UNIT II

ADJUDICATION AND COMPULSORY ARBITRATION IN INDIA

2.3.0 OBJECTIVE

After completion of this chapter the student will be able to

- Understand Adjudication and Compulsory Arbitration in India .

STRUCTURE

2.3.1 ADJUDICATION :

Adjudication generally refers to processes of decision making that involve a neutral third party with the authority to determine a binding resolution through some form of judgment or award. Adjudication is carried out in various forms, but most commonly occurs in the court system. It can also take place outside the court system in the form of alternative dispute resolution processes such as arbitration, private judging, and mini-trials. However, court-based adjudication is usually significantly more formal than arbitration and other Alternative Dispute

Resolution (ADR) processes. The development of the field of alternative dispute resolution has led many people to use the term *adjudication* to refer specifically to litigation or conflicts addressed in court. Therefore, court-based adjudication will be the main focus of this essay.

Adjudication is an involuntary, adversarial process. This means arguments are presented to prove one side right and one side wrong, resulting in win-lose outcomes. In civil cases, one side/person that believes he or she has been wronged (plaintiff) files legal charges against another (defendant). In other words, somebody sues someone they have a legal problem with. Once this occurs, both parties are obligated by law to participate in court-based proceedings. If the case goes to trial, each side then presents reasoned arguments and evidence to support their claims. Once that presentation of evidence and arguments is completed, a judge or jury then makes a decision. Appeals may be filed in an attempt to get a higher court to reverse the decision. If no appeal is filed, the decision is binding on both parties.

2.3.2 DISADVANTAGES OF COURT-BASED ADJUDICATION

The alternative dispute resolution movement of the1970s and 1980s was based primarily on promoting alternatives to litigation and court-based resolution procedures. ADR advocates argued that alternative processes such as mediation and arbitration were more effective and constructive, among other reasons, than litigation. Though the debate over which form of justice is "better" is still ongoing, adjudication definitely does have some negative qualities or disadvantages. Some of the main criticisms of court-based adjudication include:

- Court-based adjudication is prohibitively expensive in terms of monetary cost making it impossible for some parties to take their complaints to a court of law.
- Control of the process is removed from the client/disputant and delegated to the lawyer and the court.
- The decision makers lack expertise in the area of the dispute. In most courts the judges are generalists and practically every jury is too.
- Court dockets are often overbooked, causing significant delays before a case is heard. In the meantime, the unresolved issues can cause serious problems for the disputants.
- Litigation requires that people's problems be translated into legal issues, yet the court's decision about those issues does not always respond to the real nature of the underlying problem. For example, issues might be framed in terms of money, where the real issue is one of trust and respect...emotional issues not dealt with in an adversarial process.
- In addition, courts are constrained by the law as to what solutions they can offer. When the underlying issues are not addressed, the decision may produce a short-term settlement, but not a long-term resolution.
- Adjudication results in win-lose outcomes, leaving little chance the parties will develop a collaborative or integrative solution to the problem, unless the case is settled out of court before the trial.
- Litigation often drives parties apart because of its adversarial, positional nature, while effective resolution often requires that they come closer together. This polarization of the disputants is also often accompanied by emotional distress.

- People enmeshed in litigation experience indirect costs beyond the legal fees. For example, disruption to the functioning of one's business or progression of one's career can be just as damaging.

Some conflicts cannot be resolved in court, because there is no court with clear jurisdiction that is accepted by all the parties involved. This happens most often in international conflicts when one or more parties refuse to honor the authority of any international court (such as the International Criminal Court or the International Court of Justice).

2.3.3 ADVANTAGES OF ADJUDICATION/LITIGATION

Though adjudication is an adversarial process, it can produce some clear benefits over other options for dispute resolution (i.e. ADR). Proponents of adjudication argue that the process produces more fair and consistent decisions than alternative dispute resolution processes. In fact, ADR has been criticized as providing "second-class justice." This allegation is based on the fact that processes like mediation have not been institutionalized and there are no set standards of practice or rules of law upon which they are based. On the other hand, adjudication or litigation is grounded in the public judicial system and has a vast array of rules and regulations. There are several advantages that adjudication advocates cite when promoting this dispute settlement process:

- Adjudication produces an imposed, final decision that the parties are obligated to respect. An alternative process, such as mediation, produces only voluntary agreements that can easily fail.
- The outcomes of litigation are, without exception, binding and enforceable. Although arbitration decisions can be binding and enforceable (with the backing of the judicial system) this only occurs when the participating parties agree to such parameters. A party who has not agreed to arbitrate cannot be forced to do so, or be bound by the outcome of arbitration between other parties. With court-based adjudication, however, participation is involuntary and all outcomes are binding and enforceable. This can be a true advantage in situations where there is a serious lack of trust and/or respect between the parties.
- The use of court-based adjudication or litigation allows for decisions to be appealed. The option to appeal confers multiple benefits. For example in monetary settlements, the winning party is often willing to re-negotiate the settlement before it goes to appeal so as to avoid full reversal and retrial. Appeals also allow the reversal of incorrect decisions. Sometimes mistakes are made or evidence that was clearly prejudicial was allowed, thus tarnishing what otherwise may have been a just outcome.
- Public adjudication offers procedural safeguards that ensure parties due process under the law. Among such safeguards are cross-examination, limitations on hearsay and other rules of evidence, pre-hearing mandatory sharing of information between sides, and other statutory and constitutional protections that fall under the umbrella of due process. Procedural stipulations such as these help ensure that adjudicated outcomes will be fair.
- Litigated decisions are authoritative and based on precedent.

- Court-based decisions are, in theory, based on principles of the law (established norms) that have been previously validated. This makes for consistency in how similar cases are decided over time and better predictability regarding the range of possible outcomes.
- Court-based adjudication is institutionalized, meaning that a party with a complaint needs no one's permission to bring a lawsuit against another party. In addition, since the courts are funded by the government and do not rely on customer satisfaction (as do some ADR providers), they can issue decisions that may be disliked by the parties, without fear of reprisal in any form.
- Judges, the ultimate adjudicative decision makers, are chosen through a variety of publicly known procedures that ensure they are qualified for the job.
- In addition, there are cases where settlement of a short-term dispute is all that is needed or possible. (Here "settlement" is being compared to resolution which is deeper and more lasting.) If there is no need for or no possibility of a future relationship between the parties, a settlement of their dispute is adequate. If relationships are going to be a long-term issue, however, resolution is preferable, when possible. When not, dispute settlement may well be better than continued fighting, and arbitration is a way to obtain such a settlement.

2.3.4 COMPULSORY ARBITRATION OR ADJUDICATION

Although the state has devised methods for the peaceful settlement of industrial disputes, it is clear that these do not guarantee a smooth end to disputes. In spite of the pressures and inducements by the state, the parties still may prefer to resort to strikes and lock-outs to settle their disputes. In the opinion of the government such strikes and lock-outs may appear to be injurious to national and public interest and may cause irreparable damages. Under such conditions, the government may decide to refer the dispute to adjudication and force the parties to abide by the award of the adjudicator and at the same time, prohibit the parties from causing work-stoppages. This means imposing compulsory arbitration or adjudication. The main idea behind the imposition of compulsory arbitration is to maintain industrial peace by requiring the parties to refrain from causing work-stoppages and providing a way for settling the dispute.

The following are the two principal forms of compulsory arbitration based upon the nature of reference and nature of the award:

1. Compulsory reference but voluntary acceptance of the award
2. Compulsory reference and compulsory acceptance of the award.

Under the first type, a dispute is referred to a tribunal or Court of Arbitration for adjudication either by the government or the parties may be required, by law, to submit their dispute for adjudication, though they are left free to accept or reject the award when it comes. However, it is expected that once the issues have been examined by an impartial and independent authority and an award has been given, the parties will think twice before rejecting such an award for fear of incurring public displeasure. It is expected that the pressure of public opinion would lead them to accept the award.

Under the second form of compulsory arbitration, it is not only that the government has the power to refer the dispute for adjudication, but also, that the parties are put under a legal

obligation to abide by its award. Law forces the parties to appear before the adjudicator and penalties are imposed on them for non-acceptance and non-implementation of the terms of the award. The adjudicators are vested with adequate powers to summon the parties and call for witnesses and to take such steps that are necessary for arriving at a fair and reasonable conclusion. The parties are required to refrain from going on a strike or declaring a lock-out during the pendency of the adjudication proceedings and during the period when the award is in operation.

Australia and New Zealand were pioneers in introducing compulsory arbitration, but later the system came to be adopted in many other countries of the world. The system is widely in force in Australian states, particularly, New South Wales, Queensland, South Australia and Victoria. The theory of compulsory arbitration in Australia, as in most other countries, is based on the proposition that 'when agreement in an industrial dispute is not reached through negotiation between the employer and employees or their representatives or subsequently through conciliation by an independent public authority then that public authority should arbitrate'.

An Arbitration Court may consist of one person only or a few persons with one member acting as the Chairman. Usually, the adjudicators are drawn from the judiciary. The qualifications and tenure of office, powers and functions of the adjudicators are, in general, prescribed under the law itself. Sometimes, representatives of employers and employees are also associated with the deliberations of the Court.

The powers of the Courts depend mostly on the objective for which they are set up. In cases where such Courts have been set up exclusively for deciding wage disputes, their powers are narrow. Wherever the object is to decide industrial disputes in general, the powers are usually wide. In general, however, the provisions of the laws with respect to the powers of the Court vary widely.

In most cases, the agreement reached by the disputing parties is made legally binding by an award of the Court. In some countries, if the parties to an agreement represent majority of the employees and employers, its provisions are compulsorily extended, also, to other employers and trade unions not parties to the agreement. Compulsory conciliation and constitution of tripartite wage boards, generally form preceding steps before compulsory arbitration is resorted to.

2.3.5 ADJUDICATION OR COMPULSORY ARBITRATION IN INDIA

Though a small beginning in this direction was made by the Bombay Industrial Disputes Act of 1938, which provided for the creation of a Court of Industrial Arbitration, empowering it to decide cases relating to registration of unions, standing orders and legality of strikes and so on, compulsory arbitration has essentially been a child of the Second World War for the country as a whole. The exigencies of the war necessitated the adoption of certain emergency measures for preventing strikes and lock-outs in industries. The fullest mobilization of the country's economic and manpower resources and the need for uninterrupted production of goods and services demanded that work-stoppages be prohibited. But simply prohibition of strikes or lock-outs under the authority of a law without, at the same time, providing for a fair and just settlement of the dispute that caused work-stoppages, would have been of no avail. The workers, driven to desperation on account of rising prices and falling real wages would have

violated any law and faced any penalties in order to protect their meagre living standards. Therefore, the prohibition of strikes and lock-outs had to be combined with the provision of compulsory arbitration of disputes, in order to convince the workers that their claims had received a fair hearing. Initially, the Bombay Industrial Disputes Act, 1938 was amended in 1941, empowering the provincial government to refer industrial disputes to the Court of Industrial Arbitration if it considered that the dispute would lead to serious outbreak or disorder, affecting the industries concerned adversely and cause prolonged hardship to the community.

Later, in January 1942, the Government of India amended the Defense of India Rules by adding Rule 81-A in order to restrain strikes and lock-outs. This rule empowered the government to prohibit strikes and lock-outs, refer any dispute to adjudication, require employers to observe such terms and conditions of employment as might be specified and enforce the decisions of the adjudicator. Later, the provincial governments were also vested with similar powers. After the war, the Industrial Disputes Act, 1947, continued the practice of adjudication and now it has become an important feature of the law relating to the settlement of industrial disputes in the country.

The Industrial Disputes Act, 1947, as it stands amended till date, provides for three types of adjudication authorities for the adjudication of industrial disputes, namely, Labour Court, Tribunal and National Tribunal.

The Labour Court and the Tribunal can be established both by the central and state governments, but the National Tribunal is set up only by the central government, to adjudicate such disputes as involve any question of national importance or are of such a nature that industrial establishments situated in more than one state are likely to be interested in or affected by them. The Labour Court is intended to adjudicate disputes relating to the propriety or legality of an order passed by the employer under the standing orders, discharge or dismissal of workmen, legality or otherwise of a strike or lock-out. The Tribunal and the National Tribunal generally deal with such subject-matters as wages, bonus, profit-sharing, rationalization, allowances, hours of work, provident fund, gratuity, etc. Strikes and lock-outs are prohibited during the pendency of the proceedings before any of the adjudication authorities, and 2 months after the conclusion of such proceedings and during any period in which an award is in operation, in respect of any matter covered by the award.

The use of compulsory arbitration has raised controversies in India and opinions are widely divided about its utility and efficacy in maintaining industrial peace and securing to the workers their just demands. Nevertheless, there does not appear any early prospect of the rigours of compulsory arbitration being relaxed under the existing economic and political conditions of the country.

2.3.5 ADJUDICATION/COMPULSORY ARBITRATION VERSUS COLLECTIVE BARGAINING

The foregoing comments necessitate a discussion and critical evaluation of compulsory arbitration. It is also necessary to compare it to its only alternative—collective bargaining—and to find out which one of these is best suited to the needs of the peculiar economic and political situation that prevails in India.

The arguments for and against compulsory arbitration can be discussed under two heads:

(i) arguments relating to its principle; and
(ii) arguments relating to its practice in India.

i) Arguments for Adjudication/Compulsory Arbitration

In spite of many arguments against compulsory arbitration, it has come to stay in India and there are influential protagonists of it. The supporters of compulsory arbitration assert its superiority over collective bargaining, as a method of settling industrial disputes not only in the prevailing Indian conditions but also in principle. The points of view are presented below.

Relating to Its Principle

Supporters of compulsory arbitration contend that adjudication, coercive though it may be, is superior to collective bargaining. Collective bargaining settles a dispute on the principle of trial by combat. In collective bargaining, it is not the just cause but the relative strength of the parties that ultimately triumphs. A strong union may take up a weak case and still win and *vice versa*. Compulsory arbitration, though imperfect, introduces an element of law and justice in the conduct of industrial relations. The judicial standards available to the judges in adjudication of industrial disputes may be imperfect, yet they are far better than the principle of 'might is right' that underlies collective bargaining.

Besides, as the institution of compulsory arbitration grows, so will industrial jurisprudence. The concept of what is just and fair may be nebulous but it gets refined and becomes more acceptable with the development of compulsory arbitration. This is how any jurisprudence grows and industrial jurisprudence will also follow the same course. Further, it is true, no doubt, that compulsory arbitration is based upon the coercive power of the state, but the institution of collective bargaining is rooted in the coercive power of the parties themselves. It is far better to let the coercive power of the community as exercised by the state, be the arbiter of the conflicting claims of labour and capital, than to let the coercive powers of privately organized groups be the determinant of the outcome of such conflicts. The authority of the state should be used to prevent strong groups and organizations, whether they belong to the employers or to the workers, from holding the community to ransom. The workers and employers engaged in providing services vital to the community's health and safety are in a position to charge any prices for their services. Here compulsory arbitration is in a position to help the community by imposing such terms and conditions of employment which appear fair to it and thereby, keep the cost of production and prices within reasonable limits.

Relating to Prevailing Indian Conditions

The adoption of planning as an instrument of economic growth and the marginal and poor standard of living in the country demand that industrial peace be maintained in order to achieve targets of planning and economic development. The adoption of free collective bargaining, with the freedom to resort to strikes and lock-outs would jeopardize the fulfillment of these objectives. Industrial peace is the supreme need of the hour. Collective bargaining may be democratic but it endangers industrial peace. Therefore, compulsory arbitration has to be used for the purpose of resolving industrial disputes.

Further, it is pointed out that compulsory arbitration in India does not suppress collective bargaining, rather supplements it. The parties to an industrial dispute are free to settle it

peacefully and, only if they fail to come to an agreement, compulsory arbitration comes into play. If the workers and the employers are so anxious to preserve their rights of collective bargaining, they can resolve all the disputes themselves without any threat or hindrance by the government.

So far as the arguments of heavy expenses and delay are concerned, the machinery of compulsory arbitration can be improved and is gradually improving. The government can also be made more responsible and discrete in the exercise of its power to refer disputes to adjudication. In the prevailing state of trade unionism in India, compulsory arbitration has conferred more benefits on workers than a divided trade union movement could have been able to achieve. Compulsory arbitration might have, to some extent, weakened collective bargaining, but has helped the workers in many poorly organized sectors in securing significant gains.

ii) Arguments against Adjudication/Compulsory Arbitration

Opposition to the use of compulsory arbitration for the purpose of settling industrial disputes comes from many sources including trade unions, mostly of the left-wing, students of industrial relations and prominent personalities like V. V. Giri.

Relating to its Principle

The main argument against the principle of compulsory arbitration is that it leads to an authoritarian imposition of the terms and conditions of employment and suppresses the possible self-governance in industries based upon the democratic freedom of the parties to resolve their disputes through collective bargaining. In a democratic society, industrial democracy, implying collective and joint determination of the terms and conditions of employment and the settlement of their disputes by the parties themselves without any outside interference, is no less important than political democracy. It is contended that the parties should be free to work out their relations and sort out their problems by mutual discussions and negotiations, if possible, and even by strikes and lock-outs, if necessary. According to this viewpoint, the use of coercive economic power by one party against the other is preferable to the use of the coercive power of the state to impose a settlement on the parties. The success of compulsory arbitration depends upon the coercive power of the state which penalizes the parties for non-compliance with the provisions of the laws pertaining to compulsory arbitration. Any solution imposed from outside will never provide a lasting solution to the problems of industrial relations. Even if they fight for the time being, the parties will ultimately succeed in working out a lasting solution of their problems as they have to live together on a permanent basis. If they have to coexist, they will evolve the principles and the arrangements necessary for their co-existence. Compulsory arbitration is not suitable for this purpose as compared to collective bargaining.

The second argument against compulsory arbitration relates to the absence of standards which can be used by adjudicators, to resolve divergent interests and to judge the fairness or otherwise of conflicting claims. For example, in arbitrating claims for higher wages, what are the guidelines which are available to the adjudicator? What are just wages? What are fair rates of profits? What are just working hours? These are such questions, for the resolution of which, no objective standards are available in the present state of industrial jurisprudence. While the function of a judge in a civil dispute is that of locating the facts and applying to them the known law of the land, the adjudicator in an industrial dispute does not have any such laws which can guide him in resolving differences of opinion relating to economic interests. Whereas the civil

judge is an interpreter of law, the adjudicator of an industrial dispute becomes a law-giver. He performs the function that essentially belongs to the legislature. The adjudication award in industrial disputes often becomes highly subjective. It is the psychological bent, mental make-up and prejudices of the adjudicator that may finally decide the outcome of an adjudication proceeding. Under such conditions, the explanations behind an award are nothing more than a rationalization of the adjudicator's prejudices. It is also argued that judges are essentially conservative in nature and detest making far-reaching departures from the *status quo*. This puts the workers at a disadvantageous position because their interests may often lie in challenging the existing economic order and the existing distribution of the fruits of industry.

Thirdly, compulsory arbitration is criticized for its inability to ensure industrial peace, the maintenance of which is claimed to be the primary justification for its adoption. It is pointed out that no award can be enforced when the masses of workers are dissatisfied with it and have developed sentiments against its provisions. Ultimately, the adjudicators may abandon their quest for a just basis for arriving at an award and look for such solutions which would be acceptable to the parties and would avoid work-stoppages. In many cases, the quest for a just solution may run counter to the quest for industrial peace. In India, despite the operation of compulsory adjudication for a period of more than half a century, the number of industrial disputes, workers involved, and man-days lost has not shown significant decline. On the other hand, a number of strikes have taken place in public utility services and other industries, very often in complete defiance of the penal provisions of the Industrial Disputes Act, 1947, and Essential Services Maintenance Act.

Finally, compulsory arbitration is said to vitiate industrial relations by creating a litigious atmosphere. Under compulsory arbitration, trade unions may make fantastic demands because they know that these demands will not be required to be backed and secured through the organized strength and solidarity of their members. The blame for the non-fulfillment of the demands can be easily shifted to the courts of arbitration. Similarly, the employers develop the habit of saying 'no' to every demand, thinking that any concessions made earlier would weaken their position before the tribunals to which the disputes would be ultimately carried. Thus, compulsory arbitration creates an extremely artificial atmosphere because both the parties try to evade the real issues as long as possible. Compulsory arbitration then lays an excessive stress on legalism which may satisfy the law but may not solve the problem. It is agreed on all sides that a clinical rather than a legalistic approach to industrial disputes is more effective in creating healthy industrial relations.

Arguments against Compulsory Arbitration as Practiced in India

The main argument relating to compulsory arbitration as practiced in India, at present, is that it involves long delays and heavy expenditure, which put the trade unions in a comparatively disadvantageous position. The employers, by raising legal quibbling and points of law and by utilizing the services of legal experts, succeed in carrying cases up to the Supreme Court of India. This means that starting from the Tribunal and ending up in the Supreme Court, it may take many years before a final legal verdict is available on an industrial dispute. How many unions in this country are in a position to match the resources of the employers in a legal battle? Can the workers wait that long? Can they not, in the meantime, be driven to desperation and resort to violent methods which could very well have been avoided had the solutions come early?

Secondly, compulsory arbitration, as practiced in India at present, depends in most cases upon the reference of a dispute to the adjudication authorities, by the appropriate government in its discretion. As the government has the discretionary power to refer a dispute or not to refer it to adjudication, the government is in a position to pick and choose. It is alleged by many trade unions, particularly those in opposition to the ruling political party, that the exercise of this discretion is influenced by political pressures. Thus, it is often said that the Industrial Disputes Act, 1947, places an instrument in the hands of the government which ultimately boosts up the growth of the unions under the influence of the ruling party at the cost of others.

Thirdly, the practice of compulsory arbitration in India has hindered the growth of a genuine and effective trade union movement. It has consequently weakened collective bargaining by making the workers and their leaders look up to the courts of law, rather than to their own strength and organization, for the redressal of grievances and the fulfillment of their demands. The main task of many trade union leaders is to keep loitering in the corridors of the state secretariats and to hover round the Minister of Labour, to secure the reference of a dispute to adjudication. Many trade unions spring to life at the time of submitting a set of demands for the purpose of getting them referred to an appropriate adjudication authority and become silent after an award has been delivered. The number of registered trade unions has increased since 1947, no doubt, but it cannot be said that the trade union movement has also been proportionately strengthened. It was in this context that V. V. Giri said that compulsory arbitration was his enemy number one.

2.3.6 STATUTORY HISTORY OF ARBITRATION

Arbitration has deep roots throughout history. Use of arbitration between international parties' dates back to ancient Greece. It is one of the earliest methods of dispute resolution. People used to settle disputes by means of arbitration long before courts were established. In medieval Europe, from different regions, merchants and traders would assemble at markets to do business. The private dispute resolution systems can be traced back to this period. In England, the first Arbitration Act in England was in 1698 by formalizing a practice of informal arbitration which was done by trade guild members. The need for the same was reinforced by the inefficiency of common law courts in applying mercantile law.

For settlement of conflicts, arbitration is an age old practice in India. Panchayat system is based on this concept. Under the influence of Mahatma Gandhi it originated in textile industry in Ahmadabad. Along with the adjudication, provision for arbitration even was made by the Bombay Act under the Bombay Industrial relations Act. This was very popular in 1940s and 1950s. The government had also been proposing the same in the first three year plans. Voluntary arbitration is very important and essential feature of collective bargaining and it was emphasized in the labor policy chapter. In 1958 it was incorporated in code of industry discipline. In 1962 in Indian Labor Conference it was decided that arbitration would be preferred after conciliation under adjudication is necessary. During Chinese Aggression, Industrial trade resolution accepted voluntary arbitration. To make the idea more and more popular the government set up National Arbitration Board. In 1956, it was decided that voluntary arbitration would be included. Finally in 1957, section 10A was inserted which was enforced from 10 March 1957.

The first statutory recognition was given to domestic arbitration in India and it was by way of the Indian Arbitration Act, 1940 which dealt solely with the previously uncodified body of

law concerning domestic arbitration proceedings. Its purpose was to consolidate and amend the law relating to arbitration. The statutes dealing with international commercial arbitration were the Arbitration Act, 1937 and the Foreign Awards Act, 1961.The UNCITRAL adopted the UNCITRAL Model law on International Commercial Arbitration in 1985. The purpose of the model law was to provide a set of rules which by bringing about uniformity in laws of member countries would facilitate the settlement of international commercial disputes. The Arbitration and Conciliation Act 1996, seeks to amend and consolidate the law relating to domestic arbitration, international commercial arbitration and the enforcement of foreign arbitral awards.

REFERENCE OF DISPUTE TO ARBITRATION UNDER INDUSTRIAL DISPUTES ACT, 1947

In Workmen of Dimakuchi Tea Estate v. Dimakuchi Tea Estate, the SC stated the principal objects of the I.D. Act as follows:

1. For preserving amity and securing good relations between employer and workmen, promotion of measures;

2. The investigation into and the settlement of industrial disputes between employers and employees, employers and workmen or workmen and workmen, with a right of representation by a registered TU or a federation of TU or an association of employers or federation of associations of employers;

3. Prevention of illegal strikes and lockouts

4. In matters of lay off of retrenchment, providing relief to workmen

5. Ensure collective bargaining.

In Sindhu Hochtief(India) Pvt Ltd Vs Pratap Dialers, the court held that the dispute as to what should happen to the undistributed bonus will not fall within the definition of an industrial dispute as defined in section 2(k) of the Industrial Disputes Act.

An agreement, to refer an industrial dispute to an arbitrator under section 10-A is not a settlement of the disputes as laid down in section 2(p) of the I.D Act because the dispute subsists after the agreement. The solution to the dispute will be the award given by the arbitrator. Industrial dispute may be said to be in controversy with respect to working conditions, employment matters, wages or union recognition. There are different forms and causes of industrial dispute. The term industrial dispute in the Industrial Dispute Act, 1947 has the following features:

1. There should be dispute
2. It could be between employer-employer, employer-employee or employee-employee.
3. The dispute must be related to work related issue.
4. The dispute must be raised by a group or class of workers.

There are various methods of settling industrial dispute. It may be without state intervention by Collective bargaining i.e. without conciliation or with conciliation or by voluntary arbitration. The Industrial Disputes Act along with providing machinery for investigation and settlement of disputes, provides measures for prevention of conflicts. If the industrial disputes are not settled by collective bargaining or works committees or by bipartite negotiations, the Industrial Disputes Act provides the following authorities; Conciliation Officer and Board of Conciliation, Voluntary Arbitration, Adjudication by labor court, Industrial Tribunal and National Tribunal.

Arbitration refers to negotiations in which parties are encouraged to negotiate directly with each other prior to some other legal process. Arbitration systems authorize a third party to decide how a dispute should be resolved.

Arbitration process may be either binding or non-binding. Binding arbitration produces a third party decision that the disputants must follow although they disagree with the result. Non-binding arbitration produces a third party decision that the parties may reject.

ADR process may be mandatory and they may be required as part of a prior contractual agreement between parties. In voluntary process, submission of a dispute to an ADR process depends entirely on the will of the parties.

In voluntary arbitration, the parties willingly refer their dispute to a third party. The essentials include, there should be voluntary submission of dispute, investigation and attendance of witness. It may be specially arising under disagreement of contracts or agreements. There is no compulsion in this case.

In compulsory arbitration, it has to be accepted mandatorily. It is entirely based on voluntary discretion of the appropriate government based on the dispute. The essentials of compulsory arbitration consists that the parties should fail to arrive at a settlement by voluntary method, if there is grave economic crisis, there is grave public dissatisfaction, any national emergency or if parties are ill balanced and public interest is of prime importance. It leaves no scope for strikes or lockouts. Moreover it deprives both the parties of their fundamental rights.

The ADR process is extra judicial in nature. ADR is informal, there is application of equity, and there is direct participation and communication between disputants.

ANALYSIS OF SECTION 10A AND SECTION 18

Voluntary arbitration is a process in which the disputing parties show willingness to go to a third party and voluntarily submit to his decision. An arbitrator may be a single person or a panel. Arbitration is less expensive and faster than that of a court. The party might agree in advance and hence dispute is resolved at the time of submitting a dispute to arbitration to abide by the award. The party may even agree to submit the dispute to an arbitrator but at the same time reserve their right to accept or reject the award when it comes.

There are several factors hampering adoption of voluntary arbitration in India like that of legal obstacles, scarcity of arbitrators who could win people’s confidence, adjudication is available easily, cost to the parties, presence of complicated procedure, no appeal is competent against the arbitrators award, absence of recognized unions which could bind the workers.

If the conciliation officer or board of conciliation is unable to resolve dispute, parties are advised for voluntary arbitration. This was introduced into the I.D Act in 1956 by way of an amendment under Section 10-A in 1947.A voluntary arbitration is initiated by the consent of the parties, even though it is not expressly stated leads to a final and binding award.

Reference to the Arbitrator

Section 10A of the Industrial Disputes Act was inserted by section 8 of the I.D act 1956. The purpose was to enable employers and employees to voluntarily refer their disputes to arbitration by a written agreement. Strict adherence to these provisions is a condition precedent for passing a valid award. The reference will not be competent if the dispute which is existing or apprehended is not an 'industrial dispute 'at all. The definition of 'industrial dispute' in section 2(k) will not include what will happen to the undistributed bonus. An agreement to refer to an industrial dispute to an arbitrator under this section is not a settlement of the dispute because the dispute does not come to an end. Dispute cannot be validly referred to a tribunal, labor court or national tribunal for adjudication after an industrial dispute has been referred to an arbitrator under section 10A.

The parties can enter into an arbitration agreement which must be in the prescribed form. Name of the arbitrator must be specified and to the appropriate government, a copy of the arbitration agreement should be forwarded which shall be published in the official gazette. The procedure to be followed should be directory. An arbitration affecting the interests of large number of employees cannot be a private agreement. Non-publication of the arbitration agreement under section 10A (3) would be fatal to the arbitration award.

On reference to more than one arbitrator, each one of them must act personally in performance of the duties of his office, as if he were the sole arbitrator, for, as the office is joint. If one refuses, the others cannot make a valid award. Such a provision is implied, unless a contrary intention is expressed, whenever the arbitration agreement requires that there shall be 3 arbitrators the award of any two is then binding. For the making of an award, giving of a written notice to either party is not essential.

Procedure before the Arbitrator

The arbitrator can follow his own procedure, however with the rules of natural justice. Section 11 states that an arbitrator shall follow such procedure as he may think fit. An arbitrator has to follow the same procedure as that of a board, court, labor court, tribunal or national tribunal. The arbitrator has all the powers to which both the sides are partly, conferred.

Umpire

There is a provision for the appointment of an umpire in case of an even number of arbitrators by insertion of section 1A. The award of the umpire shall prevail in such a conflict.

Arbitration Agreement-As May Be Prescribed

Part 2 of I.D Act 1957 states about the arbitration agreement and it being signed and it is sufficient if the requirements of that rule and form are substantially complied with by the arbitration agreement. It is not necessary that the arbitration agreement must be in form C.

Publication of the Arbitration Agreement

Firstly, the parties should forward a copy of the arbitration agreement to the appropriate government and the conciliation officer and then within one month from the receipt of copy, the appropriate government shall publish the agreement in the official gazette. Noncompliance of the mandatory requirement of this provision would render the award itself invalid. In one particular case, neither the arbitration agreement nor the award had been published. The court held that

"The government comes into the picture only after arbitration agreement has been entered into under section 10A (1) .If once that is done, there is a valid arbitration agreement and non compliance with the other provisions of section 10A or any other provision in the Act relating to publication of the award will not invalidate or take the arbitration agreement itself outside the per view of section 10A".

All the confusion was settled by the SC pronouncement in Karnal leather Karamchari Sangahtan vs Liberty Footwear Co stating that the arbitration agreement must be published before the arbitrator considers the merits of the dispute and noncompliance of this requirement would be fatal to the arbitral award.

In Sir Silk Ltd V Govt of Andhra Pradesh, the SC held that once the award is received by the appropriate government publication is a must. But under special circumstances of this case, the SC held that the award need not be published.

In Grindlays Bank Ltd VC Central Govt Industrial Tribunal, the SC held that an application for setting aside tribunals ex parte award made within 30 days of publication of award can be validly entertained by the Tribunal.

Employers and Workmen Who Are Not Parties

The employers and the workmen who are not the parties may be given a notice to present their case before the arbitrators. Within a period of one month notification is issued. The court held that the requirements of this provision have not been complied with, will be rendered invalid. The court has taken the view that the provisions of this sub section are only directory and not mandatory.

Sub Section (4): Award of the Arbitrator:

The industrial dispute referred to arbitrator can be investigated and adjudicated under the arbitration agreement and then submitted after signature. The appropriate government should publish it too.

Jurisdiction of the Arbitrator

An arbitrator is bound to adjudicate on the dispute as specifically referred in terms of the agreement. Reference is more of an ad hoc arrangement. The arbitrator should settle the dispute and is well expected to do substantial justice between the parties in giving his award.

In Rohtas Industries Ltd v Rohtas Industries Staff Union, the SC observed:

An award under section 10A is not only invulnerable but more sensitively susceptible t be the writ lancet being a quasi statutory body's decision. The absence of reasons on support of the award will shut out the judicial scrutiny by making it a unscruable face of the sphinx.

Exclusion of the Arbitration Act

Sub section (5) excludes the application of the provisions of the Arbitration Act 1940 to the award of an arbitrator under section 10. In Hindustan National Glass and Industries Mazdoor union vs S N Singh, court held that an application under section 30 of the Arbitration Act challenging the award of an arbitrator under section 10A is not maintainable.

Judicial Review

Whether the awards of the arbitrators can be challenged before the judiciary?

In R v Disputes Committee Of National Joint Council for the Craft of Dental Technicians, it was stated that "there is no instance of which I know in the books, where certiorari or prohibition has gone to any arbitrator, except a statutory arbitrator and a statutory arbitrator is a person to whom, by a statute, the parties must resort."

If an arbitrator records findings based on no legal evidence and the findings are either his ipse dixit or his findings suffer from additional infirmity of non application of mind, the award will be quashed.

In Regina v Disputes Committee of Dental Technical, it was observed

I have heard of certiorari or prohibition going to an arbitrator. It would be an enormous departure from the law relating to prerogative writs if we were to apply these remedies to an ordinary arbitrator…

The Supreme Court, relying on the ratio of Marina Hotel Vs Workmen, and Hindustan Times Ltd Vs Workmen, held that an award passed under the Industrial Disputes Act cannot be inconsistent with the law the legislature laid down, and if it did so, it was illegal and it would quash the arbitrator's award.

In Engineering Mazdoor Sabha vs Hind Cycles Ltd, the Supreme Court held that though arbitrator is not a tribunal under article 136 of the constitution, in a proper case, a writ may lie against the award under Article 226 of the constitution.

In Rohtas Industries Ltd Vs Rohtas Industries Staff Union, the SC held that arbitrator under the I.D Act comes within the rainbow of statutory tribunals amenable to judicial review.

Section18 (2) and section 18(3)

Section 18 of the industrial Disputes Act states about persons on whom settlements and awards are binding. Section 18(2) states that an arbitration award that has become enforceable shall be binding on those parties who had referred for arbitration. An arbitration award where a notification has been issued under section 10A shall be binding on all the parties to industrial dispute.

A settlement within the meaning of section 18(3) is binding on both the parties and continues to remain in force unless the same is altered by another settlement.

In an industrial dispute referred by central government which has an all India implication, individual workmen cannot be made party to a reference. All of them are not expected to be heard.

2.3.6 THE ADVANTAGES AND DISADVANTAGES OF ARBITRATION

Whether arbitration is advantageous or disadvantageous largely depends on whether you are plaintiff or defendant. Arbitration minimizes the plaintiff's chances of obtaining large punitive damage and actual damages. While a party may save litigation costs, that savings can also increase substantially in arbitration.

N.A Palkhivala observed that there are incalculable advantages to arbitration proceedings. He said,

If the law is not to be a system of tyrannical rigidity, but instead to be the efficient and useful servant of a changing society, it must from time to time be adapted and parts of it replaced .A court of law is like an ancient castle, constantly under repair. There comes a time when it no longer pays to patch it up and it is better to resort to a new, compact house built on modern lines.

There are several benefits of arbitration. It is less expensive than resolving disputes through the judicial system; it produces a resolution of the dispute faster than the court system and achieves results that are apt to be commercially reasonable in complicated cases. Arbitration rules can be tailored to the types of disputes that are likely to occur under the contract. Moreover arbitration is an expedient, convenient, less-expensive forum. Confidential decisions are taken by the arbitrators who are selected because of their experience and expertise in the area of the dispute and quite knowledgeable. Arbitration is one of the most efficient types of resolution. In most arbitral forums today the arbitrators can award punitive. Under the rules of arbitration there is a method for filing a claim for adjudication of the grievance. The selection of the arbitrators starts once the complaint is filed.

The arbitration comes with its disadvantages as well. In recent years, arbitration proceedings have become more formal and have increased legal fees. Hence they are not

always more expedient or cost effective than the court proceedings. While the relaxed procedural and technical aspects of arbitration can lead to a more streamlined process, it can also lead to delays and unpredictable results. They are reluctant to reprimand improper behavior of the parties. Temporary injunctions, wage garnishments, property attachments, motions to dismiss, summary judgments and other interlocutory remedies and decisions are not typically available in arbitration. It is also difficult to appeal .In addition; collateral estoppels and res judicator are not typically available in arbitration. Hence arbitration comes with limitations. Arbitrations can be expensive both in the fees paid to the agency setting up the arbitration and the fees paid to the arbitrators. The courts have minimal fee. Also, at times the arbitration process may not seem faster than the court system. Arbitration is a private dispute process. Court files are public and usually available to anyone wanting to know what you are doing. Hence the court procedures are more transparent in this matter. Arbitrators generally have the power to issue subpoenas but probably do not have much authority to back up the subpoenas if they are not obeyed

How Does Arbitration Differ From Mediation And Civil Litigation?

Arbitration differs from the Court System in several respects. The parties can select the person to decide the case. The typical discovery practice is also limited and controlled by the arbitrators while the court system provides for broad investigation .While the arbitration hearing is formal, it is not as formal as a court hearing. Unlike a court decision, there are very limited grounds for an appeal challenging an award. Arbitration is binding, and parties can seek to enforce a decision through the courts. Under many Arbitration Acts, arbitration is a matter of contract between the parties. Since public policy favors arbitration, a court will resolve any doubts regarding the applicability of an arbitration provision in favor of arbitration

Arbitrators Duty of Disclosure

Arbitration is an alternative to adjudication and the two cannot be sued simultaneously. It is voluntary at the discretion of the parties to a dispute. An arbitrator is a quasi- judicial body. He is an independent person and has all the attributes of a statutory arbitrator. He has wide freedom, but must function with limitations. He must follow the due procedure of giving notice to parties, giving fair hearings, relying upon all available evidence and documents. There must be no violation of the principles of natural justice.

An arbitrator has a responsibility. An arbitrator should hear the evidence, understand it and apply the principles of justice and equity to achieve the correct result. He should be fair enough so that the people have complete faith on him. In classic arbitration they knew and trusted the individual. Today we have gone to the opposite extreme. The arbitrator selected ideally has no relationships with any of the parties. The disclosure process has thus become the modern surrogate for the purpose of transparency.

"An arbitrator should disclose any interest or relationship likely to affect impartiality or which might create an appearance of partiality or bias".

An Arbitrator must disclose a relevant interest which is regarded by the courts as a matter bearing upon the integrity which is the core of the arbitral process. Relationships may be those personal to the arbitrator. They may also be derivative, in the sense of relationships involving members of the arbitrator's family, employer, partner or business associate. There is a dual element of reasonableness here. Both the duty to disclose interests and the duty to

disclose relationships implicate a reasonable effort. Following such investigation the potential arbitrator should disclose those relationships which are likely to affect impartiality. Actual bias should be shown. An arbitrator must be without bias and require disclosure of all facts or circumstances that might give rise to reasonable doubt as to impartiality. An arbitrator must disclose personal knowledge of disputed facts concerning the proceeding; prior and pending matters in which the arbitrator served or serves as a party arbitrator or attorney serves or if served as neutral arbitrator. The disclosure should be sufficient to provide such insight and understanding but need not be as detailed or specific as that of a neutral arbitrator. A party-appointed non-neutral arbitrator is not subject to disqualification by the other party based upon matter so disclosed.

Based upon the United Nations Commission on International Trade Law (UNICTRAL) Model Law on International Commercial Arbitration, India has adopted new arbitration law. The new law is titled the Arbitration and Conciliation Ordinance 1996.

ARBITRATION PROCEEDINGS IN INDIA UNDER THE ARBITRATION AND CONCILIATION ACT, 1996

Arbitration in a common context relates to anything done or acted without any prescribed or particular frame work on a dispute. Before the emergence of judicial systems in the formal form of the country, the decisions taken upon several disputes during early time in an informal way was arbitrary in nature. Provincial State rules did not have uniform State rule strategy during pre independence era in India. During this time the arbitral proceedings were subjected to the Arbitration act of 1940. After independence the fundamental document of the land, The constitution of India was framed in 1950, that envisaged several articles ensuring proper functions of administrative systems. Article 323-B confers the power to set up Tribunals for other matters without altering the basic structure of the power put forth by the Constitution. The Arbitration Act of 1940 was exercised till the new enactment in 1996. The emergence of the Arbitration and Conciliation Act 1996, was the result of the sluggish arbitrary proceedings followed in accordance with the Act of 1940, that didn't give any fruit in the commercial disputes and resulted only in the ineffective and worthless adjudication where court had to intervene in adjudication on several arbitrary disputes.

The new Act of 1996, is a modified contribution from the United Nations Commission on International Trade Law Model and Arbitration Rules of the United Nations Commission on International Trade Law 1976. The main object of the Act was to give liberty to Arbitral proceedings and Adjudication and thereby to provide an independent status. The decree or the judgment of an arbitration proceedings need to be treated and implemented in the same manner of a Court decree as per the new Act. The new Act deals with the domestic, international commercial arbitration, enforcement of foreign award and conciliation as specified in Part I and II. The conciliation proceedings are formulated based on the UNICITRAL Conciliation Rules of 1980. The main purpose of the enforcement of the Act is to have an effective mercantile or commercial trade relation with the rest of the countries in the world. Any aspects in the dispute between countries regarding commercial arbitration, domestic arbitration matters need to be freed from the intervention of the courts was enunciated in this act for the speedy adjudication that is unlike in the normal court proceedings. In this modern time of Globalization, speedy adjudication is an important factor that will determine the international trade relations that are inevitable in the progress of economy of the country.

In the current Scenario of economy of the country, features in the Act that is applicable to all type of arbitration irrespective of being statutory or non statutory, if it is arbitrary in nature with a proper agreement that is subject to the provisions of the act of 1996.

The arbitration agreement should be in writing as per the provisions of the Act with a record of the agreement in any telecommunication mode or by exchange of letters. The Act also states that the relation of the parties in the agreement need not be in a contractual capacity and signature is not required unlike other usual agreements and the conduct of the parties in the agreement shall be treated as valid. This is a unique feature of arbitration unlike the laws of the land that insists on the signature of the relevant parties of an agreement.

The act gives the Arbitration Tribunals to adjudicate any dispute regarding the arbitration agreement and does not promote the Court Intervention except in certain exemptions provided in the Act. The Judicial Authority can interfere in arbitral proceedings according to section 11,for appointing arbitrators, provide assistance in seeking evidence as per section 27 and to give proper ruling if the arbitrator fails to perform his duties and terminated according to section 14(2) of the Act. An appeal shall lay on a decree form the tribunal to the court.

Though the arbitration Act seems to be liberal and independent, the disputes regarding agreements are not conclusively subject to act as the Judicial authority of India always have an indisputable upper hand in determining the final adjudication.

2.3.7 SELF ASSESSMENT QUESTIONS

1. What is adjudication? What are the different systems of adjudication?
2. What are the criticisms against adjudication? Suggest the measures to make adjudication effective?
3. What is compulsory arbitration? What are its advantages and disadvantages?

2.3.8 REFERENCES

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