

**MAHARASHTRA JUDICIAL ACADEMY & INDIAN
MEDIATION CENTRE & TRAINING INSTITUTE
UTTAN, BHAYANDAR**

**NOTE ON SOME OF THE RELEVANT
PROVISIONS OF THE ARBITRATION &
CONCILIATION ACT, 1996 AND IMPORTANT
CASE LAWS**

PREPARED BY

**HON'BLE SHRI JUSTICE RAMESH D. DHANUKA
JUDGE, BOMBAY HIGH COURT.**

25th July, 2015.

**MAHARASHTRA JUDICIAL ACADEMY & INDIAN MEDIATION
CENTRE & TRAINING INSTITUTE, UTTAN, BHAYANDAR**

**NOTE ON SOME OF THE RELEVANT PROVISIONS OF THE
ARBITRATION & CONCILIATION ACT, 1996 AND IMPORTANT
CASE LAWS PREPARED BY JUSTICE RAMESH D. DHANUKA,
BOMBAY HIGH COURT.**

1. An arbitral award may be set aside on an application by a party defined under section 2 (h) of the Arbitration and Conciliation Act, 1996 which provides that 'party' means a party to an arbitration agreement.

2. Application for setting aside an arbitral award can be filed only in the court defined under section 2(e) of the Act which provides as under :-

(e) "Court" means the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, but does not- include any civil court of a grade inferior to such principal Civil Court, or any Court of Small Causes;

3. Section 4 of the Arbitration Act provides that a party who knows that any provision of Part-I from which parties may derogate or any requirement under the arbitration agreement has not been complied but still proceeds with the arbitration without stating his objection to such non-compliance without undue delay or if a time limit is provided for stating that objection, within that period of time, shall be deemed to have waived his right to so object.

4. Section 5 of the Arbitration Act provides that notwithstanding contained in any other law for the time being in force, in matters governed by Part-I, no judicial authority shall intervene except where so provided in Part-I. Part-I provides for judicial intervention by the Court in the proceedings under sections 8, 9, 11, 14, 27, 34, 36 and 37.

5. Section 7 provides as to what the arbitration agreement means. The arbitration agreement shall be in writing. The arbitration agreement is in writing if it is contained in the documents signed by the parties, exchange of letters, telex, telegrams, or other means of telecommunication which provide a record of the agreement or an exchange of statement of claim and defence wherein the existence of the agreement is alleged by one party and not denied by the other. If there is a reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and reference is such as to make that arbitration clause part of the contract. Unless there is arbitration agreement between the parties, dispute cannot be referred to arbitration. An arbitration agreement however can be arrived at even in the pending court proceedings. If the parties have arrived at the arbitration agreement under Part-I, all rights and obligations of the parties would be governed by the provisions of the Part-I of the Arbitration & Conciliation Act, 1996.

6. Under section 8, a judicial authority before which an action is brought in a matter which is subject matter of an arbitration agreement shall if a party applies not later than when submitting his first statement on the substance of dispute, refer the parties to

arbitration. If parties are referred to arbitration, suit is disposed off.

7. Section 9 provides for powers of Court to grant interim measures.

8. Section 10 provides that the parties are free to determine the number of arbitrators, provided that such number shall not be an even number, failing which the arbitral tribunal shall consist of a sole arbitrator.

9. Section 11 provides that if a party does not appoint an arbitrator within 30 days from the date of receipt of a request to do so, the other party may apply for appointment of an arbitrator by filing an application under section 11(6). Even if two arbitrators nominated by the parties do not appoint a presiding officer, an application can be made to the Hon'ble Chief Justice for appointment of the presiding arbitrator.

10. Under sections 12 and 13 a party can challenge the appointment of the arbitral tribunal on various grounds by filing an application before such tribunal. If such application is rejected, the arbitral tribunal has to proceed with the matter and its award can be challenged under section 34 if the said party does not succeed in the arbitral proceedings.

11. Section 14 provides for termination of the mandate of the arbitral tribunal. Section 15 provides for substitution of the arbitral tribunal in various circumstances.

12. Under section 16 , the arbitral tribunal is empowered to rule on its own jurisdiction including ruling on any objection with respect to

the existence or validity of arbitration agreement. Such plea shall be raised not later than the submission of the statement of defence. If such plea is rejected by the arbitral tribunal, it has to proceed with the arbitral proceedings and declare an award. If plea of jurisdiction is accepted by the arbitral tribunal, the respondent may file an appeal under section 37. If plea of jurisdiction is not accepted, the respondent may challenge such ruling along with award under section 34.

13. Section 17 provides for interim measures which can be ordered by the arbitral tribunal.

14. Under section 18, the arbitral tribunal has to treat both parties equally.

15. Section 19 provides that the arbitral tribunal shall not be bound by the Code of Civil Procedure, 1908 or Indian Evidence Act, 1872. The arbitral tribunal has power to determine the admissibility, relevance, materiality and weight of any evidence subject to section 19(3).

16. Under section 21, the arbitral proceedings commence in respect of a particular dispute on the date on which a request for that dispute to be referred to arbitration is received by the respondent, unless otherwise agreed by the parties. When such notice is received by the respondent, limitation in respect of such dispute stops.

17. Under sections 23 and 24, the claimant and the respondent has to file the statement of claim and defence respectively and are to be heard by the arbitral tribunal.

18. Section 27 provides that the arbitral tribunal or a party can take an assistance of the Court for taking evidence.

19. Section 28 (1) of the Act provides that the where the place of arbitration is situate in India, in an arbitration other than an international commercial arbitration, the arbitral tribunal shall decide the dispute submitted to arbitration in accordance with the substantive law for the time being in force in India. Section 28(3) provides that in all cases the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction. Section 31 provides for form and contents of an arbitral award. Section 32 provides for termination of arbitral proceedings.

20. An arbitral award can be set aside on the grounds set-out in section 34 (2) (a) and (b) and if an application for setting aside such award is made by a party not later than three months from the date from which the party making such application had received the arbitral award or if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral tribunal. If the court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months, it may entertain the application within a further period of 30 days but not thereafter.

21. Section 34 of the Act reads as under :-

34. Application for setting aside arbitral award.

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

section (2) and subsection (3).

(2) An arbitral award may be set aside by the Court only if-

(a) the party making the application furnishes proof that-

- (i) a party was under some incapacity, or
- (ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or
- (iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
- (iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration: Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or
- (v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or

(b) the Court finds that-

- (i) the subject- matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or
- (ii) the arbitral award is in conflict with the public policy of India. Explanation.- Without prejudice to the generality of sub- clause (ii), it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or

affected by fraud or corruption or was in violation of section 75 or section 81.

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral tribunal: Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter.

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

22. Under section 36, when the time for making an application under section 34 for setting aside an arbitral award has expired or such application has been refused, the award shall be enforced under the provisions of the Code of Civil Procedure, 1908 in the same manner as if it were a decree of the court. Section 37 provides a list of appealable orders. Only those orders mentioned therein are appealable and no other orders.

23. Under section 40, arbitration agreement is not discharged by death of any party thereto, shall be enforceable by or against the legal representative of the deceased.

24. Under section 42, if any application is made with respect to any arbitration agreement under Part-I in a Court, that Court alone shall have jurisdiction over the arbitral proceedings and all subsequent proceedings arising out of that agreement and the arbitral proceedings shall be made in that Court and no other Court.

25. Section 43 provides that the Limitation Act, 1963 shall apply to arbitrations as it applies to proceedings in Court. An arbitration shall be deemed to have commenced on the date referred to in section 21. If an arbitral award is set aside, the period between the commencement of the arbitration and date of order of the Court shall be excluded in computing the time prescribed by the Limitation Act, 1963 for commencement of proceedings including arbitration with respect to the dispute so submitted.

Important Case Laws - Section 2 (e) :

26. The Full Bench of the Bombay High Court in case of Fountain Head Developers vs. Mrs. Maria Archangela Sequeira, 2007 (3) Bom.C.R. 393, has held that the District Judge in a district alone is the principle Court of the original civil jurisdiction and does not include any other judge sub-ordinate to him for the purpose of the petition under section 34 and section 9.

SECTION 9

27. Bombay High Court in case of **Tata Capital Financial Services Limited vs. Deccan Chronicles Holdings Ltd. 2013 (3) Bom.C.R. 205**, has held that the Court can grant interim measures under section 9 (2) (b), (d) and (e) even if the properties or things are not the subject matter of the dispute in arbitration. It is held under

Order XXXIV Rule 14 of the Code of Civil Procedure, 1908 that there is no bar in filing a money claim even by the mortgagee notwithstanding contained under Order II Rule 2 of the Code of Civil Procedure. It is for the claimant to decide whether to file a money claim before the Arbitral Tribunal and file a separate suit for enforcement of the mortgage after complying with the provisions of Order II Rule 2 of the Code of Civil Procedure. Proceedings under section 9 for interim measures cannot be equated with the proceedings filed in a pending suit for referring the parties to arbitration under section 8 of the Arbitration & Conciliation Act, 1996.

28. The Court should be satisfied while granting interim measures under section 9 read with Order XXXVIII Rule 5 that there are reasonable chances of decree in favour of the petitioner and grant of just or valid claim is not sufficient – **Ratnam Ayer vs. Jacki K. Shroff 2013 (5) Bom.C.R. 144.**

29. The Court is bound to decide the existence of the arbitration agreement before proceeding with the application under section 9 on merits – **Goldstar Metal Solutions vs. Dattaram Gajanan Kavtankar, (2013) 3 AIR Bombay R-529.**

30. The parties not parties to the arbitration agreement can still be impleaded in an application under section 9 if they are likely to be affected by the reliefs claimed in the application under section 9 – **Welspun Infrateck Ltd. vs. Ashok Khurana, 2014 (3) Bom.C.R. 624.**

31. The application for stay of the arbitration proceedings not maintainable under section 9 of the Arbitration Act read with section

151 of the Code of Civil Procedure – **Rameshkumar N. Chordiya vs. Principal District Judge, AIR 2014, Bombay 1.**

32. If the place of arbitration is in India, Part-I of the Arbitration Act, including section 9 would be applicable – **Konkola Copper Mines (PLC) vs. Stewarts and Lloyds of India Ltd, 2013 (5) Bom.C.R. 29.**

33. There is no provision for stay of the arbitration proceeding. Mere allegation of fraud and/or misappropriation of amount not supported by material particulars not sufficient – **Rajesh M. Mahtani vs. R.M. Khan, 2013 (6) Bom.C.R. 607.**

34. The steps taken to enforce the consent order passed under section 9 are not barred under section 22 of the Sick Industrial Companies (Special Provisions) Act, 1985. The proceedings under section 9 cannot be equated with a suit contemplated under section 22 of the said Act – **Tata Capital Services Ltd. vs. Ramasarup Industries Limited, 2013 (6) Bom.C.R. 230.**

35. The parties agree to have seat of arbitration at Singapore and governed by SIAC Rules - Section 9 cannot be resorted to. Bombay High Court has no jurisdiction to entertain the petition under section 9 in this circumstances – **Rockwood Hotels Resort Ltd. vs. Starwood Asia Pacific Hotels & Resort Ltd. (2013) 4 LJ SOFT 48.**

36. No injunction can be granted under section 9 if the specific relief cannot be granted in terms of section 41(e) of the Specific Relief Act. The contract which is determinable cannot be specifically enforced - **Spice Digital Ltd. vs. Vistaas Digital Media Pvt. Ltd.,**

(2012) 114, Bombay Law Report 3696.

37. When an application under section 9 is filed before the commencement of the arbitral proceedings, there has to be manifest intention on the part of the applicant to take recourse to arbitral proceedings. In case of **Firm Ashok Traders vs. Gurumukh Das Saluja, (2004) 3 SCC 155,** the Supreme Court held that a party invoking section 9 may not have actually commenced the arbitral proceedings but must be able to satisfy the Court that the arbitral proceedings are actually contemplated or manifestly intended and/or positively going to commence within a reasonable time.

38. Bombay High Court in **Minochar A. Irani vs. Deenyar S. Jehani, 2014 (6) Bom.C.R. 504,** has held that a party who has no intention to ultimately refer the dispute to arbitration and seek final relief cannot be permitted to seek interim relief. Interim relief is in aid of final relief.

39. The Supreme Court in case of **S.B.P. & Co. vs. Patel Engineering, AIR 2006 SC 450,** has held that when a party raises a plea that the dispute involved was not covered by the arbitration clause or that the Court which was approached had no jurisdiction to pass any order under section 9 of the Arbitration Act that Court has necessarily to decide whether it has jurisdiction, whether there is an arbitration agreement which is valid in law and whether the dispute sought to be raised is covered by that agreement. It is also held that when an application under section 8 is made before the judicial authority or Court that the subject matter of the claim is not covered by an agreement or existence of the valid arbitration agreement is disputed, the Court or the judicial authority has to decide the said

issue before referring the parties to arbitration.

40. The Division Bench of the **Bombay High Court** in case of **Deccan Chronicle Holdings Ltd. vs. L & T Finance Limited in Appeal (Lodging) No.130 of 2013, delivered on 8th August, 2013,** has held that when the Court decides the petition under section 9, the principles which have been laid down in the Code of Civil Procedure, 1908 for grant of interlocutory reliefs furnish a guide to the Court. Similarly in an application for attachment, underlined basis of order XXXVIII Rule 5 would have to be kept in mind.

Whether the Court can grant interim measures under section 9 though the claim is rejected by the Arbitral Tribunal :

41. The Division Bench of the **Bombay High Court** in case of **Dirk India Private Limited vs. Maharashtra State Electricity Generation Company Limited., delivered on 18th / 19th March, 2013,** has held that the interim measures or protection within the meaning of section 9 (ii) is intended to protect through measure, fruits of the successful conclusion of the arbitral proceedings and the party whose claim has been rejected in the courts of the arbitral proceedings cannot obviously have an arbitral award enforced in accordance with section 36.

Whether interim measure under section 9 can be granted if a document required to be stamped, is not stamped :

42. The Bombay High Court in case of **Jairaj Devidas & Ors. vs. Nilesch Shantilal Tank & Anr. 2014 (6) Bom.C.R. 92,** has after adverting to the judgment of the Division Bench in case of **Lakadawala Developers Pvt. Ltd. vs. Badal Mittal in Appeal (Lodging) No.272 of 2013 delivered on 25th June, 2013** and the

judgment of the Supreme Court in case of **SMS Tea Estates Pvt. Ltd. vs. Chandmari Tea Company Pvt. Ltd., 2011 (4) Arb.L.R. 265**, has held that insufficiently paid instrument cannot be acted upon before the Court including arbitration agreement and till such time such document is properly stamped, no relief under section 9 can be granted. Such document can be impounded and can be sent to the Collector of Stamps for adjudication under the provisions of the Maharashtra Stamp Act.

43. In case of **SBP vs. Patel Engineering Ltd. (2005) 8 SCC 618**, it is held by the Supreme Court that order passed by the Chief Justice or his designate is a judicial order and not an administrative order. Chief Justice or his designate has to decide whether conditions under section 11(6) are satisfied or not.

Under Sections 14 and 32 :

44. The Bombay High Court in case of **Wanbury Ltd. vs. Candid Drug Distributors, delivered on 18th July, 2015 in Arbitration Petition No.1461 of 2014**, has held that the power of the arbitral tribunal to issue directions to file pleadings and documents, includes the power to grant extension of time. Such orders passed by the arbitral tribunal are procedural and can be recalled if sufficient case is made out.

Power of the arbitral tribunal to award interest :

45. The Supreme Court in case of **Hyder Consulting (UK) Ltd. vs. Governor, State of Orissa, decided on 25th November, 2014 in Civil Appeal No.3147 of 2012**, has held that under section 31(7)(a) of the Arbitration Act, the arbitral tribunal has power to award interest for pre-award period, interest *pendente lite* and interest post

award on whole or part of the money and for the whole or any part of the period between the date on which the cause of action arose and the date on which the award is made however, subject to the contract to the contrary.

46. The Bombay High Court in case of **Haresh Advani vs. Suraj Jagtiani, decided on 24th April, 2015 in Arbitration Petition No.846 of 2014**, has held that the power of the arbitrator under section 31(7) is not restricted to award interest on principal only and has also power to award interest on damages prior to the date of the award even if no notice under section 3(b) of the Interest Act, 1978 is issued by the claimant.

Limitation in filing petition under section 34 – Power of condonation of delay – Applicability of section 14 of the Limitation Act, 1963 :

47. Supreme Court in case of **Union of India vs. Popular Constructions, AIR 2001 SC 4010** and in case of **Consolidated Engineering Pvt. Ltd. vs. Irrigation Department (2008) 7 SCC 169** has held that section 5 of the Limitation Act is not applicable to section 34 (3) of the Arbitration and Conciliation Act, 1996 in view of express inclusion within the meaning of section 29(2) of the Limitation Act, 1963. It is held that court cannot condone delay beyond a period of 30 days and that also only if sufficient cause is shown as to how the applicant was prevented from making application within the period of three months and not thereafter.

48. Supreme Court in case of **Coal India Ltd. vs. Ujjal Transport Agency (2011) 1 SCC 117** and in case of **State of Goa vs. M/s. Western Builders, AIR 2006 SC 2525** has held that section

14 of Limitation Act is applicable while considering application under section 34 and if time taken in prosecuting the matter before a wrong court having no jurisdiction bonafide and with due diligence, such time taken can be excluded while computing limitation under section 34(3).

49. Supreme Court in case of **Voltas Limited vs. Rolta India Limited., (2011) 4 SCC 516**, has held that the notice under section 21 saves limitation for filing a counter claim if a respondent against whom a claim has been made satisfies the test that he had made a claim against the claimant and sought arbitration by serving a notice to the claimant.

50. Supreme Court in case of **State of Goa vs. Praveen Enterprises (2012) 12 SCC 581**, has held that the arbitral proceedings in respect of those disputes commenced on the date on which the request for the said disputes to be referred to arbitration was received by the respondent and only such disputes which were referred to in the said notice invoking arbitration agreement with a request to refer the same to arbitration, the arbitral proceedings commences and it would not apply to the counter claim.

51. Bombay High Court in case of **E-square Leisure Pvt. Ltd. vs. K.K. Jani Consultants and Engineering Company (2013) 2 Bom.C.R. 689**, has held that the limitation for making an application under section 34(3) for setting aside an arbitral award would commence only after the signed copy of the award is received by a party from the arbitral tribunal under section 31(5) of the Arbitration Act.

52. Supreme Court in case of **State of Maharashtra vs.**

M/s.Ark Builders Pvt. Ltd., AIR 2011 SC 1374, has held that the period of limitation prescribed under section 34(3) would start running only from the date of a signed copy of the award is delivered to / received by a party making the application for setting aside the award under section 34(1).

53. In case of **Booz Allen Hamilton vs. SBI Home Finance (2011) 5 Scale 147**, it is held by Supreme Court that if the subject matter of dispute is not capable of settlement by arbitration under the law for the time being in force, such award is liable to be set aside. Supreme Court has enumerated some of such non arbitrable disputes and has held that such action would be an action in rem and not in personam and are thus not arbitrable even if parties agreed to refer such dispute by consent.

- (1) Disputes relating to criminal offence
- (2) Matrimonial disputes
- (3) Guardianship matters
- (4) Insolvency and winding up matters
- (5) Testamentary matters
- (6) Eviction or tenancy matters
- (7) Suit for enforcement of mortgage by sale of property.

SECTION 34

54. The award if contrary to the terms of the contract, in violation of the statutory provisions and ignoring the material piece of evidence can be set aside – **Siddhivinayak Realty Pvt. Ltd. vs. V. Hotels Ltd. (2013) 7 LJ SOFT 22.**

55. Principles of natural justice applies to arbitration. Disputed documents not proved cannot be considered by the Arbitrator as a piece of evidence – **Pradyuman Kumar Sharma vs. Jaysagar**

M.Sancheti, (2013) 5 Mh.LJ 86.

56. The Supreme Court in case of **O.N.G.C. vs. Western Geco International Ltd. (2014) 9 SCC 263**, has held that in every determination whether by a Court or other authority that affects the rights of a citizen or leads to any civil consequences, the Court or the authority concerned is bound to adopt what is in legal parlance “judicial approach” in the matter. The duty to adopt a judicial approach arises from the very nature of power exercised by the Court or the authority does not have to be separately or additionally enjoined upon the fora concerned. The Court, Tribunal or Authority exercising such powers cannot act in an arbitrary, capricious or whimsical manner. The Courts or quasi judicial authority while determining the rights and application of the parties before it has to act in accordance with the principles of natural justice. It is held that a decision which is perverse or so irrational that no reasonable person would have arrived at the same, will not be sustainable in Court of law.

57. In case of **P.R. Shah, Shares and Stock Brokers Pvt. Ltd. vs. B.H.H. Securities Pvt. Ltd. & Ors. 2012 (3) Mh.L.J. 737**, it is held by the Supreme Court that the Court does not sit in appeal over the award of an arbitral tribunal by reassessing or re-appreciating the evidence and the award can be challenged only under the grounds mentioned in section 34(2) of the Arbitration & Conciliation Act, 1996 and in the absence of any grounds under the said provision, it is not possible to re-examine the facts to find out whether a different decision can be arrived at. It is held that the arbitral tribunal cannot make use of their personal knowledge of the facts of the dispute which is not part of the record, to decide the issue but can use their expert or technical knowledge or general knowledge about the particular

trade in deciding the matter.

58. In case of **Rashtriya Ispat Nigam Limited vs. Dewan Chand Ram Saran (2012) 5 SCC 306**, it is held by the Supreme Court that if the view taken by the arbitrator is clearly possible, if not plausible, and it is not possible to say that the arbitrator had travelled outside his jurisdiction, the Court cannot substitute its views in place of the interpretation accepted by the arbitrator.

59. In case of **Oil & Natural Gas Limited vs. Garware Shipping Corporation Limited, AIR 2008 SC 456**, it is held by the Supreme Court that there is no proposition that the courts could be slow to interfere with the arbitrator's award even if the conclusions are perverse and even when the very basis of the arbitrator's award is wrong.

60. The Supreme Court in case of **Mcdermott International Inc. vs. Burn Standard Co. Ltd. and others, (2006) 11 SCC 181**, has held that the intervention of the Court under the provisions of the Arbitration Act, 1996 is envisaged in few circumstances, like in case of fraud or bias by the arbitrator, violation of natural justice etc. The Court cannot correct the errors of the arbitrators. It can only quash the award leaving the parties free to begin arbitration again if it is desired. It is held that "patent illegality" must go to the root of the matter. Public policy violation indisputably should be so unfair and unreasonable as to shock conscience of the Court. If the arbitrator has gone contrary to or beyond express law of contract or granted relief in the matter not in dispute would come within the purview of section 34 of the Act.

61. The Bombay High Court in case of **Mukesh Nanji Gala vs.**

Heritage Enterprises, (2015) 2 Bom.C.R. 123, has held that the arbitral tribunal is a private forum and gets jurisdiction to adjudicate upon the disputes between the parties to arbitration agreement and not the persons who are not the parties to the arbitration agreement. Only a party to the arbitration agreement defined under section 2(1)(h) of the Arbitration & Conciliation Act, 1996 can challenge the arbitral award under section 34 and not by a person who is not a party to the arbitration agreement unless covered by sections 40 and 41. It is held that if a person is wrongly impleaded as a party to the arbitration proceedings and is aggrieved by the arbitral tribunal, he can challenge the arbitral award.

62. The Supreme Court in case of **Associate Builders vs. Delhi Development Authority, (2015) 3 SCC 49,** has held that the interference with an arbitral award is permissible only when the findings of the arbitrator are arbitrary, capricious or perverse or when conscience of the Court is shocked or when illegality is not trivial but goes to the root of the matter. It is held that once it is found that the arbitrator's approach is neither arbitrary nor capricious, no interference is called for on facts. The arbitrator is ultimately a master of the quantity and quality of evidence while drawing the arbitral award. Patent illegality must go to the root of the matter and cannot be of trivial nature.

63. In case of **Ravindra And Associates vs. Union of India (2010) 1 SCC 80,** it is held that court cannot interfere with findings of fact rendered by the arbitrator. It is held that if a clause in the contract or any issue is outside the purview of arbitration, it is necessary to comply with such restriction strictly. An arbitrator cannot decide contrary to the terms of the contract.

64. In case of **Fiza Developers and Inter-Trade Private Limited vs. AMCI (India) Private Limited and another (2009) 17 SCC 796**, Supreme Court has held that applications under section 34 are summary proceedings. The scope of enquiry in a proceeding under section 34 is restricted to consideration whether any one of the grounds mentioned in section 34 (2) exists for setting aside the award which grounds are specific. It is held that issues under order 14 and order 18 need not be framed in applications under section 34 of the Act. An application under section 34 of the Act is a single issue proceeding. Provisions of Civil Procedure Code will be applicable only to the extent considered necessary or appropriate by the court. There is no wholesale or automatic import of all the provisions of the Code of Civil Procedure into proceedings under section 34 of the Act as that would defeat the very purpose and object of the Act.

65. In case of **Sachin Gupta vs. K.S.Forge Matel (Pvt.) Ltd. (2013) 10 SCC 540**, it is held that an award rendered without notice and without hearing the party is illegal and liable to be set aside.

66. In case of **M.Anasuya Devi and another vs. M.Manik Reddy and others (2003) 8 SCC 565**, it is held by the Supreme Court that an award cannot be set aside under section 34 for want of stamping and registration. Question as to whether there was any deficiency in stamping or registration are not within the purview of section 34 and such question falls within the ambit of section 47 of CPC and such questions can be agitated only at the stage of enforcement of award under section 36.

67. In case of **Leela Hotels Pvt. Ltd. vs. Urban Development**

Corporation Ltd. (2012) 1 SCC 302 it is held that an arbitral award has to be enforced under CPC in the same manner as if it were a decree of the court.

68. In case of **Satyanarayan Construction Co. vs. Union of India (2011) 15 SCC 101**, it is held that an arbitrator cannot rewrite the contract and if rate higher than agreed in the contract is awarded, it would be beyond his competency and authority and such award is liable to be set aside.

69. In case of **Numaligarh Refinery Ltd. vs. Daelim Industrial Co. Ltd. (2007) 8 SCC 466**, it is held that in case it is found that the arbitrator has acted without jurisdiction and has put an interpretation on the clause of the agreement which is wholly contrary to law, then in that case there is no prohibition for the court to set things right.

70. In case of **Oil and Natural Gas Corporation Ltd. vs. Saw Pipes Ltd. (2003) 5 SCC 705**, it is held that award has to be in accordance with the terms of the contract. Phrase 'public policy of India' referred in section 34(2) (b) (ii) should be given a wider and not a narrower meaning. Court can set aside the award if it is (1) contrary to (a) fundamental policy of Indian law or (b) the interest of India or (c) justice or morality or (ii) is patently illegal or (iii) is so unfair and unreasonable that it shocks the conscience of the court. Supreme Court has interpreted section 34 and has enumerated various grounds of challenge to an arbitral award.

71. Supreme Court in case of **Venture Global Engineering vs. Satyam Computer Services Ltd. & Anr., AIR 2010 SC 3371** has

held that when an award is induced or affected by fraud or corruption, the same would fall within the ground of excess of jurisdiction and a lack of due process and can be set aside. It is held that concealment of relevant and material facts which should have been disclosed before the arbitrator is an act of fraud and if the concealed facts disclosed after the passing of the award have a causative link with the facts constituting or inducing the award, such facts are relevant in a setting aside proceeding and award may be set aside as affected or induced by fraud.

Whether the Court under section 34 can allow the claim rejected by the arbitrator :

72. The Supreme Court in case of **Mcdermott Inc. vs. Burn Standard Co. Ltd. and others, (2006) 11 SCC 181**, has held that the Court cannot correct the errors of the arbitrator. It can only quash the award leaving the parties free to begin the arbitration again if it is desired.

73. The Bombay High Court in **BMA Commodities Pvt. Ltd. vs. Kaberi Mondal & Anr., (2015) 2 Bom.C.R. 457** has held that the Court cannot correct the errors of the arbitral tribunal under section 34 of the Act. It can set aside the award wholly or partly and cannot make an award under section 34.

Whether the allegations of fraud, fabrication, malpractice etc. can be referred to arbitration :

74. The Supreme Court in case of **N. Radhakrishnan vs. Maestro Engineers, (2010) 1 SCC 72**, has held that the allegations of fraud and serious malpractice on the part of the respondent can be settled in a Court through furtherance of detailed evidence by either

parties and such a situation cannot be properly gone into by the arbitrator. It is held that in the facts of that case such allegations should be tried in a Court of law which would be more competent and have means to decide such applicable matter involving various questions and issues raised in the said petition.

75. The Division Bench of the Bombay High Court in case of **Maharashtra Stage and Cultural Development Corporation Limited vs. Multi Screen Media Pvt. Ltd., (2013) 11 LJSOFT 101,** after adverting to the judgment of the Supreme Court in the case of **N. Radhakrishnan vs. Maestro Engineers, (2010) 1 SCC 72,** has held that mere allegations of fraud or malpractice would not be sufficient to divest the arbitral tribunal of jurisdiction nor does the judgment of the Supreme Court in the case of **N. Radharsihanan** supports such a proposition. It is held that if a mere allegation of fraud however vague and bereft of material particulars were to oust the jurisdiction of the arbitral tribunal, the efficacy of arbitration as an alternate dispute resolution mechanism would be eroded and undermined.

76. The **Bombay High Court** in case of **HSBC PI Holdings (Mauritius) Ltd. vs. Avitel Post Studioz Ltd. & Ors. delivered on 22nd January, 2014 in Arbitration Petition No.1062 of 2012,** by learned single Judge has held that it is at the discretion of the Court to refer the matter to arbitration or whether the same can be decided by the Court appropriately when there are allegations of fraud, fabrication or malpractice. It is held that there is no bar provided under the Arbitration & Conciliation Act, 1996 against the arbitrator from entertaining and/or deciding the issue of fraud, forgery, malpractice etc.

77. The Division Bench of the **Bombay High Court** in case of **Avitel Post Studioz Ltd. & Ors. vs. HSBC PI Holdings (Mauritius) Ltd. delivered on 31st July, 2014 in Appeal No.196 of 2014**, has upheld the judgment of the learned single Judge in case of **HSBC PI Holdings (Mauritius) Ltd. vs. Avitel Post Studioz Ltd. & Ors. delivered on 22nd January, 2014**.

78. The Bombay High Court in **Rekha Agarwal vs. Anil Agarwal delivered on 3rd April, 2014 in Arbitration Petition No.257 of 2013** has taken a view similar to the view taken in case of **HSBC PI Holdings (Mauritius) Ltd. vs. Avitel Post Studioz Ltd. & Ors.**

Whether the Court has power to remand the proceedings back to the Arbitral Tribunal once the award is set-aside under section 34:

79. The Division Bench of the Bombay High Court in case of **Geojit Financial Services Ltd. vs. Kritika Nagpal in Appeal No.35 of 2013 delivered on 25th June, 2013**, has held that section 34(4) does not contemplate or vest power in Court to remand the proceedings back to the arbitral tribunal once the Court has set-aside the award.

80. The Full Bench of the Bombay High Court in **R.S. Jiwani vs. Ircon International Ltd. 2010 (1) Bom.C.R. 529**, has held that the Court has discretion under section 34 of the Arbitration Act which takes within its ambit power to set-aside the award partially or wholly depending upon the facts and circumstances of each case. Section 34(2) do not admit of interpretation which will divest the Court of the competent jurisdiction to apply the principle of severability to the award by the arbitral tribunal, legality of which is questioned before the Court. It is held that the Court vests powers under section 34 to

set-aside the award and even to adjourn the matter and to do such act and deeds by the arbitral tribunal at the instance of the party which would help in removing the grounds of attack for setting aside the arbitral award.

81. The Supreme Court in case of **Som Datt Builders Ltd. vs. State of Kerala, (2009) 10 SCC 259**, has held that if the arbitral tribunal does not give reasons under section 31(3), the Court can pass an order under section 34(4) and can give an opportunity to the arbitral tribunal to give reasons. It is held that by remitting the award to the arbitral tribunal for recording of reasons in support of its award would be fair and reasonable.

Whether the Court can pass an order for deposit of the awarded sum under section 34 of the Arbitration & Conciliation Act, 1996 :

82. The Bombay High Court in case of **AFCONS Infrastructure Ltd. vs. Board of Trustees of Port of Mumbai, 2014 (1) Bom.C.R. 794**, has held that the Court cannot pass an order for deposit of the arbitral award since the award remains un-executable and not enforceable during the pendency of the arbitration petition under section 34.

83. The Supreme Court in **National Aluminium Co. Ltd. vs. Pressteel & Infrastructure (P) Ltd. (2004) 1 SCC 540**, has held that there is automatic stay of the award during the period of pendency of the arbitration petition under section 34 and the award becomes un-executable until the challenge under section 34 is refused.

84. The Supreme Court in case of **State of Maharashtra vs. Hindustan Construction Co. Ltd., AIR 2010 SC, 1299**, held that incorporation of additional grounds by way of amendment in the application under section 34 does not tantamount to filing of fresh application in all situations and circumstances. If an application under

section 34 has been made within prescribed time, to grant leave to amend such application if the very peculiar circumstances of the case so warrant and it is so required in the interests of justice, amendment to the petition can be allowed.

85. The Supreme Court in case of **State of West Bengal & Ors. vs. Associated Contractors, (2015) 1 SCC 32**, has held that section 42 of the Arbitration Act is not applicable to the applications made before the judicial authority under section 8, applications filed before the Chief Justice for his delegate under section 11, applications filed before the Court inferior to the Principal Civil Court or to High Court having no original jurisdiction and the applications filed in a Court that has no subject matter jurisdiction. It is held that the applications filed under section 9 and also under section 34 fall within purview of section 42 since they are to be filed before the Court.

86. The Supreme Court in case of **West Bengal & Ors. vs. Associated Contractors**, has also held that the applications under section 11 is not to be moved before the Court as defined but before the Chief Justice either of the High Court or Supreme Court or their delegates as the case may be. Though the Chief Justice or his delegate decides judicially and not administratively, section 42 would not apply to the applications made before the Chief Justice or his delegate since the Chief Justice or his delegate is not Court as defined by section 2(1)(e). It is held that the decision of the Chief Justice or his delegate not being the decision of the Supreme Court or High Court, as the case may be, has no precedential value being a decision of the judicial authority, which is not a Court of record.
