Q.1 Define foreign Award what provisions are laid down in relation to the enforcement of foreign award under the chapter of new York convection award explain

Ans.

ENFORCEMENT OF CERTAIN

FOREIGN AWARDS

INTRODUCTION

With the object to achieve international standard in arbitration law and to enforce the foreign arbitral awards, the law relating to domestic arbitration and international commercial arbitration were added, amended and modified accordingly to suit in order to be effective in regard to the present global need of arbitration law.

The present enacted law has its origin from various sources. In this context firstly provisions of the Arbitration (Protocol and Convention) Act, 1937 and secondly, the Foreign Awards (Recognition and Enforcement) Act, 1961, have been inducted in Part II of Act, 1996 however with certain deletions and amendments in the Act of 1937 and the Act of 1961, to ensure and to reflect the provisions enumerated in the Geneva Protocol on Arbitration Clauses, 1923, the Convention on the Execution of Foreign Arbitral Award, 1927 and the Recognition and Enforcement of Foreign Arbitral Awards, 1958.

Thus, Chapter I of Part II with headings "Enforcement of Certain Foreign Awards" and "New York Convention Awards" respectively were enacted to incorporate 1961 Act with certain modifications in this regard are

(i) Section 45 modifies the provisions of Section 3 of the 1961 Act-to stay of proceedings in respect of matters to be referred to arbitration, to bring them in line with provisions of Article II (3) of the New York Convention.

(ii) Section 4(1) of the 1961 Act omitted Section 49 of the Act which deals with circumstances where the court is satisfied that the foreign award is enforceable under Chapter I of Part II, the Foreign Award is considered to be a decree of that Court.

(iii) Filing of Foreign Award in court and court to declare ita judgment accordingly, Sections 5 and 6 of the 1961 Act omitted.

(iv) Section 9(b) of the 1961 Act—Non-application of the 1961 A to any award made on an arbitration agreement governed by the law of India—deleted. This section was subjected to criticism by expert specially after pronouncement of the Supreme Court of India in N.T.P.C. v. Singer Company.'

(v) Section 50 of the Act has been inducted to deal with the matters relating to appeal from certain orders made under Section 18) and Section 48.

| In the same view, Chapter II, the 1937 Act was modified in the following manner

(i) Section 3 of the 1937 Act—Stay of proceedings in respect of matters to be referred to arbitration has been modified, to make analogous with provisions of para 4 of the Protocol.

(ii) Section 4(1) of the 1937 Act was omitted. Section 58 of the Act states that where the court is satisfied that the Foreign award is enforceable under Chapter II of Part II, shall be considered to be a decree of that Court.

(iii) Section 5 and Section 6 of the 1937 Act-Filing of Foreign Award in court and court to declare judgment in accordance with award-deleted.

(iv) Section 9(b) of the 1937—Non-application of the 1937 Act to any award made on an arbitration agreement governed by the law of India—deleted.

.(v) Section 59 of the Act has been inducted to make provision for appeal from certain orders made under Section 54 and Section 57.

Thus Chapter II would be applied, in the matter relating to jurisdiction of different State parties to the Geneva Convention. This Chapter also applies to where an award is made in foreign country which is a party to the New York Convention in an arbitration between parties of the same nationality or of different nationalities.

NEW YORK CONVENTION AWARDS

Section 44. Definition. In this Chapter, unless the context otherwise requires, "foreign award" means an arbitral award on differences between persons arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India, made on or after the 11th day of October, 1960—

(a) in pursuance of an agreement in writing for arbitration to

which the Convention set forth in the First Schedule

applies, and

(b) in one of such territories as the Central Government, being

satisfied that reciprocal provisions have been made may, by notification in the Official Gazette, declare to be territories to which the said Convention applies.

COMMENTS Section 44 is on the pattern of Article I of the New York Convention and similar to Section 2 of the 1961 Act which defines a "Foreign Award" under Chapter I, Part II. The Supreme Court said that this Chapter would not be applied

where the awards are made in foreign countries which are not parties to the New York Convention,

Chapter I has been incorporated with very broad commercial object to pronkote international trade by providing expedious settlement of disputes relating to international commercial activities and development which is a global phenomenon of modern time. It is so demanding that it can't afford lethargic unsuitable arbitration machinery to settle dispute especially commercial disputes of international statutes.

In view of the Supreme Court of India the expression "commercial" should be construed broadly having regard to the manifold activities which are integral part of international trade today.

Further, the expression ‘commercial relationship contained in opening paragraph of Section 44 has been explained by the Supreme Court of India on the basis of the Model Law in R.M. Investments Trading Co. Put. Ltd. v. Boeing Co.' in the following words— i

"The term "commercial" should be given a wide interpretation so as to cover matters arising from all relationship of a commercial nature, whether contractual or not; relationships of a commercial nature include, but are not limited to, the following transactions : any trade transaction for the supply on exchange of goods or services: distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business co-operation; carriage of goods or passengers by air, sea or road.

Thus, according to aforesaid quotation by the Supreme Court any relationship which is of commercial nature, is not necessarily to be confined only to some transaction, because the expression "commercial relationship" is capable to include a large number of transactions as such, making difficult to be enumerated for the purpose of the Act in Section 44. To apply under this section "commercial relationship" must be of commercial nature which is most essential aspect of relationship to be called "commercial". It is purely immaterial that such relationship is contractual or not.

In the above cited case, the Supreme Court explained further that "An agreement between a company in India and a foreign company, where under the former i.e., R.M. Investment & Trading Co. Pvt. Ltd. agreed to provide the latter i.e., Boeing Co. with consultant services for promotion of sale of Boeing aircrafts in India was held to involve commercial relationship within the meaning of Section 44.

Another expression as contained in Section 44 i.e., "Law in force in India" in literal sense it means a particular law currently applied in territory of India, however the Bombay High Court in European Grain and Shipping v. Bombay Extraction case held that the words "law in force in India" are not intended to mean a particular law specifically enacted for the purposes of Section 44.

Thus, to deal with the matter relating to particular legal relationship which is commercial in nature, it does not necessarily mean that it is to be

interpreted and applied through a statutory provision under the law in force in India.

Clause (a) of Section 44 contains the expression, "An agreement in writing for arbitration" that means, an agreement should be written to provide 'certainty in its terms and conditions, so that in case of exigencies it can be interpreted to avoid any misunderstanding which may be a cause of such disputes. According to Article II(2) of the New York Convention, an arbitration "in writing" may be either signed by the parties or contained in an exchange of letters or telegrams. That also means that the parties to an arbitration agreement in writing are not required to be physically present while making such an agreement i.e., a resident of India, can make an arbitration agreement with resident of any foreign national by the modern means of communication such as telex, fax, cables and telephone etc.

Clause (b) of Section 44 provides the declaration in respect of Section 2(b) of 1961 Act, made by the Central Government which, states the following territories to be the territories to which the New York Convention applies-Austria, Belgium, Botswana, Bulgaria, Central African Republic, Chile, Cuba, Czechoslovok Socialist Republic, Denmark Republic, Ecuador, Arab Republic of Egypt, Finland, France, German Democratic Republic, Federal Republic of Germany, Ghana, Greece, Hungary, Italy, Japan, Kuwait, Republic of Korea, Malagasy Republic, Mexico, Morocco, Nigeria, The Netherlands, Norway, Philippines, Poland, Romania, San Marino, Spain, Sweden, Switzerland, Syrian Arab Republic, Thailand, Trinidad and Tobago, Tunisia, U.S.S.R., U.K., United Republic of Tanzania and United States of America.

These 44 countries under the declaration by the Central Government in notification in the official gazette have been declared that on reciprocal basis India also being a party in the New York Convention may enter into an arbitration agreement whether it is contractual or non-contractual but considered as commercial in nature within the meaning of Section 44(b) of the Act, 1996. (1) The term "foreign award"—Meaning of

According to Section 44 of the Act, 1996 the term "foreign award" means an arbitral award on differences between persons arising out of legal relationships,

whether contractual or not, considered as commercial under the law in force in India, made on or after the 11th day of October, 1960.

Certainly, the term "foreign award" means the award made as a result of the foreign arbitration which is not a domestic arbitration. It becomes necessary to understand the term "foreign arbitration". The Calcutta High Court in case of Serajuddin v. Michael Golodetz, laid down the necessary conditions relating to the term "foreign arbitration"—these are as under :

(a) arbitration should have been held in foreign lands, by foreign

arbitrator;

(b) arbitration by applying foreign laws;

(c) as a party foreign national is involved. These are essentinl elements of a foreign arbitration, renulting into the

for more explain the term "foreign hore in London an interim

the Indian

(foreign award.

To explain the term "foreign award" the Apex Court in N.T.P.C. v. Singer Company, observed that where in London an interim award was made which arose out of an arbitration agreement governed by the Indian Laws. It was held that such an arbitral award cannot be treated as a foreign award and it is purely a "domestic award" which is governed by the laws of India in respect of the agreement and arbitration. (ii) Distinction between the "foreign award" and "Domestic award"

In case of a foreign award, one of the parties is a national of foreign country, whereas this is not necessary in case of domestic award.

In foreign award subject-matter of arbitration agreement deals with the international commerce and trade, thus, it is international in character, Also, the award is made in a foreign country. These elements cannot be found in a "domestic award".

. To illustrate the above distinction the decision of the Delhi High Court in DorstenerMaschine (Germany) v. Sand Plast India,' is cited wherein against the enforcement of foreign award in Germany, an injunction was sought in India, the Delhi High Court refused to grant an injunction. In fact, the subject-matter of disputes was referred for arbitration to Indo-German Chamber of Commerce. Two arbitrators were appointed by each of the party. In arbitration process the counter claim of the Dorstener was rejected whereas the claim of Sand Plast was allowed. Since, Dorstener had no assets in territory of India, Sand Plast on receiving of the

copy of the award initiated the proceedings regarding enforcement of the award in Germany, The respondent i.e., Dorstener sought an interim injunction against the enforcement of award. The court while refusing to grant injunction held that in the view of New York Convention the case being a foreign award and agreement had a foreign element involving international commerce and trade the German company should not be permitted to restrain the Indian Company from enforcing the award in Germany by way of injunction as such. Hence, New York Convention was applicable to the matter. (iii) "Foreign Award"_When can be treated as "Domestic Award"

The Supreme Court in Bhatia International v. Bulk Trading S.A.," observed that awards in arbitration proceedings which take place in a non convention country are not considered to be "foreign award" under the Arbitration and Conciliation Act, 1996. They' would thus not be covered by Part II. An award passed in an arbitration which takes place in India would be a "domestic award". There would thus be no need to define an award All a "domestic award" unless the intention was to cover awards which would otherwise not be covered by this definition. Strictly, an award passed in an arbitration which takes place in a non-convention country (i.e., the country which is not a signatory of UNCITRAL Model Law) would not be a "domestie award". Thus, the necessity is to define a "domestic award" as including all awards made under Part I of the said Act. The definition indicates that ang

award made in an international commercial arbitration held in a non-convention country is also considered to be a "domestic award". (iv) Meaning of term "Commercial relationship" in the context of foreign awards

The Supreme Court in R.M. Investment & Trading Co. Put. Ltd. v. Boeing Co.,' observed that the term "Commercial" in the context of foreign awards should be construed broadly having regard to the New York Convention Awards and also manifold activities which are necessary elements of modern international trade and commerce. The court is of the view that while construing the expression "commercial relationship" in the context of Section 44 the reference of the Model Law is desirable which states :--

"The term "Commercial"* should be given a wide interpretation so as to cover matters arising from all relationship of a commercial nature, whether contractual or not. Relationship of a commercial nature include, but are not limited to, the following transactions, any trade transaction for the supply or exchange of goods or service; distribution agreement, commercial representation or agency; factoring, leasing, construction of works, consulting, engineering, licensing, investment, financing, banking, insurance, exploitation agreement concession,

joint venture and other forms of industrial or business cooperation, carriage of goods or passengers by air, sea, rail or road."

It was held that the agreement between the Indian Company and foreign company whereunder the Indian Company agreed to provide the foreign company with consultant service for promotion of sale of boeing aircrafts in India was involving commercial relationship within the meaning of Section 44. (v) Words "law in force in India'—Meaning of

The Bombay High Court in European Grain & Shipping v. Bombay Extractions, has held that the words "law in force in India" are intended to mean a particular law specifically enacted for the purpose of Section 44.

Section 45. Power of judicial authority to refer parties to nrbitration.- Notwithstanding anything contained in Part I or in the Code of Civil Procedure, 1908 (5 of 1908) a judicial authority, when seized of an action in a matter in respect of which the parties have made an agreement referred to in Section 44, shall, at the request of one of the parties or any person claiming through or under him, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

COMMENTS Section 45'has been enacted in line with Article II(3) of the New York Convention. The object of this section is to give overriding effect, if any.

provisions of Part I and the provisions of the Code of Civil Procedure over are opposed to the provision contained in the present Act.

Section 45 reproduces Section 3 of Act, 1961, but with certain specified changes to make parallel provision with Article 3 of the New York Convention. It is the requirement of this Section that the judicial authority has to make sure that the arbitration agreement is valid, operative and capable of being performed before referring the parties to arbitration in respect of disputes for which there is an arbitration agreement in writing between the parties. Although, with the use of express "shall" it is in the sense of an obligation, therefore, becoming a discretionary power of the judicial authority, so unless specified conditions are not fulfilled, this section cannot be invoked. In the words of the Supreme Court of India—The Section uses the expression "shall" which signifies that it is obligatory upon the judicial authority to refer the parties to arbitration, if conditions specified therein are fulfilled". 1

Further, expression that "a judicial authority, when seized of an action in a matter in respect of which the parties have made an agreement referred to in Section 44", that is to say that the judicial authority refers the parties to arbitration, it does not mean that the judicial authority can compel a party who is not willing to go to arbitration for reasons known best to that party.

Section 45 and also Section 44 would be applied to only such arbitration agreement which concludes to a "Foreign award" however, Section 45 does not prescribe any time limit within which a party intends to exercise the arbitration agreement before a judicial authority. According to the New York Convention which did not touch this point but expected that such time limit in such matters is to be regulated by the meeting rather discussion as it depends upon the circumstances of each case.

Section 45 states that the judicial authority may refer the parties to arbitration at the request of one of the parties or any person claiming through or under him. Thus, it is necessary that any party should make a request before the judicial authority, when seeking relief under an arbitration agreement. The judicial authority has to find out that the arbitration agreement through which party is seeking reference of dispute to an arbitration is not null and void, inoperative or incapable of being performed. It is necessary under this section that the judicial authority has to record its findings whatsoever its directions may be.

The arbitration clause in an arbitration agreement can only apply to time charter and not to bill of lading to which plaintiff is a party and said clause is vague and uncertain and not binding on party.

provided the conditions laid down in the arbitration agreement are satisfied Even if there is an arbitration agreement between the parties, the court suo motu cannot refer the parties to the arbitration except that the court is competent to proceed with the case. (ii) Applicability of Section 45

The Delhi High Court in Gas Authority of India Ltd. v. SPIE CAPAG SA, has held that Section 3 of the 1961 Act (which corresponds to Section 45 of the 1996 Act) dealing with stay of proceedings in respect of matters to be referred to arbitration applies to an arbitration agreement if it has a foreign element involving international trade and commerce even though such an agreement does not result into a foreign, award. However, this decision cannot outrightly be applied because Sections 44 and 45 of the present Act, 1996 cover only such arbitration agreement which necessarily results into a foreign award within the ambit of Section 44 of the Act.

In another case Goyal MG Gases Ltd. v. Griesheim GMBH, the court observed that the provisions of Section 45 of the new Act, 1996 are clear and apparent that the judicial authority when seized of an action in a matter in respect of which the parties have made an agreement in the nature of and as provided under Section 44 refer the parties to arbitration at the request of one of the parties or any person claiming through or under him. The provisions of the clause referred expressly

intended that it would survive the termination of agreement under the rules of the International Chamber of Commerce, Paris.)

Section 46. When foreign award binding.–Any foreign sed which would be enforceable under this Chapter shall be

ated as binding for all purposes on the persons as between whom it was made, and may accordingly be relied on by any of those persons by way of defence, set off or otherwise in any legal roceedings in India and any references in this Chapter to enforcing

breign award shall be construed as including references to relying in an award.

COMMENTS Section 46 is enacted parallel with Article III of the New York Convention and is on the pattern of Section 4(2) of the 1961 Act.

Section 46 has been incorporated with a liberal object to recognise all the "Foreign Awards" under this Chapter which is enforceable in India, even For the purpose of defence, set-off or in any legal proceedings in India. Thus, a foreign award under this Chapter becomes enforceable and shall have miling force upon the parties between whom it was made. These parties may rely on such a foreign award by way of claim, defence, set-off and in y legal proceedings initiated in India.

Section 47. Evidence.-

(1) The party applying for the forcement of a foreign award shall, at the time of the application, roduce before the court(a) the original award or a copy thereof, duly authenticated in

the manner required by the law of the country in which it

was made; (b) the original agreement for arbitration or a duly certified

copy thereof; and (c) such evidence as may be necessary to prove that the award

is a foreign award.

(2) If the award or agreement to be produced under sub-section) is in a foreign language, the party seeking to enforce the award shall produce a translation into English certified as correct by a Eplomatic or consular agent of the country to which that party belongs or certified as correct in such other manner as may be sufficient according to the law in force in India.

Explanation. In this section and all the following sections of This Chapter, "Court" means the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of

s ordinary original civil jurisdiction, having jurisdiction over the subject-matter of the award if the same had been the subject-matter of a suit, but does not include any civil court of a grade inferior to such principal Civil Court, or any Court of Small Causes.

15

Section 47 provides specified conditions to be fulfilled by the party, who is seeking enforcement of a foreign award. It is a mandatory provision. Thus, Section 47 prescribes the evidence the party has to be made prima facie before the Court for enforcement of a foreign award.

Section 47(1) provides that the following documentary evidences have to be produced before the Court, at the time of application for the enforcement of a foreign award-by a party

1. Original award or a copy of it, which should be authenticated

according to the law of that country in which it was made. 2. The original agreement for arbitration or a certified copy of

arbitration agreement, and 3. Such other evidence as may be necessary to show that the award

is a foreign award. The Court in its discretion may permit the party to fulfil these aforesaid conditions during the proceedings. It is expected that the court should not adhere too strictly in this respect, but to consider the reasonableness of the circumstances.

Section 47(2) provides that if such an award is in foreign language or arbitration agreement is in foreign language, its translated copies should be produced in English. It is required that such translated copies must be certified as correct translation by a diplomatic or consular agent of the country to which that party belongs or certified as correct in such other manner as may be sufficient according to the law of India, in force.

Explanation attached to this section defines the "Court" for the purpose of this chapter. The court means, and excludes any civil court of a grade inferior to such principal civil court, or any court of small causes, but it includes the principal civil court of original jurisdiction in a district and the High Court in exercise of its ordinary original civil jurisdiction and any subject matter over which it is having jurisdiction of a suit.

No time limit for enforcement of a foreign award has been prescribed in Part II of Chapter I. The Indian courts have given conflicting views. The Gujarat High Court is of view that "It cannot be that a foreign award can be enforced at any time,

though a domestic award can be enforced only within specified time limit.' So, the Limitation Act may be applied as it applies to proceedings in Court.

The Delhi High Court is of the opinion that "Since Part II does not prescribe any time limit in this regard, the Limitation Act, 1963, being a integral part of the procedural law of India, applies."

Now, it is clear that for enforcement of a foreign award under this Section 47, Part II, no time limit has been prescribed, however non-compliance of the procedural law of India, while such enforcement of a foreign award is sought before the court in India, the Limitation Act, should be followed.

Q2. Discuss the form and constitute of arbitral award how is correction made in arbitration award

Ans. Section 33. Correction and interpretation of award additional award.-

(1) Within thirty days from the receipt of the arbitral award, unless another period of time has been agreed upon by the parties(a) a party, with notice to the other party, may request the

arbitral tribunal to correct any computation errors, any clerical or typographical errors or any other errors of

similar nature occurring in the award; (b) if so agreed by the parties, a party, with notice to the other

party, may request the arbitral tribunal to give an

interpretation of a specific point or part of the award. (2) If the arbitral tribunal considers the request made unde sub-section (1) to be justified, it shall make the correction or give this

ARBITRATION

interpretation within thirty days from the receipt of the request and the interpretation shall form part of the arbitral award.

(3) The arbitral tribunal may correct any error of the type referred to in clause (a) of sub-section (1), on its initiative, within thirty days from the date of the arbitral award.

(4) Unless otherwise agreed by the parties, a party with notice to the other party, may request, within thirty days from the receipt of the arbitral award, the arbitral tribunal to make an additional arbitral award as to claims presented in the arbitral proceedings but omitted from the arbitral award.

(5) If the arbitral tribunal considers the request made under sub-section (4) to be justified, it shall make the additional arbitral award within sixty days from the receipt of such request.

(6) The arbitral tribunal may extend, if necessary, the period of time within which it shall make a correction, give an interpretation or make an additional arbitral award under sub-section (2) or sub-section (5).

(7) Section 31 shall apply to a correction or interpretation of the arbitral award or to an additional arbitral award made under this section.

COMMENTS Section 33 is modelled on Article 33 of the Model Law. It provides as to correction and interpretation of award and additional award. Section 33 of the Act, 1996 entrusts three functions mainly to an arbitral tribunal, when, the mandate of the arbitral tribunal is terminated under Section 32 of the Act. Chiefly, these functions are

(i) corrections in the award, if any. (ii) interpretations of specific points of the award

(iii) it may make an additional award. Both sub-sections (1) and (3) of Section 33 are relating to corrections and interpretation of an award. Clause (a) of Section 33(1), provides that a party with notice to other party may apply for correction and computation of errors. It may be any clerical or typographical errors or any other errors of a similar nature which have occurred in the award. Thus, a party with

notice to the other party may seek explanation of specified point or decision by the arbitral tribunal. Under sub-section (3) the arbitral tribunal is empowered to correct its own decision rather can remove errors as such within 30 days prescribed period i.e., from the date of the arbitral award.

Under clause (b) of Section 33(1) if a party has agreed with the other party, then with notice to the other party, he may request to the arbitral tribunal to give an interpretation of a specific point, so as to remove ambiguities in the award. However, there is no provision to seek To examination of the award,

Section 33(2) provides that on justifiable ground if a request is made to the arbitral tribunal, it may correct the mistake or give interpretation of the

award within 30 days from the receipt of the request. Such a request is made under sub-section (1).

Sub-section (4) of Section 33 provides that if something remained undecided or left out in the arbitral award, the aggrieved party with notice to the other party may request the arbitral tribunal an additional award on claims submitted in the arbitral proceedings, but not decided, however, such a request can only be made within 30 days from receipt of the award. Thus, an additional award can be requested, when the claims are presented before the arbitral tribunal, but a part of claim is incidentally omitted.

Sub-section (5) of Section 33 provides that an additional award can be made only on justifiable request made to the arbitral tribunal by an aggrieved party

Section 33(6) provides that under extraordinary circumstances to meet the end of fairness and justice, the arbitral tribunal is empowered to extend the time-limit i.e., 30 days as prescribed under sub-sections (2) and (5) of Section 33, for making correction or giving interpretation of the arbitral award.

Section 33(7) follows the provision of the preceding sub-sections. It makes Section 31 of the Act i.e., form and contents of arbitral award or to an additional award, applicable to such correction or interpretation of the arbitral award or make additional arbitral award as the case may be.

After the arbitrator has made the award, he becomes functus officio, that is to say he ceases to function thereafter with reference to the arbitration. However, if there is no agreement to the contrary, he may correct an award, at any time after the award has been made, any clerical mistake or error arising therein by an accidental slip or omission. (i) Arbitral award should be construed liberally

It is settled rule of interpretation that an arbitral award should be construed liberally and wholly, but not in isolation, thus, to give effect to the real intention of the arbitral tribunal."

While affirming the law laid down in earlier decision the Apex Court in SamtaSila v. Dhirendra Nath Sen, observed as under :

"The court should approach the award with a desire to support it if that is reasonably possible rather than to destroy it....unless otherwise required. The award need not formally express the decision of the Arbitrator on each matter of difference. The silence of the award on a particular matter is a clear indication that the claim was not upheld."

Thus wherein the arbitral award is silent and does not express clearly in respect of some claims, it should be presumed that the claim was not upheld.

However, the Delhi High Court in R. Murlidhar v. NPCC, wherein an arbitral tribunal made an arbitral award on the subject matter referred to it, the court would draw presumption in favour of the validity of the arbitral

award that the arbitrator has taken into consideration all the subject matter of disputes referred to him. The court would also presume that the arbitral award is final and complete. (ii) Words in accord with the intention

It is the interpretation of general words and phrases that the principle of strictly adapting the meaning to the particular subject-matter with reference to which the words are used finds its most frequent application. It is, therefore, a cannon of interpretation that all words, if they are general and not express and precise are to be construed as particular if the intention be particular, that is, they must be understood as used with reference to the subject-matter in the mind of the legislature and limited to it.'.

It is submitted that the words used in the arbitral award should be construed on the basis of real intention of the arbitrator under the new Act, 1996, namely, Section 33. The arbitral tribunal has been conferred power to correct, interpret and if required can make additional award within the stipulated time. However, this power of the arbitral tribunal will be exercised only at the request made by the parties in this regard. It is the discretionary power of the arbitral tribunal which seems to be exercised to meet the ends of justice and also to achieve the very objectives of the arbitration. (iii) Arbitral award can be modified

It can be said that the arbitral award can be modified wherein either of the party brings into the notice of the arbitral tribunal that the certain issues have not been taken up, in fact these were referred for arbitration or there is apparent error in the award or there is omission or accidental slip in the award, the arbitral tribunal will consider these issues and if it is justified the arbitral tribunal under its discretion would modify the award.? (iv) Review on merits-an arbitrator has no power

The Apex Court in State of Arunachal Pradesh v. Damani Construction Co., ruled that the application seeking review was not maintainable. The .court explained that this is so, firstly, because the letter seeking review had not been designed strictly under Section 33 of the Act because under Section 33 of the Act a party can seek certain correction in computation of errors or clerical or typographical errors or any other errors of a similar nature occurring in the award with notice to the other party or if agreed between the parties, a party may request the Arbitral Tribunal to give an interpretation of a specific point or part of the award. This application which was moved by the appellant does not come within any of the criteria falling under Section 33(1) of the Act. It was designed as if the appellant was meeking review of the award. Since, the Tribunal had no power of review on merits, therefore, the application moved by the appellant was wholly misconceived. Secondly, it was prayed whether the payment was to be made directly to the respondent or through the Court or that the respondent might be asked to furnish bank guarantee from a nationalised bank as it was an

interim award, till final verdict was awaited. The court was of the view that both these prayers in this case were not within the scope of Section 33 of the Act.

Q3. What are the grounds of setting aside an award Discuss Can arbitral award enforce as a decree and the court

Ans.

RECOURSE AGAINST ARBITRAL AWARD (Section 34. Application for setting aside arbitral award.—

(1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section

(2) and sub-section (3).

(2) An arbitral award may be set aside by the Court only if(a) the party making the application furnishes proof that

(i) a party was under some incapacity, or

(ii) the arbitration agreement is not valid under the law towhich the parties have subjected it or, failing any indication thereon, under the law for the time being inforce; or

(iii) the party making the application was not given proper

notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present

his case; or

(iv) the arbitral award deals with a dispute not

contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to

arbitration : Provided that, if the decisions on matters submitted toarbitration can be separated from those not 80 submitted, only that part of the arbitral award which contains decisions on matters not submitted toarbitration may be set aside; or

(v) the composition of the arbitral tribunal or the arbitralprocedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this part from which the parties cannot derogate, or, failing such agreement was not in

accordance with this part; or

(b) the Court finds that

(i) the subject matter of the dispute is not capable of

settlement by arbitration under the law for the time being in force, or

of India. Explanation.-Without prejudice to the generality of sub-clause (ii) it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption or was in violation of Section 75 or Section 81.

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under Section 33, from the date on which that request had been disposed of by the arbitral tribunal :

Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter.

(4) On receipt of an application under sub-section (1), the Court may, where it is appropriate and it is so requested by a party, adjourn the proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of arbitral tribunal will eliminate the grounds for setting aside the arbitral award.

COMMENTS Section 34 of the Act, 1996 is modelled on Article 34 of the Mode! Law. This is one of the most important sections of the present Act.

Section 34 of the Act, 1996 is analogous to Section 30 of the Arbitration Act, 1940.

Section 34 provides for the ground and circumstances when an arbitral nward may be set aside. It empowers the courts to review the whole • arbitration process followed in a presented case and also to examine

constitutionality of the arbitration process and the parties are not permitted to lessen the dignity of it. No prescribed form of an application for setting anide an award is necessary. Though the High Court may prescribe form of much application.

Section 34

(1) provides that an application for setting aside the arbitral award may be made to a Court, in accordance with sub-section

(2) and nub-section (3).

On a number of occasions, the Supreme Court had said that as a general rule, the Court should approach the award with a desire to support

If that is reasonably possible, rather than to destroy it, by calling it illegal. The court is not empowered to set-aside the award suo motu,

Section 34(2) provides the list of grounds for setting aside an arbitral award by the court and the party who is seeking setting aside an arbitral award, makes an application and furnishes proof of the followings

(i) a party was under some incapacity, or

(ii) the arbitration agreement is not valid under the law to which the parties have subjected to or, failing any indication thereon, under the law for the time being in force, or

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case.

(iv) The arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decision on matters beyond the scope of the submission to arbitration. Sub-section (2)(a)(iv) is relied on the principle that the arbitral tribunal, being a creature of the arbitration agreement, is not competent to go beyond the scope of the submission to arbitration.' Thus, an arbitral tribunal being a creature of the agreement between the parties it does not have its own jurisdiction as such, thereby it is not a judicial body to exercise judicial power of the State. However, the reasonableness of the reasons given by the arbitral tribunal cannot be challenged.

The proviso to sub-section is based on the "principle of severability", thus if the reasonable good and reasonable bad part of an arbitral award can be separated the whole of the award should not be set aside. Therefore, if the reasonable bad part of an arbitral award is severable, only the bad portion may be set aside.

Section 34(2)(a)(v) provides that if composition of the arbitral tribunal and the arbitral procedure are not as per the agreement of the parties and an arbitral award is passed in such cases the parties are permitted to put an application to the court for setting aside the arbitral award. It is necessary to apply this provision by the parties that the agreement of the parties was not in conflict with the provision of Part I. Part I provides autonomy to the parties.

Section 34(2)(b)(i) and (ii) provides the power to a court to set-aside an arbitral award, when an application by a party is presented before it, however, either condition should exist (with proof-)

(i) "The subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force", or if the subject-matter is not arbitrable under the prevailing law of the State, such an arbitral award if made on such unarbitrable matter, would be set aside.

(ii) "an arbitral award is in conflict with the public policy of India". That means, if the procedure adopted to make an arbitral award and

an arbitral award itself is opposed to public policy of India, it would be capable of being set-aside by the court, on an application made to the Court by a party. For application of this provision it is necessary that it must involve the public policy of India and not any international public policy.

The New York Convention (UNCITRAL), and many international treaties also regarded and used the term "public policy" and it has been covered as fundamental principles of law and justice which includes substantive and procedural aspects.

The explanation added to Section 34(2)(b)(ii) which states that an arbitral award given by violation of Section 75 or Section 81 in Part III of the Act, 1996 or an arbitral award induced and obtained by fraud or by unfair means or by corruption would be regarded as against public policy of India. The Supreme Court of India had also upheld the importance and application of the "Doctrine of Public Policy" in several rulings.

Section 34(3) prescribes the time-limit within which an application for setting aside an arbitral-award should be presented before a competent court.

However, for the purpose of calculation the prescribed period of three months as provided under sub-section (3) is the period that commences from the date on which the applicant receives the award and expires three months thereafter. It is a mandatory provision. In a case, if a request has been made under Section 33, the time limit shall be calculated from the date on which that request had been disposed of by the arbitral tribunal.

It is also provided under sub-section (3) that when the court is satisfied and is of the opinion that the party has been prevented by the "sufficient cause" from filing an application before the court within the statutory period of three months, in such cases the Court may entertain the application within a further period of thirty days, but not thereafter.

Section 34(4) provides that on receipt of application under sub-section (1), the Court considering it appropriate and so requested by a party, may ndjourn the proceedings for a fixed period of time with an object to give mufficient opportunity to the arbitral tribunal to re-begin, after a pause, the arbitral proceedings or to take any other initiative for removal of the ground for setting aside the arbitral award. This provision is included in the Act of 1996 which was not available in the Arbitration Act, 1940. Thus new form of the remission procedure with better concept was introduced. It intends that the court should mark first the remediable defects in the arbitral award and refer the same to the arbitral tribunal, so that the

arbitral tribunal can resume the proceeding. It is obvious that the object behind this remission procedure is to encourage and give reasonable opportunity to the arbitral tribunal to escalate rectified arbitration proceedings.

The Allahabad High Court in State v. Reshma Devi, ruled that the sub-section (4) of Section 34, does not contemplate that the court could confirm part of the award and remit the rest to the arbitral tribunal.

The Court may direct the arbitral tribunal to resume the proceeding

or to take certain measures which are necessary for removal of the grounds for setting aside the arbitral award." (i) Scope of Section 34

The Supreme Court in Olympus Superstructures Put. Ltd. v. Meena Vijay Khetan& others, observed that Section 34 of the Arbitration and Conciliation Act, 1996 is based on Article 34 of the UNCITRAL Model Law and it will be noticed that under the 1996 Act the scope of the provisions for setting aside the award is almost the same under Section 30 or Section 33 of the Arbitration Act, 1940. It will be noticed that according to sub-clause (2)(a)(iv) of Section 34, the arbitral award may be set aside by the court if the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitrator or if it contains a decision on matters beyond the scope of the submission to arbitration. The proviso to clause (iv) deals with severality. The words "terms of the submission to arbitration" in Section 34(2)(a)(iv), refer to the terms of the arbitration clause. This appears to be the meaning of the word if one refers to Section 28 which uses the words 'dispute submitted to arbitration' and to Section 43(3) which uses the words 'submit future dispute to arbitration'. (ii) The words "terms of the submission to arbitration"—Meaning of

The words "terms of the submission to arbitration" in Section 34(2)(a)(iv) refers to the terms of the arbitration clause. This appears to be the meaning of the word if one refers to Section 28 which uses the words "dispute submitted to arbitration" and to Section 43(3) which uses the words "submit future disputes to arbitration." (iii) Phrase "Public Policy of India'-Meaning of

The Supreme Court in Oil and Natural Gas Corporation Ltd. v. SAW Pipes Ltd.,' explained that the phrase "public policy of India" is not required to be given a narrow meaning. The said phrase is susceptible of narrow or wide meaning depending upon the object and purpose of legislation. Hence, the award passed in contravention of the existing provisions of law is liable to be set aside.

The concept of "public policy" connotes some matter which concerne public good and the public interest. What is for public good or in publie interest or what would be injurious or harmful to the public good or publie interest has varied from time to time. However, the award which is, on the face of it, patently in violation of

statutory provisions cannot be said to bu in public interest. Such award/judgment/decision is likely to adversely affect the administration of justice. Hence, in the Court's view narrow meaning given to the term "public policy" in Renusagar's case," it is required to be held that the award could be set aside if it is patently illegal. (iv) Expression "but not thereafter" in proviso to Section 34() Scope of

The use of expression "but not thereafter" in the proviso to Section

34(3), places a complete bar precluding the Court from entertaining an application for setting aside an arbitral award made beyond three months and a further period of 30 days upon the Court being satisfied about the sufficient cause. Section 43(1) stating that Limitation Act, 1963 shall apply to arbitrations as it applies to proceedings in Court, does not have the effect of overriding the bar created by the proviso to Section 34(3).' (v) Limitation of power of the court to intervene

It is to be noted that Section 34 of the new Act, 1996 restricts grounds for setting aside the arbitral award. In other words this section specifies the grounds on which the court may order for setting aside of arbitral award. The implication of Section 34 has been considered by the courts which are taken up as under :

The Bombay High Court in United India Insurance Co. Ltd. v. Kumar Texturiser, observed that the present Act, 1996 contains three sections, namely, Sections 34, 37(2) and 14(2) which inherently empowers the court to intervene in the matter. However, Section 34 of the Act, 1996 is the main section. Wherein present case is for a declaration that there is no arbitral dispute. It was held that considering the express language of Section 5 of the Act, 1996 i.e., extent of judicial intervention and the absence of present case falling under Section 14(2) or Section 34 or Section 37(2), this court will have no jurisdiction to entertain petition.

It has been seen in foregoing pages that Section 5 of the Act, 1996 specifically states that no judicial authority shall intervene except where so provided in part I i.e., general provisions, arbitration agreement composition and jurisdiction of arbitral tribunal, conduct of arbitral proceedings, making of arbitral award, termination of proceedings, recourse against arbitral nward and finality and enforcement of arbitral award etc. of the Act, 1996. In Union of India v. East Coast Boat Builders Engineers Ltd., the Delhi High Court observed that on perusal of the provisions of Part I of the Act it is apparent that nowhere it is provided that a court may intervene and entertain a petition challenging the order passed by arbitral tribunal under Nection 16(5) taking a decision that the arbitral tribunal has jurisdiction to proceed with the arbitration case.

Scope of challenge to jurisdiction of arbitrator was considered by the Rajasthan High Court in Union of India v. Rattan Singh Gehlot. It was held that in an

unreasoned award unless it is found by seeing at the arbitral mward that an error has been committed by the arbitrator, no interference unn be made. The court observed that this is different from saying that when # challenge is made to the arbitral award by saying that the arbitrator has Beted beyond his jurisdiction. It has to be determined that there is a Histinction between disputes as to the adjudication of the arbitrator and the

upute as to in what way the jurisdiction should be exercised. In the later Poses the court has no role to play but in the former cases where there is a

challenge to the jurisdiction of the arbitrator the courts have reasons to interfere. The court further observed that this is within the domain of the court to see whether the arbitrator has acted within its jurisdiction or out side jurisdiction. To that extent the court is required to adjudicate.

It is well settled legal principle that the question regarding jurisdiction is to be raised at first instance it cannot be allowed to be raised at a later point of time even under Section 34 of the Act, 1996. Hence, it is a meagre ground for setting aside of arbitral award.

The scheme of the Act, 1996 shows that the legislature did not provide appeal against the order under Section 16(5) where arbitral tribunal takes a decision by rejecting the plea that the arbitral tribunal has no jurisdiction. In such cases, the arbitral tribunal shall go ahead with the arbitral proceedings and make an arbitral award without delay and without being interfered in the arbitral process at that stage by any court in their supervisory role. (vi) Arbitrator's existence depends upon the agreement

It is settled law of arbitration that the arbitrator is governed by the terms of agreement and he has to function within the limits of the said agreement. Thus, he cannot act beyond the terms of Act. If he makes an arbitral award by acting beyond the scope of agreement, such award is liable to be set aside by invoking Section 34 of the Act, 1996.

The Apex Court in Steel Authority of India v. J.C. Budharaj," observed that the arbitrator cannot deliberately overlook the conditions laid down in the arbitration agreement which are binding on the parties in the contract. If he ignores the same it can be very well said that he has acted beyond the jurisdiction conferred upon him. Undoubtedly the arbitrator derives the authority from the contract and if he disregards the contract the award given by him, is arbitrary, it is not sustainable. It has been held that the deliberate departure from the contract amounts not only to manifest disregard of the authority but misconduct on his part.

(Similarly, in New India Civil Erectors (P.) Ltd. v. Oil and Natural Gas Corporation, the Supreme Court has held that the arbitrator being a creature of

the agreement must operate within the four corners of the agreement and cannot travel beyond it. In the present case the agreement between the parties clearly says that in measuring the built-up area, the balcony areas should be excluded. The arbitrators could not have acted contrary to the said stipulation and awarded any amount to the appellant on that account. More particularly, arbitrator cannot award any amount, which is ruled out or prohibited by the terms of agreement.
(vii) Setting aside of non-speaking award

The Supreme Court in State of J. & K. v. Dev Dutt Pandit, considered the scope of challenging a non-speaking award, wherein submission was made before the court that the arbitral award is a non-speaking award. It was observed that the Supreme Court cannot go into the mental process of the arbitrator in making the award on various claims. The court has certain limitations while examining a non-speaking award but there is no complete bar in examining if the award is in terms of reference or in terms of the contract.

(viii) Whether the issue of lack of jurisdiction could be raised for the first time

In matter of Olympus Superstructures Put. Ltd. v. Meena Vijay Khetan& others, before the Apex Court a question arose whether in view of the provisions of Section 16(2) which uses the words 'not later than any such objection as contained in Section 16(2) not raised before the arbitrator can be permitted to be raised for the first time under Section 34 of the Act. Similarly, a question arises whether in view of the proviso of Section 16(3) which uses the words 'as soon as' any objection as contained in Section 16(3) cannot be raised for the first time under Section 34. There was no necessity to decide this question in view of the fact that though Section 16 was referred to during the course of the hearing, the respondents had urged on merits that the arbitrator had jurisdiction to decide the disputes/differences concerning the Interior Design Agreements also and that even if the appellant could be permitted to raise these issues at the stage of Section 34, there was no substance in the said contention. The Apex Court did not decide the question in view of the facts of the case, and therefore, the question was left open.

v objectection at thortidents

(ix) Which court empowered to set aside arbitral award

It is settled legal principle that the place wherein the parties entered into the arbitration agreement that court is competent to entertain the application under Section 34 of the Act, 1996.

In cases wherein the disputed properties are situated within the jurisdiction of two courts located at different places, either of the court would have jurisdiction to entertain application for setting aside of the arbitral award, however, in case the

court which first entertains such application no such application is entertainable by other court."

In case of an international commercial arbitration it will be governed by Article 3 of the Geneva Convention or Article V, para l(a) of the New York Convention. These provisions of the Convention provide that the country in which or under the law of which the arbitral award was made, the court of that country only would have jurisdiction to set aside the arbitral award." ;)

(xvi) Grounds for setting aside of arbitral award

In Oil and Natural Gas Corporation Ltd. v. SAW Pipes Ltd., the Supreme Court had an occasion to elaborate and lay down proof and grounds for setting aside of arbitral award. According to the Supreme Court -

(1) The Court can set aside the arbitral award under Section 34(2) of the Act if the party making the application furnishes proof that

(i) a party was under some incapacity; or

(ii) the arbitration agreement is not valid under the law to which the parties have been subjected it or falling under the law for the time being in force; or

(iii) the party making the application was not given proper notice of the appointment of an arbitrator;

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of submission to arbitration or it contains decisions on matters beyond the scope of the submission to arbitration. (2) The Court may set aside the award

(i)(a) if the composition of the arbitral tribunal was not in accordance with the agreement of the parties;

(b) failing such agreement, the composition of the arbitral tribunal was not in accordance with Part I of the Act;

(ii) if the arbitral procedure was not in accordance with

(a) the agreement of the parties; or

(b) failing such agreement, the arbitral procedure was

not in accordance with Part I of the Act. However, exception for setting aside the arbitral award on the ground of composition of arbitral tribunal or illegality of arbitral procedure is that the agreement should not be in conflict with the provisions of Part I of the Act from which parties cannot derogate. (3) The award could be set aside if it is :

(1) Against the Public policy; or (2) Against the Fundamental policy of Indian law; or (3) Against the Justice and morality; or (4) Against the Patently illegal; or (5) Against the Interest of India.

(xxii) Effect of an arbitral award being set aside

Once the arbitral award is set aside by the court while exercising the power under Section 34, the effect of an award being set aside is that it becomes unenforceable by law. The parties have to be reverted to their former position in respect of the subject-matter of dispute.

It is settled legal position that as soon as the arbitral award is made, an arbitral tribunal is functus officio, thus it ceases to function, on the authority of the court's order as provided under Section 34(4) the arbitral tribunal may resume its power and may conduct fresh arbitral proceedings, when the matter has been remitted back to the tribunal. While clarifying this point the Apex Court in Narain Das v. Narsingh Das,* observed that the court is empowered to order the tribunal to correct or modify an arbitral award where it is imperfect in form, but the court cannot substitute its own order for the arbitrator's award.)

FINALITY AND ENFORCEMENT OF

ARBITRAL AWARDS Seetion 35. Finality of arbitral awards.-Subject to this Part an arbitral award shall be final and binding on the parties and persons claiming under them respectively.

COMMENTS Section 35 of Act, 1996 contains essence as, contained in paragraph 7 of the First Schedule of the Arbitration Act, 1940.

Section 35 states that the final arbitral award is binding upon the parties and any other persons claiming under them. To achieve finality, the arbitral award should not be challenged after the expiry of period of time provided under Section 34(3). Such an arbitral award, has not only achieved finality but also becomes binding force on the parties. This is a reformative provision in the Act of 1996. After the finality of an arbitral award, rights and liabilities of the parties relating to the said claims etc. are to be decided in accordance with the said arbitral award!

Section 36. Enforcement.-Where the time for making an application to set aside the arbitral award under Section 34 has expired, or such application having been made, it has been refused, the award shall be enforced under the Code of Civil Procedure, 1908 in the same manner as if it were a decree of the Court. 1

COMMENTS (Section 36 is not modelled on the Model Law.

Section 36 provides condition for enforcement of an arbitral award and its procedure that how the award will be enforced. There are two conditions either to

be fulfilled to become an award enforceable. It is the mandatory provision. The conditions are(i) under Section 34, time limit for making an application for setting

aside an arbitral award has expired, or (ii) such an application has been made but it has been refused.

If, either condition is fulfilled the award shall be enforced under the Code of Civil Procedure, 1908 (5 of 1908) in the same manner as if it were a decree of the Court. In fact an arbitral award is not a decree of the court but, mutatis mutandis shall apply to the enforcement of an arbitral award. Section 36 contains the words "in the same manner as if it were a decree of the court" thus, an arbitral award must include essential ingredients of a decree of the court, to become capable of being enforced.

An arbitral award made on oral submission is not enforceable.

Under the new Act, 1996 the requirement as to stamping of the arbitral award and making of the rule of the court and issuing of a decree in terms thereof have been taken away. Now the arbitral award itself is executable without these formalities which were necessary under the old Act, 1940. Thus, it is well said that the "award is given teeth."). (i) Enforcement of award

In Khaleel Ahmed Dakhami v. Hatti Gold Mines Ltd.,' the fact of the instant case were as follows :

Award allowed some of the claim of the appellant, and the respondent filed an application under Section 34 for setting aside the award. Earlier caveat had been filed by the appellant along with application under Section 9 i.e., interim measures etc. by court. The appellant also filed an application under Section 36 for execution of the award without mentioning pendency of application under Section 34, i.e., for setting aside of arbitral award. It was held that the application under Section 36, for enforcement of instant award could not be entertained.

In the case the Apex Court observed that the Principal District Judge, Raichur had, no doubt, jurisdiction in the matter but his holding that the Principal City Civil Judge, Bangalore would have no jurisdiction is not commendable. It cannot always be said, in view of Section 10 of the Civil Procedure Code, 1908, that only one court will have jurisdiction to try the

suit. It is not that the Principal City Civil Court, Bangalore is not a court within the meaning of Section 2(e) of the Act, 1996, whether the Principal City Civil Judge, Bangalore has jurisdiction in the matter or not was still pending with him when proceedings were filed earlier in time than the execution application by the appellant in the District Court at Raichur. The award had not attained finality. In these circumstances, the Principal District Judge, Raichur should not have

entertained the application for execution and ordered attachment of movable properties of the respondents. In such circumstances, the Principal District Judge, Raichur should not have entertained the execution application at all.