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IMPORTANT QUESTIONS

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UNIT – I

ARBITRATION

Arbitration is not a new concept for the administration of justice without any delay. It is an age old alternative dispute resolution method all over the world. It is an alternative way to resolve the dispute out any access to the regular judicial system i.e. regular courts. Arbitration has been adopted from e immemorial and it has been given the sanctity of law after its efficacy was tested by the Governments.

Objectives: The main objectives of the Act are :

- a) to comprehensively cover international commercial arbitration and conciliation as also domestic arbitration and conciliation;
- b) to make provision for an arbitral procedure which is fair, efficient and capable of meeting the needs of the specific arbitration;
- c) to provide that the Arbitral Tribunal gives reasons for its arbitral award;
- d) to ensure that the Arbitral Tribunal remains within the limits of its jurisdiction.
- e) to minimise the supervisory role of courts in the arbitral process;
- f) to permit an Arbitral Tribunal to use mediation, conciliation or other procedures during the arbitral proceedings to encourage settlement of disputes;
- g) to provide that every final arbitral award is enforced in the same manner as if it were decree of the court;
- h) to provide that a settlement agreement reached by the parties as a result of conciliation proceedings will have the same status and effect as an arbitral award on agreed terms on the substance of the dispute rendered by an Arbitral Tribunal; and
- i) to provide that, for purposes of enforcement of foreign awards, every arbitral award made in a country to which one of the two international Conventions relating to foreign arbitral awards to which India is a party applies, will be treated as a foreign award.

Use of Objects and Reasons for Interpreting Provisions :

The Supreme Court observed in Narain Khamman vs. Parduman Kumar (1985): It is now well settled

that though the Statement of Objects and Reasons accompanying legislative Billing cannot be used to determine the true meaning and effect of the substantive provisions of a statute, it is permissible to refer to the Statement of Objects and Reasons accompanying a Bill for the purpose of understanding the background, the antecedent state of affairs, the surrounding circumstances in relation to the statute, and the evil which the statute sought to remedy.

It is well-settled that when the language of the statute is clear and admits of no ambiguity, recourse to the statement of objects and reasons for the purpose of construing a statutory provision is not permissible. The objects and reasons give an insight into the background why the provision was introduced. Though objects and reasons cannot be the ultimate guide in interpretation of statutes, it often-times aids in finding out what really persuaded the legislature to enact a particular provision.

The objects and reasons of an Act should be taken into consideration in interpreting the provisions of the statute in case of doubt. If the language of a provision is not clear, words have to be construed in the light of the legislative scheme, the object and purpose of enacting the provision and the ultimate effect of adopting one or the other construction.

Definitions: In this part, unless the context otherwise require:

- a) "arbitration" means any arbitration whether or not administered by permanent arbitral institution;
- b) "arbitration agreement." means an agreement referred to in Section 7;
- c) "arbitral award" includes an interim award;
- d) "arbitral tribunal" means a sole arbitrator or a panel of arbitrators.

Meaning, Nature and Scope of Arbitration: In the terms of sub-section (1) (a) "arbitration means any arbitration whether or not administered by permanent arbitral institution".

When the parties agree to have their disputes decided with the mediation of a third person, he with all the formality of a judicial adjudication, may be, speaking broadly, called an arbitration. An arbitration, therefore, means the submission by two or more parties of their dispute to the judgment of a third person, called the "arbitrator" and who is to decide the controversy in a judicial manner. "An arbitration is the reference of a dispute or difference between not less than two parties for determination, after hearing both sides in a judicial manner, by a person or persons other than a court of competent jurisdiction." "Arbitration" is thus defined by Romilly M.R. in the case of Collins vs. Collins (1858):

"An arbitration is a reference to the decision of one or more persons, either with or without an umpire, of a particular matter in difference between the parties."

Dispute: What is meant by the term "dispute" for this purpose? The term has not been defined by the Act nor there seems to be any judicial definition for the purposes of the Act.

Thus, the word "dispute" means/the matter in dispute, and not the contention or disputation over it. The expression shall include disputes of law as well as of fact. The dispute may relate to an act of commission or omission, for example, withholding a certificate to which a person is entitled or refusal to register a transfer of shares.

Where the liability is already clear, but the party liable is refusing to pay up, that is not a "dispute". It is a mere default. It is directly actionable.

In *Cleobulos Shipping Co. Ltd. vs. Intertanker Ltd.*, (1982) 132 ~Jew LJ 557, a ship was chartered to carry a cargo of naphtha under a voyage charter-party containing an arbitration clause'. The charterers refused to pay the full freight on the ground that the vessel had to be taken to a second unloading port owing to defects in the vessel's pumping facilities.

The owner brought an action for the freight. The charterers wanted the action to be stayed because of the arbitration clause. The court refused to agree that a failure to pay the full form freight was capable of constituting a "dispute". The court said that the rule is well established in *Aries Tanker Corporation vs. Total Transport Ltd.*, (1977) 1 All ER 398 HL, that freight had to be paid in full without any set-off; the good conduct of business so required. All cross-claims can be adjusted in legal proceedings.

In *Damodar Valley Corporation v. K.K. Kar*, AIR 1974 SC 158; (1974) 1 SCC 141: (1974) SCR 240, where, in a case before the Supreme Court, the liability to pay for coal supplied by a party under a contract was first repudiated, but finally payments were made and accepted by the other party, the latter than claiming compensation for repudiation, it was held that this was a dispute and the defendant's contention that the matter had been settled was not sufficient to bar arbitration.

In *State of Orissa v. Damodar Das*, (1996) 2 SCC 216: AIR 1996 SC 942; (1996) 82 Cut LT 110, the agreement to refer disputes and differences to arbitration must be expressly or impliedly spelt out from the clause. A clause in a contract empowered the public health engineer to decide questions relating to the meaning of specifications, drawings, quality of work etc. and provided that the decision shall be final and effect of being an arbitration clause.

It is not permissible for the complainant to raise new disputes in relation to damages claimed to have been sustained by him after the disputes have been referred to arbitration. The scope of arbitration has to be confined to the disputes which were the subject-matter of arbitration before the first arbitrator.

Dispute of Civil Nature: Whatever be the type of dispute, the matter in dispute must be of civil nature. Matters of criminal nature cannot be referred to arbitration. In most cases reference to arbitration shuts out the jurisdiction of the courts, except as provided in the Act and since criminal courts cannot be deprived of their jurisdiction to try criminals, no criminal matter can be referred to arbitration. Thus, if the reference of any case to arbitration would mean stifling prosecution of a criminal, the reference is not proper. Where, however, a criminal prosecution is only incidentally affected by reason of a reference, the reference is not improper.

Similarly, where a single act involves civil as well as criminal consequences and the injured party has either remedy at his disposal, he may agree to refer the matter to arbitration even if it has the effect of wiping out the crime.

If it is an implied term of the arbitration agreement or of the reference to arbitration that a complaint for non-compoundable offence will not be further proceeded with, the arbitration agreement is illegal and an award, if any, is invalid and it is immaterial whether a prosecution has been actually started or not (*Kamini Kumar Basu v. Birendra Nath Bose*, AIR 1930 PC 100; 57/A117; ILR (1930) 57 Cal 1302 : AIR 930 PC 100)

Generally matters of a criminal nature which cannot be compromised cannot be referred to arbitration. In cases where the injured party has a remedy by civil action as well as by criminal prosecution, a reference to arbitration can be made. Thus compoundable cases may be referred to arbitration. Disputes under Section



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145, Cr.P.C. (disputes to possession) are mostly of a civil nature and may be referred to arbitration.

Subject to this restriction, any matter of civil nature can be referred to arbitration. Disputes relating to property, ownership or tenancy, claims for damages howsoever arising, partnership matters, disputes between an institution, like a company, and its members, can all be referred to arbitration. But some letters involving a special type of jurisdiction cannot be so referred. For example, matters involving insolvency or probate jurisdiction or those involving breach of a trust created for a public purpose under - section 82 of the Code of Civil Procedure cannot be referred, for they involve public consequences and not merely adjudication of rights between private individuals. Matters under the Electricity Supply Act, 1948 which contains its own statutory provision are not arbitrable except as provided. In *Punjab S.E.B. v. Guru Nanak Cold Storage and Ice Factory Manufacturers*, (1996) 5 SCC 411 : AIR 1996 SC 284, before the Supreme Court, a defaulter in payment of bills was sued by the Electricity Board and decree for payment was obtained. The consumer, instead of satisfying the decree, claimed compensation for losses caused because of the sudden disruption of supply and demanded arbitration. The court said that the matter was not arbitrable because of the special provisions of the Electricity Supply Act.

Tort Matters: The arbitrator can decide matters connected with the contract. Where a charterer arrested the ship because it refused to deliver the whole of the cargo, the ship owner's claim for damages for the arrest was held by the court to be one in tort, but because the claim had arisen out of the breach of the charter party, the arbitrator was competent to adjudicate upon the connected matter.

Winding up of Companies: In *Astro Vencedor Comapnia Naviera v. Mobanaft*, (1971) 2 OB 588, the matter of the winding up of a company cannot be referred to arbitration. The court explained the position as follows:

Section 8(1) of the Arbitration and Conciliation Act, 1996 provides that the judicial authority before whom an action is brought in a matter will refer the parties to arbitration the said matter in accordance with the arbitration agreement. This, however, postulates that what can be referred to the arbitrator is only that dispute or matter, which the arbitrator is competent or empowered to decide. The claim in a petition for winding up is not for money. The petition filed under the Companies Act would be to the effect, in a matter like this that the company has become commercially insolvent and, therefore, should be wound up. The power to order winding up of a company is contained in the Companies Act and is conferred on the court. An arbitration notwithstanding any agreement between the parties, would have no jurisdiction to order winding up of a company.

Contracts of Apprenticeship: Contracts of apprenticeship being for the benefit of minors, if they contain an arbitration clause it will also be binding upon the minors.

Assignment: "When a contract is assignable, the benefit of an arbitration clause contained in it is assignable as part of the contract".

Powers under Agreement: Specific Enforcement: Where a reference was made by the court under a consent order which provided that the arbitrator would have summary powers and would not have to give reasons, it was held that the consenting party was precluded from challenging the validity of the non-speaking award.

Arbitration and Litigation: "One of the principal advantages of arbitration over litigation is commonly stated to be that where the dispute concerns a technical matter such as a building contract, the person chosen to arbitrate will normally be an expert in the subject-matter of the dispute, whereas a judge will

seldom have any practical experience of the technicalities of the trade in question."

"The court does not have the power which the arbitrator had to open up and review the exercise of the architect's discretion since the court's jurisdiction was limited to determining the enforcing the contractual rights of the parties. The arbitrator, on the other hand because the parties' agreement expressly gave him such power, was entitled to modify the parties contractual rights by substituting his own discretion for that of the architect if he disagreed with the architect's certificates and opinions. Accordingly, if the parties choose to litigate rather than arbitrate the court would not have the same powers."

The Supreme Court has also passed the following observation in *State of J&K v. Dev Dutt Pandit*, (1999) 7 SCC 339 : AIR 1999 SC 3196; "Arbitration is considered to be an important alternative dispute redressal process which is to be encouraged because of high pendency of cases in the courts and cost of litigation. Arbitration has to be looked up to with all earnestness so that the litigant has faith in the speedy process of resolving their disputes."

Reference under Arbitration Agreement: The second important feature of an arbitration is the agreement between the parties to the dispute to refer the matter to arbitration. The word "reference" was defined in Section 2 (e) of the Arbitration Act, 1940 (now repealed) this way : "reference" means a reference to arbitration.

ARBITRATION AGREEMENT

According to Section 70f Arbitration Conciliation Act, 1996 the Essentials and Kinds of Arbitration Agreement are:

1. "Arbitration agreement" means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.
2. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.
3. An arbitration agreement shall be in writing.
4. An arbitration agreement is in writing if it is contained in :
 - 1) an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement; or
 - 2) An exchange of statements of claim and defense in which the existence of the agreement is alleged by one party and not denied by the other.
5. The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.

Agreement to be in Writing: One of the points of some formal importance emphasised by these provisions is that the reference should be by means of a written agreement. Section 7(3) most emphatically

prescribes that "an arbitration agreement shall be in writing". An oral agreement to submit a dispute to arbitration is not binding. If the agreement is in writing it will bind, even if some of its details are filled in by oral understanding. It is not necessary that the agreement should be on a formal document nor it is necessary that the agreement should be signed by both or either party. It is sufficient that the written agreement has been orally accepted by the parties or that one has signed and the other has accepted.

Act recognises in Section 7(4) some three methods of arriving at a written agreement. One of them is exchange of letters or raising a claim under an alleged arbitration agreement which is not denied by the other party. The Act provides in Section 7 (4) that an arbitration agreement is in writing if it is contained in an exchange of letters, telex, telegrams, or other means of telecommunication which provide a record of the agreement or in an exchange (if statements of claim and defense in which the existence of the agreement is alleged by one party and not denied by the other).

Whatever be the form or contents of the agreement, it is necessary for the Act to apply that there should be a mandatory requirement for settlement of disputes by means of arbitration. An agreement that the parties may go in for a suit or may also go in for arbitration is not an arbitration agreement.

No prescribed form of agreement: In Rukmanibai Gupta v. Collector, Jabalpur (1980) 4 SCC 556: AIR 1981 SC 479, the Supreme Court laid down that an arbitration clause is not required to be stated in any particular form. If the intention of the parties to refer the dispute to arbitration can be clearly ascertained from the term of the agreement, it is immaterial whether or not the expression "arbitration" or "arbitrator" has been used. Nor it is necessary that it should be contained in the same contract document. An arbitration clause may be incorporated into an existing contract by specific reference to it. Section 7 (5) clearly provides that the reference in a contract to a document contained an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make the arbitration clause a part of the contract. Hence, the whole thing turns upon the intention of the parties. Where the party showed that the arbitration clause in the signed agreement crept in mistake, it was held that the civil court was in error in acting upon a clause which the parties did not intend to be there and appointing an arbitrator on that basis.

Tenders Containing Arbitration Clauses: The acceptance of a tender or a work order which carries an arbitration clause, or the membership of an institution the constitution of which provides for arbitration or a contract which contains a provision for arbitration, is sufficient. Acceptance of such a tender by an authorised functionary of the Government would be a sufficient compliance of the formal requirements of Article 299 of the Constitution of India so as to bind the Government by the arbitration clause.

"Arbitration Agreement" and "Reference": The expressions "arbitration agreement" and "reference" have been separately defined. Explaining the purpose and effect of this scheme, the Supreme Court observed in *Banwari Lal Kotiya v. P.C. Aggarwal*, (1985) 3 SCC 255, 260: AIR 1985 SC 1003: 1985 Arb. LR 1003. (The term "reference" has not been defined in the new 1996 Act, but the statement continues to be valid as emphasising the distinction between an agreement for arbitration and a reference under it):

"The expression (reference) obviously refers to an actual reference made jointly by the parties after disputes have arisen between them for adjudication to named arbitrator or arbitrators, while the expression "arbitration agreement" is wider as it combines two concepts, (a) a bare agreement between the parties that disputes arising between them should be decided or resolved through arbitration and (b) an actual reference of a particular dispute for adjudication to named arbitrator.

The facts of Banwari Lal Case, (1985) 3 SCC 255, were that there was a dealing about shares between a Stock Exchange member and an outsider under which a sum of money had become due to the member. The parties signed the contract-notes on a prescribed form. The transaction was subject to the rules, regulations and bye-laws of the Stock Exchange one of which provided for arbitration in such matters. The member appointed his arbitrator. The other refused to reciprocate. In such cases, the rules provided for appointment by the Exchange. The latter accordingly appointed one. The other party participated in the proceedings under protest that he had not given his consent and, therefore, the award would not be binding on him. The Supreme Court came to the conclusion that a fresh consent was necessary on his part. He had consented to the rules and regulation which contained an elaborate machinery for submission. No fresh consent was necessary.

Clauses having the effect of "arbitration agreement": Whether a clause in a contract amounts to an agreement of arbitration depends upon its scope. In State of U.P. v. Tipper Chand, (1980) 2 SCC 341: AIR 1980 SC 1522: 1980 All LJ 749, before the Supreme Court a clause in a Government contract provided that the decision of the superintending engineer upon all questions relating to the contract shall be final and binding. An application was made under Section 20 of 1940 Act (now Section 8) to refer a dispute to arbitration on the basis that the above clause amounted to an agreement of arbitration. The supreme Court rejected the contention. FAZALAI, J., observed:

"Admittedly the clause does not contain any express arbitration agreement. Nor can such an agreement be spelled out from its terms by implication, there being no mention in it of any disputes much less of a reference thereof. The purpose of the clause clearly appears to be to vest the superintending engineer with supervision of the execution of the work and administrative control over it from time to time."

The court distinguished the case from some earlier rulings in which the clause in question provided that in any dispute between the contractor and the department the decision of the chief engineer shall be final". The court said that this clause was correctly interpreted as amounting to an arbitration agreement.

In another case i.e., Rukmani Gupta v. Collector, Jabalpur (1980) 4 SCC 556, a mining lease granted by e State carried a clause that disputes, if any, shall be decided by the lessor (in this case the Governor whose name the lease was executed) and his decision shall be final. The Supreme Court held that is amounted to an arbitration agreement. DESAI. J., said:

Arbitration agreement is not required to be in any particular form. What is required to be ascertained is 'whether the parties have agreed that if disputes arise they would be referred to arbitration, then such an arrangement would spell out an arbitration agreement."

Reference of time-barred claim: An arbitration agreement may even contemplate reference of a time barred claim. A policy of insurance required the assured to refer the matter to arbitration within twelve months of the company's disclaimer. The assured referred it after twelve months and yet the reference as held to be binding. (Ruby General Insurance Co. Ltd. v. Peare Lal Kumar, AIR 1951 Punjab 440)

The significance of Section 25(3) of the Indian Contract Act, 1872 has also to be kept in view. A time barred claim can, therefore, validly form the subject-matter of reference. A distinction, however, is to be made between an arbitration agreement entered into about a time-barred claim and a reference made the basis of an arbitration clause after the expiry of the period of limitation. In the latter case no reference can be made as the right to claim ceases to subsist and the relief with respect to the dispute as become time-barred.

Adoption of arbitration clause from main contract by sub-contract: Where an arbitration clause contained in the main contract is adopted in a sub-contract also by a clause declaring that this subcontract is being granted on the terms and conditions applicable to the main contract, it will not necessarily follow that the parties to the sub-contract would also be bound by the arbitration clause. For e thing, the parties are different and for another, the purpose of the contract being different, different kinds of disputes are likely to arise than those contemplated by the main contract.

Position of Non-Parties: An arbitration is a private procedure. It is an implied term that stingers to the 2 agreement are excluded from hearing and conduct of proceedings. Accordingly, an arbitrator cannot, less all parties consent, order that the arbitration of a dispute between a ship owner and a charterer - 'sing out of a charter party and the arbitration of a separate but closely-related dispute between the charterer and a sub-charterer arising out of a sub-charterer be heard together even though the two disputes are closely related and a consolidated hearing would be convenient.

Validity of Arbitration Agreement

Reference without agreement or under void agreement: The court may stay arbitration proceedings where the parties have not agreed to refer the particular dispute to arbitration or where the contract which carried the arbitration clause is itself void. The proceedings remain stayed till the matter as to the validity of the reference is decided. A situation of this kind came before the Court of Appeal in England in Ben & Co. Ltd. v. Pakistan Edible Oils Corporation Ltd. (1979)

There was a contract to purchase palm-oil by a Karachi firm from a Singapore seller. The contract included a London arbitration clause. The Karachi firm contended that the agent who purported to contract on their behalf had no actual or apparent authority to do so . the seller commenced arbitration proceedings in London. The Karachi party-applied for a stay.

In K.K. Modi v. K.N. Modi, (1998) 3 SCC 573 : AIR 1998 SC 1297, in a family matter before the Supreme Court, a memorandum of understanding was signed between the two branches of the family for bringing about division of property between them. Experts were appointed for valuation and preparation of scheme for division between the two groups the corporate undertakings of the family. The agreement also provided that any dispute, clarification, etc. in the matters of implementation would be referred to the Chairman of the Industrial Finance Corporation of India. It was held that this did not constitute an arbitration agreement. It only amounted to a reference of issues to an expert for decision.

Nature of Dispute: Disputes which can be referred to arbitration are :

- 1) present or future disputes which are,
- 2) In respect of a defined legal relationship, whether contractual or not.

Present or Future Disputes: All matters of a civil nature with a few exceptions, whether they relate to present or future disputes may form the subject of reference but not a dispute arising from and founded on an illegal transaction.

Though the existence of a dispute is essential to the validity of a reference to arbitration, an arbitration agreement may provide for a present or a future dispute. If the agreement relates to a present dispute it will generally amount to a reference, but if it has been entered into merely to provide for any future dispute, it is an arbitration clause.