



FACULTY OF JURIDICAL SCIENCES

COURSE: B.A.LL.B.

Semester: VIII

SUBJECT: Alternative Dispute

Resolution

SUBJECT CODE: BAL803

NAME OF FACULTY: Mohammad Aqib

Lecture-14



LECTURE 14: Prerequisites to Arbitral Proceedings and Appointment of Arbitrator

Pre-requisite to commence an Arbitral proceedings

Arbitration Agreement:- The requirements of an arbitration agreement are provided under Section 7 of the Act. The arbitration agreement must be in writing and duly signed by the parties. The arbitration agreement can be in the form of an arbitration clause in a contract or in the form of a separate agreement.

In **P.A.G Raju v. P.V.G. Raju** (AIR 2000 SC 1886), the Hon'ble Supreme Court held that Arbitration agreement is not a prerequisite for arbitration. If one party applies to the court to get a matter referred to arbitration and if the other party does not object then there is no bar on the court in referring the parties to the arbitration. Parties are allowed to go for arbitration. The important requirement is the consensus of parties.

In the case of **Bihar State Mineral Dev. Corpn. v Encon Builders (I) Pvt. Ltd.** (AIR 2003 SC 3688), the court laid down the essential elements of an arbitration agreement which are as follows:

- a) Existence of present or possibility of future differences.
- b) Intention to resolve differences through arbitration.
- c) Written agreement to be bound by the decision of arbitration.
- d) Consensus ad idem.
- e) Concluded consent to refer the dispute to arbitration.

Notice required prior to referral of disputes: Notice by one party to another party under Section 21 of the Act is mandatory before referring the disputes to arbitration.

In 2017, the Delhi High Court in the case of *Alupro Building Systems Pvt Ltd v. Ozone Overseas Pvt. Ltd.* considered the question whether notice under Section 21 is mandatory where the petitioner received a notice from a sole arbitrator. The respondent appointed the sole arbitrator and issued notice to the petitioner through the sole arbitrator that the dispute between them will be arbitrated over by him. The unilateral appointment of a sole arbitrator by one party was the grievance of the petitioner. The court after hearing observed that the bare reading of Section 21 provides the date of commencement of arbitration proceedings based on the receipt of notice by the other party. The court further ascertained the object behind this provision is that the other party to the arbitration agreement against whom a claim through

notice is made should know what the claims are. The notice under this provision serves an important purpose of reaching a consensus between parties on the appointment of an arbitrator. And lastly, the court explained the relation between Section 11(6) and Section 21 of the Act where one party fails to adhere to the procedure of the appointment of an arbitrator. Therefore, Section 21 is mandatory as the arbitration proceedings commenced without prior notice are unsustainable and bad in law.

Appointment of Arbitrators:

One of the advantages of arbitration is that it allows parties to an arbitration agreement to submit a dispute to judges of their own choice. Under Section 10 of the Act, the parties are free to determine any odd number of arbitrators. In cases where the parties fail to determine the number of arbitrators, the arbitral tribunal shall consist of a sole arbitrator.

Under Section 11 of the Act, the parties are free to agree on a procedure for the appointment of arbitrator or arbitrators. But if the appointment of the arbitrator is not consensual, the arbitrator has no power to make a binding order or award and if he makes any award it will be a nullity.

The appointment of an arbitrator by a party is complete only on its communication to the other party.

Members involved in the proceeding:

Arbitration is a procedure in which a dispute is submitted, by agreement of the parties, to an arbitrator or to a tribunal of several arbitrators who give a decision on the dispute that is binding on the parties.

Section 7 of the Act defines an arbitration agreement. It is 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.

The parties to the arbitration agreement under Section 10 of the Act are free to determine the number of arbitrators but such number shall not be an even number.

The Arbitration and Conciliation Act does not give arbitrator or tribunal any power to enjoin a third party to pending arbitration proceedings or consult third parties without disclosing it to the parties. In

the Husein Ebrahim v. Keshardeo Kanaria & Co. (AIR 1954 Cal 111), the arbitrators approached a third person, who was not the party to the arbitration agreement, by writing a letter to him. They asked him for certain information which was related to arbitration proceedings. The arbitrators also did not discuss or disclose this information to the parties. The court held that the arbitrators were guilty of misconduct.

So, the members involved in any arbitration proceedings are the parties to the arbitration agreement and a sole arbitrator, or a tribunal of several arbitrators.