Rights and Powers of Auditors

Important rights and powers of the auditors are as follows:

(1) **Right of access to books, accounts and Vouchers:** Every auditor of a company has been empowered to have free and complete access at all times to the books, accounts and vouchers of the company wherever kept.

(2) **Right to obtain information and explanations:** He is entitled to require from die officers of the company such information and explanations as he thinks necessary for the performance of his duties as auditor. [Section 227 (l)]

(3) **Right to visit branch offices and right of access to books etc:** Where the accounts of any branch office are audited by a person other than the company's auditor, the company's auditor is entitled to visit the branch office, if he deems it necessary to do so, for the performance of his duties as auditor and further he has a right of access at all times to the books and accounts and vouchers of the company maintained at the branch office.

(4) **Right to receive notice of general meeting and to attend them:** Section 231 provides that the auditor has got right to receive notice of and other communications relating to any general meeting of the company. He has also got right to attend any general meeting and to be heard on any part of the business which concerns him as auditor.

(5) **Right to receive remuneration [Sec 224 (8)]:** He is well within his right to receive remuneration for auditing the accounts of the company. Any officer of the company who fails to comply with die rules mentioned above may be fined upto Rs. 500/-

Duties of Auditors (Sec 227)

Section 227 (2) lays down the statutory duties of an auditor. The important duties are as follows.

(1) The auditor must acquaint himself with the Articles and Companies Act: The auditor is under duty bound to make himself acquainted with his duties under the Articles of the company and the Companies Act 1956.

(2) Auditor should report to the members of the company on the accounts examined by him: The main duty of an auditor is that he shall make a report to the members of the company on the accounts examined by him and on every balance-sheet and profit and loss account and on every other document declared by the companies Act to be part of or annexed to the balance-sheet or Profit and Loss account which are laid before the company in general meeting during his tenure of office and the report, shall state whether in his opinion and to the best of his information and according to the explanations given to him, the said accounts give the information required by this Act in the manner so required and give a true and fair view.

(3) Duty as watch dog: A company auditor must be honest and must exercise reasonable skill and care; otherwise he may be sued for damages. He must be a good watch dog, be alert and careful and ascertain the true position of the company's affairs by examining the books and by making inquiry. While he must exercise reasonable care, he is not bound to be a detective and approach his work with suspicion or with a foregone

conclusion that there is something wrong. He is a watchdog, but not a blood hound. He must not, however, confine himself merely to the task of arithmetical accuracy of the balance-sheet, but should ascertain by comparison with the books of the company, that it was properly drawn so as to show the correct financial position. The auditor is personally liable for neglecting wilfully to perform his duties imposed by law.

Thus, default to comply with requirements of Section 229 regarding his report, makes him liable to a fine up to Rs. 1,000/- and he must be sued by the company for damages.

Auditor's Report [Section 227]

After examining the accounts of the company an auditor is required to make a report to the members of the company. The report must state whether in his opinion and to the best of his information and according to the explanations given to him, the accounts give the information required by die Act and give a true and fair view of the state of the company's affairs and of the profit or loss.

Further, Section 227 (I-A) imposes an obligation on the auditor to inquire specially on the following matters :

(i) Whether the loans and advances given by the company, on the basis of security, have been properly secured or not and whether the terms of the loans given arc not prejudicial to the interests of the company.

ii) Whether, the assets of the company consist of shares, debentures and other securities have been sold at a price less than the purchase price of the company.

iii) Whether, the loans ad advances made by the company have been shown as deposits.

v) Whether, the personal expenses have been charged to revenue account.

v) If any shares have been allotted for cash, whether, cash has actually been received in respect of such allotment, and if no cash has been received, whether the position shown in the books and balance-sheet is correct, regular and not misleading

Further, the report must also mention:

i) Whether the auditor has obtained all information and explanations which to the best of his knowledge and belief were necessary for the purposes of his audit;

ii) Whether, proper books of account as required by law have been kept by the company or not; and proper returns adequate for the purposes of his audit have been received from branches not visited by him;

iii) Whether, the report on the accounts of any branch office audited by some person other than the company's auditor has been forwarded to him, and how hi has dealt with it in preparing his report;

iv) Whether, the Profit and Loss Account and balance sheet dealt with in the report are in agreement with the company's books of account and returns; and

v) Whether, the accounts examined by him, in his opinion give the information required by the Act and whether die balance-sheet and profit and loss Account laid before the company in general meeting render a true and fair view of the state of affairs of the company and of its profits or losses for the financial year of which they have been prepared.

Where any of the -above matters is answered in negative or with a qualification, the report must state in clear terms the reasons for it. {See 227 (4)].

Special Audit at the Instance of Central Government (Sec 233A)

It has been mentioned under Section 233-A of the Company's Act that — "Where the Central Government is of the opinion that the affairs of any company are not being managed in accordance with sound business principles or prudent commercial practices or the company is being managed in a manner likely to cause serious injury' or damage to the interests of the trade, industry or business to which it pertains, or the financial position of the company is such as to endanger its solvency, the Central Government may at any time by order direct that a special audit of the company's accounts for such period or periods as may be specified in the order shall be conducted by the Chartered Accountant specially appointed by the Government or by the Company's auditor. Such special auditor will re- port to the Central Government and the latter, on receipt of the report, shall take such action as is necessary. But if the Government does not take any action on the report within four months from the date of its receipt, it shall send to the company a copy of the report with its comments for circulation among the members of the company. The expenses of the special audit, as determined by the Central Government, shall be paid by the Company."

Audit of Cost Accounts [Sec 233-B]

Under Section 233-B the Central Government may by order direct that the audit of a manufacturing or mining companies may be conducted by an auditor who must be a Cost Accountant within the meaning of the Cost and Works Accountants Act. (I.C.WA.) 1959. If sufficient number of Cost Accountants arc not available the Government may by notification direct that for a specified period of time Chartered Accountants who will fulfil the prescribed qualifications may also conduct the audit of Cost Accounts of any company, Section 224-1 B says that the cost auditor must be appointed by the Board of directors of the company in accordance with the provisions of this section and with the previous approval of the Central Government.

A Cost Audit has been considered as an addition to the 'Routine Audit'. A cost auditor has the same powers and duties in relation to an audit conducted by him and suffers from some disqualifications as an auditor of a company appointed under Section 224 or Section 224-A. The auditor is to make report to the Central Government and also to for- ward a copy of the report to the concerned company. On receipt of the report of the cost auditor the Central Government may take such action as it considers necessary.

REVIEW QUESTIONS

1. What books of Account a company is bound to maintain? Do you know of any other statutory books that a company must maintain?
2. Discuss the provisions of the companies Act, 1956 relating to the preparation, adoption, circulation and filing of the annual accounts of a company.
3. Explain the provisions of the Companies Act, 1956, relating to (a) the special audit of a company (b) the audit of cost accounts of a company?
4. Discuss the duties and liabilities of an auditor in the light of the dictum that an auditor is "a watchdog, not a blood hound".
5. Write an explanatory notes on investigations under Sections 235 and 237 of the Companies Act, 1956.

6. State and explain the statutory duties of the auditors of a company.
7. State die provisions of die Companies Act, 1956, relating to qualifications, appointment, remuneration and removal of an auditor.
8. Who appoints (a) the first auditors of a company (b) auditors to fill casual vacancies (c) auditors at each annual general meeting.

PRACTICAL PROBLEMS

Attempt the following problem, giving reasons for the answer:

I The directors of a company are prosecuted for default in filing the balance-sheet and the Profit and Loss Account with the Registrar of Companies. Their defence is that the annual general meeting for the relevant year was not held for some reason and therefore, since the occasion for placing the same before the general meeting did not arise, they are not guilt)' of contravention of Section 220 The Registrar contends that the directors cannot take advantage of their own default in holding the annual general meeting and should, therefore he held guilty. What arc your views?

{Hint - The directors are guilty of violating the provisions of Section 220]

2. The auditors of a company made a confidential report to die directors calling their attention to the fact that the security for some loans was insufficient and that there was a difficulty in their realisation. They also reported that in their opinion no dividend should be paid for the year. In their report to the shareholders, however, they merely stated that the value of the assets was dependent upon realisation. A dividend of seven per cent was declared by the company out of capital are the auditors liable for their omission?

{Hint - yes, the auditors are liable and are guilty of misfeasance and liable to make good the loss. They are duty bound to report the facts to the shareholders. {Section 227}

CHAPTER - 29

INVESTIGATION, MAJORITY RULE AND MINORITY INTEREST

CHAPTER OUTLINE

INVESTIGATION

INSPECTOR'S REPORT

MAJORITY RULE AND MINORITY INTEREST

OPPRESSION AND MISMANAGEMENT

COMPROMISES AND ARRANGEMENTS

RECONSTRUCTION AND MERGER

5. Where the action represents an *infringement of the personal rights* of the shareholders, any individual shareholder affected by it may sue.
6. The minority shareholders are empowered to bring action with a view to *preventing the majority from oppression and mismanagement.*

Proper balance of the rights of majority and minority shareholders is essential for the smooth functioning of the company. But sometimes a group of persons or a particular person gains control of the majority of the shares and run the company to serve their own property to the detriment of the minority shareholders. In such cases, the minority shareholders can adopt the following measures.

1. Apply to the courts for the winding up of the company.
2. Apply to the court for appropriate orders giving relief without directing winding up.
3. Apply to the Central Government for relief.

The last two measures are discussed below.

Powers of the Court to grant relief in cases of Oppression: When the affairs of a company are being conducted in a manner prejudicial to public interest or in a manner oppressive to any member or members, an application may be made to the Court by the requisite number of members for appropriate relief. The Court may, on being satisfied that the company's affairs are being conducted in the manner alleged and that to wind up the company, though justified on the facts, would unfairly prejudice such members, make such orders as it thinks fit with a view to bringing to an end the matters complained of.

Prevention of Mismanagement : Any member of a company may apply to the court for appropriate relief on the ground : (a) that the affairs of the company are being conducted in a manner prejudicial to public interest, or in a manner prejudicial to the interests of the company; or (b) that by reason of a material change in the management or control of the company it is likely that the affairs of the company it is likely that the affairs of the company will be conducted in a manner prejudicial to public interest or to the interest of the company.

The Court may, if it is satisfied with the truth of the complaint, make such orders as it thinks fit in order to bring an end or preventing the matters complained of or apprehended.

Who may apply for Relief? The following members of a company have the right to apply to the court for relief.

(a) In the case of a company having a share capital (i) *not less than 100 members of the company*, or (ii) *not less than one-tenth of the total number of its members*, whichever is less or (iii) any member or members holding not less than one-tenth of the issued share capital on which all calls and other sums due have been paid.

(b) In the case of a company not having a share capital, *not less than one-fifth of the total number of its members.*

Powers of Court : The Court can pass any order which in its opinion is *just and equitable.* The court may provide for-

(1) the regulation of the conduct of the company's affairs in future;

(2) the purchase of the shares or interests of any members of the company by other members thereof or by the company;

(3) in the case of purchase of its shares by the company, the consequent reduction of its share capital;

(4) the termination, setting aside or modification of any agreement between the company and its managing director, or any other director and the manager upon such terms and conditions as may in the opinion of the court, be just and equitable in all circumstances of the case;

(5) the termination, setting aside or modification of any agreement between the company and any persons not referred to above provided due notice has been given to the person concerned and his consent obtained;

(6) the setting aside of any transfer, delivery of goods, payment, execution or other act relating to property of the company made within three months before the date of the application, it would make such order only if the circumstances are such that the transaction would have been deemed to be a fraudulent preference in an insolvency proceeding against an individual;

(7) any other matter for which, in the opinion of the Court, it is just and equitable that provision should be made.

Powers of the Central Government

Power to appoint directors : Where there is oppression or mismanagement, the shareholders can apply to the Central government for relief. This the Central Government can do of its own or on the application of 100 or more members of the company or by members holding 10% or more of the total voting powers of the company. On receipt of the application, the Central Government may make such inquiry as it thinks fit. If the Central Government is satisfied that the affairs of the company are being conducted in a manner oppressive to any members of the company, or which is prejudicial to the interests of the company or of public interest, it may appoint may number of directors to prevent oppression and mismanagement.

Power to prevent change in Board of directors. (Section 409): Power is vested with the Central Government to prevent any change in the Board of directors which is likely to affect the company in a prejudical manner. When a compliant is made to the Central Government by the managing director or any other director or the manager of a company that as a result of a change which has taken place or is likely to take place in the ownership of any shares held in the company, a change in the Board of directors is likely to take place which would prejudicially affect the affairs of the company, the Central Government may, after making such inquiry as it thinks fit, direct that no change in the Board for directors after the date of complaint shall have effect, unless confirmed by it.

COMPROMISES, ARRANGEMENTS AND RECONSTRUCTION

Compromises and Arrangements : The term '*compromise*' means a settlement of dispute or controversy by the method of making mutual concessions. Compromise implies the existence of a dispute which it seeks to settle. In a compromise the parties agree not to try it out but to settle it between themselves by a give and take arrangement. As in the case of individuals, companies also enter into compromise with their creditors or members by way of a mutual decision.

CHAPTER - 30

WINDING UP

CHAPTER OUTLINE

MODES OF WINDING UP

- COMPULSORY WINDING UP
- VOLUNTARY WINDING UP
- WINDING UP SUBJECT TO SUPERVISION OF COURT

OFFICIAL LIQUIDATOR

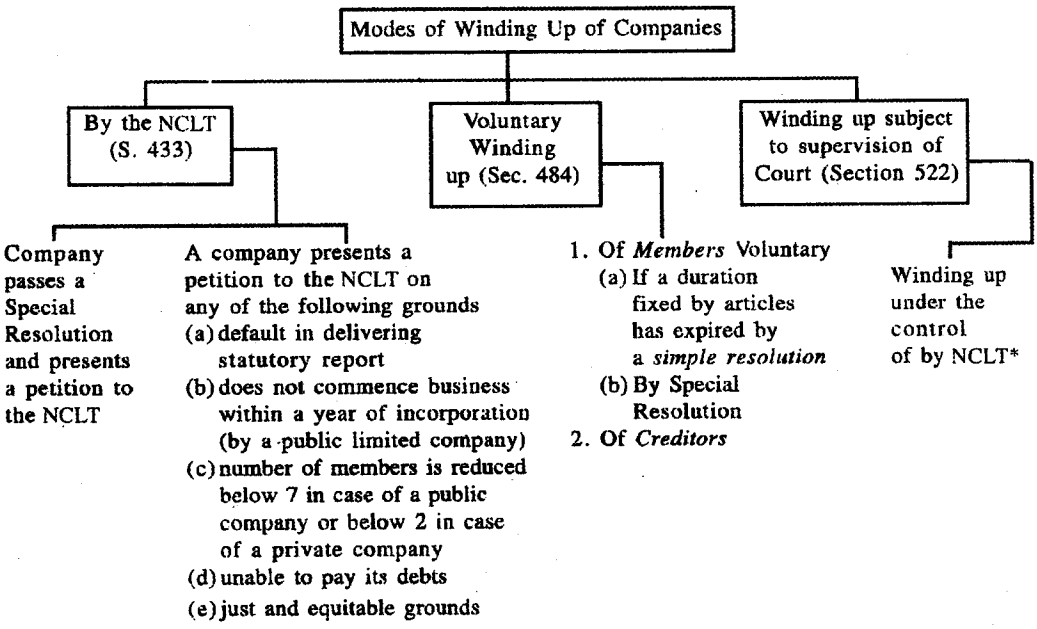
CONSEQUENCES OF WINDING UP

- PREFERENTIAL PAYMENTS
- DISSOLUTION OF A COMPANY
- DEFUNCT COMPANY

Winding up of a company is a process of putting an end to the life of a company. It is a proceeding by means of which a company is dissolved and in the course of such a dissolution its assets are collected, its debts are paid off out of the assets of the company or from contribution by its members, if necessary. If any surplus is left, it is distributed among the members in accordance with their rights.

MODES OF WINDING UP

There are three modes of winding up of a company. These are : (a) Compulsory winding up by the court, (b) Voluntary winding up, which is itself of two kinds: (i) Members' voluntary winding up, (ii) Creditors; voluntary winding up, (c) Winding up under the supervision of the court.



**Note*: Winding up under the control of court has been abolished by the companies (Amendment) Act of 2004.

COMPULSORY WINDING UP BY NCLT

A company may be wound up by an order of the NCLT. This is called *Compulsory Winding up*. Section 433 lays down the following grounds for the winding up of a company by the NCLT.

1. If the company has by a *special resolution* resolved that it may be wound up by the court.
2. If a company makes a *default in delivering the Statutory Report to the Registrar or in holding the statutory meeting*, the court may order winding up of the company either on the petition of the Registrar or on the petition of the Contributory.
3. Where a company *does not commence its business within a year* from its incorporation, or suspends its business for a whole year, the court may order for its winding up.

4. Where the *number of members is reduced below 7* in the case of a public company and below 2 in case of a private company, the court may order the winding up of the company.

5. The NCLT may order for the winding up of a company if it is *unable to pay its debts.* The basis of an order for winding up under this clause is that the company has *ceased to be commercially solvent.*

6. The last ground on which the NCLT can order the winding up of a company is when the NCLT is of the opinion that is *just and equitable* that the company should be wound up. The following are the instances where the Courts have exercised their discretion under this clause : (i) Where there is a *deadlock in the management*, (ii) Where it is impossible to carry on the business of the company *except at a loss,* (iii) Where the company has ceased to carry on its authorised business and is engaged in an *illegal business*, (iv) Where the object for which the company is formed is *impossible of further pursuit*, (v) where the *minority is being disregarded or oppressed*, (vi) where there is *lack of confidence in directors*, (vii) where a company has been *conceived and brought forth in fraud.*

Persons eligible to file petition for Winding up : The following persons can file a petition : 1. The Company; 2. Any Creditor or creditors including any contingent prospective creditor or creditors; 3. Any Contributory or contributories; 4. All or any of the aforesaid parties, together or separately; 5. The Registrar; 6. Any person authorised by the Central Government under Section 243.

Commencement of Winding up : The winding up of a company by the NCLT is deemed to commence at the time of the presentation of the petition for winding up. But where, before the presentation of the petition, a resolution has been passed by the company, for voluntary winding up, the winding up shall be deemed to have commenced at the time of the passing of the resolution. [Section 441].

Official Liquidator

Under the present Act, the only person who is competent to act as the liquidator in a winding up is the Official Liquidator. For the purpose of winding up, there shall be attached to each High Court an Official liquidator appointed by the Central Government, who may be either a whole time or part time officer. In District Courts, the official receiver will be the official liquidator. The Central Government may appoint one or more deputy or assistant official liquidators to assist the official liquidator. On a winding up order being made, the official liquidator, by virtue of his office, becomes the liquidator of the company.

Statement of Affairs of the Company : After a winding up order is made or the official liquidator is appointed as provisional liquidator, a statement as to the affairs of the company must be made out and submitted to the official liquidator. It must be in the prescribed form and verified by an affidavit. The statement must contain the following particulars : (a) The assets of the company stating separately the cash balance in hand and at the bank, if any, and the negotiable securities, if any, held by the company. (b) Debts and liabilities of the company. (c) The names, residences and occupations of its creditors, stating separately the amount of secured and unsecured debts. (d) The debts due to the company and the names, residences and occupations of the persons from whom they are due and the amount likely to be realised on account thereof. (e) Such further or other information as may be prescribed, or as the official liquidator may require.

Duties of the Liquidator : The liquidator of a company in compulsory winding up must perform such duties in reference thereto as the court may impose. These are as under :

1. To submit preliminary report
2. To take over company's assets
3. To convene meetings of creditors and contributories
4. To keep proper books
5. To submit accounts
6. To submit information in pending liquidation.

Powers of Official Liquidator : The powers of the liquidator can be divided into two classes : (a) those which can be exercised with the sanction of the NCLT; and (b) those which do not require such sanction.

Powers to be exercised with the sanction of the NCLT : (i) To institute or defend suits, prosecutions or other legal proceedings in the name and on behalf of the company. (ii) To carry on business of the company so far as it may be necessary for the beneficial winding up of the company. (iii) To sell the immovable and movable property and actionable claims of the company by public action or private contract. (iv) To raise money on the security of any asset of the company. (v) To do all other acts as may be necessary to wind up the company and to distribute assets.

Powers to be exercised without the sanction of the NCLT : The following powers do not require sanction of the court for their exercise : (i) To do all acts and execute in the name of the company all deeds, receipts, documents etc. and to use the company's seal for that purpose, where necessary. (ii) To inspect the records and returns of the company on the files of the Registrar without payment of any fees. (iii) to prove, rank and claim in the insolvency of any contributory and to receive dividend out of his estate. (iv) to draw, accept, make and endorse bill of exchange, hundi or promote in the name of and on behalf of the company. (v) To take out in his official name, letters of administration to any deceased contributory and in his official name to do all things necessary for obtaining any money from a contributory and in his official name to do all things necessary for obtaining any money from a contributory or his estate. (vi) To appoint agents where necessary.

Contributory

Section 428 defines the term '*contributory*'. It means every person who is liable to contribute to the assets of the company in the event of its being wound up and includes the holders of fully paid up shares. A debtor to the company is not a contributory nor a person who guarantees such debts. When a company goes into liquidation, every member whether past or present, has to contribute to the assets of the company. The list of contributories is made out in two parts A and B in accordance with section 426. The *A list* comprises the present members and the *B list* those of past members, who have ceased to be members within one year preceding the winding up. The 'A' contributories, i.e., those in the list of present members are primarily liable for everything and must be first individually exhausted before any 'B' contributory can be called upon.

A past member is not required to contribute in the following cases : (a) Where he had ceased to be a member for a period of one year or upward before the commencement of winding up. (b) Where the debt or liability of the company was incurred after he ceased to be a member.

(c) Where the present members are able to satisfy the contributions required to be made by them under the Act.

VOLUNTARY WINDING UP

The object of a voluntary winding up is that the company and its creditors are left to settle their affairs without going to the NCLT, but they may apply to the NCLT for any directions or orders if and when necessary. This form of winding up is by far the most common and the most popular form. A company may be wound up voluntarily when-(a) the period fixed by the articles for the duration of the company has expired or an event upon which the company is to be wound up has happened and the company in general meeting has passed a special resolution; (b) the company has for any cause, whatever passed a *special resolution* to wind up voluntarily (Section 484). The company may be wound up by special resolution even if it is prosperous.

A voluntary winding up commences from the date of the passing of the resolution. (Section 486). From the commencement of the winding up, the company ceases to carry on its business except so far as may be required for the beneficial winding up of such business. But the corporate status and powers continue until it is dissolved.

Distinction between Members' Voluntary Winding up and Creditors' Voluntary Winding up.

	Members' Voluntary Winding up		*Creditor's Voluntary Winding up*
1.	Such winding up takes place only when the company is in a position to pay is debts.	1.	Such winding up takes place only in case when the company is not in a position to pay its debts.
2.	Declaration of solvency is made by the Directors	2.	No such declaration is made.
3.	Only meeting of members is called	3.	Meeting of the members and creditors is called.
4.	The liquidator is appointed and remuneration is fixed by the company itself	4.	The liquidator in fact is appointed by the creditors and remuneration is fixed by the committee of inspection.
5.	No committee of inspection is appointed.	5.	Committee of inspection is appointed.
6.	The liquidator can exercise some powers with the sanction of a special resolution of the company	6.	The liquidator exercises powers with the sanction of the court.
7.	Meeting of members is called on completion of proceedings of winding up.	7.	Meeting of members and creditors is called when the proceeding for winding up has been completed

Types of Voluntary Winding Up : A voluntary winding up may be: (a) A members' voluntary winding up. (b) A creditor's voluntary winding up.

Members's Voluntary Winding Up and Declaration of Solvency : Section 488 provides that where it is proposed to wind up a company voluntarily, the directors or a majority of them, may.

Dissolution of a Company (Sec. 481)

The Court makes an order for the dissolution of a company on any of the grounds stated below : (i) when the affairs of a company have been completely wound up, or (ii) when the court is of the opinion that the liquidator cannot proceed with the winding up of a company for want of funds or assets; or (iii) when it is just and reasonable in the circumstances of the case that an order of dissolution of the company should be made, or (iv) for any other reason whatsoever.

The company is dissolved from the date of the order of the Court. Within 30 days of the order of the court, the liquidator must send a copy of the order to the Registrar, failing which he is punishable with fine which may extend to Rs. 50 for every day of default.

Where a company has been dissolved by process of winding up, or by order or court under Section 481 or for facilitating reconstruction and amalgamation or otherwise, the Court may at any time within 2 years of the date of dissolution make an order declaring the dissolution to have been void. A certified copy of such an order shall be filed with the Registrar within 30 days after the making of such an order.

Defunct Company

A '*defunct company*' means a company which has never commenced business or which has ceased to carry to business. Under Section 560, the Registrar of Companies can strike the name of such a company from the Companies' Register and for striking off the name, he is supposed to adhere to the following steps : 1. He has to send to the company by post a *letter* enquiring whether the company is carrying on business or is in operation. 2. If no reply is received within one month, then he must send within the next 14 days a *registered letter* referring to the first letter and stating that no answer thereto has been received and that if an answer is not received to the second letter within one month from the date thereof, a *notice* will be published in the Official Gazette with a view to striking the company's name off the Register. 3. If no satisfactory reply is received within one month from the date thereof, he must send to the company by post and publish in the Official Gazette a notice stating that unless cause is shown to the contrary, the name of the company will be struck off the Register after 3 months and the company will be dissolved.

REVIEW QUESTIONS

1. What do you understand by the winding up of a company? What are the various modes of winding up?
2. Discuss the circumstances in which a company may be wound up by the Court.
3. Under what circumstances will the Court order a compulsory winding up of a company? What is the effect of the winding up of a company?
4. Explain the grounds on which the Court would consider it just and equitable to wind up a company.
5. Who can present a petition for the winding up a company by the Court? Under what circumstances each may present a petition?
6. State the procedure for the members voluntary winding up of a company.
7. Who is a contributory? What is the nature and extent of his liability?
8. Describe the duties and powers of liquidator appointed by the Court.
9. Explain the provisions of the Companies Act in respect of the creditor's voluntary winding up. How does it differ from a member's voluntary winding up?

10. What do you understand by 'winding up subject to the supervision of the court?

11. Write short notes on (a) Defunct company; (b) Official Liquidator; (c) Contributory; (d) Preferential Payments.

PRACTICAL PROBLEMS

1. On December 31, 2001, a company creates a floating charge in consideration of a previously existing debt of Rs. 25,000 and a future advance of Rs. 75,000. The company is wound up on October 1, 2001. Discuss the right of charge-holder.

   [*Hint :* The creditor in this case will have to prove that the company was solvent on December 31, 2001, after the creation of charge. If it is not proved, the charge shall be void. Section 534 of the Act].

2. A company, without passing a resolution in its general meeting and getting sanction of the Court, allotted 500 shares at a discount to 'G', its Chairman, and placed his name on the Register of Members. In the winding up of the company. 'G' claimed that he was not liable to be made a contributory as the allotment was made in contravention of the provisions of the Companies Act, 1956. Is G's contention justified in any way?

   [*Hint :* The liability of a contributory is not ex-contractual but is ex-ledge. Therefore, G's contention is not justified. He is not allowed to raise any objections regarding the validity of or irregularities in the allotment after winding up has commenced.]

3. A company's trade has been suspended temporarily owing to the trade depression but it has bonafide intention to continue its operations when conditions improve. A prayer was made to the Court for winding up of the company. Decide.

   [*Hint :* The request for winding up should not be accepted by the Court. Section 433 of the Companies Act, 1956].

4. In a petition for winding up of a company, the Registrar of Joint Stock Companies state that since company's liabilities exceed its assets it was unable to pay its debts. However, evidence as to the working of the company reveals that it has been making profits and is likely to earn it in future too, and there is not instance when the company refused to meet any demand of its creditors. How will the Court decide?

   [*Hint :* The petition of the Registrar shall be rejected by the Court because insufficiency of assets to meet liabilities by itself is not a ground for an order of winding up].

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THE ARBITRATION AND CONCILIATION ACT, 1996

Arbitration is a settlement of dispute by the decision of one or more persons called arbitrators. It is an arrangement for investigation and settlement of a dispute between opposing parties by one or more unofficial persons chosen by the parties. In arbitration some dispute is referred by the parties for settlement to a tribunal of their own choosing. The dispute is not submitted for decision to the ordinary courts but to a domestic tribunal. It is thus a method of settling the disputes in a quasi-judicial manner. The essence of arbitration is that the arbitrator decides the case and his award is in the nature of a judgement. Arbitration is a speedy and inexpensive method of settling the disputes between the parties.

Keeping in line with the international trend, the Government of India has also enacted the Arbitration and Conciliation Act, 1996 and reprealed the three earlier enactments namely, the Arbitration (Protocol and Convention) Act, 1937; the Arbitration Act, 1940; and the Foreign Award (Recognition and Enforcement) Act, 1961.

Objectives of the Act

The main objectives of the Act are as under: -

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

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

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

(iv) to ensure that the arbitral tribunal remains with in the limit of jurisdiction;

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

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

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

(viii) to provide that a settlement agreement reached by the parties as a result of conciliation proceedings will have the same status and effect as an arbitral award on agreed terms on the substance of the dispute rendered by an arbitral tribunal; and

(ix) to provide that, for purposes of enforcement of foreign awards, every arbitral award made in the country to which one of the two international Conventions relating to foreign arbitral awards to which India is a party applies, will be treated as a foreign award.

PART I

GENERAL PROVISIONS REGARDING DOMESTIC ARBITRATION (SECTION 2 to 43)

ARBITRATION AGREEMENT

Arbitration means any arbitration whether or not administered by permanent arbitral institution. [Section 2(a)].

"Arbitration agreement" means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. [Section 7(1)].

A person appointed to adjudicate the differences and disputes between the parties is called an *arbitrator* or *arbitral tribunal,* the proceedings before him are called *arbitration proceedings.* The decision of the arbitrator is called *award.*

Essentials of Arbitration Agreement

1. It must be in writing. [Section 7(3)]. Like the old law, the new law also requires the arbitration agreement to be in writing. It also provides in section 7(4) that an exchange of letters, telex, telegrams or other means of tele-communications can also provide a record of such an agreement. Further, it is also provided that an exchange of claim and defence in which the existence of an arbitration agreement is alleged by one party and not denied by the other, will also amount to be an arbitration agreement.

It is not necessary that such written agreement should be signed by the parties. All that is necessary is that the parties should accept the terms of an agreement reduced in writing. The naming of the arbitrator in the arbitration agreement is not necessary. N o particular form or formal document is necessary.

2. It must have all the essential elements of a valid contract. An arbitration agreement stands on the same footing as any other agreement. Every person capable of entering into a contract maybe a party to an arbitration agreement. The terms of the agreement must be definite and certain. If the terms are vague it is bad for indefiniteness.

3. The agreement must be to refer a dispute, present or future, between the parties to arbitration. If there is no dispute, there can be no right to demand arbitration. A dispute means an assertion of a right by one party and repudiation thereof by another. A point as to which there is no dispute cannot be referred to arbitration. The dispute may relate to an act of commission or omission, for example, withholding a certificate to which a person is entitled or refusal to register a transfer of shares.

Under the present law, certain disputes such as matrimonial disputes, criminal prosecution, questions relating to guardianship, questions about validity of a will, etc. are treated as not suitable for arbitration. Section 2(3) of the new Act maintains this position. Subject to this qualification section 7(1) of the new Act makes it permissible to enter into an arbitration agreement "in respect of a defined legal relationship, whether contractual or not."

4. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement. [Section 7(2)].

MODES OF ARBITRATION

(a) Arbitration without the intervention of the court. [Sec.3 to 19]

(b) Arbitration with the intervention of the court when there is no suit pending [Sec.20]

(c) Arbitration with the intervention of the court where a suit is pending. [Sec. 21 to 25]

(7) Proceedings relating to the appointment of a guardian to a minor;

(8) Questions relating to offences affecting public at large;

(9) Lunacy proceedings;

(10) Questions relating to the genuineness of a will;

(11) Matters of a criminal nature.

COMPOSITION OF ARBITRAL TRIBUNAL

An arbitrator is a person selected by mutual consent of the parties to settle the matters in controversy between them. A person appointed to adjudicate the difference between two or more parties is called an arbitrator. An arbitrator is a tribunal chosen by the consent of the parties. The person who is so appointed must also give his consent to act as an arbitrator.

Number of Arbitrators (Section 10)

The parties are free to determine the number of arbitrators provided that such number shall not be an even number. If the parties fail to make the determination the arbitral tribunal shall consist of a sole arbitrator.

Under the old and new law, the mode of appointment of arbitrators and their number is left to the agreement by the parties. But unlike old law, the new law envisages only odd number of arbitrators. This will do away with the system of having two arbitrators and one umpire prevalent under the old law. Section 10 of the new Act provides that there shall be only a sole arbitrator, where the parties do not specify the number of arbitrators.

Appointment of Arbitrators (Section 11)

A person of any nationality may be an arbitrator, unless otherwise agreed by the parties. The parties are free to agree on a procedure for appointing the arbitrator or arbitrators.

Presiding arbitrator. Failing any agreement on a procedure, in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two appointed arbitrators shall appoint the third arbitrator who shall act as the pesiding arbitrator [Sec: 11(3)].

If the appointment procedure agreed on by the parties applies and: -

(a) a patty fails to appoint an arbitrator within thirty days from the receipt of a request to do so from the other party; or

(b) the two appointed arbitrators fail to agree on the third arbitrator within thirty days from the date of their appointment.

The appointment shall be made, upon request of a party, by the Chief Justice or any person or institution designated by him. [Sec.11(4)].

Failure of Parties to agree on procedure: It may so happen that the parties may fail to agree on the procedure for the appointment of the arbitrator or arbitrators. In such a case, a sole arbitrator, if the parties fail to agree on the arbitrator within thirty days from receipt of a request by one party from the other party to so agree the appointment shall be made, upon request of a party, by the Chief Justice or any person or institution designated by him [Sec. 11(5)].

Sometimes, under an appointment procedure agreed upon by the parties:-

(a) a party fails to act as required under that procedure; or

(b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or

(c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure.

In such a case, a party may request the Chief Justice or any person or institution designated by him to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment. [Sec. 11(6)].

A decision on a matter entrusted to the Chief Justice or the person or institution designated by him in final. [(Sec. 11(7)].

Qualification for the appointment of arbitrator

The Chief Justice or the person or institution designated by him, in appointing an arbitrator, shall have due regard to –

(a) any qualifications required of the arbitrator by the agreement of the parties; and

(b) other considerations as the likely to secure the appointment of an independent and impartial arbitrator. [sec 11 (8)].

In the case of appointment of sole or third arbitrator in an international commercial arbitration, the Chief Justice of India or Inc person or institution designated by him may appoint an arbitrator of a nationality other than the nationalities of the parties where the parties belong the different nationalities. [Sec 11(9)].

The Chief Justice may make such scheme as he may deem appropriate for dealing with above matters [Sec. 11 (10)].

Grounds for Challenge (Section 12)

When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose in writing any circumstances likely to give rise to justifiable doubts as to his independence or impartiality. [Sec 12(1)].

Further, an arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall, Without delay, disclose to the parties in writing and circumstances referred to above unless they have already been informed by him [Set:. 12 (2)]. Thus, under the new Act, an arbitrator before accepting his appointment, is required to disclose to the parties in writing about such matters which may create doubts about his impartiality or independence.

An arbitrator may be challenged only if –

(a) circumstances exist that give rise to justifiable doubts as to his independence or impartiality, or

(b) he does not possess the qualifications agreed to by the parties [Sec. 12(3)].

Where above mentioned doubts exists, his appointment can be challenged. Similarly, where the arbitrator does not possess the required or the agreed qualification for the appointment, his appointment can be challenged as per section 12 and 13 of the new Act.

Interim measures ordered by arbitral tribunal **(Section 17)**

Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order a party to take any interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject-matter of the dispute. Further, the arbitral tribunal may require a party to provide appropriate security in connection with a measure so ordered.

Section 17 provides for the taking of interim measures in respect of the subject-matter of the dispute by the arbitral tribunal. However, the parties may by agreement exclude the exercise of such a power by the arbitral tribunal.

The Arbitration Act, 1940, did not confer any specific powers on arbitrators to take interim measures. It was, however, open on the parties to confer such powers on the arbitrator.

CONDUCT OF ARBITRAL PROCEEDINGS

Equal treatment of Parties (Section 18)

The parties shall be treated with equality and each party shall be given a full opportunity to present his case. Thus, section 18 laws down two obligations on the arbitral tribunal i.e. to treat the party with equality and to give full opportunity to each party to present his case. It constitutes a fundamental principle which is applicable to entire proceedings. The principle of equality and full opportunity to present the case should be observed by the parties also, when laying down any rules of procedure. An agreed procedure which violates the fundamental principle of equality and grant of opportunity to be heard, is null and void and an award passed in violation of this principle can be set aside.

Determination of rules of Procedure (Section 19)

The arbitral tribunal shall not be bound by the Code of Civil Procedure, 1908 or the Indian Evidence Act, 1872.

The arbitral tribunal is not bound to follow the procedure as followed by a Court. However, the arbitral tribunal is to observe fundamental principles underlying the Code of Civil Procedure and the Evidence Act. The procedure adopted by arbitral tribunal should be according to the principles of natural justice.

Section 19(2) provides that subject to provisions of the Part-**I**, the parties are free to agree on a procedure to be followed by the arbitral tribunal in conducting its proceedings. Parties generally incorporate arbitration rules of a particular institution by reference to the same in the agreement. The arbitral tribunal does not have any discretion where any such rule has been provided for in the agreement.

The arbitral tribunal may conduct the proceeding in the manner it considers appropriate, but such power is subject to two exceptions mentioned below: -

(1) The arbitral tribunal cannot conduct the proceedings in a manner which is in violation of a mandatory provisions of the law.

(2) The arbitral-tribunal cannot conduct proceedings in a manner which is in violation of the procedure agreed by the parties if any.

However, it there was no agreed rules by the parties, the arbitral tribunal has power to determine the admissibility, relevance, materiality and weight of any evidence and make decision in the manner it considers appropriate [Sec. 19(4)].

Place of Arbitration (Section 20)

Section 20(1) provides that parties are free to agree on the place of arbitration. Where parties have not agreed on the place of arbitration the arbitral tribunal has to determine the place of arbitration having regard to the circumstances of the case, including he convenience of the parties. Section 31(4) provides. A mandatory requirement and obligation on the arbitral tribunal to state the place of arbitration as determined in accordance with section 20 in the award and award is then deemed to have been made at that place.

The arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of documents, goods or other properly. [(Sec. 20(1)].

Place of arbitration in an arbitration other than international commercial arbitration i.e. in domestic arbitration does not pose any problem. Parties may agree on the place of arbitration anywhere in India. But in international commercial arbitrations, place of arbitration has legal implications in terms of law applicable to arbitration.

Commencement or Arbitral Proceedings (Section 21)

Section 21 gives freedom to the parties to agree on the date of commencement of arbitral proceedings. The arbitral proceedings, subject to agreement of party, in respect of a particular dispute, commence on the date, on which a request for the dispute to be referred to arbitration is received by the respondent. A request for reference of disputes to arbitration is different from request for the appointment of arbitrator of constitution or arbitral tribunal.

Language (Section 22)

Section 22 gives freedom to parties to agree upon the language or languages to be used in the arbitral proceedings. The arbitral tribunal, subject to an agreement of parties, has power to determine the language or languages to be used in the arbitral proceedings. The arbitral tribunal may ask for translation of documentary evidence into the agreed language.

Statement of claim and defence (Section 23)

Section 23 is a mandatory provision. The claimant should state the facts supporting his claim, the points at issue and the relief or remedies sought and the respondent should state his defence in respect of these particulars. However, the parties have been given freedom to agree on required elements of those statements. The parties have also been given freedom to agree upon the period of time for submission of those statements. The arbitral tribunal has power to determine the period of time for submission of these statements where parties have not agreed on the same. [Section 23(1)].

The statement Contemplated by section 23 need not be in writing.

The parties may submit with their statements all documents they consider to be relevant or may add a reference to documents or other evidence they will submit. [Sec. 23(2)].

The parties may agree to amend or supplement their statements during the course of arbitral proceedings. The arbitral tribunal has exclusive discretion to restrict supplementary claim and defences having regard to the delay in making it. [Sec. 23(3)].

If, during arbitral proceedings, the parties settle the dispute, the arbitral tribunal shall terminate the proceedings and, if requested by the parties and not objected to by the arbitral tribunal, record the settlement in the form of an arbitral award on agreed terms. [Sec. 30(2)]

An arbitral award on agreed terms shall be made in accordance with Section 31 and shall state that it is an arbitral award. [Sec. 30(3)]

An arbitral award on agreed terms shall have the same status and effect as any other arbitral award on the substance of the dispute. [Sec. 30(4)]

Section 30 of the Act allows arbitral tribunal to resort to mediation, conciliation or other procedures for settlement of the disputes, during the arbitration proceedings. The conciliation as envisaged in this section is different from the conciliation that has been provided under sections 61- 81 of the Act. The conciliation under Part **III** (Sections 61- 81) is separate and independent proceedings as against informed and flexible proceedings under this section.

Termination of Proceedings (Section 32)

The arbitral proceedings shall be terminated by the final arbitral award. [Sec. 32(1)]. It shall also be terminated by an order of the arbitral tribunal where -

(a) the claimant withdraws his claim, unless the respondent objects to the order and the arbitral tribunal recognises a legitimate interest on his part in obtaining a final settlement of the dispute,

(b) the parties agree on the termination of the proceedings, or

(c) the arbitral tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible. (Sec. 32(2)]

The mandate of the arbitral tribunal shall terminate the termination of the arbitral proceedings. [Sec. 32(3)]

AWARD

Award means an arbitral award. It is a final decision or judgement of the arbitral tribunal on all matters referred to it. An award in order to be valid must be final, certain and must decide all the matters referred to. An award by the arbitrator is as binding in its nature as the judgement of a court.

Arbitral award includes an interim award

There are two types of decisions to be made by the arbitral tribunal i.e. decision on the merits of the dispute and decision on questions of procedure. Decision on merits of dispute is to be made by the, majority of members of the arbitral tribunal but question of procedure can be decided by the presiding arbitrator, if authorised by the parties or all members of the arbitral tribunal. In the absence of such authorisation by the parties or other members of the tribunal, the decision on question of procedure is also to be made by majority of members of the arbitral tribunal. In the absence of such authorisation by the parties or other members of the tribunal, the decision on question of procedure is also to be made by majority of members of the arbitral tribunal. The presiding arbitrator has not been given any special power and he acts like any other arbitrator. All arbitrators have been given equal power irrespective of mode of appointment.

Essentials of an Arbitral Award

Section 31 deals with the form and contents of the arbitral award. The provisions of Section 31 are discussed in the form of essentials which are as under: -

1. An arbitration agreement is required to be in writing. Similarly, a reference to arbitration and award is also required to be made in writing. The arbitral award is required to be made on stamp paper of prescribed value. An oral decision is not an award under the law.
2. The award is to be signed by the members of the arbitral tribunal. However, the signatures of majority of all the members of the tribunal are sufficient if the reason for any omitted signature is stated.
3. Unless the agreement provides otherwise, the arbitrator must give reasons for the award. Thus, the making of an award is a rational process which is accentuated by recording the reasons. However, there are two exceptions where award without reasons is valid i.e.
   (a) where the arbitration agreement expressly provides that no reasons are to be given, or
   (b) where the award has been under section 30 of the new Act i.e where the parties settled the dispute and the arbitral tribunal has recorded the settlement in the form of an arbitral award on agreed terms.
4. The award should be dated i.e. the date of the making of the award should be mentioned in the award.
5. The arbitral tribunal shall state the place of arbitration in the award.
6. The arbitral tribunal may include in the sum for which award is made, interest up to the date of award and also a direction regarding future interest. The rate of interest shall be eighteen per cent.
7. The award may also include decisions and directions of the arbitrator regarding the cost of the arbitration.
8. After the award is made, a signed copy should be delivered to each party for appropriate action.
9. The arbitral tribunal may, at any time during the arbitral proceedings, make an interim arbitral award on any matter with respect to which it may make a final arbitral award.

Finality of Arbitral Awards (Section 35)

An arbitral award shall be final and binding on the parties and persons claiming under them respectively. Now, under the new Act, by virtue of section 35 of the Act, the award made by the Arbitrator shall be final and binding on the patties itself and shall be decree without being made a decree by the court.

CORRECTION, INTERPRETATION AND SETTING ASIDE OF AN AWARD

In arbitration the parties choose their own arbitrator to be the judge in the dispute between them. They are bound by the decision given by such an arbitral tribunal. Such an award is not

(a) granting or refusing to grant any measure under section 9 ;

(b) setting aside or refusing to set aside an arbitral award under section 34 [Sec. 37(1)].

An appeal shall also lie from an order granting or refusing to grant an interim measure under section 17 to a Court. [Sec. 37(2)].

No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or take away any right to appeal to the Supreme Court. [Sec. 37(3)].

MISCELLANEOUS

Deposits (Section 38)

The arbitral tribunal may fix the amount of the deposit or supplementary deposit, as the case may be, as an advance for the costs referred to in sub-section (8) of Section 31, which it expects will be incurred in respect of the claim submitted to it where, apart from the claim, a counter-claim has been submitted to the arbitral tribunal, it may fix separate amount of deposit for the claim and counter-claim. [Sec. 38(1)].

The deposit for cost shall be payable in equal shares by the parties. However, where one party fails to pay his share of the deposit, the other party, may pay that share further, where the other party also does not pay the aforesaid share in respect of the claim or the counter-claim, the arbitral tribunal may suspend or terminate the arbitral proceedings in respect of such claim or counter-claim, as the case may be. [Sec. 38(2)].

Upon termination of the arbitral proceedings, the arbitral tribunal shall render an accounting to the parties of the deposits received and shall return any unexpended balance to the party or parties, as the case may be. [Sec. 38(3)].

Lien on arbitral award and deposits as to Costs (Section 39)

The arbitral tribunal shall have a lien on the arbitral award for any unpaid costs of the arbitration. [Sec. 39(1)].

If in any case an arbitral tribunal refuses to deliver its award except on payment of the costs demanded by it, the Court may, on an application in this behalf, order that the arbitral tribunal shall deliver the arbitral award to the applicant on payment into Court by the applicant of the costs demanded, and shall after such inquiry, if any, as it thinks fit, further order that out of the money so paid into court there shall be paid to the arbitral tribunal by way of costs such sum as the court may consider reasonable and that the balance of the money, if any, shall be refunded to the applicant. [Sec. 39(2)].

An application under sub-section (2) maybe made by any party unless the fees demanded have been fixed by written agreement between him and the arbitral tribunal, and the arbitral tribunal shall be entitled to appear and be heard on any such application. [Sec. 39(3)].

The Court may make such orders as it thinks fit respecting the costs of the arbitration where any question arises respecting such costs and the arbitral award contains no sufficient provision concerning them. [Sec. 39(4)].

Jurisdiction (Section 42)

Where with respect to an arbitration agreement any application under this Part has been made in the Court, that Court alone shall have jurisdiction over the arbitral proceedings and all

subsequent applications arising out of that agreement and the arbitral proceedings shall be made in the Court and in no other Court.

Limitations (Section 43)

The Limitation Act, 1963 shall apply to arbitrations as it applies to proceedings in court and an arbitration shall be deemed to have commenced on the date referred in Section 21.

Where an arbitration agreement to submit future disputes to arbitration provides that any claim to which the agreement applies shall be barred unless some step to commence arbitral proceedings is taken within a time fixed by the agreement, and a dispute arises to which the agreement applies, the Court, if it is of opinion that in the circumstances of the case undue hardship would otherwise be caused, and notwithstanding that the time so fixed has expired, may on such terms, if any, as the justice of the case may require, extend the time for such period as it thinks proper .

Where the Court orders that tan arbitral award be set aside, the period between the commencement of the arbitration and the date of the order of the Court shall be excluded in computing the time prescribed by the Limitation Act, 1963 for the commencement of the proceedings (including arbitration) with respect to the dispute so submitted.

PART II
ENFORCEMENT OF CERTAIN FOREIGN AWARDS (SECTIONS 44 TO 60)

Before the passing of the Arbitration and Conciliation Act, 1996, foreign awards were deal with in the following two enactments, namely-

1. The Arbitration (Protocol and Convention) Act, 1937, and
2. The Foreign awards (Recognition and Enforcement) Act, 1961.

Both these Acts have been repeated by the Arbitration and Conciliation Act, 1996, which came to into force on the 25th day of January, 1996.

Part II of the Act containing sections 44 to 60 deals with the enforcement of certain foreign awards. Chapter 1 containing sections 44-52 deals with the awards under New York Convention on the Recognition and Enforcement of Foreign Arbitration Award (1958), whereas Chapter-**II** containing sections 53-60 deals with awards under Geneva Convention on the Execution of Foreign Arbitral Awards. The Act repeals two earlier enactments relating to enforcement of foreign awards, yet re-enacts operative portions of the repealed Acts.

There is no change in the legal position of enforcement of foreign arbitral awards in India.

International Commercial arbitration [Sec. 2(f)]

It means an arbitration relating to disputes arising out of legal relationship, whether contractual or not, considered as commercial under the law in force in India and where at least one of the parties is -

(i) an individual who is a national of, or habitually resident in, any country other than India; or

(ii) a body corporate which is incorporated in any country other than India; or

(iii) a company or an association or a body of individuals whose central management and control is exercised in any country other than India; or

proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security. [Sec. 48(3)].

Enforcement of foreign awards (Section 49)

Where the Court is satisfied that the foreign award is enforceable under this Chapter, the award shall be deemed to be a decree of that Court.

Appealable orders (Section 50)

An appeal shall lie from the order refusing to -

(a) refer the parties to arbitration under Section 45;

(b) enforce a foreign award under Section 48;

To the Court authorised by law to hear appeals from such order. [Sec. 50(1)].

No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or take aware any right to appeal to the Supreme Court [sec. 50(2)].

Saving (Section 51)

Nothing in this Chapter shall prejudice any rights which any person would have had of enforcing in India of any award or of availing himself, in India of any award if this Chapter has not been enacted.

GENEVA CONVENTION AWARDS (Sections 53 to 60)

Foreign award (Section 53)

In the Chapter **II** of Part **III** "foreign award" means an arbitral award on differences relating to matters considered as commercial under the law in force in India made after the 28th day of July 1924 -

(a) in pursuance of an agreement for arbitration to which the Protocol set forth in the Second Schedule applies, and

(b) between persons of whom one is subject to the jurisdiction of some one of such Powers as the Central Government, being satisfied that reciprocal provisions have been made, may, by notification in the Official Gazette, declare to be parties to the Convention set forth in the Third Schedule, and of whom the other is subject to the jurisdiction of some other of the Powers aforesaid, and

(c) in one of such territories as the Central Government, being satisfied that reciprocal provisions have been made, may, by like modification, declare to be territories to which the said Convention applies.

For the purposes of Chapter **II** of Part **III** an award shall not be deemed to be final if any proceedings for the purpose of contesting the validity of the award are pending in the country in which it was made.

Power of judicial authority to refer parties to arbitration (Section 54)

Not withstanding anything contained in Part **I** or in the Code of Civil Procedure, 1908 a judicial authority, on being seized of a dispute regarding a contract made between persons

to whom Section 53 applies and including an arbitration agreement, whether referring to present or future differences, which is valid under that section and capable of being carried into effect, shall refer the parties on the application of either of them or any person-claiming through or under him to the decision of the arbitrators. Such reference shall not prejudice the competence of the judicial authority in case the agreement or the arbitration cannot proceed or becomes inoperative.

Foreign awards when binding (Section 55)

Any foreign award which' would be enforceable under this Chapter shall be treated as binding for all purposes on the persons as between whom it was made, and may accordingly be relied on by any of those persons by way of defence, set off or otherwise in any legal proceedings.

Evidence (Section 56)

The party applying for the enforcement of a foreign award shall, at the time of application produce before the Court -

(a) the original award or a copy thereof duly authenticated in the manner required by the law of the country in which it was made;

(b) evidence proving that the award has become final; and

(c) such evidence as may be necessary to prove that the conditions mentioned in clauses *(a)* and *(c)* of sub- section, (1) of Section 57 are satisfied.

(2) Where any document requiring to be produced under sub- section (1) is in a foreign language, the party seeking to enforce the award shall produce a translation into English certified as correct by a diplomatic or consular agent of the country to which that party belongs or certified as correct in such other manner as may be sufficient according to the law in force in India.

In this section and all the following sections of this Chapter, "Court" means the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil juridiction, having jurisdiction over the subject-matter of the award if the same has 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.

Conditions for enforcement of foreign awards (Section 57)

In order that a foreign award may be enforceable under this Chapter it shall be necessary that -

(a) the award has been made in pursuance of a submission to arbitration which is valid under the law applicable thereto;

(b) the subject-matter of the award is capable of settlement by arbitration under the law of India;

(c) the award has been made by the arbitral tribunal provided for in the submission to arbitration or constituted in the manner agreed upon by the parties and in conformity with the law governing the arbitration procedure;

(d) the award has become final in the country in which it has been made, in the sense that it will not be considered as such if it is open to opposition or appeal or if is

proved that any proceedings or the purpose of contesting the validity of the award are pending;

(e) the enforcement of the award is not contrary to the public policy or the law of India. 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. [Sec. 57(1)].

Even if the conditions laid down in sub-section (1) are fulfilled, enforcement of the award shall be refused if the Court is satisfied that -

(a) the award has been annulled in the country in which it was made;

(b) the party against whom it is sought to use the award was not given notice of the arbitration proceedings in sufficient time to enable him to present his case; or that, being under a legal incapacity, he was not properly represented;

(c) the award does not deal with the differences contemplated by or falling within the terms of the submission to arbitration or that it contains decisions or matters beyond the scope of the submission to arbitration.

However, if the award has not covered all the differences submitted to the arbitral tribunal, the court may, if it thinks, fit, postpone such enforcement or grant it subject to such guarantee as the court may decide [Sec. 57(2)].

If the party against whom the award has been made proves that under the law governing the arbitration procedure there is a ground, other than the grounds referred to in clauses *(a)* and *(c)* of sub-section (1) and clause *(b)* and *(c)* of sub-section (2) entitling him to contest the validity of the award, the Court may, if it thinks fit, either refuse enforcement of the award or adjourn the consideration thereof, giving such party a reasonable time within which to have the award annulled by the competent tribunal. [Sec. 57(3)].

Enforcement of foreign awards (Section 58)

Where the Court is satisfied that the foreign award is enforceable under this Chapter, the award shall be deemed to be a decree of the Court.

Appealable orders (Section 59)

An appeal shall lie from the order refusing -

(a) to refer the parties to arbitration under Section 54; and

(b) to enforce a foreign award under Section 57,

to the court authorised by law to hear appeals from such order. [Sec. 59(1)].

No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or take award any right to appeal to the Supreme Court [Sec. 59(2)].

Saving (Section 60)

Nothing in this Chapter shall prejudice any rights which any person would have had of enforcing in India of any award or of availing himself in India of any award if this Chapter has not been enacted.