CHAPTER IV

JUDICIAL INTERVENTION BEFORE ARBITRATION

INTRODUCTION

The general principle pertaining to the extent of judicial intervention is emphasised in Section 5 of the Arbitration and Conciliation Act 1996\textsuperscript{150}. This Section is analogous to Article 5 of UNCITRAL Model Law as well as the general principle as stated in Part 1 of the English Arbitration Act 1996. Section 5 is a new section as there was no analogous provision in the old Act of 1940.

SCOPE AND OBJECT

This Statement of principle in Section 5 of the Arbitration and Conciliation Act 1996 is a clear recognition of the need to limit and define the Court’s role in arbitration. Party Autonomy and the independence and authority of arbitrators are the hallmarks of this Act. The prevalence of party autonomy over court intervention with the object of achieving the two fold objective of speed and economy in resolution of disputes by ‘domestic’ and ‘international commercial arbitration’ is the core of this legislation. In order to eliminate any possibility of intervention by courts, Section 5 of the Act begins with non obstante clause – “Notwithstanding anything contained in any other law’. Now judicial intervention in the arbitral process is permissible only to the extent as permitted by Part I. This clearly indicates the legislative intent to minimize supervisory role of courts to ensure that the intervention of the court is

\textsuperscript{150} Section 5: Extent of Judicial Intervention: Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part.
minimal. It defines the extent of judicial intervention in arbitration proceedings. It clearly brings out the object of the Act viz. to minimise judicial intervention and to encourage speedy and economic resolution of disputes by the arbitral process in cases where disputes are covered by an arbitration agreement\textsuperscript{151}. It is aimed at giving certainty to the arbitral proceedings and ensuring speedy and inexpensive justice between the parties. Wellington Associates Ltd., V. Kirit Mehta\textsuperscript{152}. Shree Bal Krishan Aggarwal Glass Industries Ltd., V. Union of India and others\textsuperscript{153}. Ford Credit Kotak Mahindra Ltd., Rep. by its Authorised Signatory V. M. Swaminathan\textsuperscript{154}.

The words “Not withstanding anything contained in any other law” signifies that even if there are provisions in any other law in force, which permit a judicial authority to intervene, the said authority shall not intervene unless the intervention is provided for in any of the provisions of Part I of this Act as stated supra. Such a prohibition on judicial intervention will however be applicable only to matter governed by Part I of the Act. These words “no judicial authority” is wide enough to apply to and cover not only the Court which has jurisdiction in to intervene in arbitration matters or proceedings but to any and all other judicial authority in so far as the matter in question is governed by Part I of this Act. Interpreting the words “shall intervene” connotes that the use of the word ‘shall’ takes away the discretion normally available to a judicial authority.

Permitted Judicial Intervention is visualized from the words “except where so provided in this part – exceptions”. However in certain situation, without necessary

\textsuperscript{151} P. Anand Gajapathi Raju V. PVG Raju (2000) 4 SCC 539, 541
\textsuperscript{152} AIR 2000 SC 1379
\textsuperscript{153} 2005 (3) RAJ 665 (All)
\textsuperscript{154} 2005 (2) RAJ 225 (Mad)
court support, the arbitral process will find itself in a helpless position. It is for alleviating such situations, speaking for the House of Lords, in *Coppee-Lavalin SA/NV V. Ken-Ren Chemicals and Fertilisers Ltd (In Liquidation)*\textsuperscript{155}, Lord Mustill said, ‘Whatever view is taken regarding the correct balance of the relationship between international arbitration and national courts, it is impossible to doubt that at least in some instances the intervention of the Court may be not only permissible but highly beneficial’. The question remains, to what extent should a court intervene particularly during the arbitral proceedings.

Section 5 which is contained in Part I of the Arbitration and Conciliation Act 1996 defines the extent of judicial intervention in arbitration proceedings. Part I, provides judicial intervention in following among other cases which can be drawn under three groups i.e. before, during and after arbitration.

Section 8 – Power to refer the parties to arbitration.

Section 9 – Power to make interim orders.

Section 11 – Appointment of arbitrator in certain events.

Section 13 (5) - Procedure for challenging an arbitrator.

Section 14(2) - Power to decide on the termination of mandate of the arbitrator in the event of his inability to perform his functions.

Section 16 (6) - Competence of an arbitral tribunal.

Section 27 – Assistance in taking evidence.

Section 34 – Power to set aside an award.

Section 34(4) – Power to remit the award to the arbitration tribunal.

\textsuperscript{155} (1994)2 All ER 449,466 (HL). This case was decided before the enactment of the Arbitration Act 1996
Section 36 - Enforcement of an award by way of decree.

Section 37 – Power to hear appeal only on certain specified matters.

Section 37(3) – Power of Supreme Court to hear appeal.

Section 39 (2) (4) – Power of the Court to order delivery of an award on payment of costs of the arbitration and also power to make orders in respect of costs in the absence of sufficient provision concerning them in the award.

Section 41(2) – Reference of a dispute to arbitration in insolvency proceedings.

Section 43(3) – Power of the court to extend time with respect a dispute which may become time barred.

The Supreme Court in Surya Dev Rai V. Ram Chander Rai\(^{156}\) had observed as follows: “The parameters for exercise of jurisdiction under Article 226 or 227 of the Constitution cannot be tied down in a strait jacket formula or rigid rules. Not less than often the High Court would be faced with dilemma. If it intervenes in pending proceedings there is bound to be delay in termination of proceedings. If it does not intervene, the error of the moment may earn immunity from correction. The facts and circumstances of a given case may make it more appropriate for the High Court to exercise self restraint and not to intervene because the error of jurisdiction though committed is yet capable of being taken care of and corrected at a later stage and the wrong done, if any, would be set right and rights and equities adjusted in appeal or revision preferred at the conclusion of the proceedings. But there may be cases where ‘a stitch in time would save nine’. Thus, the power is there but the exercise is discretionary which will be governed solely by the dictates of judicial conscience enriched by judicial experience and practical wisdom of the Judge.

\(^{156}\) AIR 2003 SC 3044
In *Anil Constructions V. Vidarbha Irrigation Development Corporation and another*157 case, the proceedings were on before the Sole Arbitrator appointed by the petitioner as per agreement, and the Respondent filed the application before the District Court regarding the maintainability of the proceedings and issue of restraint order. The District Court restrained the Arbitrator from conducting the arbitration proceedings. In a Writ Petition (Bombay High Court, Nagpur Bench) it was held that in accordance with the law laid down by the Supreme Court in *M/s. Sundaram Finance Ltd., V. M/s. N.E.P.C. India Limited*158 the Respondent No. 1 could not have approached the Civil Court for any relief to stall the proceedings pending adjudication before the arbitrator. Court affirmed that the provisions of Section 9 has been laid down to lien towards for smooth sailing of arbitral proceedings and cannot be misused so as to hamper the proceedings. Accordingly the order of the Trial Court was quashed.

Hon’ble Apex Court in the case of *Morgan Securities and Credit Pvt. Ltd., V. Modi Rubber Ltd*159, observed that “The Board exercises statutory functions. It is a quasi judicial authority. It exercises various powers under the Code of Civil Procedure. The expression ‘Judicial Authority’ must be interpreted having regard to the purport and object for which the 1996 Act was enacted. The Board is a judicial authority within the meaning of Section 5 of the 1996 Act. A power to pass an interim order, however, and that too directing disposal of the assets must be found out in the scheme of the statute itself. Although the Courts of limited jurisdiction may also

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157 2000 (Suppl.) Arb. LR 111(Bombay)
158 AIR 1999 SC 565
159 AIR 2007 SC 683
possess by necessary implication incidental power so as to enable it to direct preservation of property during the pendency of a proceeding before it, it is doubtful whether such incidental power can be exercised for sale of the assets of the company Section 19A does not empower the Board to direct sale of the assets at the stage of Enquiry”.

It is equivalently significant to advert to the wordings of the Hon’ble Apex Court in the case law *Secur Industries Ltd., V. Godrej and Boyce Mfg. Co., Ltd*[^160^].

“The extent of judicial intervention in arbitrations is limited by the non obstante provisions of Section 5 of the 1996 Act. The Court could therefore, only intervene in respect of matters expressly provided for in the Arbitration Act of 1996. The validity of the proceedings before the Arbitral Tribunal is an issue which the Council, and not the Court, could decide under Section 16 of the Arbitration Act of 1996[^161^]. The council can go into the question whether its authority had been wrongly involved by the appellant and it is open to it to hold that it had no jurisdiction to proceed with the

[^160^]: AIR 2004 SC 1766

[^161^]: Section 16 in the Arbitration and Conciliation Act 1996

**Competence of arbitral tribunal to rule on its jurisdiction.**—

(1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose,—

(a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and

(b) a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence; however, a party shall not be precluded from raising such a plea merely because that he has appointed, or participated in the appointment of, an arbitrator.

(3) A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.

(4) The arbitral tribunal may, in either of the cases referred to in sub-section (2) or sub-section (3), admit a later plea if it considers the delay justified.

(5) The arbitral tribunal shall decide on a plea referred to in sub-section (2) or sub-section (3) and, where the arbitral tribunal takes a decision rejecting the plea, continue with the arbitral proceedings and make an arbitral award.

(6) A party aggrieved by such an arbitral award may make an application for setting aside such an arbitral award in accordance with section 34.
matter. Indeed it is incumbent on the Court to refer the parties to arbitration under Section 8 (1) of the 1996 Act if a suit is filed in a matter which is the subject matter of an arbitration agreement. Furthermore, even while this question is pending decision before a court, the Arbitral Tribunal may proceed with the arbitration under Section 8(3) and make its award. The High Court cannot, therefore stay the proceedings before the Council”.

Major focus on this chapter is to focus upon on the role of the court before arbitration. Following this the on going chapters are to be focused upon the role of the court during and after arbitration and its powers to do so which is highlighted in the corresponding sections. Parrelly to whet upon purpose of the judiciary functioning arbitration during the reference and the role of the court after the award has been made. This is designed to examine the essence of the arbitration functioning as an approach for speedy justice.

JUDICIAL INTERVENTION BEFORE ARBITRATION

Function of Judicial Authority begins with the application to stay court proceedings, which have been brought in contravention of the arbitration agreement. The court has no power to compel arbitration save indirectly by refusing the claimant a remedy through the courts, so that if he wants to pursue his claim he can only do so by arbitration. Parrelly this chapter focuses upon the power of the tribunal to decide by itself the disputes regarding the allegation of fraud, validity of the arbitration agreement, inoperative or incapable of being performed nullity and void.
A party to a judicial proceeding can seek a reference of the dispute to arbitration by virtue of invoking Sections 8 of the Arbitration and Conciliation Act, 1996, Sections 45 and 54 of the Arbitration and Conciliation Act, 1996 depending upon the context therein. Section 8 relates to domestic arbitration coming under Part-I of the Act while Sections 45 and 54 of this Act relate to International Commercial Arbitration under the New York Convention Awards and the Geneva Convention Awards respectively dealt with under Part-II of the Act.

POWER TO REFER PARTIES TO ARBITRATION

When there exist arbitration agreement, power to refer parties to arbitration emerges. In respect of a matter agreed to be referred to arbitration and there exists a valid arbitration agreement, in which event a judicial authority has been invoked by

162 **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 than 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.

163 **Section 45. Power of Judicial Authority to refer parties to arbitration.**—

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.”

164 **Section 54. Power of Judicial Authority to refer parties to arbitration.**—

Notwithstanding anything contained in Part I or in the Code of Civil Procedure, 1908 (5 of 1908), a Judicial Authority, on being seized of a dispute regarding a contract made between persons to whom Section 53 applies and including an Arbitration Agreement, whether referring to present or future differences, which is valid under that Section and capable of being carried into effect, shall refer the parties on the Application of either of them or any person claiming through or under him to the decision of the Arbitrators and such reference shall not prejudice the competence of the Judicial Authority in case the agreement or the arbitration cannot proceed or becomes inoperative.”

165 This extract is taken from Kotak Mahindra Bank Ltd.V. Sundaram Brake Lining Ltd., (2008) 4 CTC 1
commencing legal proceedings by one party to the agreement in respect of the very same matter agreed to be referred to arbitration, the other party can apply to the judicial authority for an order to refer the parties to arbitration. This provision is contemplated under Section 8 of the Arbitration and Conciliation Act 1996. Sub-section (1) of Section 8 Arbitration and Conciliation Act 1996, with some difference, is analogous to Section 34 of Arbitration Act 1940. It is also analogous to Article 8 of UNCITRAL Model Law. Similar provisions are made under Sections 9, 85, 86 and 87 of the English Arbitration Act 1996.

**SCOPE AND OBJECT**

The basic object of the arbitration law designed for speedy and inexpensive dispute resolution. An arbitration agreement is a contractual undertaking by which the parties agree to settle certain disputes by way of arbitration, rather than by litigation in court. Judicial intervention, therefore, should be in support of arbitration. Section 8 of the Arbitration and Conciliation Act 1996 mandates for intervention of the judicial authority by referring parties to arbitration where there exists an arbitration agreement. The requirement that the judicial authority shall refer the parties to arbitration is mandatory\(^\text{166}\). The language in this section is pre-emptory and the court is under a legal obligation to refer the parties to arbitration\(^\text{167}\). Furthermore, notwithstanding that an application has been made to the judicial authority and that issue is pending before it, ‘arbitration may be commenced or continued and concluded by making an arbitral award’ during the pendency of the application\(^\text{168}\). This section

\(^{166}\) Hindustan Petroleum Corporation Ltd., V. Pink City Midway Petroleums, (2003) 6 SCC 503

\(^{167}\) P. Anand Gajapathy Raju V. P.V.G. Raju, (2000) 4 SCC 539

\(^{168}\) Kapana Kothari V. Sudha Yadav AIR 2002 SC 404
has been described as one of the pillars of this Act\textsuperscript{169}. Section 8 of the Arbitration and Conciliation Act, 1996 and Section 34 of the Arbitration Act 1940 is different. Therefore these two respective provisions of different Acts have no application to deprive the party of the legitimate right to invoke section 8 of the Arbitration and Conciliation Act to have the matter relating to the disputes referred to arbitration, in terms of the arbitration agreement.

**ANALOGOUS PROVISIONS**

There is a departure from analogous provisions. In this section, the legislature has not adopted the phrase ‘unless satisfied that the agreement is null and void, inoperative or incapable of being performed’, from Article 8 (1) of the Model Law. Consequently the judicial authority acting under this provision has no jurisdiction to determine the question of existence and validity’ of the arbitration agreement\textsuperscript{170}. This phrase has been dropped by the legislation with the specific object of marginalizing the judicial intervention as legislated in section 5 of this Act. It has not been concurrently vested in the judicial authority and the arbitral tribunal. It has been left to the exclusive jurisdiction of the tribunal to be decided under section 16 which provides ‘the arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement’.

\textsuperscript{169} Binder, International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions, second edn, 2005 pg 88 para 2079

\textsuperscript{170} Renusagar Power Co Ltd., V. General Electric Co (1984) 4 SCC 679
The provisions of the 1996 Act do not envisage the specific obtaining of any stay as under the 1940 Act. There is a striking departure in Section 8 of this Act from the scheme underlying the provision of Section 34 of Act of 1940. Under the old Act, the judicial authority had the discretion to make an order staying the proceedings before arbitrator. However under the New Act now once an application is properly made before the judicial authority, it is obligatory to refer the parties to arbitration. Once the parties have been referred to arbitration, the question of stay would not arise. Filing of an application and praying to refer parties to arbitration would not ipso fact stay the proceedings before the arbitrator. Despite an application has been made under Sub Section (1) and that the issue is pending before the judicial authority there exist no sort of embargo for the arbitration proceedings to be commenced or continued and an award can also be passed. Sub- section (3) empowers the arbitral tribunal to commence or continue the proceedings before it and even pass the award. The object of giving such powers to the Tribunal is to reduce the chances of dilatory tactics by a party with the intention of unnecessarily prolonging the adjudication of the matter by the arbitral tribunal.

**APPLICABILITY**

Under section 8, Power is conferred upon the Judicial Authority to refer the parties to the dispute to arbitration, in the circumstances, namely, where:

(1) an action is brought, before such judicial authority:

(2) the matter brought is subject matter of an Arbitration Agreement;

(3) a party applies while submitting his first statement on the substance for reference:
(4) the application so filed by a party is accompanied by original arbitration agreement or its certified copy.

If however, the party who wants the matter to be referred to arbitration applies to the court after submission of his statement and the other party who has brought the action does not he object, there is no bar on the ‘judicial authority’ referring the parties to arbitration. By the consent of the parties, the matter may be referred to arbitration even after the submission of the first statement of the party before the judicial authority and conversely by implication, if a party objects to the application, such a reference cannot be made\textsuperscript{171}.

**JUDICIAL AUTHORITY**

In this section the expression ‘Judicial Authority’ instead of ‘Court’ has been used obviously with the object of widening the scope of the applicability of the provisions of the Act with respect to parties who have entered into an arbitration agreement.

In *Fair Air Engineers Pvt Ltd., V. NK Modi*\textsuperscript{172} the Supreme Court held that the District Forum, the State Commission and the National Commission constituted under the Consumer Protection Act 1986 are all included in ‘Judicial Authority’ for the purpose of section 34 of the Arbitration Act of 1940.

\textsuperscript{171} Sudarshan Chopra V. Company Law Board 2004 (2) Arb LR 241, 259 (P & H) (DB)

\textsuperscript{172} (1996)6 SCC 385
Similarly, the Commission set up under the Monopolies and Restrictive Trade Practices Act 1969 has also been held to be the judicial authority. In *Canara Bank V. Nuclear Power Corporation of India Ltd.*, the Supreme Court observed that the Company Law Board is a ‘judicial authority’. The legislature after empowering the judicial authority to refer parties to arbitration where there is an arbitration agreement has properly used the word ‘matter’ instead of suit or other judicial proceedings.

“The existence of an arbitral clause in the agreement is accepted by both the parties as also by the lower Courts. If that be so, in view of the mandatory language of Section 8 of the Act, the Courts below ought to have referred to arbitration. The Civil Court should not embark upon an inquiry in regard to the applicability of the arbitration clause to the facts of the case”.

“Merely because there is an arbitration clause in the agreement that cannot prevent criminal prosecution against the accused if an act constituting a criminal offence is made out even prima facie”.

Overall the conditions which are required to be satisfied sub Section (1) and (2) of Section 8 of the Arbitration and Conciliation Act 1996, before the Court can exercise its power to refer parties to arbitration are

(1) there is an arbitration agreement

(2) a party to the agreement brings an action in the Court against the other party

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173 *Shri Balaji Traders V. MMTC Ltd.*, (1999) CLA 261
175 *H.P. Corp. Ltd., V. Pinkcity Midway Petroleums* AIR 2003 SC 2881
176 *S.N. Palanitkar V. State of Bihar* AIR 2001 SC 2960
(3) subject matter of the action is 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 his first statement on the substance of the dispute.

PENDING ACTION

A provision of section 8 is available only when the case is pending before the court. Section 8 of this New Act 1996 is not having a resemblance of Section 20 of the 1940 Act. It is only if in an action is pending before the Court and the party applies and pleads that the matter is the subject of an arbitration agreement, then in that event the Court get jurisdiction to refer the parties to arbitration. In other words the section postulates the pendency of a lis before the judicial authority. For the applicability of the provisions of this Section it is necessary that the action pending before the judicial authority pertains to the subject matter covered by an arbitration agreement.

SUBJECT ISSUE

To see the subject issue in the arbitration agreement, a perusal of the entire agreement is essential so as to determine whether a matter is covered by an arbitration agreement entered into between the parties. The jurisdiction of the judicial authority is not completely ousted even if the matter is covered by the arbitration clause. It is manifest from the provisions of this Section that if procedural requirements as provided for under sub-section (2) of the 1996 Act are not complied with, the
application filed under sub section (1) has to be rejected. The Arbitration agreement is a solemn agreement entered into between the parties for resolution of the disputes. The provision regarding reference of the matter pending before the judicial authority to the arbitral tribunal as got to be strictly complied with.

In *Sukanya Holdings Pvt., Ltd., V. Jayesh H. Pandya case* the Supreme Court had to deal with the interpretation and application of the expression ‘an action is brought in a matter which is the subject of an arbitration agreement’ used in Section 8 (1) of the 1996 Act. The Supreme Court observed that “The relevant language used in Section 8 is - “in a matter which is the subject matter of an arbitration agreement”. The judicial authority is required to refer the parties to arbitration. Therefore, the suit should be in respect of “a matter” which the parties have agreed to refer and which comes within the ambit of arbitration agreement. Where, however, suit is commenced – “as to a matter” which lies outside the arbitration agreement and is also between some of the parties who are not parties to the arbitration agreement, there is no question of application of Section 8 of 1996 Act. The words ‘a matter’ indicates entire subject matter of the suit should be subject to arbitration agreement.

**LIMITATION**

Limitation for submission of application under section 8 of 1996 Act: “not later than when submitting first statement on the substance of the dispute.” An application under sub section (1) has to be filed by the party seeking reference of disputes to arbitration before submitting his first statement on the substance of the

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177 *Northern Eastern Electric Power Corporation Ltd., V. Jiban Kimar Saha* AIR 2000 Gau 80
179 *AIR 2003 SC = 2003 AIR SCW 2209*
dispute. The object of this provision is that the applicant has to make the application for referring the parties to arbitration with utmost promptness, in any case, not subsequent to submitting his first statement on the substance of the dispute before the judicial authority. Such application can be submitted at any time before the party files his first statement on the substance of the dispute. It can even be filed simultaneously with the first statement on the substance of the dispute. It can as well be contained in any interlocutory application or in reply to any interlocutory application.

Section 34 of the old Act provided that a party to an arbitration agreement could at any time before filing a written statement or ‘taking any other steps in the proceedings’, apply to the judicial authority before which the proceedings were pending, to stay the proceedings. Taking of any effective step in the proceedings created a bar for a party to apply under Section 34 despite the fact that the written statement had not been filed. Under the new section the bar of, ‘taking any other steps in the proceedings’ is no ground to deny a party the right to move for reference of disputes to the arbitration.

The uncertainty which to some extent existed under the old Act has now being completely removed by omitting the words ‘taking any other steps in the proceedings’ in Section 8. Taking part in the proceedings in a lis before judicial authority is now no bar of applying for reference to arbitration before submitting the first statement on the substance of the dispute.

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180 Ajit Singh V. Sri Mata Vaishno Devi Shrine Board, Katra 2003 (1) Arb LR 137, 142 (J & K)
181 Sudershan Chopra V. Company Law Board, 2003 (3) Arb. LR 14 (P & H)
In *Manna Lal Kedia and others. V. State of Bihar*\(^{182}\), it was held “…Section 8 is not to understand as referring to written Statement within the meaning of Order 8 of the Civil Procedure Code. If it was so, nothing prevented the Legislature from using the term which is a well understood term of law.

Section 34 of the old Act was referred to point out that it used the term “before filing a written statement or taking any other steps in the proceedings” and referring to the Gujarat High Court decision in *Varun Seacon Ltd., V. Bharat Bijli Ltd.*, it was held “Section 8(1) of the New Act is, thus, an improvement upon the provisions of Section 34 of the old Act”.

**THE FIRST STATEMENT**

The meaning of the first statement on the substance of dispute has to be seen. The first statement on the substance of dispute can be contained in any interlocutory application or any reply to any interlocutory application. The first statement does not mean the written statement or else the legislature in its wisdom would have used the words written statement instead the words ‘first statement”\(^{183}\). The expression “The first statement on the substance of dispute” The first statement on the substance of dispute must be a statement which would indicate the clear intention of he party to proceed with the proceedings and not to seek arbitration\(^{184}\). As such each case will have to be decided on merits and facts involved but in the light of the mandatory nature of Section 8 of the 1996 Act.

\(^{182}\) AIR 2000 Patna 91

\(^{183}\) Sudershan Chopra V. Company Law Board, 2003 (3) Arb. LR 14 (P & H)

\(^{184}\) Jashu M. Patel V. Shivdatta R. Josh 2003 (2) Arb. LR 479 (Bombay)
APPLICATION TO BE FILED ALONG WITH ARBITRATION AGREEMENT

An application shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof as provided under Sub Section (2) of Section 8 of 1996 Act. This Section specifically envisages that a request of this nature should be contained in a written application. Oral request does not fall within the purview of Section 8 of 1996 Act. The arbitration agreement referred to sub-section (2) is not restricted to the agreement as defined in sub section (1) of Section 7 of the Act but also includes an agreement within the meanings of sub sections 2 to 5 of the Act. Such an agreement would, therefore, include an arbitration clause in a contract, or which can be seen from an exchange of telegrams, telex, letters, and other means of telecommunication which give a record of agreement or from an exchange of statement of claim and defence.

Where in a case an application was accompanied with a photocopy of the agreement and later on complied with the provisions of Section 8 of the Act by filing certified copy of the agreement and produced the original agreement, it was held that the rejection of the prayer on the ground that the application was not filed by proper person and not accompanied by the original agreement was bad. In *Bharat Seva Sansthan V. U.P. Electronics Corporation Ltd.*, the Supreme Court upheld the decision of the High Court allowing application under section 8 of the Act on the basis of photocopy of the lease agreement.

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185 Raj and Associates V. Videsh Sanchar Nigam Ltd., (2004 (3) Raj 238 (Del)
186 Tata Finance Ltd., V. Naresh Ch. Deb, 2007 (2) Arb. LR 500 (Gauhati)
187 2007(3) ARb LR 299 (SC)
The agreement to have recourse to arbitration may be reached by the parties even after the disputes have arisen. This interpretation gets support from the provisions of Sub-section (3) of the Act. This Section expects the application to be accompanied with the original arbitration agreement or duly certified copy thereof. The Courts have been liberal in construing this provision regarding compliance by the applicant.

In a case, the party applying under Section 8 of the Act, had duly reproduced verbatim and in extensor the arbitration clause, contended that there has been substantial and sufficient compliance with the provisions of the Section. It was observed\textsuperscript{188} “A pedantic approach to statutory provisions, which approach would have the effect of defeating the purpose of law, is to be eschewed…. Having incorporated the Arbitration clause in the application itself, it would serve no purpose if the contract or a certified copy thereof is still to be filed. In fact, greater sanctity is bestowed on the pleadings of the parties, especially where these are also supported by the affidavits. Greater reliance should be placed on them rather, than on documents which are yet to be admitted and/or proved. In my view the requirements of Section 8 of the 1996 Act have been substantially and sufficiently met in the present case.”

**“SHALL REFER”**

The words “shall refer” makes it clear that the reference is mandatory. Provisions of Section 8 of the Act are mandatory and give no discretion to the Court or Judicial authority and reference has to be made if the conditions of the Section are

\textsuperscript{188} Jonsons Rubber Industries V. General Manager, Eastern Railways and another 2000 (3) ARb LR 496 (Delhi)
satisfied including the condition in sub-section (2) of the Act. In the latest decision, Supreme Court in *Renusager Power Co. Ltd., V. General Electric Company* and also in *Agri. Gold Exims Ltd., V. Lakshmi Knits & Wovens* Supreme Court observed that “On the plain reading of the section as it now stands two things become very clear. In the first place the section opens with a non obstante clause giving overriding effect to the provision contained therein and making it prevail over anything to the contrary contained in the Arbitration Act 1940 or the Code of Civil Procedure, 1908. Secondly, unlike Section 34 of the Arbitration Act 1940 which confers discretion upon the Court, the section uses the mandatory expression “shall and makes it obligatory upon the Court to pass the order staying the legal proceedings commenced by a party to the agreement if the conditions specified therein are fulfilled.” The Court should, as far as possible proceed to give opportunity for resolution of disputes through arbitration rather than by judicial adjudication.

The Rajasthan High Court in a case, observed “…Section 8 of the Act of 1996 which mandates a Judicial Authority before whom an action is brought in a matter which is subject of arbitration agreement to refer the parties to the arbitration on fulfillment of the conditions mentioned therein. It is also required to be seen that by virtue of Section 89 of the Code of Civil Procedure inserted by the Code of Civil (Amendment) Act 1999 with effect from 1st July 2002, it is moreover imperative for the Court to consider that where there exist elements of a settlement which may be acceptable to the parties, the Court shall formulate the terms of settlement and after

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189 AIR 1985 SC 1156
190 2007 (1) Arb. LR 235(SC)
191 *Hindustan Petroleum Corporation Ltd., V. Parshw Auto Centre*, 2006 (4) Arb. LR 358 (Bom)
192 *Rajasthan State Road Transport Corp., V. Nand Lal Saraswat*, AIR 2005 Raj 112
receiving observations of the parties, the Court may reformulate the terms of possible settlement and refer the same for arbitration, conciliation, judicial settlement including Lok Adalat or mediation, as the case may be.”

It needs to be noted that arbitration contemplated by Section 89 of the CPC is not a reference under Section 8 and it is not necessary to follow the mandate of Section 8\textsuperscript{193}.

**ADJUDICATION**

Must court adjudicate whether disputes fall within the ambit of arbitration clause before referring parties to arbitration? The above question needs careful consideration. A few decisions of the Supreme Court need to be considered in this aspect. *In H.P. Corpn. Ltd. v. M/s. Pinkcity Midway Petroleums*\textsuperscript{194}, it was observed: “This Court in the case of *P. Anand Gajapathi Raju and others v. P.V.G. Raju (Dead) and others*\textsuperscript{195} had held that the language of Section 8 is peremptory in nature. Therefore, in cases where there is an arbitration clause in the agreement, it is obligatory for the Court to refer the parties to arbitration in terms of their arbitration agreement and nothing remains to be decided in the original action after such an application is made except to refer the dispute to an arbitrator. Therefore, it is clear @ page SC 2886 that if as contended by a party in an agreement between the parties before the Civil Court, there is a clause for arbitration, it is mandatory for the Civil Court to refer the dispute to an arbitrator.

\textsuperscript{193} *Afcons Infrastructure Ltd., v. Cherian Verkey Construction Co.* 2007 (1) Ar.LR 405
\textsuperscript{194} AIR 2003 SC 2881 = 2003 AIR SCW 3558
\textsuperscript{195} 2000 (4) SCC 539
The question then would arise, what would be the role of the Civil Court when an argument is raised that such an arbitration clause does not apply to the facts of case on hand? The answer to this argument is found in Section 16 of the Act itself. Power has been conferred upon the Arbitral Tribunal to rule on its own jurisdiction including rule on any objection with respect to the existence or validity of the arbitration agreement. That apart, a Constitution Bench of this Court in Konkan Railway with reference to the power of the arbitrator under Section 16 has laid down thus AIR 2002 SC 778 : 2002 AIR SCW 426.

In another case Smt. Kalpana Kothari, V. Smt. Sudha Yadav and others196, it was observed:

“In striking contrast to the said scheme underlying the provisions of the 1940 Act, in the new 1996 Act, there is no provision corresponding to Section 34 of the old Act and Section 8 of the 1996 Act mandates that the Judicial Authority before which an action has been brought in respect of a matter, which is the subject-matter of an arbitration agreement, shall refer the parties to arbitration if a party to such an agreement applies not later than when submitting his first statement. The provisions of the 1996 Act do not envisage the specific obtaining of any stay as under the 1940 Act, for the reasons that not only the direction to make reference is mandatory but Authority or the making of an application under Section 8 (1) of the 1996 Act, the arbitration proceedings are enabled, under Section 8 (3) of the 1996 Act to be commenced or continued and an arbitral award also made unhampered by such pendency.”

196 AIR 2002 SC 404
Relying upon the decision of the Supreme Court of India\textsuperscript{197} it was held by the Delhi High Court\textsuperscript{198} “Having regard to the scope, object and purpose of Section 8 of the new Act and particularly in the light of the ratio of the decision in Kalpana Kothari’s case (supra), I do not find any substance in the contention of learned counsel for RN that on the filing of an application under the said provision, before referring the parties to arbitration, the Court must adjudicate whether disputes raised fall within the ambit of the arbitration clause or not.”

COMPARATIVE ANALYSIS

On comparative analysis of these three provisions of section 8, 45 and 54 of the 1996 Act it is seen that Section 8, 45 and 54 of the Act has been couched by the Law Makers in such a fashion having its own distinct and different features in the area of its operation, scope and ambit. From the overall comparative analysis of these three provisions the following distinctions would emerge\textsuperscript{199}

(a) \textit{Non obstante} clause are the opening words in Sections 45 and 54, so as to exclude anything contained in Part-I of the Act or in the Code of Civil Procedure from being applied to the proceedings, to which Sections 45 and 54 apply\textsuperscript{200}. Such a non

\begin{footnotesize}
\textsuperscript{197} Smt. Kalpana Kothari, V. Smt. Sudha Yadav and others
\textsuperscript{198} J.B. Dadachanji V. Ravinder Narain and another, 2002 (3) Arb. LR 395 (Delhi)
\textsuperscript{199} Kotak Mahindra Bank Ltd V. Sundaram Brake Lining Ltd., (2008) 4 CTC 1
\textsuperscript{200} Section 45 in Arbitration and Conciliation Act 1996

\textit{Power of judicial authority to refer parties to arbitration}.- 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
\end{footnotesize}
obstante clause is not found in Section 8 and the same does not form part of the provision. The power of the Judicial Authority therefore while dealing with an Application under Section 8 is bounded by Section 5. In addition to that Section 16 which falls in Part-I of the Act, also authorize the Arbitral Tribunal itself to decide the questions relating to jurisdiction and to the existence or validity of the Arbitration Agreement. Consequently Section 8 is conditioned by Sections 5 and 16.

(b) Section 8 of the Act mandates the Court, to refer the parties to arbitration if the party seeking a reference to arbitration, applies not later than when submitting the first statement on the substance of the dispute. Such a proviso clause “to apply before submitting the first statement on the substance of the dispute” has not been incorporated in Section 45 and 54.

(c) The word, ‘party’ appearing in Section 8(1) would mean to cover only party to the Arbitration Clause by virtue of the definition as contained in Section 2(1) (h) of the Act. Per contra such a restrictive meaning for the word party does not apply to Section 45 and 54. Both Sections 45 and 54 enables any of the parties to the Arbitration Agreement or even any person claiming through or under him to seek a reference.

Section 54 in Arbitration and Conciliation Act 1996
Power of judicial authority to refer parties to arbitration.- Notwithstanding anything contained in Part I or in the Code of Civil Procedure, 1908 (5 of 1908), a judicial authority, on being seized of a dispute regarding a contract made between persons to whom section 53 applies and including an arbitration agreement, whether referring to present or further differences, which is valid under that section and capable of being carried into effect, shall refer the parties on the application of either of them or any person claiming through or under him to the decision of the arbitrators and such reference shall not prejudice the competence of the judicial authority in case the agreement or the arbitration cannot proceed or becomes inoperative.
(d) Significantly the obligation conferred under Section 45 of the Act to refer
the parties to arbitration suffixed by the word “shall” contained therein is very much
diluted by the penultimate portion of Section 45, wherein a discretionary power is
conferred to the Judicial Authority not to refer the parties to arbitration if it finds that
the agreement is null and void, inoperative or incapable of being performed.
Obviously such a leverage conferred upon the Judicial Authority in the later part of
Section 45 is absent in Section 8. Section 54 ahead further contemplates that if the
agreement or the arbitration cannot proceed or becomes inoperative, the reference to
arbitration shall not prejudice the competent of the judicial Authority.

(e) The restriction of the power of intervention of a Judicial Authority as
contained in Section 5 of the Act and the power of the Arbitral Tribunal itself to rule
on its own jurisdiction by virtue of Section 16 of the Act, apply only to Part-I. So that
it goes to read that they apply only to the proceedings Therefore, they apply only to
the proceedings sheltered by Section 8 and not to proceedings which comes under
Sections 45 and 54, since Non obstante clause are the opening words in Sections 45
and 54, so as to exclude anything contained in Part-I of the Act.

The distinction among Sections 8 and 45 was illustrated by the Apex Court in
Shin-Etsu Chemical Co. Ltd. v. Aksh Optifibre Ltd. and another201 in the words to the
effect that

“Section 8 of the Act is deviated from Section 34 of the Old Act. No
discretionary power is vested under the Judicial Authority under this section. It is
obligatory to refer the parties to arbitration if the party seeking a reference to

201 2005 (4) CTC 297 : 2005 (7) SCC 234
arbitration, applies not later than when submitting the first statement on the substance
of the dispute and satisfying the conditions stipulated therein. Unlike Section 45
which confers discretionary power to the Judicial Authority not to refer the parties to
arbitration if it finds that the agreement is null and void, is totally absent in Section 8.
It is apparent that the endeavor is nothing but to avoid protraction of litigation and to
speed up the reference to arbitration leaving it open to the parties to raise objections,
if any, to the validity of the Arbitration Agreement before the arbitral forum and/or
post-award under Section 34 of the Act.

The purpose to limitation of judicial intervention as contained in Section 5 of
the Act is to promote speedy justice in arbitration proceedings by curtailing the
dilatory tactics that may creep up in court proceedings. Section 8 which deals with
domestic arbitration, does not confer the power to go into the validity of the
Arbitration Agreement at that stage and the only option is to refer the parties to
arbitration. Per contra Section 45 which deals with arbitrations to which the New
York Convention applies confers discretionary power to the Judicial Authority not to
refer the parties to arbitration if it finds that the agreement is null and void. Therefore
these two provisions of Section 8 and Section 45 are couched differently with its
features suitably as applicable to domestic arbitration and other case international
arbitration respectively but the common object is to refer parties to arbitration.
Section 8 of the Act mandates the Court, to refer the parties to arbitration if the party
seeking a reference to arbitration, applies not later than when submitting the first
statement on the substance of the dispute. Such a proviso clause “to apply before
submitting the first statement on the substance of the dispute” has not been
incorporated in Section 45. Obviously the reasons is that in so far as domestic
arbitration is concerned, the endeavor is nothing but to avoid protraction of litigation and to speed up the reference to arbitration leaving it open to the parties to raise objections, if any, to the validity of the Arbitration Agreement before the arbitral forum and/or post-award under Section 34 of the Act. In case of foreign arbitration, however, the legislature is its wisdom left the question relating to the validity of the Arbitration Agreement being examined by the Court itself. One of the foremost motive for this departure is that of the huge expense involved in such arbitrations which may be avoided if the Arbitration Agreement is invalidated in the manner prescribed in Section 45.”

It would be fruitful and worth it if an inbuilt research is made to find out whether the above spelt would distinctions as contained in Section 8, 45 and 54 of the Act more particularly absence in Section 8, of the rider “unless it finds that the said agreement is null and void, inoperative or incapable of being performed,” as found in Section 45 of the Act attaches such significance with meaning to meet the intention of the legislators while formulating or is only an accidental omission, illusory without much significance attached to it.202

Part II of the 1996 Act contains a provision for approaching the Court. It is reiterated that Non obstante clause are the opening words in Sections 45 and 54. It is the foremost objective and the purpose upon the Judicial Authority while entertaining the Application at the instance of a party which alleges that there exists an Arbitration

Agreement to refer the parties to arbitration. But however discretionary power is conferred to the Judicial Authority not to refer the parties to arbitration if it finds that the agreement is null and void, inoperative or incapable of being performed. Obviously such a leverage conferred upon the Judicial Authority in the later part of Section 45 is absent in Section 8.

Three observations can be laid down are: Firstly with the eyes wide open it is apparent and clear that the words used in Section 8 with that of Section 45 are different carrying with it variations. Secondly the discretionary power vested with the Judicial Authority under Section 45 and 54 has only been consciously, intentionally and purposefully deleted under Section 8. Thirdly it is a well known fundamental principle that fraud vitiates contract. While that so, Arbitration and Conciliation Act 1996 despite the general proposition of law that fraud vitiates the entire contract, allows an enquiry into the question of nullity and validity of the agreement, only under Section 45 and not under Section 8. To make it more precisely understandably and substantiate it is to be seen that if it is a general preposition of law that fraud vitiates the entire agreement including the arbitration clause or agreement then what is the necessity for the law makers to add a rider clause only in Section 45 so as to affirm and reiterate the common preposition of law and to ignore such a rider clause in Section 8 of the Act. Therefore it can be safely affirmed with clarity that the discretionary power vested with the Judicial Authority under Section 45 and 54 of the Act has only been consciously, intentionally and purposefully deleted under Section 8 of the Act.
Section 45 does not speak anything about the court granting an injunction restraining the arbitration proceedings already initiated before the filing of the suit and what it mandates is that when there is a valid agreement, the courts refer the parties to arbitration. Power to issue injunction should not be confused with the power to grant stay under Section 45 of the Act. If the debate that when a suit questioning the validity of an arbitration agreement is instituted (during the pendency of proceedings for arbitration already commenced by the other party on the basis of such agreement) injunction from proceeding with arbitration should automatically follow were to be accepted, it can lead to anomalous situation. Firstly it means that the court is not governed by any guidelines for issuing an injunction. Secondly the intendment of the Act would get frustrated. Thirdly a situation may arise when the court may on a petition filed by the opposite party under Section 45 of the Act, stay the proceedings in the suit. If injunction were to automatically follow at the behest of the party filing the suit, the result would be neither arbitration proceedings would go on because of the injunction, nor can there be a progress in the suit because of the stay granted under Section 45 of the Act. Such position could never have been contemplated by the Legislature. Therefore, the contention that injunction should automatically follow when a suit questioning the validity of the arbitration agreement is filed has no force.

The provisions of Section 54 are comparable to those of Section 45. There is a departure from the provisions incorporated in Section 3 of the Act of 1937, which provided for stay of the legal proceedings by any judicial authority. This section requires the positive action of referring the parties to arbitration if a dispute regarding

203 Nicholas Piramal India Ltd., V. Cultor Food Science Inc. AIR 2003 AP 254
the contract made between the persons to whom section 53 applies and including an arbitration agreement which is valid under section 53 capable of carrying into effect and either party or any person claiming through or under him applies to the judicial authority for such reference. This section also eliminates the time limit incorporated under Act of 1937 for filing such an application, which, in any case, party is expected to file at an early stage in the judicial proceedings. If the conditions are not satisfied, obviously, the judicial authority will continue to hear the matter on merits and decide the controversy.

ADVENT OF THE UNCITRAL MODEL LAW

“Though the 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 legislation on domestic arbitration and conciliation. The present Bill seeks to consolidate and amend 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 said UNCITRAL Model Law and Rules.”

Therefore from the Statement of Objects and Reasons it can be visualised that Part II of the 1996 is merely an adoption of the UNICTRAL Model Law for the reason that Part II deals with International Commercial Arbitration while Part I of the Act has been drafted adopting the UNCITRAL Model law with appropriate and suitable modifications. It is not out of focus that the adoption of the UNICTRAL Model Law with the provisions of 1996 Act with variations in Part I of the Act

204 Statement of Objects and Reasons of the Act
compared to Part II of the Act gains more significance and the same is very much apparent.

While substantial portion of the UNITRAL Model law play a very vital role, Parliament has chosen to mould the same with additions, modifications and omissions appropriately wherever required with total application of mind. The legislators have cautiously formulated the Statute to meet the essence of Arbitration suitable to the Indian scenario. While that so, Judicial Authority while exercising intervention is duty bound to interpret and apply the same with same rigour and spirit as that of the law makers who consciously intended while drafting the provisions of the Act. Only then the purpose would be served to fruitfully achieve the objectivity of the Act. The role of the court plays very predominant as a pillar for the smooth functioning of the arbitration proceedings.

AN EVALUATION

A comparative analysis of Article 8 of the UNCITRAL Model Law with the provisions of Sections 8, 45 and 54 of the 1996 Act would depict that the contents of Article 8 of the Model Law have been followed with the exclusion of the last part of Article 8, to the extent concerning domestic arbitration. Similarly Article 8 of the UNCITRAL Model Law have been followed with alteration insofar as international commercial arbitration under the New York Convention Award is concerned and insofar as international commercial arbitration under the Geneva Convention Award is concerned under Section 45 and 54 of the Act is concerned respectively.
Article 8 of the Model Law hold a rider clause expressing “unless it finds that the agreement is null and void, inoperative or incapable of being performed”. This expression has been given a complete go buy while drafting Section 8 of the 1996 Act. However these words have a safe seat and incorporated comfortably in Section 45 of the Act which only deals with identical and similar power of the Judicial Authority to refer the parties to arbitration. Curiously such a rider has a different tuning in Section 54 of the Act which deals with same powers. The difference is that Section 45 of the Act deals with New York Convention Awards and Section 54 of the Act deals with Geneva Convention Awards.

Therefore the legislative intent conferring discretionary power upon the Judicial Authority under Section 45 of the Act has only been consciously, intentionally and purposefully while adding a rider clause as found in Article 8 of the Model Law, and the same is being deleted under Section 8 of the Act. It is equally important to analyse the factors which made the law makers to take such a conscious decision not to confer such powers upon a Judicial Authority to go into the question as to whether the Arbitration Agreement is null and void, inoperative or incapable of being performed, in respect of domestic arbitrations.

While the rider clause contained in Article 7 of the Model Law “unless it finds that the agreement is null and void, inoperative or incapable of being performed” has been deleted under Section 8 of 1996 Act, it is interesting to note down one addition also which has been made under Section 8 of the 1996 Act requiring that the application shall be accompanied by the original Arbitration Agreement or a certified copy thereof.
Judicial Authority has been conferred with the power under Section 45, to reject a reference, if it finds that the agreement is null and void, inoperative or incapable of being performed in respect of international commercial arbitration, to which the New York Convention Awards relates to. However, no such power is conferred under Section 54 in respect of international commercial arbitration to which Geneva Convention Awards applies. However have a different tune.

The principle that arbitration clause shall be treated as an agreement independent of the other terms of the contract is the base of foundation upon which the legislative have intended while conferring discretionary power upon the Judicial Authority under Section 45 of the Act by adding a rider clause as found in Article 8 of the Model Law consciously, intentionally and purposefully and omitting such a rider clause in Section 8 of the Act.

**DOCTRINE OF SEVERABILITY**

Arbitration clause shall be treated as an agreement independent of the other terms of the contract. *In Heyman V. Darwins*\(^ {205}\) fascinatingly, para 18 of the said judgment of the Supreme Court deals with the circumstances when the jurisdiction of Arbitrator is not been ousted always to the effect in the following words:

“If the arbitration clause is so wide as to have included the very validity or otherwise of the contract on the grounds of fraud, misrepresentations, mutual mistake or any valid reason, the Arbitrator surely will have jurisdiction to decide even that dispute. Two extreme cases have to be avoided, namely, if simply because there is an

\(^ {205}\) (1942) AC 356
arbitration clause all Suits including one questioning the validity or existence or binding nature of the parent contract is to be referred to Arbitrator irrespective of whether the arbitration clause covered it or not, then in all cases of contracts containing arbitration clause the parties will be deprived of the right of a Civil Suit. On the other hand if despite the arbitration clause having included or covered *ex facie* even a dispute as to the existence, validity or binding nature of the parent contract to allow the Suit to proceed and to deprive the Arbitrator of his jurisdiction to decide the question will go contrary to the policy and objects of the Arbitration Act as embodied in Sections 32, 33 and 34 of the Act.”

The dictum of law laid down by the Hon’ble Apex Court under the 1940 Act is that if the clause providing for arbitration is wide enough to encompass within its purview the issues pertaining to validity or invalidity of the Contract on the grounds of fraud, misrepresentation, mutual mistake or any other valid reason, then in such case, the same would not ouster the jurisdiction of the Arbitrator. The same proposition of law has now been verbatim laid down and incorporation in Section 16 (1) of the Arbitration and Conciliation Act 1996\(^\text{206}\).

\(^{206}\) Section 16 in Arbitration and Conciliation Act 1996

*Competence of arbitral tribunal to rule on its jurisdiction.*—

(1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose,—

(a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and

(b) a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence; however, a party shall not be precluded from raising such a plea merely because that he has appointed, or participated in the appointment of, an arbitrator.

(3) A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.

(4) The arbitral tribunal may, in either of the cases referred to in sub-section (2) or sub-section (3), admit a later plea if it considers the delay justified.
While the contents of Article 16(1) are taken as such into Section 16 (1) (a) and (b) of the Act, the contents of Article 16(2) are incorporated into Sections 16 (2), (3) and (4). Articles 16(3) of the Model Law give power to the Arbitral Tribunal to rule on its own jurisdiction either as a preliminary question or in an award on merits. If the issue of jurisdiction is decided as a preliminary question by the Arbitral Tribunal, Article 16(3) of the Model Law enables a party aggrieved by such decision to challenge that ruling before a Court. But Sections 16(5) and (6) make a complete departure from Article 16(3). Section 16 does not enable the Arbitral Tribunal decide the question of jurisdiction also as a preliminary issue while Articles 16(3) of the Model Law give power to the Arbitral Tribunal to rule on its own jurisdiction as a preliminary question. Consequently follows that while Section 16 does not permit a challenge to be made to the decision of the Arbitral Tribunal on the preliminary issue before a Court, while Article 16(3) permits so. The Arbitral Tribunal invoke its jurisdiction and decide the issue relating to the objections with respect to the existence or validity of the Arbitration Agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the Arbitral Tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause. Even a decision declaring the contract as null and void will not make the arbitration clause invalid.

(5) The arbitral tribunal shall decide on a plea referred to in sub-section (2) or sub-section (3) and, where the arbitral tribunal takes a decision rejecting the plea, continue with the arbitral proceedings and make an arbitral award.
(6) A party aggrieved by such an arbitral award may make an application for setting aside such an arbitral award in accordance with section 34.
The principles that the arbitration clause shall be treated as an agreement independent of the other terms of the contract; that the Arbitral Tribunal invoke its jurisdiction and decide the issue relating to the objections with respect to the existence or validity of the Arbitration Agreement including the question as to its nullity and void; and that even a decision declaring the contract as null and void will not make the arbitration clause invalid have been unanimously accepted in many of the neighbouring countries especially SAARC countries after the advent of the UNCITRAL Model Law. Canada, Australia and a few states in U.S.A., have also adopted the Model Law.

AN OVER VIEW

An overview of the principle that the arbitration clause shall be treated as an agreement independent of the other terms of the contract after the advent of the UNCITRAL MODEL LAW both in India and in the neighbouring countries as well as in England, Canada and U.S. would be of useful reflection.

Article 16 of the Model Law was adopted by The Bangladesh Arbitration Act of 2001, thereby empowering the Arbitral Tribunal, under Section 17 to decide whether the Arbitration Agreement is against public policy or incapable of being performed. Section 18 of the Act made a provision for treating severability of the

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207 Section 17 in The Bangladesh Arbitration Act of 2001 - Competence of arbitration tribunal to rule on its own jurisdiction.-Unless otherwise agreed by the parties, the arbitral tribunal may rule on its own jurisdiction on any questions including the following issues, namely –

(a) whether there is existence of a valid arbitration agreement.
(b) whether the Arbitral Tribunal is properly constituted;
(c) whether the arbitration agreement is against the public policy;
(d) whether the arbitration agreement is incapable of being performed; and,
Arbitration Act, 2001 Page 10
(e) whether the matters have been submitted to arbitration in accordance with the arbitration agreement.
Arbitration Agreement, for the purpose of enabling the Arbitral Tribunal to rule on its own jurisdiction. Under the said Act, High Court have been conferred with limited powers to determine any question as to the jurisdiction of the Arbitral Tribunal, if any of the parties to the Arbitration Agreement makes an Application in this regard. However, the said powers are circumscribed by certain conditions prescribed under Section 20(2) of the said Act.

Likewise, Section 16 of the Nepal Arbitration Act, 1999, provides that the Arbitrator shall decide whether the Arbitration Agreement is itself illegal or null and void before commencing proceedings on the matter referred to him. Section 16 (3) of the Act provides that the arbitration clause will not be taken to be null and void even though an arbitration clause is found to be an integral part of one single contract and that the Arbitrator finds that the contract by itself is null and void. Curiously the

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208 Section 18 in The Bangladesh Arbitration Act of 2001 - Severability of agreement.-An arbitration agreement which forms part of another agreement shall be deemed to constitute a separate agreement while giving decision for the purpose of determining the jurisdiction of the arbitral tribunal.

209 Section 20 in The Bangladesh Arbitration Act of 2001 - Powers of the High Court Division in deciding jurisdiction.- (1) The High Court Division, may on the application of any of the parties to the arbitration agreement, after serving notice upon all other parties, determine any question as to the jurisdiction of the arbitral tribunal.

(2) No application under this section shall be taken into account, unless the High Court Division is satisfied that-

(a) the determination of the question is likely to produce substantial savings in costs;

(b) the application was submitted without any delay; and

(c) there is good reason why the matter should be decided by the Court.

(3) The application shall state—— the reasons on which the matter should be decided by the High Court Division.

(4) Unless otherwise agreed by the parties, where any application is pending before the High Court Division under this section the arbitral tribunal shall continue arbitration proceedings and make an arbitral award.

210 Section 16 in the Nepal Arbitration Act, 1999

Power of the Arbitrator to Determine Jurisdiction: (1) In case any party claims that the arbitrator has no jurisdiction over the dispute which has been referred to him/her for settlement, or that the contract because of which the dispute has emerged is itself illegal or null and void, it may claim so before the arbitrator. The arbitrator shall take a decision on his/her jurisdiction or the validity or effectiveness of the contract before starting the proceeding on the matter referred to him/her,
Nepal Act provides for an Appeal to an Appellate Court against such a decision of the Arbitrator as to the issue whether the Arbitration Agreement is itself illegal or null and void.

The Arbitration Act, 1940 of Pakistan does not come into sight in harmony with the Model Law. Yet, Section 32 of the Act provides for bar to suit contesting arbitration agreement or award. By virtue of the said provision the existence, effect or validity of an agreement cannot be challenged by way of suit or an award can be set aside by filing a suit. Nevertheless, Section 34 of the said Act has cut down the effect of Section 32 to a little level.

(2) Any party is not satisfied with the decision taken under Subsection (2) may file an appeal with the Appellate Court within 30 days from the date of decision, and the decision taken by that court on the matter shall be final.
(3) For the purpose of taking a decision on the validity or effectiveness of a contract pursuant to Sub-section (1), in case the contract contains provisions for the settlement of disputes through arbitration as its integral part, such provisions shall be taken as a separate agreement, and even if the arbitrator takes a decision holding the contract as null and void, such provisions shall not be held to be legally null and void for that reason alone.
(4) No claim may be made pursuant to Sub-section (1) after the expiry of the time limit for submitting objections prescribed pursuant to Sub-section (2) of section 14.
(5) No party shall be deemed to have been deprived of the opportunity to claim pursuant to Sub-section (1) simply for the reason of having appointed an arbitrator on its behalf, or participated in or agreed to the appointment of the arbitrator.
(6) The filling of a petition with the Appellate Court pursuant to Sub-section (2) shall not be deemed to have prejudiced the power of the arbitrator to continue the proceedings and pronounce the decision before the petition is finally disposed of by the court.

211 **Section 32 of Pakistan Arbitration Act 1940 - Power to stay legal proceedings where there is an arbitration agreement**: Where any party to an arbitration agreement or any person claiming under him commences any legal proceedings against any other party to the agreement or any person claiming under him in respect of any matter agreed to be referred, any party to such legal proceedings may, at any time before filing a written statement or taking any other steps in the proceedings, apply to the judicial authority before which the proceedings are pending to stay the proceedings; and if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of arbitration, such authority may make an order staying the proceedings.

212 **Section 34 of Pakistan Arbitration Act 1940 - Power of Court, where arbitration agreement is ordered not to apply to a particular difference, to order that a provision making an award a condition precedent to an action shall not apply to such difference**: Where it is provided (whether in the arbitration agreement or otherwise) that an award under an arbitration agreement shall be a condition precedent to the bringing of an action with respect to any matter to which the agreement applies, the Court, if it orders (whether under this Act or any other law) that the agreement shall cease
The Arbitration Act, 1995 of Sri Lanka has taken up the same standards as contained in the Model Law. Under Section 11 of the Act provides that the Arbitral Tribunal is vested with jurisdiction to rule on any question as to the existence or validity of an Arbitration Agreement or as to whether such agreement is contrary to public policy or is incapable of being performed\(^{213}\). On the other hand, Section 11(1) in addition enables a party to the arbitral proceedings to apply to the High Court for a determination of any such question. Section 12 clarifies that the Arbitration Agreement which forms part of another agreement shall be deemed to constitute a separate agreement for the purpose of deciding the jurisdiction of the Tribunal and the validity of the Arbitration Agreement\(^{214}\).

Section 7 of The (English) Arbitration Act, 1996, also adopts the separability of the Arbitration Agreement and declares that the Arbitration Agreement shall not be regarded as invalid, non-existent or ineffective. On the other hand, Section 9(4) of the Act provides a minute control to the Court to decline to stay the legal proceedings if it is established and satisfied that the Arbitration Agreement is null and void or incapable of being performed.

to have effect as regards any particular difference, may further order that the said provision shall also cease to have effect as regards that difference.

\(^{213}\) Section 11 in Arbitration Act, No. 11 of 1995 (Sri Lanka) Jurisdiction Of The Arbitral Tribunal (1) An Arbitral tribunal may rule on its jurisdiction including any question, with respect to the existence or validity of the arbitration agreement or as to whether such agreement is contrary to public policy or incapable of being performed; but any party to the arbitral proceedings may apply to the High Court for a determination of any such question.

\(^{214}\) Section 12 in Arbitration Act, No. 11 of 1995 (Sri Lanka) An arbitration agreement which forms part of another agreement shall be deemed to constitute a separate agreement when ruling upon the validity of that arbitration agreement for the purpose of determining the jurisdiction of the arbitral tribunal.
In so far as Canada is concerned, with the exception of Quebec, each of Canada's provinces and territories has two arbitration statutes: one for domestic arbitrations and another for international arbitrations. The applicable federal statute, namely, the *Commercial Arbitration Act* (R.S.C. 1985, c.C-34.6), governs both domestic and international commercial arbitrations but is limited to disputes involving the Federal Government, Federal Crown Corporations and certain enumerated Federal Agencies. All other arbitrations are governed by Provincial or Territorial law. Since the implementation of the UNCITRAL Model Law, Canadian Courts have demonstrated a clear shift in policy in favour of arbitrations over Court proceedings. On at least two occasions—in *Automatic Systems Inc. V. Bracknell Corp*\(^{215}\) and in *Canadian National Railway Co. V. Lovat Tunnel Equipment Inc*\(^{216}\), the Ontario Court of Appeal has stated that any ambiguities in the interpretation of arbitral legislation or agreements should be resolved in favour of arbitration.

Canadian Courts regularly implement Article 8(1) of the Model Law, which requires the stay of a judicial proceeding in favour of an arbitration where one party wishes to enforce the Arbitration Agreement\(^ {217}\) see *Automatic Systems Inc v. Bracknell Corp*\(^ {218}\). All Canadian jurisdictions have adopted Article 16 of the Model Law by providing that the Arbitration Agreement is independent of the contract in which it is found and thereby permitting the Arbitral Tribunal to decide its own

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\(^{215}\) 1994 (18) O.R. (3d) 257  
\(^{216}\) 1999 (174) D.L.R. (4th) 385  
\(^{217}\) Article 8- Arbitration agreement and substantive claim before court  
(1) A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.  
(2) Where an action referred to in paragraph (1) of this article has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court.  
\(^{218}\) 1994 (18) O.R. [3d] 257
jurisdiction, including objections with respect to the existence of an Arbitration Agreement\(^{219}\). Domestic arbitrations are governed by similar principles. For example, Section 17(1) of the Ontario Arbitration Act provides that “an Arbitral Tribunal may rule on its own jurisdiction to conduct the arbitration and may in that connection rule on objections with respect to the existence or validity of the Arbitration Agreement.”

International commercial arbitration recognize the central principle of Competence-competence. The tribunal would exercise its competency to decide its own jurisdiction. Articles 16 of the UNCITRAL Model Law enshrine this principle. Curiously the domestic arbitration statutes also symbolize the principle of competence-competence. While Section 17(1) of the Ontario Arbitration Act 1991 contemplates that an Arbitral Tribunal may rule on its own jurisdiction to conduct the arbitration and may in that connection rule on objections with respect to the existence or validity of the Arbitration Agreement, parrelly Section 17(2) states that if within 30 days of the arbitral tribunal making a jurisdiction decision, a party invokes a request, then the court may rule on a jurisdictional objection.

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\(^{219}\) Article 16. Competence of arbitral tribunal to rule on its jurisdiction

(1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail \textit{ipso jure} the invalidity of the arbitration clause.

(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence. A party is not precluded from raising such a plea by the fact that he has appointed, or participated in the appointment of, an arbitrator. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified.

(3) The arbitral tribunal may rule on a plea referred to in paragraph (2) of this article either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the court specified in article 6 to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.
In Ontario Medical Association v. Willis Canada Inc., the Ontario Court of Appeal has observed as follows “First, that the regimes contained in Ontario’s domestic act and Ontario’s International Commercial Arbitration Act did not reveal any difference, or sufficient differences, to justify a different approach to competence-competence under the two statutes. Second, the past decisions at first instance show that Ontario courts have deferred to the jurisdiction of domestic arbitral tribunals to rule on jurisdictional issues and have stayed actions on that ground. Third, the Court of Appeal could see no policy basis for distinguishing between international commercial arbitral tribunals and domestic tribunals so far as the competence-competence principle is concerned. Having made that decision, the Court of Appeal then held that, in any event, the appeal was barred by virtue of sub-section 7(6) of the Arbitration Act, 1991 of Ontario. That sub-section states that “there is no appeal from the court’s decision” under section 7(1). The Court of Appeal applied the existing case law which has held that if the judge hearing the motion does grant a stay of the action then there is no appeal, but if the court does not grant a stay there is an appeal. In this case, since the motion judge had granted a stay, the Court of Appeal held that there was no appeal”.

In so far as U.S.A. is concerned, some of the states have adopted the UNCITRAL Model Law, but the federal law namely, the United States Arbitration Act, 1925, now known as Federal Arbitration Act, does not seem to have been brought in harmony with the Model Law. Section 2 of the said Act provides that a written Arbitration Agreement may be denied enforcement on such grounds as per law or in equity for the revocation of any contract. In their book “Arbitration Law in America A Critical Assessment”, published by the Cambridge University Press, the
authors Edward Brunet and Richard E. Speidel, say the following on the question of separability of the arbitration clause and its enforcement:

“The practical effect of the separability doctrine is that in most cases, an attack on the validity or enforceability of the underlying contract will not be regarded as a direct attack on the arbitration clause and that these disputes can be decided by Arbitrators under a ‘broad’ arbitration clause. The nagging exception is where one party attacks the ‘very existence’ of the underlying contract by claiming that it is void ab initio (as opposed to public policy) or that no contract was ever formed. The debate over ‘competence’ and ‘separability’ involves a piece of the age old struggle between Courts and Arbitrators. Assuming that the tribunal does not have competence to decide its own jurisdiction, the ‘separability’ doctrine gives the Arbitrator the power to decide the merits of whether the contract in which the Arbitration Agreement is contained is enforceable. An award on a matter within the scope of ‘separability’ doctrine is entitled to deferential review, that is it cannot be reviewed on the merits even though it determines indirectly the validity of the Arbitration Agreement. On the other hand if the tribunal has power through agreement of parties to determine its own jurisdiction, the separability doctrine is less important”

Thus an over view of arbitration law after the advent of the UNCITRAL Model Law, both in India and in the neighbouring countries as well as in England, Canada and U.S., shows—that the arbitration clause could be “broad” enough to cover disputes relating to the validity of the contract itself even on grounds of fraud, misrepresentation, etc., in which case the jurisdiction of the Arbitral Tribunal is not ousted; and that if the arbitration clause is not broad enough to cover those disputes,
even then the ‘separability’ doctrine could be invoked to sustain an arbitration. Therefore, if by agreement, parties could have disputes where allegations of fraud, misrepresentation, etc., are made, referred to arbitration, it is certainly possible for the legislature to bring them within the purview of arbitration. This is what the 1996 Act has done by virtue of Section 16 of the Act. In so far as domestic arbitration is concerned, what a Court can do at the pre reference stage, is restricted to what is prescribed under Sections 8, 9 and 11 of 1996 Act. That it cannot traverse beyond what is provided therein, is also stated in Section 5 of the Act. Similarly what an Arbitral Tribunal can do is spelt out in Section 16. If the deletion in Section 8, of the rider contained in Section 45 is a case of omission, the insertion of a similar rider in Section 16 empowering the Arbitral Tribunal to go into the question, is a case of commission. This, therefore, is a clear signal to the fact that in so far as domestic arbitration is concerned, the question as to whether an Arbitration Agreement is vitiated by fraud, etc., are also to be determined only by the Arbitral Tribunal. It does not fall under the exception to the rule of casus omissus and hence the Court cannot supply the same by resorting to the maxim “ex nihilo nihil fit”.

In an Application under Section 8, judicial authority cannot go into the question as to whether an Agreement itself is vitiated by fraud, etc., since the said question can also be determined by the Arbitrator himself. (i) The difference in language between Sections 8 and 45, (ii) the adoption of the UNCITRAL Model Law as such in Section 45, but with a modification in Section 8, (iii) the Doctrine of separability incorporated in Section 16 with a power for the Arbitrator to adjudicate even the question of nullity and voidity (iv) the deviation made in Section 16 from Article 16 of the Model Law, and (v) the developments that have taken place world
wide, are all pointers to the fact that the arbitration clause, contained in a contract to which Part-I of the 1996 Act would apply, is to act as a black box in an aircraft. The crash of the contract (like that of the aircraft), its reasons, implications and consequences are to be ascertained only by invoking the arbitration clause.220

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220 Kotak Mahindra Bank Ltd. V. Sundaram Brake Lining Ltd., (2008) 4 CTC 1