CHAPTER - II

GENESIS OF ARBITRATION LAW IN INDIA

Arbitration as a method of dispute resolution has it traces in ancient India.\(^1\) The grievances in the community use to be referred to either a single village headman of a group of a five persons who are known as the Panchas. These Panchas use to hold setting for grievance resolution and their setting were known as Panchayats. Disputes and grievance of myriad nature use to be referred to the Panchayats and their decision was binding upon the parties to the dispute.\(^2\)

One of the advantages of this Panchayats system was that the Panchas were the from the same place and possessed intimate knowledge about the parties. Thus, there was an inbuilt compulsion not to tell falsehood before the Panchas. The verdicts of these Panchas has commanded.\(^3\) Confidence and obedience of generations.

Even during the Muslims rule in India, the panchayat system was intact. The state administration was mostly confined to criminal justice. After the advent of the East India Company, a slow but consistent change in the administration of civil justice was brought about. The compulsion to seemingly do justice between the subjects inter-se and the state was an essential concomitant for an ascendant sovereignty for the British Rulers, who were successful in extending their political paramountcy by gaining the confidence of the Indian subjects by taking recourse to their system of administration of justice.

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1 Dr. Priyanath Sen, 'The general principles of Hindu jurisprudence.'
2 Madhabhuahi Sridhar, Alternative Dispute Resolution - Negotiation and Mediations (Lexix- Nexix worth's – New Delhi 1st ed. 2006 ) p.82
3 Ibid
The Indian arbitration Act, 1940 which was enacted during pre-independence period, was designed to bring about innovation together with continuity with the tradition. The award of the Arbitrator was subject to the judicial supervision by way of seeking to make it a rule of the court and/or entertaining objections with or without independent proceedings to set aside the award on limited grounds. The proceedings under the Arbitration Act were expected to be expeditious.

In actual practice, the experience showed that the hopes about the arbitration law were belied and the trust about its efficacy stood breached due to the prolonged court proceeding. The Supreme court of India in a case\textsuperscript{4} held that:

“The way in which the proceedings under the Act are conducted and without an exception challenge in courts has made lawyers laugh and legal philosophers weep. Experience shows and law reports bear ample testimony that the proceedings under the Act have become highly technical accompanied by unending prolixity. At every stage providing a legal trap to the unwary.” The quantum of arbitration litigation is a testimony to the fact that an arbitration has become more dreaded than a suit to a common litigant.

In another case,\textsuperscript{5} the Supreme Court held that it was obligatory on the appellant to questions the validity or otherwise of the order of the Appellate Authority before an appropriate forum by filing an appropriate application in this behalf. As the award had been set aside, the single judge and consequently the division bench of High Court were correct in holding that the Prayer of making the award a rule of court could not be granted. In

\textsuperscript{4} Gurunanak Foundation v. Rattan Singh & Others\textsuperscript{16}, AIR 1981 SC 2075

\textsuperscript{5} Uptron India Ltd. v. U.O.L and another (2004) 3 SCC 130.
the light of above cases, it is crystal clear that Supreme court of India is not satisfied with the working of arbitration law. The national court has time to time given directions to the government of India to amend their municipal law in confirmation of international.

The new Arbitration and Conciliation Act, 1996 is comprehensive while compared to the 1940 Act. The aims and the object of the new Act are to resolve the disputes regarding domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards and also statutorily recognizes the conciliation as a mode of settlement of disputes.

The consensus reached in conciliation has been recognized on par with an award and susceptible for enforcement. The role of a Conciliator is aimed at motivating the parties to reach an understanding to give quietus to their disputes, whereas, an arbitrator not merely assists in resolving a dispute but also gives a binding decision. Section 30 of the new Act mandates an arbitrator to encourage the parties for settlement by way of mediation. Conciliation etc. A recourse to conciliation is possible even without an agreement for arbitration. But for the purpose of an arbitration a prior agreement is essential.

The new Act gives finality to a settlement reached by the parties through a conciliator and makes hem binding and enforceable vide Sections 73(3) and 74 thereof. The conciliator and/or the conciliators are bound to maintain confidentiality.

The new Act empowers and arbitrator to pass interim orders and interim awards and restricts the access to judicial proceedings by reducing the grounds of challenge of the award. A welcome feature of the new Act is that it mandates the arbitrator to give a reasoned award unlike the previous Act. The new Act also incorporates the law declared by the
Supreme Court in a case, where under the Court has ruled that an arbitrator can award interest *pendente lite*.

Under Section 8 of the new Act, a court is bound to direct the parties to take recourse to arbitration whenever any agreement between the parties becomes a subject matter of the court proceedings.

The new Act has two parts. Part-I deals with domestic arbitration while Part-II deals with foreign awards under the New York and Geneva conventions. The Government of India is a signatory to the New York convention of 1958 and as a consequence thereof the award given in a country can be enforced in the courts of competent jurisdiction in India relation to the subject matter of the awards. The convention on the recognition and enforcement of foreign arbitral awards is enacted as first schedule to the new Act while the second schedule contains the protocol on a arbitration clauses and the third schedule contains the convention on the execution of foreign arbitral awards. Thus, the international conventions by virtue of their inclusion in the schedules have become a part of the legislation enacted by the Parliament of India.

A new provision has been made under Section 34(2)(b)(ii) read with explanation that an arbitral award in conflict with the public policy of India shall be null and void. The expression public policy is highly elastic and can be extended to mean misconduct, fraud, deception, corruption, bias, etc. It can also be stretched to ensure the award to be consistent with the other laws in force in India including the binding case law.

A notable omission in the new arbitration Act is the absence of an institutional mechanism or a judicial remedy for replacement of an arbitrator at the initial stages after discovery of a strong likelihood of bias.

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on the part of the arbitrator. Even though substantial provisions of the new law are incorporated from the UNCITRAL Model Law, yet the provisions under section 12 of the new Act which though enjoin an arbitrator to disclose at the earliest any circumstances giving rise to justifiable doubts about his independence or impartiality yet the absence of a curative mechanism has rendered the attention of the law makers to provide sufficient and efficacious remedy consistent with the norms of expedition to an aggrieved party. Otherwise the affect party would have only one recourse to challenge the award on the ground of non-disclosure on the part of the arbitrator himself which, in fact, is a rare situation or as the experience shows at a belated stage such a ground would tend to lose its sting and effectiveness.\(^7\)

Genesis of Law of Arbitration can be studied as follows.

I. Indian Law

Development of Law of Arbitration may be divided into three phases:

(1) Pre British Period

(2) System of Arbitration from the commencement of British rule and its development.

(3) Position after the Act of 1996.

(1) Pre British Period

In villages, the affairs of the community were frequently managed, its customs interpreted and the disputes of its members decided, by a single headman whose office was sometimes hereditary and sometimes elective.

Sir Henry Maine informs us that in those parts of India, in which the village community was most perfect, the authority exercised elsewhere by headman was lodged with what was called the village council. It always bore a name which recalled its ancient constitution of five persons or *Panchayat*, who act as the sole and final judges of the matter referred to them by the parties for decision. We had in India territorial arbitration boards such as *Panchayat* and sectarian tribunals such as *Panchatats* of different castes and creeds.

To determine a dispute between contending parties, the head of a family, the chief of a community or selected inhabitants of a town or village might act as *Panchayat*. To begin with, this class of assembly must have been the spontaneous result of a natural desire to settle disputes when other more or less regularly constituted means of obtaining justice were unavailable.8

In ancient India, there grades of arbitrators namely:

i) **Puga**: Assemblies of townsmen, or meetings of persons belonging to various tribes and following different professions but inhibiting the same place.

ii) **Sreni**: Companies of traders or artisans and conventions of persons belonging to different tribes, but subsisting by the practice of the same profession.

iii) **Kula**: Meetings of Kinsmen or assemblage of relation connected by consanguinity. Their decisions or awards were subject to revision. A decision of “Kula” which either party considered defective or unsatisfactory was capable of being revised by the “Sreni” as less liable to suspicion or partiality, than the kindred and a

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unsatisfactory decision of “Sreni” or fellow – artisans was open to revision by the assembly of co-habitants (Puga) who were still less to be suspected of partiality. From the award of the ‘Puga” “Serni” and “Kula” are different degrees of Panchayat which is not in the nature either of a jury, or of a rustic tribunal, but merely a system of arbitration, subordinate to regularly constituted tribunals or courts of justice.

With the rise of the powers of the East India Company in Bengal and Benaras and the acquisition of territorial sovereignty in India by the company the inherent power and vitality of the village community which had been tenaciously preserved as solution to all difficult questions were solved by Headman of the village or arbitrators cited by parties got involved in complications with the change of circumstances and introduction of foreign methods which were but natural in the altered state of things but the Bengal Regulation did not abrogated Panchayat or discourage arbitration.

System of Arbitration from the commencement of the British Rule and its developments

Bengal Regulation, 1772

The regulation of 1772 provided that “in all cases of disputed accounts etc. It shall be recommended to the parties to submit the decision of their cause to Arbitration, the Award of which shall become a decree of the court”. Similar Provisions were made in the regulations passed in 1780.⁹

⁹ Dayal Rameshwar, “Arbitration Act, P.2
Bengal Regulation, 1781

Drawn up Sir Eligha Impey, a further addition was made that “the judge do recommend, and so far as he can, without compulsion prevail upon the parties to submit to the arbitration of one person to be mutually agreed upon by parties, “with a further provision that” no award of any arbitrator or arbitrators be set aside except upon full proof, made by oath, of two credible witnesses that the arbitrators had been guilty of gross corruption or partiality in the cause in which they had made their award. This provision which was enacted to render arbitration more effectual affected the constitution of arbitration board. The original idea was that it was lowest tribunal, as such an appeal by against its decision. But the regulation of 1781 reflects the idea that it was a tribunal of the parties’ own choice, as such in the absence of misconduct the parties are bound by its decision. So the only course left open to the dissatisfied party was to impeach an award on the ground of gross corruption and partiality, the result was that all respectable persons declined to serve as arbitrators and the Panchayati system fell into disuse.\textsuperscript{10}

Lord Cornwallis came to India as governor general in 1786, Previous to his arrival an Act of Parliament (statute 24 GEO-III Ch. 25) had established a board of commissioners for the affairs of India. Lord Cornwallis brought with him instructions from the court of directors to establish permanent rules for the administration of justice founded on the ancient laws and local usages of the country. The directors ordered that the office of the judge or collector should be united in one and the same person. Accordingly, with the exception of 3 civil courts in the cities of Patna, Murshidabad and Dacca, the European civil servants in each of the districts were vested with the powers of Judge. Collector and Magistrate

\textsuperscript{10} Singhal J.P., “Arbitration Act”.
and a separate set of regulations were drawn up for their guidance in each one of these three capacities and the proceedings were directed to be kept wholly distinct in each department. \textsuperscript{11}

\textbf{Regulation of 1787}

The regulations for the administration of justice passed on 27\textsuperscript{th} June 1787, empowered the courts to refer certain suits to the decision of one person without the consent of either party. This rule, which was in keeping with arbitrary policy in view at that time. – best expressed in the words of Sir John Shore, “people accustomed to a despotic authority should look to one master”, - deprived the parties in such suits of the benefit of having their claims tried by the regular tribunals, and it vested in the Judges a discretionary power of committing the administration of the laws to any person they thought proper. The regulations also provided for reference of suits to arbitration with the consent of parties but that regulation made no provision for adjusting difference of opinion which might arise between the arbitrators there were other defects in it. \textsuperscript{12}

\textbf{Bengal Regulation XVI of 1783}

The governor general in council being desirous to promote the reference of disputes of certain descriptions to arbitration and to encourage people of credit and character to act as arbitrators, Bengal regulation XVI of 1793 was passed on 1\textsuperscript{st} May, 1793, which prescribed rules whereby in suits brought before any of the court or contested bargains, or non performance of contracts in which the cause of action exceeded Rs. 200. The courts were to recommend the parties to submit the decision of the matters in dispute to arbitration, and in all suits for money or personal property the amount or value of which did not exceed Rs. 200. The courts were

\textsuperscript{11} Supra Note 3. at p.

\textsuperscript{12} Ibid.
empowered with the consent of parties to refer the suit to the decision of one arbitrator, the parties or their Vakils upon agreeing to the reference were on or before the next court day to choose mutually, someone willing or indifferent person as an arbitrator but if the parties did not agree as to the person to be appointed as an arbitrator, or if the nominated person refused to act, and the parties or their Vakils could not agree on another willing arbitrator, the court with the consent of the parties was to appoint as an arbitrator the proprietor of the estate in which the cause of action arose or the Kazi of the parganah or the Tehsildar or any other credible person provided he was not interested in the matter in dispute, if the parties could not agree on the nomination of an arbitrator, or if the parties could not agree on the nomination of an arbitrator, or if the nominated arbitrator refused to accept and the parties could not agree upon the appointment of another willing person, the cause was not to be referred to arbitration but was to be tried by court.

When a suit was submitted to arbitration the court in which the suit had been pending, was to cause the parties to execute bonds binding themselves to abide by the award and agreeing that it be made a decree of court; The court was to fix a reasonable time for the delivery of award and had powers to extend the time if the award could not be completed within the time fixed, the court was to transmit to the arbitrator or arbitrators a copy of the bill of ‘complaint’ (The plaint) and by a writing under seal refer to them the matters in dispute, a final award of arbitrators was to be submitted to court under the seal and signature of the person or person by whom it was made together with all the proceedings, the court was not to be set aside the award unless it was fully proved to its satisfaction by two credible witnesses that there was gross corruption and partiality, the court
was to pass a decree conformably to the award and it was to be executed in the same manner as ordinary decree of courts.\textsuperscript{13}

**Regulation XV of 1795 and XXI of 1803**

Regulation XV of 1795 extended regulation XVI of 1773 to Beneras and the regulation XXI of 1803 extended the same to the territory ceded by *Nawab Vazeer*.\textsuperscript{14}

Under these regulations the Judges of the courts were enjoined to afford every encouragement in their power to persons of character and credit to become arbitrator – but they were not to employ any coercive means for that purpose, nor to permit any of their public officers or private servants or any of the authorized *Vakils* to be arbitrators in a cause.\textsuperscript{15}

**Regulation VI or 1813 and XXII of 1814**

In 1813 provision was made by regulation VI of 1813 to make the provisions of regulation XVI of 1783 applicable even to suits with respect to rights in land as so far no provision was available for referring to arbitration, suits and disputes relation to land.

Regulation XXVII of 1814 the restriction imposed upon authorized *Vakils* to act as arbitrators by earlier regulations was withdrawn.\textsuperscript{16}

**Regulation IV of 1816 and V of 1816**

Regulation IV of 1816 passed by the Governor in Council of Fort St. George, Madras, had, with a view to lessen the business of the *Zila* Courts, and o diminish the expense of litigation in petty suits and promote their

\textsuperscript{13} *Supra No. 3*

\textsuperscript{14} Rameshwar Dayal, “Arbitration Act. p. 2

\textsuperscript{15} *Supra* note 1 at p. 11.

\textsuperscript{16} Ibid.
speedy adjustment declared the heads of villages to be *Munsifs* within their respective villages.

Madras regulation V of 1816 authorized the village Munsifs constituted by Regulation IV of 1816 to summon Panchayats within their respective villages for the decision of suits, it was to consist of not less that 5 and not more than 11 persons and decision given according to the opinion of the majority. The decision of the village Panchayat was not open to appeal. But if the members of the Panchayat were guilty of gross partiality, the matter could be enquired into, upon a proper complaint, by the Zila Judge – if the charge was established to the satisfaction of the Zila Judge, he was to submit to proceeding with his opinion to the provincial court of appeal, which had the power annulling the decision of the *Panchayat* and the parties would then be at liberty to have recourse to another *Panchayat* or any other competent Jurisdiction.

**Madras Regulaton VII of 1816**

Similarly, District *Munsifs* constituted under Regulation VI of 1816 of the Government of Fort St. George were authorized to summon *Panchayat* within their respective Jurisdictions for the decision of suits for real and personal property without limitation as to amount or value, by Madras Regulation VII of 1816. The object as the preamble shows, was to diminish the expense of litigation and render the principal and more intelligent inhabitants useful and respectable by employing them in administering justice to their neighbours. And rule regulation the proceedings of the District *Panchayat* and regarding the finality of their decisions were almost the same as those for the village *Panchayat*.
Bengal Regulation VII of 1822

Hitherto only the Civil Courts had power to refer disputes falling within their jurisdiction, as described above, to arbitration, but by Bengal Regulation VII of 1822 which declared the principles according to which settlement of land revenue was made in the ceded and conquered provinces and which defined, settled and recorded the rights and obligations of various classes of persons possessing interest in land or its rent and which vested the revenue authorities with judicial cognizance in certain cases of suits and claims relating to land and its rent. Collectors were for the first time authorized to refer certain cases to arbitration. Section 33 of that regulation made following rules respecting arbitration:

First, It shall be competent to collectors or other officers exercising the powers of collectors to refer to arbitration any disputes cognizable by them under the provisions of this regulation provided the parties consent to that mode of adjustment, and on award being made to cause the same to be executed. In referring cases to arbitration under the above provision, the collector shall be guided by the rule contained in Regulation XVI of 1793 and other corresponding enactments and in regulation IV of 1813, in so far as the same may be applicable and shall be competent to vest in the arbitrators, the same powers and authority in regard to the summoning and examination of witnesses, and the administration and oaths, and to enforce such powers in the same manner as the courts of judicature are empowered to do, and all awards made on such references shall, when confirmed by the collector have the same force and validity as a regular decree of the Adult, and shall not be liable to be reversed unless the award shall be open to impeachment on the ground of corruption or gross partiality.\(^{17}\)

\(^{17}\) Supra note 1,8
Second, in referring any disputes to arbitration, the collector shall be careful to specify in his proceedings, the precise matter submitted to the arbitrators: and if the award first made by the arbitrators is incomplete, it shall be competent to the collector again to refer. The matter of them, with directions to perfect their award.\textsuperscript{18}

Third, the Parganah, Kanungoes, and Tehsildars may be appointed arbitrators in any case referred to arbitration under the above rules, anything in the existing regulations not with standing.

It was also provided by this regulation that the collector was in all such cases to use every proper means for inducing the parties to refer their disputes to arbitration in like manner as the Diwani Courts were directed to do.

**Bombay Regulation of 1827**

In Regulation IV of 1827 of Bombay which prescribed the procedure of the courts of law in civil suits and appeals in the presidency of Bombay with a view to facilitate the work of European officers presiding over civil courts, it was provided that in the trial of suits the European presiding officer could avail of the assistance of arbitrators.

Regulation VII of 1827 was passed to facilitate the amicable adjustment of disputes of a Civil nature by means of arbitrators in the presidency of Bombay. This regulation was a complete code by itself laying down rules for reference of civil matters and appointment of arbitrators, for regulating the proceedings of the arbitrators.

\textsuperscript{18} Supra note 3,6
Bengal Regulation VI of 1832

The usefulness of the system introduced by Bombay regulation IV of 1827 was so far recognized that Bengal Regulation VI of 1832 made similar provisions enabling European functionaries presiding in the civil courts to avail themselves of the assistance of native gentlemen (as arbitrators) in the trial of civil suits in the original or the appellate court by referring the whole suit or any point therein to a Panchayat for enquiry and report, and the answer of the reference to the Panchayat was to be filled in the suit but the decision vested exclusively in the presiding officer of the court.\textsuperscript{19}

Bengal Regulation IX of 1833

In addition to the rules framed under Section 33 of Bengal Regulation VII of 1822 referred to above, it was enacted by Regulation IX of 1833.

Section 5 to 10, that the collector or other officer employed in making settlements under the provisions of Regulation VII of 1822 in referring access to the decision of arbitrator was to fix a period within which the parties were to produce the award in case of default, it was lawful for the collector or other officer to summon a Panchayat composed of three or five impartial persons of good repute for the trial of the matter at issue. And after the Panchayat declared their opinions, the court was to record judgment. Such Judgment was final, and no appeal was allowed there from.

The above is a fair narrative of the development and changes in the law of arbitration that look place from time to time in Bengal, Madras and

\textsuperscript{19} Supra note 1,8,10
Bombay. While the Regulations were in force. Prior to 1834 when the Legislature Council of India came into existence under statutes 3 and 4, William IV, Ch. 85, each presidency government had power to enact what were called regulations. The rules relating to arbitration in presidency towns, remained in force with slight modifications here and there until the procedure of the courts of civil Judicature not established by Royal Charter was codified by Act VII of 1859, which received the assent of the Governor General.

**Act VII of 1859**

Section 312 to 327 of that Act dealt with the law of arbitration Sec. 312 permitted references to arbitration in pending suits and Sec. 313 to 325 authorized arbitration without the intervention of court.

It was originally intended that the act was to apply to the courts established by Royal Charter.

The Act was repealed by Act X of 1877 which however made no change in the law relating to arbitration. The Code of Civil Procedure was again revised in 1882.

**Act XIV of 1882**

But Sections 506-526 of the new Act repealed the same provisions about references to arbitration with or without the intervention of the court.

**Position under Indian Contract Act, 1872**

In our old contract law, arbitration has been developing as an exception to the court proceedings. Judges contributed to this exception by
their judicial pronouncement i.e., under Section 28 of Indian Contract Act, 1872.\footnote{Rule of English Law that “an agreement to oust the jurisdiction of the court is illegal and void on ground of public policy. In India. Act declares that every agreement by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by usual legal proceedings in ordinary tribunal is void “Refer Khardha Co. Ltd. v. Raymen & Co. (1963) 3 SCR 164: Union of India v. A.L. Rallia Ram where it was held that an arbitration agreement would not be binding if in violation of statutory provisions.}

Arbitration Act, 1899

It was in the year, 1899 that an Indian Act entitled the Arbitration Act of 1899 came to be passed. It was based on the model of the English Act of 1899. The 1899 Act applied to cases where if the subject matters submitted to the arbitration were the subject of a suit, the suit could whether with leave or otherwise be instituted in a presidency down.

Civil procedure Code, 1908

The came the Code of Civil Procedure of 1908. Schedule II to the said code contained the provisions relating to the law of arbitration, which extended to the other parts of British India.\footnote{Mittal. D.P., “Law of Arbitration ADR and contract”,p.21.}

Civil Justice Committee 1925

Civil Justice Committee of 1925 recommended several changes in the arbitration law. On the basis of the recommendations by the Civil Justice Committee, the Indian Legislature passed the Act, i.e., The Arbitration Act, 1940.

Arbitration Act 1940

The former Arbitration Act, 1940, which has been enacted for the effective and speedy resolution of disputes, became outmoded. Its
ineffectiveness was emphasized by the Supreme Court of India in *Guru Nanak Foundation v. Rattan Singh & Sons*,

Interminable, time-consuming, complex and expensive court procedures impelled jurists to search for an alternative forum, less formal, more effective and speedy for resolution of disputes avoiding procedural clap-trap and this led them to Arbitration Act, 1940 (“Act” for short). However, the way in which the proceedings under the Act are conducted and without an exception challenged in court, has made lawyers laugh and legal philosophers weep.

Experience shows and law reports bear ample testimony that the proceedings under the Act have become highly technical accompanied by unending prolixity, at every stage providing a legal trap to the unwary informal forum chosen by the parties for expeditious disposal of their disputes has by the decisions of the courts clothes with “legalize” of enforceable complexity. This case amply demonstrates the same.

The 1940 Act failed to achieve the desired objectives and the entire process there under became litigation-oriented. Court’s intervention was frequent and was sought almost at every stage of the arbitral proceedings. This led to inevitable delays, formalities and technicalities and also bitterness of business relations. The 1940 Act, thus allotted to the courts more role for supervision and intervention than necessary. The Act was also out of tune with the Indian Economic Reforms. Uruguay Round was concluded on the 15th December, 1993 and final treaty was signed on the 15th April, 1994. A World Trade Organisation (WTO) in place of GATT came into existence. With such development in the sphere in international trade there has been significant increase in the volume of world trade since then and still on the increase. Since 1991 when the Indian Economy

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22 [1981], 4 SCC 634.
opened up, the Government of India announced many radical changes in its policy relating to trade, investment and economy. The new industrial policy saw changes relating to industrial licensing, Foreign investment and technological collaboration. All these made India focal destination for investment and trade. In this scenario, commercial disputes are likely to arise which may need quick and amicable settlement. Dispute resolution mechanism alternative to normal judicial process, is now regarded the world-over as the satisfactory mechanism. All international contracts and agreement contain arbitration clause for settlement of commercial disputes through this mechanism.

Since the Indian Arbitral System, which was governed by the Civil Procedure Code, 1908, the Arbitration Act, 1940, the Arbitration (Protocol and Convention) Act, 1937, and the Foreign Awards (Recognition and Enforcement) Act, 1961, was grossly outdated and not in harmony with the arbitral mechanism available and prevalent in most of the countries in the world, there was a pressing need for a change for a lay adjudication of business disputes. Commercial expediency rather than the legal accuracy is the main object of the alternative dispute resolution mechanism.

II. ENGLISH LAW

(1) Position Prior to, 1996 Act,

(2) Position after the Act of 1996.

(1) Position Prior to, 1996 Act,

The practice of arbitration, therefore comes, so as to speak, naturally to primitive bodies of law; and after courts have been established by the state and a recourse to them has become the natural method of settling disputes, the practice continues because the parties to a dispute want to
settle them with less formality and expense than is involved in a recourse to the courts.\textsuperscript{23}

Arbitration differs from court proceedings although the reference will be heard by an arbitrator in a judicial manner, and the ordinary rules of court procedure and of evidence will be enforced at the hearing. Arbitrations are probably as old as legal history itself, but there are very few statutes which refer to the subject prior to the \textit{Arbitration Act. 1697}. Consequently, a long time of cases decided at common law, and commencing in the early seventeenth century with Blake’s case (1606), are still importance in this branch of the law.

Shortly before the middle of the 18\textsuperscript{th} century, Sir Robert Raymond C.J. was held to have stated: An Arbitrator is a private extraordinary judge between, party and chosen by their mutual consent, to determine controversies between them. And Arbitrators are so called because they have an arbitrary power for if they observe the submission (arbitration agreement) and keep within due bounds, their sentences are definite form which there lies no appeal.\textsuperscript{24}

From the very nature of arbitration, some degree of control by the kings courts has been inevitable from Stuart times onwards, the growth of British Overseas Trade, and the expansion of the Empire from the time of the Treaty of Paris (1763), enlarged greatly the work of merchants and traders, and consequently matter in dispute between such persons became increasingly frequent and of major importance in the mercantile affairs of the realm. At first, these disputes were decided in practice under the common law, and related originally to chattels personal, or torts to the person. In more recent times, disputes were referred to arbitration in

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\textsuperscript{23} Holdsworth, History of English Law (1964), Vol. XIV.p.187
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\textsuperscript{24} Gill William H., “Evidence and procedure in Arbitration”, p. 1-3
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questions on real property, and more frequently, questions in the law of contract.

Thus from the passing of arbitration Act, 1697 the Legislature became aware of the necessity of provisions which would aid the common law. Member enactments were added to statute book, culminating in the Common Law Procedure Act, 1854. The advert of Railways, Tramways and other mercantile means of transport, led to an enormous increase of cases held in arbitration in the second half of the nineteenth century, and as a result, Parliament passed the Arbitration Act, 1889.

Arbitration Act, 1889

This statute has been the bedrock of statutory arbitration ever since, and codified the general law as it then stood. A number of Acts of Parliament had been passed which referred disputes that could arise from their provisions, to various courts of arbitration, thus setting up special statutory arbitrations which differed from the arbitrations held under the Common Law. Many of the statutory provisions may be excluded by agreement between the parties to an arbitration, for such parties may themselves determine what procedure is to be followed, what powers are to be vested in the arbitrator and what type of constitution the tribunal itself shall have in the particular circumstances. The Act of 1889 was mainly declaratory of previous legislation, or of commercial and convincing practice, where the list of terms to be implied in arbitration agreement had to be construed. Many substantial changes to the previous law were made by the Arbitration Act, 1934. But the 1889 Act, the 1934 Act have been repealed, but parts of both these statutes have been incorporated into other consolidating statutes. (e.g., Limitation Act, 1939 and Agricultural Holdings Act, 1948).
Act of 1934

Made several important amendments to both statute and case law as a result of the recommendations of the Mackinnon Committee in 1927. Before the Act of 1934, an arbitration agreement was called the submission to arbitration.

Arbitration Act, 1950

On September 1, 1950, came into force the Arbitration Act, 1950 which purports to consolidate without amendment, all the earlier acts on arbitration. This act did not apply to arbitrations actually in existence, or pending, on the date, but it did apply to arbitrations commenced after that date made pursuant to earlier agreements.

This act is divided into three parts. Part I deals with general provisions as to arbitration part III deals with enforcement of foreign awards and part II general provisions in Arbitration Act, 1950.

Some highlights of this act are as under:25

(i) Section 1 of this act provides that the authority of an arbitrator or umpire be irrevocable except by leave of high court or judge thereof.

(ii) Section 2 Arbitration Agreement shall not be discharged by death of any party but shall be enforceable against legal representative.

(iii) Section 4(i), if any party an arbitration agreement, commences any legal proceedings in any court against any other party to the agreement, any party to those proceedings may at any time after appearance and before delivering any pleading or taking any steps in proceedings and if court or judge is satisfied and parties are ready and willing to do all things necessary to the proper

conduct of the arbitration, may make an order staying the proceedings, Section [4(2) repealed by Arbitration Act. 1975].

Section 6, if no contrary intention appears reference be deemed to -

(iv) include a provision that it is to a single arbitrator.

(v) Section 8(1) provided earlier that in arbitration agreement if reference is to two arbitrators be deemed to include a provision that two arbitrators may appoint an umpire at any time, [Section 8(1) as Amended by the Arbitration Act, 1979].

(vi) Section 9 provides agreements for reference to three Arbitrators, the award of any two arbitrators would be binding [Section 9 substituted by Arbitration Act, 1979]

(vii) Section 10 deals with the power of court in certain cases to appoint an arbitrator or umpire and if parties fail to appoint within 7 clear days after services of notice to other party high court or Judge thereof may appoint an arbitrator umpire or third arbitrator and shall act as if appointed by consent of all parties. [Section 10(1) was amended by Arbitration Act, 1979].

(viii) Section 26 dealt with enforcement of award.

**Arbitration Act, 1975**

In the Principal Act, 1950, certain amendments were made and came the act of 1975 and the Arbitration Act, 1979.

The New York Convention, 1958 – which was first implemented in England and Wales by Arbitration Act, 1975 – introduced a regime which went a long way towards ensuring that Arbitration agreement are respected and that arbitral awards are easily enforceable.
This act contained certain provisions regarding the effect of arbitration agreements on court proceedings, Enforcement of Convention awards and certain general provisions.

**Arbitration Act, 1979**

This Act contained supplementary incidental and transitional provisions as appeared at that time to be expedient with amendments in the Principal Act, 1950. The following provisions were repealed:

(a) Section 10(c) of the Principal Act regarding the condition where parties or two arbitrators are required or are at liberty to appoint an umpire or third arbitrator.

(b) Section 21 Principal Act was repealed and that dealt with “Special cases” remission and setting aside of Awards etc.

(c) Some minor amendments were made in Section 8 umpires and Section 9 Majority award of three arbitrators.

(2) **Position after the Act of 1996**


The 1996 Act contains four parts:

(i) The main body of the act is to be found in Part I (Sections 1 to 84);

(ii) Part II which is entitled “Other provisions relating to arbitration”, sets out special rules which apply to consumer arbitration agreements, small claims arbitration in the country court, Judge arbitrators and statutory arbitrations (Sections 89 to 98);
Part II deals with the recognition and enforcement of foreign award, in particular New York Convention awards (Sections 99 to 104); and

Part IV contains a few general provision (Sections 105 to 110).

**Salient Features of the English Arbitration Act of 1996**

1. Section 1 of this Act provides that object of arbitration is to obtain a fair resolution without unnecessary delay as well as parties should be free to agree how their disputes are resolved.

2. Section 9 to 11 provides stay of legal proceedings.

3. Section 66 provides enforcement of arbitrate awards.

4. Section 45 for securing the attendance of witnesses.

5. Section 44 provides that court’s powers exercisable in support of arbitral proceedings.

6. Section 17 provides powers in case of default to appoint sole arbitrator.

7. Section 69 provides the provision for challenging the award on the point of law.

8. Section 93 provides appointment of India as arbitrators.

3. **Position after the Arbitration and Conciliation Act, 1996**

The first step that was identified as a pre-requisite for development of ADR was conducive legal framework. Towards this goal the Arbitration Act, 1940 was repealed. Simultaneously, the new Arbitration and Conciliation Act, 1996 was enacted. The 1940 Act had become so much out of the tune with the objects it was supposed to achieve, that no less an
institution than the Supreme Court of India constrained to say the following in *Guru Nanak Foundation v. Ratan Singh & Sons*:26

“Interminable, time consuming, complex and expensive court procedures impelled jurists to search for an alternative forum, less formal, more effective and speedy for resolution of disputes avoiding procedural claptrap and this led them to the Arbitration Act, 1940. However, the way in which the proceedings under the Act are conducted and without exception challenged in courts, has made lawyers laugh and legal philosophers weep….”

The 1940 Act became outdated and a need was expressed by the law commission of India and various representative bodies of Trade and Industry for its amendment so to be more responsive to the contemporary requirements, and to render Indian Economic Reforms more effective. Besides Arbitration, other mechanisms of settlement of disputes such as mediation and conciliation should have legal recognition and the settlement agreement reached between the parties as a result of such mechanism should have the same status and effect as an arbitral award on agreed terms with a view to making Indian arbitration mechanism to be in harmony with different legal system of the world, the Arbitration and Conciliation Ordinance 1996 was promulgated by the President of India on the 16th January 1996 which was brought into force on 25th January 1996. The President re-promulgated the ordinance on the 26th March 1996. Which is called the Arbitration and Conciliation Second Ordinance 1996. The Ordinance is made effective with effect from the 26th January 1996 that ordinance was also repealed. It was replaced by the *Arbitration and Conciliation Act. 1996* (Act No. 26 of 1996) which is deemed to have come into force on 25th January 1996.

Arbitration and Conciliation Act, 1996 – Based on UNCITAL Model Law

The new Arbitration and Conciliation Act, 1996 seeks to consolidate and amend the law of arbitration and is largely based on the model law of United Nations Commission for International Trade Law (UNCITRAL). The important feature of the UNCITRAL Model Law and Rules is that they have harmonized concepts of arbitration and conciliation of different legal systems of the world and thus contained provisions which are designed for universal application.

SALIENT FEATURES OF ARBITRATIONS & CONCILIATION ACT, 1996

The 1996 Act has several advantages over the 1940 Act. The most important departure made by the 1996 Act from the previous law is in regard to judicial intervention with the process and product of arbitration. There are many distinctive features in this Act. First, where there is an arbitration agreement, the court is required to direct the parties to resorts to arbitration as per the agreement.\(^27\)

However in such situations parties seeking arbitration are expected to make an application to the court either before or at the time of filling a written statement on merits before the court.

Second, the grounds on which awards of an arbitrator could be challenged before the court under the 1940 Act have been severely cut down. Such a challenge, now is, permitted only on the basis of invalidity of the agreement, want of jurisdiction on the part of the arbitrator or want of proper notice to a party of the appointment of the arbitrator or of arbitral

\(^27\) The Arbitration and Conciliation Act, 1996, section 8
proceeding or a party being unable to present its case. At the same time an award can now be set aside if it is in conflict with ‘the public policy of India’- a ground which covers inter alia fraud and corruption.

Third, the powers of the arbitrator himself have been amplified by inserting specific provisions on several matters, such as the law to be applied by him, power to determine the venue of arbitration failing agreement, power to appoint experts, power to act on the report of a party, power to apply to the court for assistance in taking evidence, power to award interest, and so on.

Fourth, obstructive tactics sometimes adopted by parties in arbitration proceedings are sought to be thwarted by an express provision where under a party who knowingly keeps silent and then suddenly raises a procedural objection will not be allowed to do so.

Fifth. The role of arbitral institutions in promoting and organizing arbitration has been recognized for the first time in law.

Sixth, the Act provides considerable improvement in the nature of the appointment of arbitrator, with the formulation of the Chief Justice scheme. Which takes the task of selecting an arbitrator by court outside the litigation process and makes it an administrative Act. It is the prerogative of the parties to nominate their own arbitrator. It is only when there is a difference between the parties on the appointment, the court intervention becomes necessary. The Act also empowers the court to nominates arbitrator (failing agreement between the parties) or designate an institution or a person to make such appointment. Accordingly some of the institutions in India are under the consideration of the Chief Justice of

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29 The Arbitration and conciliation Act, 1996 section 11.
High Court for such designation. There has been a controversy has now been finally resolved by a Constitutional Bench of the Supreme Court in Konkan Railway Corporation V/S Rani Construction (p) Ltd [2002] 2 SCC 388 holding that this power is not judicial while stopping short of saying that it is administrative.

Seventh, under the 1940 Act there was a time limit of four months within which the arbitrator has to make the awards. However, this time limit used to be extended by the arbitration tribunal with the agreement of the parties and failing such agreement, by the court. This resulted in delay. The time limit for making awards has now been deleted.

Eighth, the importance of transnational commercial arbitration has been recognized and it has been specifically provided that even where the arbitration is held in India, the parties to the contract would be free to designate the law applicable to the substance of the dispute.

Ninth, the requirement of a formal arbitral agreement under the 1940 Act has now been relaxed to include even an informal agreement.  

Tenth, the 1996 Act has clothed the arbitrator with the power to grant interim orders in respect of the preservation of property and for ordering security. This is in addition to the interim orders that can be passed by a court.

Eleventh, the arbitrators can now decide on his own jurisdiction. This will help considerably to reduce interference by courts. Prior to the 1996 Act, the Supreme Court in Renusagar Power Co. v/s General Electric Co.[(1984) 4 SCC 6791, had restricted the power of the arbitrator to decide on the raised in respect of jurisdiction almost invariably the parties had to

31 The Arbitration and Conciliation Act,1996, section 9 and 17
approach courts for adjudication which caused enormous delay. The 1996 Act, having defined the jurisdiction of the arbitrator, will surely prevent interim intervention by courts and consequent delay.\(^{32}\)

Twelfth, the 1996 Act also provides for various other time saving measure such as requiring an arbitration to disclose any possible bias at the threshold itself.\(^{33}\)

Thirteenth, when an arbitrator is replaced, the proceedings conducted by him are protected. This will save time as it would otherwise require de novo proceeding before the new arbitrator.\(^{34}\)

Finally, unless the agreement provides otherwise, the arbitrators are required to give reasons for the award. The awards itself has now finally, unless the agreement provides otherwise, the arbitrators are required to give reasons for the award. The awards itself has now been vested with the status of a decree, in as much as(subject to the power of the court to set aside the award) the award itself is made executable as a dence and it is no longer necessary to apply to the court for a decree in terms of the award.

**Variations From the UNCITRAL Model Law**

Though this Act adopts the UNCITRAL Model Law, in the following situations it departs from its model:

- Sub-section (1) of section 10 of the 1996 Act deals with the number of arbitrators in an arbitral tribunal and provides that the number of arbitrator shall not be of even number. The Model Law does not contain any such limitation. Where the parties fail to determine the number of arbitrator the Model Law provides that the number of

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\(^{32}\) The Arbitration and Conciliation Act, 1996, section 16

\(^{33}\) The Arbitration and Conciliation Act, 1996, section 12

\(^{34}\) The Arbitration and Conciliation Act, 1996, section 15
arbitrators shall be three. Sub-section (2) of section 10 of the 1996 Act provides that in such an eventuality the arbitral shall consist of a sole arbitrator. In *Narayan Prasad Lohia v/s Nikunj Kumar Lohia (2002) 1 RAJ 381 (SC)*, a three judge Bench of the Court has held that the requirement of s 10 (1) that the number of arbitration comprising the arbitral tribunal,’ shall not be an even number’ is not mandatory and an arbitral tribunal can consist even of an even number of arbitrators. This is tantamount to judicial legislation as it wipes out the proviso in s 10 (1) which in imperative language states that’ such number shall not be an even number.

- In the matter of appointment of arbitrators, where the parties fail to reach an agreement, the Model Law permits the parties to approach a court or other authority arbitrator or sole arbitrator as the case may be. However, section 11 of the 1996 Act empowers the Chief Justice of the High Court concerned or any person or institution designated by him to appoint the arbitrator. Further in the case of International commercial arbitration, it is the Chief Justice of India, or any person or institution designated by him, who is empowered to appoint the arbitrator. Sub-section (10) of section 11 empower the Chief Justice of India or the Chief justice of the High Court, as the case may be, to make such scheme as he may deem appropriate for dealing with such appointments.

- The Model Law lays down the procedure for challenging an arbitrator. It empowers the arbitral tribunal to decide on the challenge and, if a challenge is not successful, the challenging party may request a court or other authority to decide on the challenge. While such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award. The corresponding
provision contained in section 13 of the 1996 Act does not permit the challenging party to approach the court at that stage. However, after the award is made, the party could challenge the award on the ground that the arbitrator has wrongly rejected the challenge.

- Similarly, under the Model law, if the arbitral tribunal turns down the plea that it has no jurisdiction, provision exists for the party concerned to approach a court to decide the matter. The corresponding provision contained in section 13 of the 1996 Act does not make provision for approaching the court at that stage.

- The following additional provisions, which are not to be found in the Model Law, have been made in the 1996 Act.
  
  o Sub-section (7) of section 31 contains detailed provision on award of interest by the arbitral tribunal.

  o Section 31 also deals with the costs of arbitration.

  o Section 36 provides that under the following two situations, namely,

    (i) Where an award is not challenged within the prescribed Period, or

    (ii) Where an award has been challenged but challenge is turned down, the award shall be enforced in the same manner as if it were a decree of the court.

- Section 37 makes provision for appeals in respect of certain matters.

- Section 38 enables the arbitral tribunal to fix the amount of deposit or supplementary deposit, as the case may be, as an advance for the cost of arbitration.
Section 39 to 43 make provision for lien on arbitral award and deposits as to cost, arbitration agreement not to be discharged by death of party thereto, the rights of a party to an arbitration agreement in relation to the proceedings in insolvency of a party thereto, identification of the court which shall have exclusive jurisdiction over the arbitral proceedings and application of the Limitation Act to arbitrations under 1996 Act.

The 1940 Act provided for a detailed process for implementation of the award, the award had to be approved by the civil court. At this stage parties could make objections to the award which means that the matter was almost reheard by the civil court. This led to the inordinate delay which arbitration sought to avoid. The 1996 Act introduces and improvement in this regard. It makes the award final in character and provided for execution of the award without approval by the civil court. This is a great step forward for arbitration.

The Arbitration and Conciliation Act, 1996 seeks to establish the general principles on which arbitrations law should be based and is intended to provide an all-embracing statutory framework for each aspect of the arbitral process. It should be stressed. However, that many questions are left to be decided by the courts and certain provisions have been drafted against the background of existing judicial decisions. The structure of the 1996 Act is, to a certain extent, based on the Model Law and, as far as Possible, the 1996 act adopts the style and, where appropriate, the text of the Model Law. In this research, the researcher in latter chapter critically outlined the importance of working of Arbitration and Conciliation Act, 1996.

35 UNCITRAL Model Law.