(e) of the Act and directed that the petition filed under section 34 of the Act by the appellant be listed before the district judge, East Singhbhum, to enable the district judge to allot the petition under section 34 to an appropriate court in terms of the provision of section 2(1)(e) of the Act.

Reasoned award

Under the 1940 Act, the arbitrators were not required to give any reasons for the award which caused great hardships since the awards without reasons could not be challenged because the courts could not go into the mental process of the arbitrators for giving the award. Under the 1996 Act, the arbitrators have to give reasons for the award unless the parties agreed otherwise. In *M/s. Som Datt Builders Ltd.* v. *State of Kerala*,[43] a construction contract was entered into between the appellants and respondent state. When dispute arose between the parties, an arbitral tribunal comprising three arbitrators was constituted and all claims of the appellants were referred for adjudication to the arbitral tribunal. The arbitral tribunal gave an award which was challenged before the district judge on the ground that the award was not a reasoned award. This challenge was rejected on the ground that there were sufficient reasons recorded by the arbitral tribunal for allowing each claim. The respondent approached to the High Court. A division bench allowed the appeal in part and set aside the award relating to some of the claims on the ground that the findings did not have

43 (2009) 10 SCC 259.

supporting reasons being violative of sections 28(3) and 31(3) of the Act. The division bench also set aside the interest awarded on these two counts. The appellant approached the Supreme Court.

The appellant contented before the Supreme Court that reasons had been given in support of the claims by the arbitral tribunal and the same were clearly discernible from the award and if at all the High Court felt that there are no reasons in support of the award, it ought to have remitted the matter to the arbitral tribunal to give further reasons. The court held as follows:[43a]

> 25. The requirement of reasons in support of the award under Section 31 (3) is not an empty formality. It guarantees fair and legitimate consideration of the controversy by the Arbitral Tribunal. It is true that the Arbitral Tribunal is not expected to write a judgment like a court nor it is expected to give elaborate and detailed reasons in support of its finding(s) but mere noticing the submissions of the parties or reference to documents is no substitute for reasons which the Arbitral Tribunal is obliged to give. However brief the reasons may be, reasons must be indicated in the award as that would reflect the thought process leading to a particular conclusion. To satisfy the requirement of Section 31 (3), the reasons must be stated by the Arbitral tribunal upon which the award is based; want of reasons would make the award legally flawed.

The Supreme Court pointed out that section 31(3) mandates that the arbitral award should state the reasons upon which it was based, unless: (a) the parties had agreed that no reasons are to be given or (b) the award was an arbitral award under section 30. The court, however, relying on sub-section (4) of section 34 held that the matter ought to have been remanded by the High Court to the arbitrators to give reasons and after taking note of the fact that all the three persons constituting arbitral tribunal were available remitted the matter to the arbitrators to give reasons.

Award of interest

Award of interest is an area of contentious litigation in the arbitral proceedings. There are three key periods which would be relevant for the purpose of awarding interest. The first one is pre-reference period, the second is the *pendent lite*, and the third period is the post-award period. The pre-reference period interest is part of the substantial law covered by the agreement between the parties and the Interest Act, 1978. In many contracts, the parties prohibit any payment of interest during this period. The *pendent lite* interest is covered by the procedural law. The 1996 Act has virtually removed the difference between the pre-reference and *pendent*

43a. *Id.* at 266-267.

lite interest. Sub-section 7 of section 34 of the Act states that unless otherwise agreed between the parties, in an arbitral award for payment of money, the arbitral tribunal may include in the sum for which the award is made interest 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. The said sub-section also states that unless the award otherwise directs, the amount awarded would carry interest at 18 per cent *per annum* from the date of the award to the date of payment.

Pre-reference interest

In *Union of India* v. *Saraswat Trading Agency*,[44] the Supreme Court dealt with the issue of the validity of the award granting escalation cost by the arbitral tribunal due to statutory increase of wages and pre-reference interest. In this case, a works contract was entered into between the respondent and appellant. During the continuance of the contract, the appellant increased the wages of labour by circulars/guidelines revising the rates of casual labourers from retrospective dates. The respondent demanded enhancement of rates under the contract on the ground that the rates stated in the agreement had undergone a number of revisions and as a result the contract rates had become unrealistic and unviable. The appellant rejected the respondent's demand for enhancement and/or revision of rates taking the stand that the contract was a "fixed price contract" and it had no clause for enhancement of rates. A departmental arbitrator was then appointed who gave his award which the respondent challenged under section 34 before the High Court. The High Court upheld the award on some of the items but set it aside in respect of others and appointed an arbitrator under section 34 of the Act. The arbitrator appointed by the High Court awarded the appellant certain sum along with interest on that amount @ 18 per cent *per annum* from the date of the award till the date of payment. The appellant challenged the award and the learned single judge of the High Court substantially upheld the appellant's challenge and set aside the award on certain. The respondent preferred an appeal before the division bench of the High Court which set aside the judgment and order passed by the learned single judge and restored the arbitrator's award.

The appellant contented before the Supreme Court that, in the absence of any escalation clause in the agreement, the respondent's claim for enhanced payments for the period during which the agreement was in force was unfounded and both the arbitrator and the division bench of the High Court were in error in granting the claim for that period. On the grant of interest on the amounts arrived at by allowing the respondent's claim for higher rates for the work done by it, the appellant relied on certain clause of the agreement which had expressly barred the claim of any interest by the contractor and, hence, the award was clearly unsustainable in so far as the

44 (2009) 16 SCC 504.

grant of interest was concerned. The Supreme Court relying on its earlier decisions in *Tarapore & Co.* v. *State of M.P.*[45] and *Food Corporation of India* v. *M/s. A. M. Ahmed & Co.*,[46] held that if rates of fair wages were raised afterwards, the tendered sum could not be taken to be agreed amount for completing the contract, in the face of the directions of the authorities requiring the appellant to pay wages at rates higher than those prescribed or notified at the time of inviting tenders. On this fact situation, the court held that the state had by necessary implication agreed to reimburse this increased payment. On the issue of interest, the court held that no pre-reference or *pendente lite* interest was payable to the respondent on the amount and the arbitrator's award allowing pre-reference and *pendente lite* interest on that amount was plainly in breach of the express term of the agreement. However, for the claim for interest relating to the period after the termination of the agreement, it upheld award of interest on the ground that the bar of relevant clause would not apply and, therefore, no infirmity was found in grant of pre- reference and *pendente lite* interest on that amount.

Prohibition of interest payment clauses

In *M/s. Sayeed Ahmed & Co.* v. *State of U.P.*,[47] the issue was whether the arbitrator can award interest for pre-reference and *pendente lite* periods, when the contract prohibited the employer from entertaining any claim for interest. In this case, the respondent state entrusted a construction work to the appellant under an agreement, containing a clause prohibiting payment of interest, as follows:

> G 1.09 No claim for interest or damages will be entertained by the Government with respect to any money or balance which may be lying with the Government or any become due owing to any dispute, difference or misunderstanding between the Engineer-in-Charge on the one hand and the contractor on the other hand or with respect to any delay on the part of the Engineer-in-charge in making periodical or final payment or in any other respect whatsoever.

Disputes arose between the parties by reason of the rejection of claims of appellant and they were referred to arbitration. The arbitrator made an award directing the respondents to pay to the appellant certain sum with interest from the date of completion of the work till date of payment, thus covering payment of interest during pre-reference, *pendente lite* and post-award periods. The respondents challenged the award under section 34 of the Act before the court which was dismissed. The appeal filed by the respondents was allowed in part by the High Court holding that having regard

45 (1994) 3 SCC 521.
46 AIR 2007 SC 829.
47 (2009) 12 SCC 26.

to the bar contained in the particular clause of the contract, the arbitrator had no power to award interest and consequently, set aside that part of the award granting interest till date of award. The High Court, however, granted interest at 6 per cent *per annum* from the date of award till the date of payment. Aggrieved by the deletion of interest upto the date of award and reduction of interest from the date of award to 6 per cent *per annum*, the appellant approached the Supreme Court. The Supreme Court stated that under sub-section (7) of section 31 of the Act, the difference between pre-reference period and *pendente lite* period had disappeared in so far as award of interest by arbitrator. The court further stated the said section recognised only two periods and made the following provisions:

(a) In regard to the period between the date on which the cause of action arose and the date on which the award is made (pre-reference period plus pendente lite), the arbitral tribunal may award interest at such rate as it deems reasonable, for the whole or any part of the period, unless otherwise agreed by the parties.
(b) For the period from the date of award to the date of payment the interest shall be 18 percent per annum if no specific order is made in regard to interest. The arbitrator may however award interest at a different rate for the period between the date of award and date of payment.

The decisions of the court with reference to awards under the 1940 Act making a distinction between the pre-reference period and *pendente lite* period and the observation therein that arbitrator had the discretion to award interest during *pendente lite* period inspite of any bar against interest contained in the contract between the parties were not applicable to arbitrations governed by the 1996 Act. The court also pointed out that the interest prohibition clause made it clear that no interest or damages would be paid by government, in regard to: (i) any money or balance which may be lying with the government; (ii) any money which may become due owing to any dispute, difference or misunderstanding between the engineer-in-charge on the one hand and the contractor on the other hand; (iii) any delay on the part of the engineer-in-charge in making periodical or final payment; or (iv) in any other respect whatsoever and that the clause was comprehensive and barred interest under any head in clear and categorical terms. The court, therefore, held that in view of clause (a) of sub-section (7) of section 31 of the Act, it was clear that the arbitrator could not have awarded interest upto the date of the award, as the agreement between the parties barred payment of interest and that the bar against award of interest would operate not only during the pre- reference period but also during the *pendente lite* period. Consequently, the Supreme Court upheld the High Court judgement setting aside the interest up to the date of the award and reversed the judgement in reducing the interest for the post-award period.

VIII APPEAL TO SUPREME COURT IN NEW YORK CONVENTION AGREEMENTS

Part II of the Act deals with enforcement of foreign awards and chapter I deals with the New York Convention Awards. There are arbitration agreements and awards which are governed by the New York Convention. Section 45 of the Act provides for mandatory reference for arbitration, when a party approaches a civil court in India ignoring an agreement for arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed. Under sub-section (1) of section 50 of the Act, an appeal would lie against an order refusing to refer the parties to arbitration under section 45 of the Act. Sub-section (2) of section 50 prohibits any second appeal against the order passed in appeal under that section, but that would not affect or take away any right to appeal to the Supreme Court. In *Shin-Etsu Chemical Co. Ltd.* v. *Vindhya Telelinks Ltd.*,[48] the scope of the said prohibition under sub-section (2) of section 50 came up for consideration before the Supreme Court. In this case, the respondents filed a suit ignoring the arbitration clause and the appellants filed an application in the court for referring the same for arbitration. When the matter reached the Supreme Court, it had remitted the matter back to the civil judge for deciding the matter afresh after treating the application as one under section 45 of the Act. In pursuance of that, the civil judge considered the applications filed by the appellant as applications under section 45 of the Act and passed a common order, holding that the arbitration clause on the basis of which the appellant had filed an application under section 45 was *prima facie* inoperative and in such a situation, the parties could not be referred to arbitration and the matter should be proceeded with and decided on merits by the court.

The said order of the trial court was challenged by the appellant before district court, which allowed the appeals, set aside the order of the trial court, and remitted the matters to the trial court with a direction to consider afresh the applications of the appellant under section 45 of the Act. The said orders of the additional district judge were challenged before the Supreme Court. The appellant contended that as neither the trial court nor the appellate court recorded a finding that the arbitration agreement was null, void, inoperative or incapable of being performed, the appellate court ought to have merely allowed the appeals, and ought not to have remanded the matters to the trial court for fresh consideration. The appellant further contended that even though an appeal may not lie from the order in the appeal, the right of appeal to Supreme Court having been specifically saved, appeals to Supreme Court were maintainable.

The Supreme Court drew attention to section 45 and stated the said section dealt with power of judicial authority to refer the parties to

48 (2009) 14 SCC 16.

arbitration and provided that the judicial authority, when seized of an action (in a matter in respect of which the parties have made an agreement referred to in section 44) should at the request of one of the parties refer the parties to arbitration, unless it had found that the said agreement was null and void, inoperative or incapable of being performed. The court also pointed out that sub-section (1) of section 50 provided for an appeal from an order refusing to refer the parties to arbitration under section 45, to the court authorized by law to hear appeal by such order and that, therefore, the appellant correctly filed appeals before the district court, which was said to be the court authorised to hear appeals from the orders of the civil judge. The court also pointed out that while sub-section (2) of section 50 barred second appeals, it clarified that nothing in section 50 should affect or take away any right to appeal to the Supreme Court. The court stated as follows:[48a]

> 20. The right to appeal to Supreme Court referred and excluded from the bar contained in section 50 (2) of the Act, refers to appeals under Article 132 or 133(1) against any judgment, decree, or final order of the high court, if the high court certified under Article 134-A that the case involves a substantial question of law as to interpretation of the Constitution or that the case involves a substantial question of law of general importance and that in the opinion of the high court the said question needs to be decided by the Supreme Court. The words "right to appeal" refers to a right conferred either under the Constitution or under a statute to file an appeal to a higher court against the judgment, decree or order of a lower court, without having to first obtain any permission or leave.
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> 21. In the absence of a constitutional or statutory provision for an appeal as of right, the appellant cannot contend that it has a 'right to appeal' to the Supreme Court. An appeal by special leave to Supreme Court cannot therefore be considered as an appeal as of right or as an appeal in pursuance of a right to appeal to the Supreme Court.

The court relied on its earlier decisions and held that the civil revision petition before the High Court was available to the aggrieved party. The court, therefore, dismissed the appeals without going into the merits reserving liberty to the appellants to pursue their remedy in accordance with law before the High Court.

IX ARBITRATION ACT, 1940

The Arbitration Act, 1940 (1940 Act) had been repealed by the 1996

48a. *Id.* at 21.

Act, but despite such repeal, there are cases arising under the 1940 Act which have been coming up before the Supreme Court for settling down the legal position. These decisions are still relevant while interpreting the provisions of the 1996 Act.

Application for reference

Section 20 of the 1940 Act enabled parties to arbitration agreements who wanted to refer their disputes covered by an arbitration agreement to file a suit in the court for filing the arbitration agreement in the court and for referring the matter for arbitration. The court had discretion to refer the disputes for arbitration.

Jurisdiction ouster clause in arbitration agreement

In *Rajasthan State Electricity Board* v. *M/s. Universal Petro Chemicals Ltd.*,[49] the Supreme Court held that the jurisdiction ouster clause in a contract superceded the provisions of section 31(4) of the 1940 Act, which stipulated that where any reference in any application under the 1940 Act had been made in a court competent to entertain it, that court alone should have jurisdiction over the arbitration proceedings and all subsequent applications arising out of that reference, and the arbitration proceedings. The appellants entered into a contract with respondent which contained an arbitration clause and choice of law and jurisdiction ouster clause which stated that the contract should for all purposes be construed according to the laws of India and subject to jurisdiction of only at Jaipur in Rajasthan courts only. When a dispute arose between the parties, the respondent filed a petition under section 20 of 1940 Act, in the nature of a suit in the High Court at Calcutta along with an application under section 41 of the 1940 Act seeking *interim* reliefs, which was dismissed by the single judge on the ground that the Calcutta High Court had no jurisdiction in view of the jurisdiction ouster clause. In appeal, the High Court reversed it on the ground that the Calcutta High Court had jurisdiction. Against the said order the appellant approached the Supreme Court.

The issue before the Supreme Court was whether or not the Calcutta High Court or the Jaipur court had territorial jurisdiction to entertain the petition filed by the respondent under section 20 of the Act and also the application filed under section 41 of the Act seeking *interim* orders. The Supreme Court took note of the ouster jurisdiction clause used in the contract stating that the courts at Jaipur alone would have jurisdiction to try and decide proceedings which could be initiated for adjudication of the disputes between the parties and held that even though the courts at Calcutta had territorial jurisdiction to try and decide such disputes, in view of the jurisdiction ouster clause it was only the courts at Jaipur which would have jurisdiction to entertain such proceeding. The court also dealt with the applicability of section 31(4) which had been relied on by the division

49 (2009) 3 SCC 107.

bench of the High Court to hold that the ouster clause would not be applicable in the light of section 31(4).[50] The Supreme Court held that an analytical look at the provisions of sub-sections (3) and (4) of section 37 made it explicitly clear that any application in any reference, meaning thereby even an application under section 20, could or should be filed in a court competent to entertain such proceeding and having jurisdiction to decide the subject of the reference and that such jurisdiction would or could be restricted by the agreements entered into by and between the parties. The court, therefore, held that the parties had clearly stipulated and agreed that no other court, but only the court at Jaipur will have jurisdiction to try and decide the proceedings arising out of the said agreements and therefore, it was the civil court at Jaipur which would alone have jurisdiction to try and decide such issue and that would alone be the competent to entertain such proceedings.

Existence of a live claim

The Supreme Court in *Sunder Kukreja* v. *Mohan Lal Kukreja*[51] held that the court while entertaining an application under section 20 of the 1940 Act had the jurisdiction to go into the validity and existence of an agreement. In this case, the appellant and respondent were carrying on business under a partnership deed which also contained an arbitration clause. According to the respondent, the partnership was dissolved by the parties with mutual consent in terms of the retirement deed alleged to have been executed by the appellant. However, the appellant denied having executed any such retirement deed. Subsequently, a petition under section 20 of the Arbitration Act was filed by the appellant seeking a direction for filing the arbitration agreement in the court and for reference of the dispute between the parties to arbitration. The learned single judge held that the arbitration clause was wide enough to include all the disputes sought to be referred and allowed the application. In appeal, however, the division bench of the High Court was of the view that in case there was a dispute as to the very existence of an arbitration clause by reason of supersession of the agreement which contained the arbitration agreement by another subsequent agreement arrived at between the parties, the said dispute could not be referred to arbitration. The appellant approached the Supreme Court.

The Supreme Court relied on the decision in *M/s. S.B.P. & Co.* v. *M/s. Patel Engineering Ltd.*[52] (vide Para 46) and *M/s. Shree Ram Mills Ltd.* v. *M/s. Utility Premises (P) Ltd.*[53] (vide Para 27) wherein in the context of the

50 S.31(4) states: "Notwithstanding anything contained elsewhere in this Act or in any other law for the time being in force, where in any reference any application under this Act has been made in a Court competent to entertain it, that Court alone shall have jurisdiction over the arbitration proceedings and all subsequent applications arising out of that reference, and the arbitration proceedings shall be made in that Court and in no other Court."

51 (2009) 4 SCC 585.

52 JT 2005 (9) SC 219.

53 JT 2007 (4) SC 501.

1996 Act, the Supreme Court had held that the Chief Justice or his designate judge in an application for appointment of arbitrators had to examine the claim as to whether the dispute was a dead one in the sense whether the parties had already concluded the transaction and had recorded satisfaction of their mutual rights and obligations, or whether it was still alive. The court noted that in this case, the learned single judge had referred the matter to a forensic expert who gave a report that the alleged retirement deed was not genuine and had not been executed by the appellant and that on the basis of this report of the forensic expert, the learned single judge recorded a *prima facie* satisfaction that the dispute was still alive and deserved to be referred to the arbitrator. The court, therefore, held that in its opinion the division bench was not correct in holding that the dispute should not have been referred to the arbitrator in view of the alleged retirement deed when the very genuineness of the said retirement deed was under challenge, that in fact the forensic expert gave a report that it was not genuine and that it would have been appropriate to have left the question regarding the genuineness of the alleged retirement deed to be decided by the arbitrator. The court, therefore, set aside the judgement of the division bench and referred the dispute to an arbitrator.

Challenging the awards

Court having jurisdiction

In *Petine Shipping Inc.of Monorovia* v. *Minerals & Metals Trading Cor. of (I) Ltd*.,[54] the Supreme Court was called upon to decide the meaning of the expression 'court' under section 31(4) of the 1940 Act and territorial jurisdiction to file application. In this case, the contract was signed in Delhi and the port of delivery was Bombay. At the stage of appointment of arbitrators, one of the parties had approached Delhi High Court for a declaration that its appointment of an arbitrator was valid. During the pendency of the application, the arbitrator died and the said application became infructuous. Subsequently, when the appellant filed an application before Bombay High Court, both the single judge and the division bench dismissed the same on the ground that Bombay High Court was not a "court" within the meaning of section 31(4) because the respondent had already filed an application before the Delhi High Court. Aggrieved by the said order, the appellant filed special leave petition.

The question before the Supreme Court was whether Bombay High Court had the jurisdiction to adjudicate upon the arbitration petition, where a previous application had been filed before the Delhi High Court and subsequently dismissed by the same court as having become infructuous. The court held that the main object of section 31 was to invest a single court with the exclusive jurisdiction to decide all questions relating to the matter

54 (2009) 7 SCC 516.

of arbitration and this object was achieved by the combined operation of all its sub-sections. In this regard, the court expressed its view that words "application in a reference" used in sub-section (4) should be related back to sub-sections (2) and (3) and all applications regarding the conduct of arbitration proceedings or arising out of such proceedings or in which the court had to decide questions regarding the validity, effect or existence of an award or an arbitration agreement between the parties to the agreement. The court further held that the very foundation for the jurisdiction of the court under section 34 was the existence of an arbitration agreement and that applications under sections 33 and 34 were fundamentally in the nature of arbitration proceedings and fell within the purview of section 31(4) though the former was intended to make an arbitration agreement ineffective and the latter effective and neither lead to a reference. The court also pointed out that the expression 'court' would have to be understood as defined in section 2(c) only if there was nothing repugnant in the subject or context and that it was in that light that the expression 'court' occurring in section 14(2) would have to be understood and interpreted. The court held that the Bombay High Court had jurisdiction since the application filed in Delhi High Court had became infructuous and that court neither gave any directions nor did it appoint an arbitrator in the adjudication of the said application and that when a court had no control of the arbitration proceedings, the said court was not a court within the meaning of section 31(4).

Scope of challenge

Non-application of mind by the arbitrator

In *Tamil Nadu Water Supply & Drainage Board* v. *M/s. Satyanarayana Brothers Pvt. Ltd.*,[55] a dispute arose between the appellant and the respondent under a works contract, which was referred to arbitration resulting in an award. The respondent challenged the award before the High Court. The learned single judge set aside the award. The division bench of the High Court allowed the appeal and a decree was passed in terms of the award. The respondent approached the Supreme Court which remitted the matter to the division bench of the High Court. On remand, the division bench dismissed the said appeals. The High Court held that the respondent had not committed any breach of the contract. Aggrieved by the said order, the appellant preferred appeals before the Supreme Court which were dismissed, but, by consent of the parties, a retired judge of the Supreme Court was appointed as a sole arbitrator to decide the disputes between the parties who gave an award. At the very outset, it was urged on behalf of both the parties that the said award was not acceptable to either party on account of an erroneous understanding by the arbitrator of the respective cases

55 (2009) 8 SCJ 930.

made out by the parties. The issue involved in this case was whether the non-application of mind in appreciating the case made out by the respective parties' *vis-à-vis* the materials on record by the sole arbitrator would attract legal misconduct under section 30(a). The Supreme Court held that non-application of mind was a legal misconduct under section 30(a) and setting aside the award, it appointed another retired judge of the Supreme Court as sole arbitrator and remitted the matter to him.

Court is not an appellate court

In *M/s. Ravindra & Associates* v. *Union of India*,[56] a disputes arose between the parties under a contract and the parties invoked the arbitration clause in the general conditions of contract. The arbitrator awarded to the claimant a certain sum with interest. The appellant-claimant filed an application before the principal sub-judge, to make the award a rule of the court. The respondent also filed an application for setting aside the award of the arbitrator. The sub-judge allowed the application of the appellant and made it a rule of the court. Aggrieved against the order of the sub-judge, the respondent preferred an appeal before the High Court which was allowed. The Supreme Court in this case reiterated the scope of interference in domestic arbitral awards by courts and relying on the earlier decision in *State of Rajasthan* v. *Union of India & Anr.*,[57] it held that the High Court wrongly interfered with the arbitration award acting as a court of appeal and set aside the order of the High Court.

No interference on question of fact

In *M.P.Housing Board* v. *Progressive Writers & Publishers*,[58] the parties had entered into three agreements in connection with the construction of building by the appellant to the respondent. When dispute arose between the parties, the appellant filed a civil suit which was referred to a sole arbitrator who by his award granted certain reliefs in favour of the respondent. Being aggrieved by the award passed by the arbitrator, the appellant initiated appropriate proceedings for setting aside the award. The trial court confirmed the award against which the appellant preferred appeals to the High Court which dismissed the same. The appellant approached the Supreme Court. The appellant contended that the arbitrator had committed gross misconduct by disregarding the terms of the contract and passed the award based on irrelevant events and circumstances while interpreting the terms of the contract. The respondent contented that the award did not suffer from any infirmities and that both the courts below concurrently found that the award passed by the arbitrator was just and reasonable and was not vitiated by any act of misconduct on the part of the arbitrator. The Supreme Court held that the finding arrived at by the arbitrator was on a

56 (2010) 1 SCC 80.
57 (2009) 6 SCC 414.
58 (2009) 5 SCC 678.

question of fact which was not even challenged by the appellant in the proceedings initiated by it under section 30 and that the award of the arbitrator was ordinarily final; the courts hearing applications under section 30 did not exercise any appellate jurisdiction and reappraisal of evidence by the court was impermissible. The court also pointed out that the finding could not be said to be perverse to give rise to legal misconduct deserving intervention under section 30 of the Act. Relying on its decision in *Jugal Kishore Prabhatilal Sharma*,[59] the court also held that the arbitrator had all the powers which the court itself would have in deciding the issues in the suit, that as the court's power to frame an additional issue if it was just and necessary for deciding the matter in dispute could not be denied, so also of the arbitrator where disputes between the parties pending adjudication on suits had been referred to arbitrator for determination.

No interference by substituting the views of court

In *K.V. Mohd. Zakir* v. *Regional Sports Centre*,[60] the appellants and respondent had entered into an agreement for the execution of certain works. Dispute arose because works could not be completed on account of delay on the part of the respondent in supplying cement and steel, and also in making available the drawings and for various other factors. A sole arbitrator was appointed. An award was passed by the arbitrator, which was challenged by the respondent before the High Court which set aside the award with regard to one claim and upheld the rest of the award. The Supreme Court in appeal held that the settled position in law was that court should not substitute its own view for the view taken by the arbitrator while dealing with the proceedings for setting aside an award and that where the arbitrator had acted within jurisdiction, the reasonableness of the reasons given by the arbitrator was not open to scrutiny by the courts. The court further held that if the reasons were such as no person of ordinary prudence could ever approve of or if the reasons were so 'outrageous in their defiance of logic' that they shock the conscience of the court, then it would be a different situation, and that the degree of such unreasonableness must be greater than the standard in a *certiorari* proceeding. The court also found that the arbitrator in that case had reached a finding of fact on the basis of materials on record about the delay on the part of the respondent and that the arbitrator had also held that because of such delay the claimant was put in great difficulty in completing the work in time and therefore the arbitrator had acted within his jurisdiction and had committed no legal misconduct.

Similarly, in *Ravindra Kumar Gupta and Co.* v. *Union of India*,[61] the court set aside the judgment of the High Court, which on a re-appreciation of evidence, had set aside the award.

59 (1993) 1 SCC 114.
60 (2009) 9 SCC 357.
61 (2010) 1 SCC 409.

In *Steel Authority of India Ltd.* v. *Gupta Brother Steel Tubes Ltd.*,[62] a dispute arose between the parties under a supply contract, which was referred to arbitration who passed an award in favour of the respondent. The appellant filed objections to the award before sub-judge, Ist class, Chandigarh raising diverse grounds. The sub-judge overruled the objections raised by the appellant and made the award a rule of the court and directed the payment of interest to the claimant @ 12 per cent *per annum* from the date of judgment until realization. The appellant challenged the judgment and order by filing an appeal before the district judge, Chandigarh who dismissed the appeal. The appellant preferred a revision petition before the High Court which dismissed the same against which the appellant approached the Supreme Court.

The Supreme Court held that the award could not be set aside merely on the ground that the arbitrator acted contrary to the provisions of the Contract Act, 1872. The court summarized the legal position that emerged from various decisions on the scope of interference thus:

(i) in a case, where an arbitrator travels beyond the contract, the award would be without jurisdiction and would amount to legal misconduct and because of which the award would become amenable for being set aside by a court.
(ii) An error relatable to interpretation of the contract by an arbitrator is an error within his jurisdiction and such error is not amenable to correction by courts as such error is not an error on the face of the award.
(iii) If a specific question of law is submitted to the arbitrator and he answers it, the fact that the answer involves an erroneous decision in point of law does not make the award bad on its face.
(iv) An award contrary to substantive provision of law or against the terms of contract would be patently illegal.
(v) Where the parties have deliberately specified the amount of compensation in express terms, the party who has suffered by such breach can only claim the sum specified in the contract and not in excess thereof. In other words, no award of compensation in case of breach of contract, if named or specified in the contract, could be awarded in excess thereof.
(vi) If the conclusion of the arbitrator is based on a possible view of the matter, the court should not interfere with the award.
(vii) It is not permissible to a court to examine the correctness of the findings of the arbitrator, as if it were sitting in appeal over his findings.

62 (2009) 10 SCC 63.

In *State of Rajasthan* v. *Ferro Concrete Construction (Pvt.) Ltd.*,[63] the Supreme Court, however, held that while the quantum of evidence required to accept a claim may be a matter within the exclusive jurisdiction of the arbitrator to decide, if there was no evidence at all and the arbitrator made an award of the amount claimed in the claim statement merely on the basis of the claim statement without anything more, the award on that account would be invalid. The court also held that it would be a legal misconduct if the arbitrator gave an award overlooking the terms of the contract.

Severability of an award

In *M/s. Kwality Manufacturing Corporation* v. *Central Warehousing Corporation*,[64] the Supreme Court held that when an award could not be upheld in its entirety, instead of setting aside the same, it should be modified to the extent it was valid and severable from the invalid portion. In this case, the issue before the Supreme Court related to the validity of an arbitration award made against the respondent. The respondent entered into a supply contract with the appellant which resulted in disputes and, at the instance of the appellant, the disputes were referred to arbitration. The arbitrator made a reasoned award which was challenged by the respondent by filing a petition in the High Court of Calcutta. A learned single judge of the High Court upheld the award and dismissed the application for setting aside the award. Aggrieved by the order, the respondent filed an intra-court appeal. A division bench of the High Court allowed the appeal by judgment, and set aside the award. The appellant approached the Supreme Court.

The Supreme Court pointed out that the scope of interference by courts in regard to arbitral awards was limited and that a court considering an application under section 30 or 33 of the Act did not sit in appeal over the findings and the decision of the arbitrator and that it should not re-assess or re-appreciate evidence or examine the sufficiency or otherwise of the evidence. The court also took note of the fact that the approach of the division bench was contrary to well settled principles relating to interference with arbitral awards under sections 30 and 33 of the Act and that the division bench had proceeded as if it was sitting in appeal over the award of the arbitrator and had reassessed the evidence. The court, therefore, held that a careful reading of the award showed that the inconsistency referred to by the division bench related to only a clearly separable issue relating to a portion of the award and, therefore, the High Court ought to have modified the award only to that extent instead of setting aside the entire award.

Award of interest

In *Madani Construction Corporation (P) Ltd.* v. *Union of India*, disputes arose between the appellant contractor and the respondent with

63 (2009) 12 SCC 1.
64 (2009) 5 SCC 142.

regard to a bridge construction contract. A sole arbitrator was appointed to adjudicate the disputes. He gave his award holding that the respondent should pay certain amount with compoundable bank interest prevalent at that time from date of demand to the date of award. The said award was made a rule of court by the senior civil judge, Gorakhpur who directed preparation of a decree with interest from the date of the award to the date of payment at the rate at which banks charge interest for loans. Challenging the aforesaid order of the civil judge, the respondent filed an appeal before the High Court. The High Court partly allowed the appeal. The appellant approached the Supreme Court.

The Supreme Court considered the question of grant of interest by the arbitrator and noted that section 29 enabled the court to award interest from the date of the decree and at such rate as the court deemed reasonable. Dealing with the arbitrator's power to award interest, the court stated that the same was governed by various judicial pronouncements and the provisions of Interest Act, 1978 under which the expression 'court' included both a tribunal and an arbitrator and that section 3 empowered the court to allow interest. The Supreme Court pointed out that normally there were three periods for which interests were awarded - (a) pre-reference period, *i.e.* from the date of the cause of action for going to arbitration and to the date of reference; (b) the *pendente lite* period, *i.e.* from the date of reference to the date of award; and (c) the post-reference period, *i.e*. from the date of the award to the date of realization. The court following the pronouncement of a constitution bench in *Secretary, Irrigation Department*,[65] which was followed in *Hindustan Construction Company Limited* v. *State of Jammu and Kashmir*,[66] and *State of Orissa* v. *B.N. Agarwalla*,[67] accepted the legal position with regard to the award of interest and held that the arbitrator had jurisdiction to award interest for all periods. The court then dealt with the agreement between the parties prohibiting payment of interest, and reiterated the position that mere prohibition in the agreement would not prevent the arbitrator from granting interest to the claimant. It then dealt with the specific clause in the agreement which did not contain any prohibition on the arbitrator to grant interest and, therefore, held that the High Court was not right in interfering with the arbitrator's award in the matter of awarding interest on the basis of the aforesaid clauses and, therefore, on a strict construction, those clauses did not impose any bar on the arbitrator in granting interest.

Interest for pre-reference period and interest on interest

In *U.P. Cooperative Federation Ltd.* v. *M/s. Three Circles*,[68] a dispute arose in a contract between the appellant and respondent and, at the instance

65 (1992) 1 SCC 508.
66 (1992) 4 SCC 217.
67 (1997) 2 SCC 469.
68 (2009) 10 SCC 374.

of the parties, the High Court appointed a sole arbitrator who by a reasoned award directed the appellant to pay a certain sum to the respondent along with interest at the rate of 15 per cent till the date of final payment. The appellant filed an application for setting aside the said award before the High Court which was dismissed. Aggrieved by the dismissal, the appellant filed appeal to the division bench which partly allowed the appeal, limited to the question of interest but rejected all other contentions of the appellant. Against the said order, the appellant approached the Supreme Court.

The Supreme Court relying on its earlier decision in *State of Rajasthan* v. *Ferro Concrete Construction Pvt. Ltd.*,[69] held that the High Court was perfectly justified in holding that the arbitrator had the power to award interest for the pre-reference period. The court then dealt with the question of awarding of 'interest on interest' and interest on cost. The court following its earlier decision in *McDermott International Inc.* v. *Burn Standard Co. Ltd.*,[70] upheld the award of interest on interest. The court also considered the question of award of interest on cost and held that the legislature by way of an amendment in the year 1956 had deleted section 35(3) of the Code of Civil Procedure, 1908 which empowered the court to award interest and that therefore, the arbitrator, on analogy, did not have the power to award interest on costs. The court further held that the powers of the arbitrator were not affected by changes made to the Code of Civil Procedure and that the power of the arbitrator, if any, should be located in the 1940 Act itself and that awarding costs was a matter of discretion of the arbitrator under the 1940 Act which did not contain any provision either permitting or prohibiting award of interest on cost. The court then relied on the 55th Report of the Law Commission of India which had recommended the award of interest on cost and upheld the award both on interest on interest and interest on cost.

In *Indian Hume Pipe Co.Ltd.* v. *State of Rajasthan*,[71] the Supreme Court reiterated the settled principle that the arbitrators have the power to award pre-reference, *pendente lite* and post-award interest if money had been wrongly withheld.

X CONCLUSION

The survey has shown that the arbitral jurisprudence in India is a dynamic and evolving area in Indian jurisprudence. The Supreme Court has laid down principles in certain important areas such as incorporation by reference of an arbitration agreement in a contract, appointment of government employees as arbitrators in government contracts, and the court's power to deviate from the appointment procedure under the

69 2009 (8) SCALE 753.
70 (2006) 11 SCC 181.
71 (2009) 10 SCC 187.

arbitration agreement and appoint arbitrators when the competent authority had failed to act in time. The court has also diluted the mandatory reference principle by holding that when complicated facts were involved and detailed evidence was required to be taken, the court need not refer the dispute to the arbitrator even when there was an arbitrable dispute between the parties. One notable feature of the majority of the cases decided by the Supreme Court pertain to pre-arbitration stage. This would show that considerable delays are involved before the actual arbitration proceedings begin. The only way to curb this delay is to prescribe time periods at every stage of arbitration. This alone would make arbitration an alternate dispute mechanism speedier and litigant friendly. The recent efforts by the ministry of law to remove the bottlenecks in the existing Act are a positive sign towards the laudable goal of efficient and speedy arbitral process in India.