Q-1- Discuss salient features of Arbitration and conciliation act. 1996.

Salient Features of the Arbitration and Conciliation Act, 1996

The Arbitration and Conciliation Act, 1996 contains the following salient features

1. A Comprehensive Statute.-The Arbitration and Conciliation Act, 1996, is related to the domestic, international and inter-state arbitrations. This Act provides importance to enforcement of international arbitral awards and conciliation matters as well. The comprehensive nature of this Act is the result of the United Nations Commission on International Commercial Arbitration, 1985 because Geneva Assembly of the United Nations had emphasized and also recommended uniform model law on arbitration among the countries.

2. An Explanatory Code.-The old Act of 1940 had no provision for international arbitration whereas this Act of 1996 is an explanatory and a complete Code in itself, rather it is an exhaustive Code. For the first time a procedure for setting of Arbitral Tribunals is provided by this statute, it also gives status of Tribunal to the Arbitrators or Board of Arbitrations or Statutory Arbitrations.

3. Curtailment of the Courts Powers. The Act has limited the powers of court rather restricted the exercise of judicial power, in other words, it has confined the extent of judicial intervention as under Section 5 of the Act-"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."

Finality of arbitral awards is given under Section 35 according to which an arbitral award shall be final and binding on the parties and persons claiming under them respectively. Thus, the Act itself provides finality to arbitral awards and its enforcement (Section 36) without intervention of the Court.

4. Procedure for Conduct of Arbitration and Awards in detail. Chapter V of the Arbitration and Conciliation Act, 1996 from Section 18 to Section 27 provides detailed procedure and practice in hearings as well as statements of claim and defence.

The Arbitral Tribunals are empowered to settle any objections raised in respect of jurisdiction or scope of authority of the arbitrators.

5. Precised Powers of the Court. The Act of 1996 has precised the powers of the court by taking assistance only in certain specific matters. The Court's assistance can be sought in taking evidence only with the prior approval of the arbitral tribunals, as under Section 27(1) "The arbitral tribunal or a party with the approval of the arbitral tribunal, may apply to the court for assistance in taking evidence." In the matter of jurisdiction Section 42 of the Act of 1996 states that

"Notwithstanding anything contained elsewhere in this part or in any other

law for the time being in force, where with respect to an arbitration agreement any application under this part has been made in a court, that court alone shall have jurisdiction over the arbitral proceedings and all subsequent applications arising out of that agreement and the arbitral proceedings shall be made in that court and in no other court." 6. Powers of the Arbitrators enhanced.-In comparison with the old Act, the new Act has enhanced the powers of the arbitrators in respect of jurisdiction of Arbitral Tribunals and has also improved the competence of the arbitrators to rule. Chapter IV, Section 16 and Section 17 of the Act, 1996 provide these measures.

7. A new form of Conciliation.-Part III of the Act, 1996 deals with new internationalised approach to conciliation and explain its application and scope. The Act under Section 63 intends to prescribe number of conciliators and in case of more than one conciliator, their number should be decided by the agreement of the parties.

Section 63(2) States-"Where there is more than one conciliator, they ought, as a general rule, to act jointly." Thus, the new Act makes scope of conciliation more wide, and much emphasis has been provided on mutual rather consensual conciliation in every respect. Section 66 of the Act, 1996 takes away restrictions of certain enactments from conciliation. "The Conciliator is not bound by the Code of Civil Procedure, 1908 (5 of 1908) or the Indian Evidence Act, 1872 (1 of 1872),"

8. International applicability.-Under the old Act of 1940, there was no provision for applicability of any interim award made by the Foreign Arbitral Tribunal is., An Arbitral Tribunal constituted by I.C.C. Court Arbitration at London. But, the new Act of 1996, has provinions for applicability of Foreign Arbitral Tribunal's awards.

Scope of Arbitration Law in India

The globalisation of trade and commerce and economic liberalisation created need for effective implementation of economie reforms, It was realised that old Indian Arbitration Law, 1940 is not effective enough to meet the present day requirements. The multinational companies/enterprises are pouring into India in the field of banking, insurance, building construction, electricity, telecommunication, etc. and there is commercial interaction between India and foreign countries wherein parties Agree or have agreed for arbitration in case of dispute arising out of such commercial activities and the dispute shall be determined and settled in accordance with the Arbitration and Conciliation Act, 1996 and the rules framed thereunder.

However, it is to be noted that the expression "commercial" in the context of the Arbitration Law has been observed by the Apex Court in RM Investment and Trading Co. Put. Ltd. v. Boeing Company, as follows:

"While construing the expression "commercial" in section 2 of the Act, it has to be borne in mind that the Act is calculated and designed to subserve the cause of facilitating

international trade and promotion thereof by providing speedy settlement of disputes arising in such trade through arbitration and any expression or phrase occurring therein should receive a liberal construction"

In this case the Apex Court has held that consultancy rendered by R.M. Investment and Trading Co. Pvt. Ltd. to Boeing Company for the purpose of developing commercial activities of sale of Boeing aircrafts is purely "commercial" in nature, hence, relationship between the two companies with each other is commercial.

In another case the Apex Court has held that activities such as exchange of commodities for money or other commodities, carriage of persons and goods by road, rail, air or waterways, contract, postal and telegraph services, banking, insurance and transactions in stock exchange are considered to be commercial interaction within the ambit of Article 301 of the Constitution of India, 1950 which deals with freedom of trade, commerce and intercourse-"Subject to the other provisions of this part (i.e., Part XIII of the Constitution of India, 1950 under heading, Trade, commerce and intercourse within the territory of India), trade, commerce and intercourse throughout the territory of India shall be free."

Thus, all kinds of commercial activities may be arbitrable provided there is agreement in this regard between the parties. But in Kamini Engineering Corporation v. Re Traction, the Apex Court has held that merely providing technical assistance in electrification of railways did not involve assistance or consultancy into active business and therefore such an agreement could not be interpreted to be commercial in nature as it is outside the scope of the term commercial' in the context of the Arbitration Act.

Where there is an arbitration agreement within the meaning of Section 7 of the Arbitration and Conciliation Act, 1996, in case of dispute the conflicting parties can be referred for arbitration. Section 7(1) of the Arbitration and Conciliation Act 1996 defines the term 'arbitration agreement' as follows"Arbitration Agreement" means an agreement By r parties to submit to arbitration all or certain disputes which have arisen for which may arise between them in respect of defined legal relationship, whether contractual or not".

Sub-section (2) of Section 7 of the said Act provides that an arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement. Although Section 7(3) makes it compulsory that an arbitration agreement shall be in writing. According to Section 7(4) of the Arbitration and Conciliation Act, 1996 an arbitration agreement may be contained in the following

(a) a document signed by the parties;

(b) an exchange of letter, telex, telegram or other means telecommunication which provides a record of the agreement; or of

(c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.

Therefore, it can be said that to come within the scope of the Arbitration Act, there are three essentials

(1) such an agreement must be in writing;
(2) there must be definite parties;
(3) parties must have intention to settle their disputes by way
arbitration.

Whether the arbitration clause is a part of contract

As provided under Section 7(5) of the Arbitration and Conciliation Act, 1996 the reference in a contract to a document containing 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.

Bill on the Law of Arbitration and Conciliation

On 16th May, 1995 the Bill relating to law of arbitration and conciliation was introduced in the Rajya Sabha by the then Minister of Law and Justice. On 17th May, 1995 the Chairman of Rajya Sabha referred the Bill to the Parliamentary Committee. On 28th November, 1995 the said Committee submitted its report to the Parliament. The then Central Government was compelled to promulgate an Ordinance on Arbitration and Conciliation Act as the Winter Session of the Parliament in December, 1995 expired without transacting any business. Only on 16th July, 1996 the Rajya
Sabha passed the Arbitration and Conciliation Bill, 1995 and on 2nd August, 1996 the Lok Sabha also cleared the said Bill, thereafter it received the assent of the President of India on 16th August, 1996 and it became an Act," nse Arbitration and Conciliation Act 1996 came into force on 25th January, 1996.

Q-2- Discuss the provisions in relation to the conduct of arbitral proceeding giving under the Arbiration and conciliation act 1996.

Statement of Objects and Reasons

(As appended to the Arbitration and Conciliation Bill, 1995).

The present Arbitration and Conciliation Act, 1996 is substantially based on the three statutes, namely,

(i) The Foreign Awards (Recognition and Enforcement) Act, 1961, Protocol and

(ii) The Arbitration

(iii) The Arbitration Act, 1940.

Convention) Act, 1937; and

It was realised from all quarters that the (Indian) Arbitration Act, 1940 has become outdated as it contained the general law relating to arbitration and with a view to provide more responsive arbitration law to contemporary requirements and also to provide effective law dealing with settlement of both domestic and international disputes regarding commercial intercourse such major reformative amendments in the (Indian) Arbitration Act, 1940 have been incorporated by the Indian Parliament. Undoubtedly the arbitration and conciliation in the commercial transactions are getting global recognition as a machinery for settlement of disputes.

The Model Law on International Commercial Arbitration has been adopted by the United Nations Commission on International Trade Law (UNCITRAL) in 1985. The United Nation's General Assembly has recommended that all countries give due recognition to said Model Law, in view of the desirability of uniformity of the Law of arbitral procedures and specific needs of international commercial arbitration practice. Also, the United Nations Commission on International Trade Law (UNCITRAL) has adopted a set of Conciliation Rules in 1980. It was intended by the General Assembly of the United Nations that these Conciliation Rules are to be used in case of disputes arising in the context of the international commercial relations and conflicting parties can seek friendly settlement of their disputes by taking recourse to conciliation. It is important to note that the United Nations Commission on International Trade Law (UNCITRAL), the Model Law and Rules aimed to harmonise the concept of arbitration and conciliation of different legal systems worldwide, therefore, these UNCITRAL Model Law have such provisions which are designed for universal application.

It would be seen that the said UNCITRAL Model Law and Rules served as a model for legislation on domestic arbitration and conciliation. The Arbitration and Conciliation Bill, 1995 seeks to consolidate and amend the law relating to domestic arbitration, international commercial arbitration, enforcement of foreign arbitral awards and to define the law relating to conciliation, taking into account the United Nations Commission on International Trade Law (UNCITRAL), Model Law and Rules.

The Arbitration Act, 1940 has become outdated-Objects of the present Act

In Objects and Reasons appended to the Arbitration and Conciliation Bill, 1995 it has been stated that the Arbitration Act, 1940 has become outdated and, therefore, the present Bill sought to consolidate and amend the law relating to domestic arbitration and International commercial arbitration.

Prior to the promulgation of the Arbitration and Conciliation Ordinance, 1996 the law on arbitration in India was substantially contained in three enactments, namely the Arbitration Act, 1940, the Arbitration (Protocol and Convention) Act, 1937 and the Foreign Awards (Recognition and Enforcement) Act, 1961. In the statement of Objects and Reasons appended to the Bill it was stated that the Arbitration Act, 1940, which contained the general law on arbitration, had become outdated. The said Objects and Reasons stated that the United Nations Commission on International Trade Law (UNCITRAL) adopted in 1985 the Model Law on International Commercial Arbitration. The General Assembly had recommended that all countries give due consideration to the said Model Law which alongwith the rules, was stated to have harmonised the concepts on arbitration and conciliation of different legal systems of the world and thus contained provisions which were designed for universal application. The abovesaid statement of Objects and Reasons in para 3 states that "though the said UNCITRAL Model Law and Rules are intended to deal with international commercial arbitration and conciliation they could, with appropriate modifications serve as a model for legalisation on domestic arbitration and conciliation. The present Bill seeks to consolidate and amend the law relating to domestic arbitration, international commercial arbitration, enforcement of foreign awards and to define the law relating to conciliation, taking into account the said UNCITRAL Model Law and Rules, 1

The main objectives of the said Bill are as follows

(i) to comprehensively cover international commercial arbitration and conciliation as also domestic arbitration and conciliation;

(ii) to make provision for an arbitral procedure which is fair, efficient and capable of meeting the needs of the specific arbitration;

(iii) to provide that the arbitral tribunal gives reasens for its arbitral award;

(iv) to ensure that the arbitral tribunal remains within the limits of its jurisdiction;

(v) to minimise the supervisory role of courts in the arbitral process;

(vi) to permit an arbitral tribunal to use mediation, conciliation
or other procedures during the arbitral proceedings to encourage settlement of disputes;

(vii) to provide that every final arbitral award is enforced in the
same manner as if it were a decree of the court;

(viii) to provide that a settlement agreement reached at 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

(ix) to provide that for the purpose 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. be noted that in this context the International Conventions mean the New York Convention and the Geneva Convention relating to
tenga arbitral awards. to which India is a party, and which will be
considered as a foreign award. would be relevant to mention here that the expression "arbitration" has been included in Entry 13. of the Concurrent List of the 7th Schedule to the Constitution of India, 1950. Thus. State Legislature can enact legislation relating to arbitration only after obtaining the assent of the President of India. When such assent is obtained the enacted law can become effective in the State concerned." According to the Apex Court the main objective of the Arbitration and Conciliation Act, 1996 is to make provision for an arbitral procedure which
is fair, efficient and capable of meeting the needs of the specific arbitration
and to minimise the supervisory role of courts in the arbitral process and to
permit an Arbitral Tribunal to use mediation, conciliation or other
procedures during the arbitral proceedings in the settlement of disputes.
In Bharat Sewa Sansthan v. U.P. Electronics Corporation Ltd., wherein the dispute raised by the appellant Bharat Sewa Sansthan against the respondent corporation in terms of the arbitration clause contained in the lease agreement is arbitral. It was held by the Supreme Court that the disputed claims involved therein can be appropriately tackled and adjudicated upon by the arbitrator in terms of the arbitration clause.)

Arbitration Act, 1996 should be interpreted keeping in mind the UNCITRAL Model Law

In view of the Apex Court the Preamble of the Arbitration and Conciliation Act, 1996 makes it amply clear that Parliament has enacted the Act almost on the same lines as the Model Law, which was drafted by the United Nations Commission on International Trade Law. The provisions of the Act should be interpreted keeping in mind the Model Law as the concept under the present Act has undergone a complete change. It will, therefore, be useful to tak note of the corresponding provisions of th UNCITRAL Model Law. The whole object and scheme of the Act is to secure an expeditious resolution of disputes. Therefore, where a party raises a plea that the Arbitral Tribunal has not been properly constituted or has no jurisdiction, it must do so at the very threshold so that remedial measures may be immediately taken and time and expense involved in hearing of the
matter before the Arbitral Tribunal found to be either not properly constituted or lacking in jurisdiction may be avoided. Such a plea must be raised before the Arbitral Tribunal right at the beginning and normally not later than in the statement of defence. The commentary on Model Law

clearly illustrates the aforesaid legal position.

Q-3- What do you understand by Arbitration Agreement? What are essential elements?

(i) Essential ingredients of a valid arbitration agreement. It is settled legal position that a valid agreement should have the following :
(i) it must be in writing;
(ii) there must be agreement between the parties;
(iii) the parties must be ad idem; and
(iv) there should be intention of the parties to have their disputes or differences referred and decided through arbitration. Thus, the parties, disputes and finality of the decision are three essentials of an arbitration agreement. However, the statutory essentials of an arbitration agreement may be listed as :
1. an agreement;
2. it must be in writing
3. it may be relating to either present or future differences or disputes;
4, whether an arbitrator is named therein or not.

A Valid Arbitration Agreement-Ingredients of.-In terms of Section 2(1)(b) read with Section 7 of the Arbitration and Conciliation Act, 1996 a valid arbitration agreement must contain the ingredients as under
1. There must be a written arbitration agreement between the parties;
2. The agreement must be for reference to arbitration;
3. The dispute to be submitted to arbitration is in respect of defined contractual relationship between the parties.

Intention of the parties.-According to the Supreme Court' when the agreement was in writing and not a contingent or a future contract was a contract at that time, endeavour should always be made to find out the intention of the parties and that intention has to be found out by reading the terms broadly, clearly and without being circumscribed.

(iii) What amounts to arbitration agreement.-The Madhya Pradesh High Court in M.P. Housing Board v. Satish Kumar Raizada, has held that where the words "reference" and "final", "conclusive" and "binding" were used in the clause, it amounts to arbitration agreement. However, clause 29(2) of the contract read as under :

"If any party to the contract is not satisfied with the decision of the "Superintending Engineer", it may make a reference to the Chief Engineer, P.W.D., Madhya Pradesh, through the Executive Engineer concerned within 30 days from the date of communication of the decision of the Superintending Engineer, and the Chief Engineer will give his decision after hearing the parties and his decision thereon shall be final, conclusive and binding on all parties to the contract. In case no reference is made within the period specified above, the decision of the Superintending Engineer shall be final, conclusive and binding on the parties."

The High Court expressed the view that the use of the word "reference" n the above clause denoted that the Chief Engineer was to act as an arbitrator. It was further held that it was true that the word "award" was not mentioned in the clause but that would not make any difference since "award" also meant official decision on the matters in dispute. The clause was held to be an arbitration agreement.

(iv) Validity of an arbitration agreement does not depend on the number of arbitrators.-It is well settled legal position that the validity of an arbitration agreement does not depend on the number of arbitrators specified therein. The present Arbitration and Conciliation Act, 1996 does not suggest anywhere that number of arbitrators is a part of an arbitration agreement.

(v) Factum of a contract Submission dectslon. The parties are free to submit by an agreement in the frustum to Arbitrate to of a contract for the decision by the arbitrator. It is all a matter of interpretation of a contract from which the arbitrator derive their authority. arbitration

(vi) Difference between asreement. The important difference between a reference, and a reference and arbitration agreement or an arbitration clause, is that where the agreement relates to a present dispute, it generally amounts to a reference, but if it is entered into merely to provide for any future dispute or disputes, it it on arbitration clause. The definition of an "arbitration agreement makes it clear that future differences can form the basis of an agreement to refer those disputes, as and when they arise to an arbitrator."

(vii) Constitution of agreement between partie terms to be reduced to writing. To constitute an arbitration agreement in writing, # is not necessary that it should be signed by the parties and that it is sufficient if the terms are reduced to writing and the agreement of the parties thereto is established.

(viii) When dispute shall be referred to arbitration, While Section 7(1) of the Arbitration and Conciliation Act, 1996 spells out the internal elements of an agreement, sub-sections

(2) to (5) thereof deal with its external aspects. Section 7(2) read with Section 2(1)(b) of the said Art recognises an arbitration agreement, whether it is in the form of an arbitration clause in a contract or in the form of a separate agreement, Whereas a contract is generally used for incorporating an arbitration clause for future disputes, a separate agreement can contain an arbitration clause both for existing and future disputes. An arbitration clause is not required to be stated in any particular form. What is required to be ascertained is whether the parties have agreed that if disputes arise between them in respect of the subject matter of the agreement such dispute shall be referred to arbitration, then such an agreement would spell out an arbitration agreement.

Similarly, it was held that failure to pay within time stipulated in the agreement resulting in breach of the terms of the agreement, it would validly make the matter to be referred for arbitration provided the terms of agreement contain such clause."

But, the Apex Court in State of Uttar Pradesh v. Tipper Chand, while rejecting the findings of the trial court has held that agreement clause in question merely gave supervisory and administrative control to the Superintending Engineer and no specific words as 'arbitration agreement appeared in the agreement, therefore, it did authorise parties to refer the dispute to arbitral forum. In the present case the agreement contained a clause that "except where otherwise specified in the contract, the decision of

the Superintending Engineer (SE) for the time being shall be final, conclusive and binding on all the parties to the contract upon all questions relating to the meaning of specifications, designs, drawing and instructions. The decision of S.E. as to the quality of workmanship or materials used on the work or any other questions of claim etc. whether arising out of or relating to the contract, designs, drawing, classifications, estimates, introduction orders or conditions concerning execution or progress of work would also be final and conclusive and binding on the contractor. In this case the defendant put his contention that above clause in the agreement is to be treated as an arbitration agreement, however the specific expression "arbitration agreement" have not appeared in the agreement, while accepting the plea of the defendant the courts below held that above agreement clause amounted to an arbitration agreement under Section 34 of the Arbitration Act, 1940. But, the Apex Court was of the view that only power conferred on S.E. to take decision on his own in matter of supervision and execution of the work and consequently exercise supervisory/administrative control over it, there is no mention in the agreement that in case of dispute the matter will be referred to arbitral forum. Hence, in absence of arbitration agreement the parties can be referred to arbitration for settlement of their dispute.

(ix) Parties should intend to settle their disputes by arbitration.–It is one of the essential requirements of an arbitration agreement that the parties should intend to make a reference to arbitration in case of any dispute relating to the terms of the contract. There must be clear intention in this regard, because consent of the parties is necessary before

making a reference to arbitration. Where, there is express intention in the agreement to resolve the dispute if it arises by way of arbitration, on arising of dispute a reference to arbitration may be made by one party without the consent of the other party.

(x) Whether arbitration agreement should show bilateral rights

of reference to the parties.-Whether the arbitration agreement should show mutuality to confer the right to exercise to initiate arbitration proceedings. On the point there is conflicting opinions expressed by the High Courts. The Calcutta High Court in New India Assurance Co. Ltd. v. Central Bank of India, observed that-"where there is an arbitration agreement providing the option to the parties to elect the dispute being referred to the arbitration, it amounts to a valid arbitration agreement and merely
unilateral option as to refer the dispute to arbitration does not negative the
very existence the arbitration
the arbitration agreement, it only restricts the
enforceability. The court opined though it lacks mutuality but it cannot be
treated as invalid. On the other hand the Delhi High Court in Union of India v. Bharat Engineering Corporation," was of the opinion that an arbitration agreement should show bilateral rights of reference to the parties that means either of the party should have right of reference to arbitration in a case of disputes
or differences arising between the parties. To illustrate the point arbitration clause of agreement is being given, which reads as under :
the event of any dispute or difference between the parties, the contractor; after 90 days of his presenting his final claim on disputed matters, may demand in writing that the dispute or difference h referred to arbitration Such demand for arbitration shall specify the matters which are in question, the difference or dispute and only such dispute or difference of which the demand has been made and no other, shall be referred to arbitration."

In this case the court has held that in the view of Section 2(a) of the Arbitration Act, 1940 such arbitration clause in the agreement is not permissible as it lacks mutuality, an arbitration agreement should have bilateral terms for reference of disputes to arbitration, it is invalid and not sustainable.

It is to be noted on the above point till date there is no Hon'ble Supreme Court's ruling, it is yet to come.

(xi) Under the Act oral agreement cannot be recognised. It is
one of the essential requirements that an arbitration agreement must be in
writing. Neither the Arbitration Act, 1940 nor the Arbitration and
Conciliation Act, 1996 recognises oral agreement. It is a mandatory provision
as provided under Section 7 of the new Act, 1996 which must be complied
with to make a valid arbitration agreement. In Gopal Chand v. Madan Lal,' the court refused to recognise oral agreement regarding arbitration of dispute and it was held that oral submission/agreement may be the basis of suit but it cannot be a basis of arbitration as it

has no weight in the eyes of law. Similarly, the Apex Court in M. Dayanand Reddy v. AP. Industrial Infrastructure Corporation Ltd. & others, observed that the Arbitration Act, 1940 recognises only written arbitration agreement and the terms of such agreement must be redueed into writing, thus, to become a valid arbitration agreement, although, no particular format is prescribed under the Act.

(xii) Whether the signature of parties is necessary in arbitration agreement.

Even the Arbitration and Conciliation Act, 1996 nowhere says that an arbitration agreement should necessarily be signed by both the parties, though the Act makes it mandatory that an arbitration agreement must be in writing. The Apex Court in Jugal Kishore Rameswardas v. Mrs. Goelbai Hormusji, has held that it is not necessary that both the parties should sign the arbitration agreement. Such agreement must be reduced into writing and may be signed by one party showing terms of arbitration agreement and the other party accepts the terms therein. It arbitration agreement.

can be said that wherein one party signs a written agreement/arbitration agreement and other party accepts the same, it amounts to a legal arbitration agreement.

(xiii) Agreement must expressly or impliedly spell out axbitration clauses.-- The Apex Court in State of Orissa v. Damodar Das, observed that agreement to refer disputes or differences to arbitration must be expressly or impliedly spelt from the clause. The relevant clause 25 of the agreement is as under :

"25. Decision of Public Health Engineer to be final, conclusive and binding on all parties to the contract upon all questions relating to the meaning of the specifications, drawing and instructions herein before mentioned and as to the quality of workmanship or materials used on the work, or as to any other question, claim, right matter or thing whatsoever in any way arising out of, relating to the contract, drawings, specifications, estimates, instructions, orders or these conditions or otherwise concerning the works or the execution or failure to execute the same, whether arising during the progress of the work or after the completion or the sooner determination thereof of the contract."

It was held that clause 25 of the agreement does not contain an arbitration agreement and there is no arbitration clause in the agreement nor it envisages any difference or dispute that may arise or had arisen between the parties in execution of the works for reference to an arbitration.

But, the Karnataka High Court in Lachmanna B. Horamani v. State of Karnataka,' considered the arbitration agreement, namely, clause 29 of the agreement and held that there is a clause for making reference to an arbitrator in case of dispute. In present case the petitioner had already served the notice and there was no response. The court directed that the arbitrator has to be appointed on account responding to the request of the petitioner. failure of the respondent in

The Apex Court in recent judgment in Bharat Bhusan Bansal v. U.P. Small Industries Corporation Ltd., has considered its judgment including the above case and observed as follows :-)

"Clause 24 does not mention that dispute can be referred to the arbitration of the Managing Director. Clause 24 also does not spell out any duty on the part of the Managing Director to record evidence or to hear both parties before deciding the question before him. From the wording of clause 24 it is difficult to spell out any intention of the parties to leave any disputes to the adjudication of the Managing Director of the respondent as an arbitration."

The court ruled that clause 24 of the agreement cannot be treated as an arbitration agreement.

(xvi) Government Arbitration Agreement must satisfy the requirement of Article 299 of the Constitution of India.-It is well settled that arbitration agreement must be in writing and signed. However, if it relates to Government contract it will have to satisfy the mandatory requirements of Article 299 of the Constitution. Normally, arbitration agreement forms a part of the Government Contract, it is as if two contracts are rolled into one. The essentials of Government arbitration agreement are as under :- r th

1. Such an agreement must be expressed, to be made by the President or the Governor.
2. Such an agreement must be in writing.
3. Execution of such agreement must be by such person and in such manner as the Government might direct or authorise. It is obvious if the agreement has not been executed in accordance with Article 299 of the Constitution of India, 1950, the same cannot be enforced against the Government or by the Government.

(xv) Government Arbitration Agreement must be signed by authorised person.--If agreements involving Rs. 50,000 and above are to be signed by the Superintending Engineer, any agreement signed by the Executive Engineer would be 'non est in law, even though the negotiations may have been entered into by Superintending Engineer himself.

(xvi) Arbitration Agreement by Partners of firm.-According to Russell

"Partners will only be bound by a submission to arbitration upon proof that they either expressly authorised it beforehand or have subsequently adopted and ratified it, or unless, by the terms of the submission, it can be implied that the arbitration was within the normal scope of the trade or business of the partnership.

Thus, English Law provides that if the agreement is executed by one of the partners, it is binding on all and it may be treated within the normal scope of business.

ARBITRATION AGREEMENT

Section 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.
(2) An arbitration agreement may be in the form of an arbitration clause in a contractor 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
(a) a document signed by the parties;
(b) an exchange of letter, telex, telegrams or other means of telecommunication which provide a record of the agreement; or
(c) an exchange of statements of claim and defence 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.

COMMENTS

Section 7 of the Act, 1996 is on the pattern of Article 7 of the Model Law, which has been taken from Article II (1) of the New York Convention, 1958.
arbitration agreement is an agreement which provides that in P Dispute, it is to be submitted to "arbitration", the nature of surcharge would be voluntary, however it does not matter whether such dispute is on present or future dispute, Section 71) of the Act, recognises both types of disputes.
Section 7(1) provides classification by means of agreement between the parties that all or certain disputes are to be submitted to arbitration and also an agreement in respect of existing dispute and future dispute. However it is expected that arbitration agreement is to be made in specific clauses: but no particular form of arbitration agreement is prescribed under the Act: In Rukmanibai v. Collector, Jabalpur, the Supreme Court said that
what is required to be ascertained is whether the parties have agreed that if disputes arise between them in respect of the subject-matter of the agreement such dispute shall be referred to arbitration, then such agreement would spell out an arbitration agreement. That means what is required under Section 7(2) to (5) is the terms of an arbitration agreement which must be very clear and specific. may be, in form of clauses and expression used in an arbitration agreement such "arbitration" and "arbitral tribunal" should be defined. The clauses contained as in an arbitration agreement is not like the clauses of a contract because the "arbitrator", clauses of an arbitration agreement are enforceable under this Act.
Section 7(3) makes necessary that an arbitration agreement must be in writing so, it does not recognise oral or verbal agreement. Section 2(a) of the Arbitration. Act, 1940 also provided similar condition in respect of an arbitration agreement.

Section 7(4) affirms essential condition that an arbitration agreement must be in writing signed by the parties and it recognises the modern mode of communication such as telex, telegrams, letters and also a communication by means of tele-communication which forms a record of the arbitration agreement. Section 7(4)(c) deals with an arbitration agreement contained in an exchange of statements in respect of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other party

Although, Section 7(4), clause (b) and clause (c) explains that it is not necessary that an arbitration agreement in all cases should be signed by the parties. Section 7(5) explains that in a contract agreement if the reference is made as to 'arbitration clause it will amount to an "arbitration agreement".

Thus, an "arbitration clause" can be a part of a contract provided it is in writing. Now, it is clear that this sub-section recognises the practice prevailing in such documents of contract containing an arbitration clause.

Q-3- Can court refer parties to Arbitration.

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.

COMMENTS

Section 8 of the Act, 1996 is on the pattern of Article 8 of the Model Eaw, however, Section 8 has its own distinction from Article 8 of the Model Law, which are the following:

(i) If, an arbitration agreement is not null and void and one of the parties to an arbitration agreement before proceeding with the subject mattor before the court, makes roquest in his first statement to refer the subject matter to an arbitration but not at later stage, such subject-matter would be referred to an arbitration, if it is operative and capable of being performed.

(i) If, the subject matter has been brought before the court as in the aforesaid manner and consequently arbitral proceedings commenced or continued, an arbitration tribunal may make an award while the issue is pending before the court.

Section 8(1) provides discretionary power to the judicial authority, and if the parties to an arbitration agreement make such request before a judicial authority but not later than submitting his first statement, the judicial authority should refer the parties to arbitration.

It is necessary for application of this sub-section that a judicial authority can refer only the subject matter of an arbitration agreement but not otherwise.

Although, under Section 8(1) a court cannot adopt on its own motion to avail this provision, the parties have to apply with request, however while considering such request, the court cannot go into the merits of the dispute. Section 8(2) provides mandatory provision for application of Section 8(1) which specifies that, "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".

Section 8(3) empowered the arbitral tribunal to start arbitration and if already commenced can continue arbitration and also can make award, it is not the point that an application under Section 8(1) is pending before the court. Thus, the parties are not deprived to initiate arbitral proceeding even if proceeding before a judicial authority has already commenced. The main object of this sub-section is to discourage deserters and instead push them to their agreement to arbitration.

Section 8 of the new Act is not in pari materia with Section 20 of the 1940 Act. It is only if in an action which is pending before the court that a party applies that the matter is the subject of an arbitration agreement does the Court get jurisdiction to refer the parties to arbitration. The said provision does not contemplate, unlike Section 20 of the 1940 Act, a party applying to a court for appointing an arbitrator when no matter is pending before the Court. Under the 1996 Act appointment of arbitrator(s) is made as per the provision of Section 11 which does not require the Court to pass a judicial order appointing arbitrator(s). The High Court was, therefore, wrong in referring to these provisions of the 1940 Act while interpreting Section 9 of the new Act.

It is important to note that Section 8 of the 1996 Act postulates, not only request by the party for staying legal proceedings but also contemplates for referring the parties to arbitration.

(i) Expression 'Party under Section 8-Meaning of Although, Section 2(1 x h) of the Arbitration and Conciliation Act o defines the expression "party", it means a party to an arbitration agreement. Thus, the party to an arbitration agreement, may be between two or more persons, it may also be between body of persons or incorporated bodies. R certainly they are parties to dispute who submit their dispute for settlement under the arbitration agreement.

It is to be noted that the "party" referred to in Section 8(1) of Arbitration and Conciliation Act, 1996 is a party who is entitled to maintain the application thereunder. The party to the arbitration agreement who han himself instituted suit is clearly not the "party" envisaged. In Magma Leasing Ltd. v. NEPC Micon Ltd.,' wherein first defendant however, a na to the arbitration agreement who has elected to institute the suit in quest y in enforcement of its

rights and as such he cannot be said to be a "part within the meaning of that section 8(1) of the Act.

(ii) Applicability of Section 8-Obligatory for the Court to refer parties to arbitration in terms of arbitration agreement

The Calcutta High Court in Fiat India Pvt. Ltd. v. Rahul Udyog Vinion Ltd. & another, said that the language of Section 8 being pre-emptory, it is obligatory for the Court to refer the parties to arbitration in terms of their arbitration agreement and nothing to be decided in the original action or the appeal arising therefrom.

The conditions, which are required to be satisfied under sub- sections (1) and (2) of Section 8 of the Act, 1996 before the Court can exercise its powers, are,

(1) there is an arbitration agreement;

(2) a party to the agreement brings an action in the Court against the other party; (3) 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 it submits its first statement on the substance of the dispute.

(iii) Nature of Section 8

The Supreme Court in Hindustan Petroleum Corporation Ltd. v. Pink City Midway Petroleums, has held that Section 8 is pre-emptory in nature and mandatory for Civil Court to refer the dispute to arbitrator if the agreement contained arbitration clause. The Supreme Court observed if there is any objection as to application of arbitration clause to the facts of