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Cases of Special Jurisdiction: Where the law has given jurisdiction to determine, certain matters to specified tribunals only, such matters cannot be referred to arbitrations, e.g.,

a) Insolvency proceedings
b) Probate proceedings
c) Suit under Section 92, CPC
d) Proceedings for appointment of guardian
e) Matrimonial causes - except settlement of terms of separation or divorce
f) Title to immovable property in a foreign country
g) Claim for recovery of octroi duty.

Not necessary to specify dispute: It is not necessary to specify the dispute either in the arbitration agreement or in the reference to the arbitrator. Such specification can also be made in the proceedings before the arbitrator.

Statutory Arbitrations: The disputes which may be the subject of an arbitration agreement need not necessarily arise out of a contract. They may also arise out of stat4tory provisions.

Who can make reference: Reference to arbitration may occur in any of the following ways :

Under Statutory Provisions: A reference can be made under the provisions of an Act. There are many Acts of Parliament which provide that any dispute about their provisions shall be settled by arbitration. The electricity Supply Act, 1948, for example, provides for disposal by arbitration the disputes that may arise about its provisions.

By Consent of Parties: The parties to a dispute may agree to have their differences resolved by arbitration.

The method of having arbitration though the intervention of the court has been dropped by the 1996 Act. The policy of the Arbitration and Conciliation Act, 1996 is to minimise the intervention of the court. The new Act minces no words in declaring in Section 5 that notwithstanding anything contained in any other law for the time being in force, in matters governed by part I of the Act no judicial authority can intervene except where permitted by the provisions of Part I. Accordingly, an arbitration can now by only parties' agreement and not through court or through intervention of court. On this point, Section 8 of the 1996 Act carries this provision that where a party to an arbitration agreement nevertheless files a suit the other party may apply to the court and the letter may order reference to 'arbitration'.

Effect of Arbitration Agreement: Stay of Suits (Section 8)
Power to refer parties to arbitration where there is an arbitration agreement:

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

2) The application referred to in sub-section (1) shall not be entertained unless it is accompanied by the

original arbitration agreement or a duly certified copy thereof.

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

Power of court to order parties to arbitration: The Arbitration and Conciliation Act, 1996 is intended help the parties to settle their differences privately by conciliation or by arbitration and thereby to spare - themselves of wasteful and vexatious litigation. If the matter covered by an arbitration agreement could shall be litigated upon, the arbitration, instead of being a cheaper and less time-consuming alternative to litigation, would involve duplicity of expenditure and effort and would in essence be self-defeating. It is, therefore, necessary to provide, to make arbitration meaningful and a real alternative to litigation, that the matter covered by an arbitration agreement shall not be litigated upon in any court of law whatsoever, except for the purposes of making the arbitration really effective.

In recognition of this principle Section 8(1) of the Arbitration and Conciliation Act, 1996 provides that if any party to an arbitration agreement brings before a judicial authority the matter covered by the agreement, the other party may apply for stay of the suit and for order of reference to arbitration.

The question whether the dispute in question is arbitrable or not has to be decided by the court. It has also to decide whether the dispute brought before it is the subject-matter of the arbitration agreement. In satisfying itself whether the dispute is arbitrable or not the court has to go into the aspects of validity, existence etc. of the agreement.

Under the Arbitration and Conciliation Act, 1996 (Section 8), the word used is "shall". The effect is that the court has no choice or discretion in the matter and is bound to refer the parties to arbitration.

The Supreme Court in Anderson Wright Ltd. v. Moran & Co. AIR 1955 SC 53, stated the requirements of stay as they applied under the 1940 Act;

In order that a stay may be granted it is necessary that the following conditions should be fulfilled:

1) The proceedings must have been commenced by a party to an arbitration agreement against any other party to the agreement;

2) The legal proceeding which is sought to be stayed must be in respect of a matter agreed to be referred. The subject-matter of the action should be the same as the subject-matter of the arbitration agreement.

3) The applicant for stay must be a party to the legal proceedings and he must have taken no step in the proceedings after appearance. [Under the 1996 Act, the requirement is before 'submitting first statement on the substance of the dispute'] It is also necessary that he should satisfy the court not only that he is but also was at the commencement of the proceedings ready and willing to do everything necessary for the proper conduct of the arbitration; and

4) The court must be satisfied that there is no sufficient reason why the matter should not be referred to an arbitration in accordance with the arbitration agreement.

The discretionary element in the power of the court is not applicable under the 1996 Act. Under the new

provision (Section 8 of 1996 Act) the requirements of stay application and of an order for reference to arbitration were stated by the Supreme Court in P. Anand Gajapathi Raju v. P.v.G. Raju AIR 2000 SC 1886 as follows:

1) There must be an arbitration agreement;
2) A party to the agreement brings an action in the court against the other party;
3) The subject-matter of the action is the same as the subject-matter of the arbitration agreement;

4) The other party moves the court for referring the parties to arbitration before submitting the first statement on the substance of the dispute."

Matter of stay should be within arbitration agreement: Firstly, the matter about which a suit has been filed should be within the scope of the arbitration agreement. The words used in the section are:

"In a matter which is the subject of an arbitration agreement".

Impartiality of Nominated Arbitrator: The impartiality of the arbitrator or lack of independence on his part is under the 1996 Act a ground Tor having him substituted and riot for staying legal proceedings because Section 8 is couched in mandatory form. The court has no choice in the 'matter but to order the parties to reference.

The Supreme Court pointed out in U.P. Cooperative Federation vs. Sunder Bros., Delhi (1966) that a stay will not be granted if there is a good reason for apprehending that the selected arbitrator is likely to show bias or that he will not act fairly or that he has been guilty of unreasonable conduct or that for some reason it is improper that he. should arbitrate in the dispute. Bias may arise, for example, from the act that the arbitrator is related to one of the parties. Similarly, where the arbitrator has to play the role of a witness also, it is improper that he should arbitrate, and, therefore, an action would be allowed to proceed. Thus, where a contractor worked for a corporation and the disputes, if any, were to be referred o the corporation's engineer, a dispute which arose involved conflict of evidence between the contractor and the engineer, it was held that the engineer was not the proper person to arbitrate and so the suit should be allowed.

These rulings would be applicable under the Arbitration and Conciliation Act, t996 only when the circumstances are such and the arbitration agreement is such that the substitution of the arbitrator is not possible under the challenge procedure permitted by Section 12 and 13 of the Act.

Fraud by one party to arbitration: The court may refuse a stay where the question is whether one of the 3arties to the arbitrator, agreement has been guilty of fraud. In such cases a special issue for setting aside the agreement on the ground of fraud under Sections 17 and 19 of the Indian Contract Act, 1872 would have to be raised.

Agreement to exclude courts altogether: An arbitration agreement which seeks to exclude altogether. The jurisdiction of the courts would be void, being contrary to the arbitration am;! conciliation Act, 1996 itself. For example, the court's power to ask the arbitrator to submit a question of law for determination by the court under. the earlier 1940 Act could not be ousted. But it is open to the parties to stipulate that the award of the arbitrator shall be a condition precedent to the mi3intainability of any suit. In such cases action may be allowed until an award has been obtained. This was laid down in Scott v. Avery (1856) CL 811 and such a clause is also known by the' name of that case.

A policy of insurance on a ship provided that in the event of loss the amount of loss would be determined - arbitration and that the award of the arbitrator would be a condition precedent to the maintainability of any suit. The House of Lords accordingly held that no action was maintainable until the award was obtained.

The validity of Scott v. Avery clause was approved by the Supreme Court in Vulcan Insurance Co. v. Maharaj Singh(1976) 1 SCC 945 : AIR 1976 SC 287.

A factory was insured against fire. It was lost in a fire, but the insurance company repudiated all liability under the policy. The policy provided that if any dispute arose as to the amount of any loss or damage, the same would be decided by arbitration. The assured attempted to appoint an arbitrator by filing the agreement in the court.

UNTWALIA, J., held that the repudiation of liability was not a dispute as to the amount of "an loss or age" and, therefore, it was outside the arbitration agreement. The proper course for the assured as to commence a suit to determine the question and once a court had decided that the company could have been held liable, the matter could have been referred to arbitration as to the amount of liability. Such a suit was not barred by the policy. A suit of this kind is not barred unless there is the Scott v. Avery clause.

Effect of Legal proceedings upon Arbitration (Section 8, 1996 Act): Sub-section (3) of Section 8, 1996 Act deals with this point:

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

Under Section 8 of the new Act unless a party objects to the .legal proceedings, they are valid. The arbitration agreement does not oust the jurisdiction of the courts by itself. Where no party comes forward to object to the suit, the arbitration agreement becomes ousted. A suit would have no effect on the arbitration proceeding if it is pending, or even 'commenced. Such proceedings can be continued and an award made.

Waiver of Rights

Waiver of Right to Object: A party who knows that:

1) Any provision of this Part from which the parties may derogate, or

2) Any requirement under the arbitration agreement, has not been complied with the yet proceeds with the arbitration without stating his objection to such-non-compliance without undue delay or, if a time limit is provided for stating that objection, within that period of time, shall be deemed to have waived his right to so object.

Extent of Judicial Intervention: Notwithstanding anything contained in any other law for the time, being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part.

Judicial Intervention: This section bars the jurisdiction of courts to interfere or to intervene in arbitration proceedings except to the extent provided in Part I. This Part provides for/intervention of Courts in the following cases:

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1) Section 8 - making reference in a pending suit.
2) Section 9 - passing interim orders.
3) Section 11 - appointment of arbitrators.
4) Section 14(2) - terminating mandate of arbitrator.
5) Section 27 - Court assistance in taking evidence.
6) Section 34 - setting aside an award.
7) Section 37 - entertaining appeals against certain orders.
8) Section 39(2) - directing delivery of award.

Some of the cases where Courts exercised jurisdiction under the repealed Arbitration Act, 1940, and in which the jurisdiction is barred under the present Act were:

1) Section 11 - removal of an arbitrator or umpire
2) Section 14 - filing of an award in court.
3) Section 15 - modification of award by court.
4) Section 16 - power of court to remit an award for reconsideration.
5) Section 17 - pronouncing judgment in terms of an award.
6) Section 19 - superseding an agreement.
7) Section 20 - filing of arbitration agreement in Court and seeking an order of reference

Provision of Interim Relief by Courts

Interim Measures by Court: A party may, before or during arbitral proceedings or at any time after the making of the arbitral award -but before it is enforced in accordance with Section 36, apply to a Court -

1) For the appointment of a guardian for a minor or a person of unsound mind for the purposes of arbitral proceedings; or

2) For an interim measure of protection in respect of any of the following matters, namely:

   a) the preservation, interim custody or sale of any goods which are subject-matter of the arbitration agreement;

   b) securing the amount in dispute in the arbitration;

   c) the detention, preservation or inspection of any properly or thing which is the subject matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising any samples to be taken or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;

   d) interim injunction or the appointment of a receiver;

   e) such other interim measure of protection as may appear to the Court to be just and convenient.

and the court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it.

Power of Court: The section provides for the making of orders for interim measures to provide interim relief to the parties in respect of arbitration. Section 41 and Schedule II of repealed 1940 Act dealt with this subject-matter. Those provisions have been deleted. The powers of the court include an order in respect of the following matters:

1) the preservation, interim custody or sale of any goods which are the subject-matter of the reference.

2) Securing the amount in difference in the reference.

3) The detention, preservation of inspection of any property or thing which is the subject of the reference or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon or into any land or building in the possession of any party to the reference, or authorising any samples to be taken, or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence.

4) Interim injunctions or the appointment of a receiver.

5) The appointment of a guardian for a minor or person of unsound mind for the purposes of arbitration proceedings.

Effect of Interim Measures: An interim measure does not put to rest the rights of the parties. The rights of the parties are required to be adjudicated finally when a reference is made. The court has the authority and jurisdiction to pass interim orders for protection and preservation of rights of the parties during the arbitration proceedings but that does not necessarily mean that if a party has availed of a benefit under this jurisdiction, the other party cannot put his claim in the ,main pr0geedings which is before the arbitrator. The interim arrangement made by the court has to be giver:' the interim status. Where an arbitration clause exists in a contract and an order relating to the contract is passed and the parties do not abdicate the arbitration clause and, on the contrary, take a resource to the same, at the disputes inclusive of benefits arising or having already arisen, have to be decided by the arbitrator.

IMPORTANT QUESTIONS

Q.1. What are the salient features of Arbitration and Conciliation Act, 1969? Discuss.

Q.2. Explain the requirements of a valid arbitration agreement.

Q.3. "An arbitration agreement cannot be revoked due to the death of either of the party to dispute." Comment.

UNIT - II

ARBITRATION TRIBUNAL

According to Section 10 of Arbitration and Conciliation Act the qualification and procedure for the Appointment of Arbitrators are:

1) A person of any nationality may be an arbitrator, unless otherwise agreed by the parties.

2) Subject to sub-section (6), the parties are free to agree on a procedure for appointing the arbitrator or arbitrators.

3) Failing any agreement referred to in sub-section (2), in an arbitration with three arbitrators each party shall appoint one arbitrator, and the two appointed arbitrators shall appoint the third arbitrator who shall act as the presiding arbitrator.

4) If the appointment procedure in sub-section (3) applies and –

   a) a party fails to appoint an arbitrator within thirty days .from the receipt of a request to do so from the other party; or

   b) The two appointed arbitrators fail to agree on the third arbitrator within thirty days from the date of their appointment, the appointment shall be made, upon request of a party, by the Chief Justice or any person or institution designated by him.

5) Failing any agreement referred to in sub-section (3), in an arbitration with a sole arbitrator, if the parties fail to agree on the arbitrator within thirty days from receipt of a request by one party from the other party to so agree the appointment shall be made, upon request of a party, by the Chief Justice or any person or institution designated by him.

6) Where, under an appointment procedure agreed upon by the parties –

   a. a party fails to act as required under that procedure; or

   b. the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or

   c. a person, including an institution, fails to perform any function entrusted to him or if under that procedure, a party may request the! Chief Justice or any person or institution designated by him to

take the necessary measure, unless the agreement on .the appointment procedure provides other means for securing the appointment.

7) A decision on a matter entrusted by sub-section (4) of sub-section (5) on sub-section (6) to the Chief Justice or the person or institution designated by him is final.

8) The Chief Justice or the person or institution designated by him, in appointing an arbitrator, shall have due regard to –

a. any qualifications required of the arbitrator by the agreement of the parties; and

b. other considerations as are likely to secure the appointment of an independent and impartial arbitrator.

9) In the case of appointment of sole or third arbitrator in an international commercial arbitration, the Chief Justice of India or the person or institution designated by tlil1lf may appoint an arbitrator of a nationality other than the nationalities of the parties where the parties belong to different nationalities.

10) The Chief Justice may make such scheme as he may deem appropriate for dealing with matters entrusted by sub-section (4) or sub-section (5) or sub-section (6) to him.

11) Where more than one request has been made under sub-section (4) or sub-section (5) or sub-section (6) to the Chief Justices of different High Courts or their designates, the Chief Justice or his designate to whom the request has been first made under the relevant sub-section shall alone be competent to decide on the request.

12) (a) Where the matters referred to in sub-sections (4), (5), (6), (7), (8) and (10) arise in an international commercial arbitration, the reference to "Chief Justice" in those sub-sections shall be construed as a reference to the "Chief Justice of India".

(b) Where the matters referred to in sub-sections (4), (5), (6), (7), (8) and (10) arise in any other arbitration, the reference to "Chief Justice" in those sub-sections shall be construed as a reference to the Chief Justice of the High Court within whose local limits the Principal Civil Court referred to in clause (e) of sub-section (1) of Section 2 is situate and, where the High Court itself is the Court referred to in that clause, to the Chief Justice of that High Court.

Appointment by Chief Justice (Section 11): The expression Chief Justice in this connection virtually means the court because in most cases the Chief Justices have authorised Civil Judges.

In the three cases mentioned in -the section the Chief Justice gets- the power to appoint an arbitrator. They are:

a) Where he parties fall to appoint or concur in the appointment of an arbitrator or arbitrators;

b) Where the two appointed arbitrators fail to appoint or concur in the appointment of the presiding arbitrator.

c) Where the person or institution designated by the parties for appointment fails to act.