

PROJECT ON APPLICABILITY OF LIMITATION ACT TO ARBITRATIONS

SCOPE OF STUDY:-

- The main area of the study is whether the parties are free to fix any period for making a reference to the arbitration by their contract. It seeks to find whether the period of the Limitation Act, 1963 could be curtailed by the agreement or the Limitation Act, 1963 giving three years times must prevail.
- Whether Sec 28 of the contract Act, old as well as new allows the parties to a contract to substitute their own period of prescription i.e. the right accruing under the contract shall be forfeited or extinguished unless arbitration was commenced within a period shorter than that under the Limitation Act, 1963 Act.?
- Whether section 28 of the contract act allows the parties to a contract to substitute their own period of limitation shorter than that under the limitation act.
- Section 43(3) empowers the court to extend the time if an arbitration agreement provides that the claim shall be barred unless some steps to comment arbitral proceedings is taken within a time fix by the agreement.
- Section 9 of the SCRA Act empowers the stock exchanges to make bye-laws "the method and procedure for settlement of claims or disputes, including settlement by arbitration". If such bye-laws also provide the limitation of

six month for reference to arbitration, then whether the same is hit by law of limitation or not. Whether the bye-laws 3 of the chapter XI of the NSE Bye-Laws prescribing limitation of six month for reference of dispute / claim to arbitration is valid or not.

RELEVANT PROVISIONS:-

1. Arbitration Act:

The relevant provisions to be discussed and issue in question from Arbitration Act 1996 are as follows:-

2 (4) This Part, except sub-section (1) of section 40, sections 41 and 43, shall apply to every arbitration under any other enactment for the time being in force, as if the arbitration were pursuant to an arbitration agreement and as if that other enactment were an arbitration agreement, except in so far as the provision of this Part are inconsistent with that other enactment or with any rules made there under;

43. Limitations- (1) The Limitation Act, 1963 (36 of 1963), shall, apply to arbitrations as it applies to proceedings in court.

(2) For the purposes of this section and the Limitation Act, 1963 (36 of 1963), an arbitration shall be deemed to have commenced on the date referred in section 21.

(3) Where an arbitration agreement to submit further 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.

(4) Where the Court orders that an 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 (36 of 1963), for the commencement of the proceedings (including arbitration) with respect to the dispute so submitted.

2. Limitation Act: -

The Limitation Act does not provide the period to refer the matter to arbitrate, however, it provides the period of three years within which claim is allowed to institute any action whether before a civil court of arbitral tribunal.

Article 29:- Savings:-

(2) Where any special or local law prescribes for any suit, appeal or application a period of limitation different from the period prescribed by the Schedule, the provisions of section 3 shall apply as if such period were the period prescribed by the Schedule and for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law, the provisions contained in sections 4 to 24 (inclusive) shall apply only in so far as, and to the extent to which, they are not expressly excluded by such special or local LAW.

Article-3:

3. Bar of Limitation. (1) Subject to the provisions contained in sections 4 to 24 (inclusive), every suit instituted, appeal preferred, and application made after the prescribed period shall be dismissed although limitation has not been set up as a defense.

Article :137

Any other application Three years. When the right to for which no period of apply accrues.

3. Contract Act:-

Section 28 under Old Contract Act

Section 28:- Agreements in restrain of legal proceedings, void

Every agreement, by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void to the extent.

Section 28 under Amended Contract Act

Section 28 was amended by Indian Contract (Amendment) Act, 1996 (Act 1 of 1997) with effect from 8.1.1997 and amended Section 28.

Section 28:- Agreements in restrain of legal proceedings, void

*28. Agreements in restraint of legal proceedings, void
- Every agreement,*

(a) by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any

contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights; or,

(b) which extinguishes the rights of any party thereto, or discharges any party thereto, from any liability, under or in respect of any contract on the expiry of a specified period so as to restrict any party from enforcing his rights, is void to that extent.

Exception 1 : Saving of contract to refer to arbitration dispute that may arise -This section shall not render illegal a contract by which two or more persons agree that any dispute which may arise between them in respect of any subject or class of subjects shall be referred to arbitration, and that only the amount awarded in such arbitration shall be recoverable in respect of the dispute so referred.

Exception 2: Saving of contract to refer questions that have already arisen -Nor shall this section render illegal any contract in writing by which two or more persons agree to refer to arbitration any question between them which has already arisen, or affect any provision of any law in force for the time being as to references to arbitration.

CONTRACTUAL AND STATUTORY ARBITRATION

There are two types of arbitrations namely, Contractual and Statutory.

CONTRACTUAL ARBITRATION:-

The Contractual Arbitration refers to a situation there is prior agreement between the parties that in case of future differences or disputes arising between the parties during their commercial transactions, such differences or disputes will be settled by arbitration as per clause provide in the agreement. The arbitrators (s) are appointed from a panel by the governing body of the institution or by the parties to the dispute.

The contractual arbitration has not been defined but the Arbitration and Conciliation Act defines the "arbitration agreement" in section 7(1) as follows:-

"7(1)- In this Part," 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."

An Arbitration Agreement is a contract and it must satisfy all the essential elements of a contract. As per the Contract Act, 1872, an agreement between two parties which is enforceable by law is a contract.

It is evident from the clause that the parties are free to refer the dispute to arbitration as an alternative means to resolve the dispute and may stipulate the time to refer the matter to arbitration by mutual consent. However, in view of the section 43 (1), the Limitation Act, 1963 shall apply to the Arbitration as it applies to proceedings in the court.

Under the Indian law all the contracts and the relations arising out of contract has to be dealt by the Indian Contract Act 1872 as amended up to date. Parties are free to bind themselves by the stipulation and responsibilities enumerated in the contract. However, some of the contracts which restrains the period of prescription or period of limitation are declared void in the eyes of law of contract. The relevant provisions in respect of the issue enumerated above have been provided under section 28 of the Indian Contract Act. The legal proposition is subject to study under two sub heads i.e. Section 28 as it stood before the amendment 08/01/1997 and those after the amendment.

Section 28 applies to agreements which absolutely prohibit the parties from having the legal recourse or which substitute their own period of limitation in place of the period laid down in the general law of limitation. Thus, Section 28 envisages two situations in which it is attracted to a particular agreement:-

Remedy:

The right to remedy refers to a situation whereby the party cannot enforce his right through legal proceedings to enforce a claim. Such restrictions may be partial as well as absolute. If, such as restriction is absolute, then it would become void being hit by Section 28. However, a partial restriction will be valid as observed by Supreme Court in **Hakam Singh v. Gammon (India) Ltd.** (AIR 1971 SC 740). In this case a clause in the agreement between the parties provided that “the court of law in the city of Bombay alone shall have jurisdiction to adjudicate thereupon.” The plaintiff filed a suit at Varanasi, but the same was dismissed in view of the abovestated agreement. The court held that agreement was not opposed to public policy and it did not contravene section 28, and therefore, the suit filed at Varanasi was rightly dismissed.

Right:

The right to claim refers to the extinguishment of claim and discharge of the other party after certain steps not taken within a particular time. An example of such a clause, that a party must take some steps (such as issuing a notice for arbitration) to commence arbitration proceedings within a period of time fixed by the agreement failing which the claim itself would get barred or get extinguished. Such a clause was upheld in **Atlantic Shipping Case, 1922(2) AC 250** and by our Supreme Court in Vulcan Insurance Co. Ltd.

Before the amendment of Section 28 of Contract Act in 1997, the agreements reducing the period of limitation were distinguished from those which did not limit the time within which a party might enforce his rights, but which provided for a release or forfeiture of rights if no suit was brought within the period stipulated in the agreement; and the latter class of agreements, outside the scope of the present section, were binding between the parties.

Hirabhai Narotamdas v. Manufacturers Life Insurance Co., 14 Bom LR 741, was the first case which propounded that the clauses which restricts the parties to recourse the legal proceedings unless some steps are not initiated within stipulated time are valid. The reasoning behind this judgment that the party waive off their rights if the party doesn't initiate his rights. In this case, a contract for insurance contained a clause, which ran thus: "No suit shall be brought against the company in connection with the said policy later than one year after the time when the cause of action accrues." A suit was brought on the contract after the period, but within three years as provided by Article 86, Limitation Act, and it was urged that the condition curtailing the period of limitation was void under Section 28, Indian Contract Act. It was held by the Bombay High Court that that the condition was valid, for the parties agreed thereby in that if no suit were brought within a year, neither party should be regarded as having any rights as against the other. The Bombay High Court in concluding para 4, observed thus, "*but here the parties agreed in substance that if no suit were brought within a year then neither party*

should be regarded as having any rights as against the other; in other words, the condition contained in the clause meant that there was to be a waiver of the rights of the respective parties if no suit was brought within a year. That was the intention of the parties and the conclusion, therefore, arrived at by the lower Court must be accepted as correct. We, therefore, confirm the decree with costs."

Giridharilal Hanumanbux v. Eagle Star & British Dominion Insurance Co. Ltd., 80 Ind Cas 637: (AIR 1924 Cal 186) it was held that Section 28 of the Contract Act aimed only at covenants not to sue at any time, or for a limited time, and was not aimed at a provision extinguishing the right to sue in certain events.

Later on the Supreme Court in the case of **Vulcan Insurance Co. Ltd. v. Maharaj Singh** 1976 (1) SCC 943 had taken the same view. The Supreme Court in **National Insurance Co. Ltd. v. Sujir Ganesh Nayak & Co.** AIR 1997 SC 2049, the Apex Court drew a clear distinction between the agreement which in effect curtails the period of limitation and an agreement which provides for the forfeiture or the waiver of the right itself if no action is commenced within the period stipulated by the agreement. The first was held to be void as offending under Section 28 but the later was held not to be a clause which shall fall within the mischief of the Section 28. It was, thus, held that curtailment of the period of limitation is not permissible in view of Section 28 but extinction of the right itself unless exercised within the specified time is permissible and can

be enforced. This view was reiterated in **Wild Life Institute of India, Dehradun v. Vijay Kumar Garg** (1997) 10 SCC 528.

The legal principle that emerges from the aforesaid judicial pronouncements is that a condition in a contract providing for a forfeiture of all benefits unless an action is brought within a specified period doesn't therefore violate the section. As per the contract itself the rights that might have accrued to the party cease to exist on the expiry of the period provided in the contract. What is hit by section 28 is an agreement relinquishing the remedy only, by providing that if a suit is to be filed, then it should be filed within the specified time limit (the time limit being shorter than the period of limitation provided by the Limitation Act). Under such a clause, though the rights accrued continue even beyond the time limit and are not extinguished, yet there is a limiting of the time to sue as prescribed by the Limitation Act. It is such a clause that is regarded as void by reason of Section 28. But if the rights themselves are (under the contractual clause as widely worded) extinguished, then there is no violation of limitation law

Section 28 Contract Act and 97th Law Commission Report:

The Law commission in its **97th Report** discussed the anomalous situation created due to wordings of Section 28 as it stood before the amendment in following words in **para 3.1, 3.2 and 3.12** of the said report:-

“3.1 The very brief summary of the existing legal position given in the preceding paragraphs shows that a distinction is assumed to exist between “remedy” and “right” and that distinction is the basis of the present position under which a clause barring a remedy is void, but a clause extinguishing the rights is valid. Now, this approach may be sound in theory. In practice, however, it cause serious hardship might even be abused, so as to defeat the cause of economic justice. Such contractual clauses are usually inserted where the parties are not in an equal bargaining position. By giving a clause in an agreement that shape and character of a provision extinguish the right (and not merely affecting the remedy), a party standing in a superior bargaining position can achieve something which could not have been achieved by merely barring the remedy.

In other words, under the present law, a more radical and serious consequence – the abrogation of rights – becomes permissible while a less serious device – the extinction of the mere remedy – becomes impermissible. Prima facie, such a position appears to be highly anomalous. By providing for the extinction of a right, the parties are actually creating a law of prescription of their own, which is a far more important matter than merely creating a law of limitation of their own. If the law does not allow the letter consequence to be imposed by agreement, a fortiori, the law should not allow the former consequence also to be imposed by agreement.

3.2 In support of the present position, it might be argued that substantive rights, which themselves flow from a contract, can be left to be dealt with by the contract itself. But we are not impressed by this argument. The barring of remedy affects only the adjective part of the legal system, while extinction of the right may cause serious hardship and injustice. It is understand why the parties should be allowed to invent own rules of prescription, when they are not allowed to invent something lesser – their own rules of limitation. This position is prima facie illogical, and we have not been able to think of any countervailing or overriding consideration that may justify the illogicality.

This present misconceived approach has taken root because it is overlooked that limitation and prescription are both the result of one identical circumstance – the running of time. In fact, the Limitation Act is not confined to limitation only. It provides for prescription also, in certain circumstances.”

Further, the law commission in para **3.12** observed that, “We would, however, like to observe that the analog of American Law – assuming that the position there is as has been putforth in this paragraph – is of no use. Of a legal system permits time limit clauses (in contracts) which bar the remedy, there is nothing illogical is it also permits lime clause (in can racls) which extinguish the substantive rights. No anomaly would arise in that case, since whatever be the form of the contractual stipulation, it would be

recognized as valid. The position in India (under the present law) is different. A party is not allowed to provide for the period of limitation by a contractual stipulation but he can provide for the period of prescription. This is obviously anomalous. Moreover, such a distinction encourage he parties of the contract to putforth arguments to the effect that the particular clause in contract is one which extinguishes the right, or that its one which merely affects that remedy. A party interested in affirming the validity of the clause would argue for the former while a party interested in denying its validity would argue for the latter. The confusion, hardship and disputes arise because the law is illogical and irrational by permitting a contractual stipulation that makes a bigger inroad on the general law, while not permitting a contractual stipulation that makes a lesser inroad on the general law.”

The Law commission in the aforesaid report in **para 5.2** discussed the demerits of the present law (old Section 28 Contract Act) which regards the prescriptive clauses as valid while invalidating time limit clauses which merely bar the remedy, and observed that the same suffers from following principal defects:-

- a) It causes serious hardship to those who are economically disadvantaged and is violative of economic justice.
- b) In particular, it harms the interests of the consumer, dealing with big corporations.

- c) It is illogical, being based on a distinction which treats the more severe flaw as valid, while invalidating a lesser one.
- d) It rests on a distinction too subtle and refined to admit of easy application in practice. It thus, throws a cloud on the rights of parties, who do not know with certainty where they stand, ultimately leading to avoidable litigation.

The law commission in view of the aforesaid observations highlighting the anomalous legal situation, in **para 5.3** recommended that Section 28 of the Indian Contract Act, 1872, should be suitably amended so as to render invalid contractual clauses which purport to extinguish, on the expiry of a specified term, rights accruing from the contract.

Finally, it may be mentioned that the **Government of Punjab** (Legal and Legislative Affairs Department) while expressing agreement with the need for invalidating contractual clause which extinguishes a substantive right on the failure of a party to institute a suit has further suggested that the same should be the position where there is failure to institute a legal proceedings other than suit. Law Commission have found the suggestion acceptable and have incorporated in the amendment recommended by it in Section 28.

Revised Section 28, main paragraph, Contract Act as recommended

28. Every agreement-

- (a) by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract by the usual legal proceedings in the ordinary tribunals, or
- (b) which limits the time within which he may thus enforce his rights, or
- (c) which extinguishes the rights of any party thereto under or in respect of any contract on the expiry of a specified period, or on failure to make a claim or to institute a suit or other legal proceedings within a specified period, or
- (d) which discharges any party thereto from any liability under or in respect of any contract in the circumstances specified in clause (c), is void to that extent.

Thus, it can be observed that the Government of Punjab recommended to invalidate the contractual clauses where there is a failure to institute a legal proceedings other than a suit. On this basis, the law commission in its 97th report has recommended the revised section 28 (c) to include, "which extinguish the right of any party thereto under or in respect of any contract..... on failure to make a claim or institute a suit or other legal proceeding within a specified period. The said amendment was targeted to

invalidate the contract whereby any party is prohibited to institute any legal proceedings, meaning thereby if recourse to arbitration is prohibited in any agreement then such an agreement would be void. But the clause was not incorporated into the new section 28 of the Contract Act which shows the intention of the legislature to free the parties to partially restrict the recourse to Alternate Dispute Resolution.

Effect of amendment of section 28 of Contract Act 1997 –

The effect of the amendment of Section 28 makes it clear that any clause extinguishing the right of a party or discharging any party from the liability in respect of any contract on expiry of specific period so as to restrict the time period would be void.

In **Chander Kant & Co. Vs. The Vice Chairman, DDA and Ors.** (Arbitration Petition No. 246 of 2005, Decided on 26/05/2009, Delhi High Court), the petitioner filed a petition for the appointment of an arbitrator to adjudicate the disputes between the parties. The petitioner invoked the arbitration clause. The respondents/DDA failed to respond to the notice of the petitioner and, hence, the petitioner has approached Delhi High Court for appointment of an arbitrator. The DDA opposed the petition mainly on the ground that it is barred by virtue of Clause 25 of the agreement. According to the respondents, the requirement of this Clause is that on the

final bill being ready for payment, the arbitration clause should be invoked within 90 days thereafter. Failure to make demand for arbitration within 90 days would result in forfeiture or waiver of the right. Thus, the question which was decided by the Delhi High Court was whether there can be such limitation of a period of 90 days in view of the amended provisions of Section 28(b) of the Indian Contract Act read with Article 137 of the Limitation Act.

The Delhi High Court in this case took note of the position prior to the amendment of the Section 28 of the Contract Act in 1997, and observed that before the amendment, the agreements reducing the period of limitation were distinguished from those which did not limit the time within which a party might enforce his rights, but which provided for a release or forfeiture of rights if no suit was brought within the period stipulated in the agreement; and the latter class of agreements, outside the scope of the present section, were binding between the parties. The Delhi High Court then took the note of amendment to Section 28 Contract Act, and quoting the earlier judgments of Delhi High Court held that the 1997 Amendment to the Section now also prohibits clauses which seek to extinguish the rights of any party thereto, or discharge any party from any liability under or in respect of any contract on the expiry of a specified period so as to restrict any party from enforcing his rights.

Finally, it was held in the case that in view of the amendment, the distinction which was drawn earlier has been obliterated and **the clauses providing for extinction or discharge of the rights of the parties on the expiry of the specified period are also covered by inserting Clause (b) in Section 28 of the Contract Act.**

Section 28 Contract Act and 176th Law Commission Report

Further, the 176th report of the Law commission referred to the 97th Report of the Law Commission in which the law commission made recommendation for the amendment of Section 28 so that the anomalous situation created by the existing Section may be rectified. The Law Commission observed (176th Report) that in view of the new sec. 28(b) of the Contract Act, if there is a provision in an arbitration clause which requires a party to take some steps to commence arbitral proceedings within a time fixed in the arbitration agreement, failing which the claim gets barred, such a clause will be void. Consequently, if such a clause is void, then the question of seeking extension of time on the ground of hardship is no longer necessary. Thus, the provision in sec. 43(3) that a party can seek extension of time from a court of law to relieve hardship becomes redundant w.e.f. 8.1.97.

The commission recommended adding the following proviso below in sec. 43(3):

" Provided that after the commencement of Indian Contract (Amendment) Act 1996, any provision in the arbitration agreement which provides that any such claim shall be barred unless some step to commence arbitration proceedings is taken within a time fixed by the agreement, shall be void:

Provided further that the provisions of this sub-section shall be deemed to have no effect from the date of such commencement".

New Section 28 & Section 43 (3) of the Arbitration and Conciliation Act, 1996:

The Law commission observed that if the prescriptive clause becomes invalid by the operation of amendment of Section 28 of the Contract Act, then the question of seeking extension of time on the ground of hardship is no longer necessary. Thus, the provision in sec. 43(3) that a party can seek extension of time from a court of law to relieve hardship becomes redundant w.e.f. 8.1.97.

The law commission opined that since the Section 43 (3) has become redundant by the operation of Section 28 Contract Act as amended, recommended for adding the following proviso below in sec. 43(3):

"Provided that after the commencement of Indian Contract (Amendment) Act 1996, any provision in the arbitration agreement which provides that any such claim shall be

barred unless some step to commence arbitration proceedings is taken within a time fixed by the agreement, shall be void:

Provided further that the provisions of this sub-section shall be deemed to have no effect from the date of such commencement”.

The Arbitration and Conciliation (Amendment) Bill, 2003, however omitted altogether the Sub-section (3) of Section 43. The said bill however has been withdrawn to facilitate for introduction of a new Bill on arbitration after obtaining the recommendations of the Department related Parliamentary Standing Committee on Personnel, Public Grievances, Law and Justice. (See Press release dt. 05/04/2006 of Press Information Bureau, published in its website <http://pib.nic.in/release/release.asp?relid=17020>)

STATUTORY ARBITRATION:

The situation where a law or Act specifies that if a dispute arises in a particular case it has to be referred to arbitration, the arbitration proceedings are called statutory arbitration. The statutory arbitration has been provided in almost 25 central Acts, some of them have been produced herein below:

The Indian Telegraph Act, which provided in section 7(B) as follows:

7B. Arbitration of disputes

(1) Except as otherwise expressly provided in this Act, if any dispute concerning any telegraph line, appliance or apparatus arises between the telegraph authority and the person for whose benefit the line, appliance or apparatus is, or has been provided, the dispute shall be determined by arbitration and shall, for the purposes of such determination, be referred to an arbitrator appointed by the Central Government either specially for the determination of that dispute or generally for the determination of disputes under this section.

Electricity Act, which provides in Part XVI under section 158:

Arbitration 158:-

Where any matter is, by or under this Act, directed to be determined by arbitration, the matter shall, unless it is otherwise expressly provided in the licence of a licensee, be determined by such person or persons as the Appropriate Commission may nominate in that behalf on the application of either party; but in all other respects the arbitration shall be subject to the provisions of the Arbitration and Conciliation Act, 1996.

ARBITRATION UNDER BYE-LAWS

Sometimes the Act does provide the arbitration provisions but delegate the power to delegated authority to make

rules and bye-laws in respect of arbitration procedure, one of the such types of Acts providing arbitration to arbitrate the dispute in reference to the disputes arose between the parties and bye-laws in respect of the procedure to be followed in arbitration is produced herein. The **Securities Contracts (Regulation) Act 1956** was enacted to prevent undesirable transactions in securities, by regulating the business of dealing therein and for providing certain other matters connected therewith. The recognition to the stock exchange is given under the said law. Section 9, inter alia, provides:

"9. Power of recognized stock exchange to make byelaws-

- (1) Any recognized stock exchange may, subject to the previous approval of the securities and exchange Board of India, make bye-laws for the regulation and control of contracts.*
- (2) In Particular and without prejudice to the generality of the foregoing power such byelaws may provide for-*
 - (n) the method and procedure for the settlement of claims or disputes, including settlement by arbitration;*
- (3) The bye-laws made under this section may:*
 - (a)*;
 - (b) -----.*

(4) Any bye-laws made under this section shall be subject to such conditions in regard to previous publication as may be prescribed, and, when approved by the [and Exchange Board of India], shall be Securities published in the Gazette of India and also in the Official Gazette of the State in which the principal office of the recognized stock exchange is situate, and shall have effect as from the date of its publication in the Gazette of India: Provided that if the [Securities and Exchange Board of India] is satisfied in any case that in the interest of the trade or in the public interest any bye-laws should be made immediately, it may, by order in writing specifying the reasons therefore, dispense with the condition of previous publication.

Arbitration: - Statute V Byelaws:

Now two situations arise, one where the reference to arbitration is provided by the Statute and the substantial provisions of law e.g. the limitation to refer the matter to arbitration are also provided by the Statute itself; two where the Statue provides for arbitration in case of dispute but remains silent over the question of substantial provisions of procedure and rules and confer that power to make rules and bye-laws in respect of arbitration upon delegated legislature.

Biba Sethi v. Dyna Securtites (OMP Nos. 63/2007, decided on 17/03/2009 by Delhi High Court) In this judgment the court held that the byelaws only provide for the arbitration and fixing of six month time for arbitration cannot be different from the period prescribed by the schedule to the limitation act. Further the court held that the bye laws of the NSE providing time for six months for submission of claim/disputes to arbitration is also contractual and not statutory. Further the court held that the part of byelaws (3) of chapter XI of NSE by laws to the extent prescribing limitation of six months for reference of dispute / claims to arbitration is void. The time therefore, will be governed by the Limitation.

Ashwani Kumar Mittal v. Bimla Securites P Ltd
OMP 341 /2006 decided on 20/07/09:-

While considering the same issue the court held that it cannot be said these byelaws are in any way inferior to the statutory provisions of the Limitation Act and byelaws (3) of chapter XI of NSE by laws to the extent prescribing limitation of six months for reference of dispute / claims to arbitration is valid.

The point of contention in the above two cases were:-

1. Whether the part of byelaws (3) of chapter XI of NSE by laws to the extent prescribing limitation of six months for reference of dispute / claims to arbitration is void or valid.

2. Whether the fixing of six month time without any substantive provision in the SCRA Act is hit by the law of limitation or the same shall be covered by exception as provided in the section 2(4) of the Arbitration Act.
3. The another issue was whether the byelaws of the exchange are statutory or contractual in nature.

The byelaws 3 of the chapter XI of NSE

Limitation period for reference of claims, differences or disputes for arbitration

(3) All claims, differences or disputes referred to in Bye laws (1), (1A), (1B) and (1D) above shall be submitted to arbitration within six months from the date on which the claim, difference or dispute arose or shall be deemed to have arisen. The time taken in conciliation proceedings, if any, initiated and conducted as per the provisions of the Act and the time taken by the Relevant Authority to administratively resolve the claim, differences or disputes shall be excluded for the purpose of determining the period of six months.

The perusal of section 9 of SCRA Act, 1956 and byelaws 3 of chapter XI of NSE reveals:-

1. The section 9 of SCRA Act 1956 empowers the NSE to make byelaws in respect of "The method and procedure for the settlement of claims or dispute including settlement by arbitration".

2. These byelaws have been made by the exchange in pursuance of the delegated legislative power as provided in section 9.
3. The byelaws provide that all claims, difference, dispute referred to in the byelaws shall be submitted to arbitration within six month from the date on which the claim, difference or dispute arose or shall to be deem to have arisen.
4. The byelaws nowhere provide that if arbitration is not invoked within six month time, right of any party is extinguished or any party is discharged from its liability.

The following judgment of the various courts held that the **bye-laws and statutory provisions can stand on the same footings** and the former have the same effect as to latter.

HCG Stock v. Gagar suresh 2007 2 SCC 279

The apex court while taking into consideration the bye laws as statutory held that the reference made by the appellant beyond the six months as provided by the bye-laws of NSE is time barred. The apex court held:

3. This appeal is directed against the order passed by the Division Bench of the Bombay High Court in Appeal No. 738 of 2004 on 2.12.2004 whereby the Division Bench of the

High Court has affirmed the order of learned Single Judge. Learned Single Judge in turn has affirmed the order of the Arbitral Tribunal whereby the Arbitral Tribunal has upheld the objection of the respondent that the claim raised by the appellant is barred by limitation as per Bye-laws of the National Stock Exchange of India Limited.”

S & D Securities v. UOI 2004 62 CLA 303 Cal

The apex court held in Para 25 –

“25. It may be relevant to mention here that the idea of introducing this Act of 1956 and the Bye-laws, Rules and Regulations is to regulate the dealings in securities. It is common knowledge that in the recent past number of bungling has taken place in matter of securities and, therefore, the Government came out with pieces of legislation so as to regulate the trading in securities. Bare reading of this Act, Bye-laws, Rules and Regulations make it more incumbent on the trading member to adhere to all these Acts, Bye-laws, Rules and Regulations. The scheme of relevant provisions of the Act Bye-laws, Rules and Regulations have been reproduced above in order to show that repeatedly in all such Bye-laws, Rules and Regulations emphasis has been given on the responsibility of the trading member so that the consumers; that is, the customer may not be cheated. In all the Bye-laws, Rules and Regulations burden has been placed on the trading member that they may not cheat bona fide customers who is interested in dealing in securities. Regulation 4.3.1 has

been couched in very positive terms and it leaves no manner of doubt that it is the trading member who is responsible for all these dealings. If he fails to execute the agreement with his customer, as given in 'Annexure 3' which contains a stipulation in Clause 6, the agreement shall be deemed to have been executed. Statute has made such deeming provision. Therefore, an inference of a statutory deeming has to be drawn in the scheme of the provisions of the Act, Bye-laws, Rules and Regulations."

**Nirav Securities v. Mrs Prabhuta Motiram
2002 39 SCL 372 BOM.**

In this case, the arbitrator passed the award on merit despite the fact that the reference to the arbitration was made after a period of six months. The Apex Court held that the question that need to be considered is the specific provision under which an award which grants claim which is barred by limitation is liable to be interfered with. Mr. Dhanuka, learned counsel for the Petitioner, relied on an unreported decision of the Division Bench of this Court (Pandya & Chandrachud, JJ.) in Appeal No. 301 of 2000 in arbitration petition No. 365 of 1999 Option Pratibhuti & Vinimay Co. Ltd. v. Geetashree Securities P. Ltd. dated 27-6-2000. While considering the same question, i.e., the applicability of Bye-law No. 3, the Division Bench observed in paragraph 3 as follows :

"It was seriously urged before us that this will not cover section 34 of the Arbitration and

Conciliation Act, 1996. As it was related to the public policy, in our opinion, will definitely cover the case because the bye-law, which gives a remedy of arbitration, itself is hitting the petition by limitation, and if it is ignored, the entire contract for regulation giving rise to the arbitration would stand truncated and the provision for limitation will lose its meaning. This being the regulation of contract, to ignore a part of the contract, in our opinion, would not be in the interest of public policy at all as the bye-law governs relations of the parties which have been framed by consent of the members and have agreed to act thereunder. Thus, this being eminently a matter of public policy, in our opinion, section 34 would be attracted."

The Division Bench was clearly of the view that an Award contrary to the law of limitation must be held to be in conflict with the public policy of India as envisaged by Section 34(2)(b)(ii).

**Kishor Jitendra Dalal v. Jaydeep Investments
AIR 1996 Bom 254**

The Court upheld the statutory flavor of the byelaws of NSE and held:

Since provision has been made under Bye-laws 254 and 261 of the bye-laws of the Exchange empowering the Governing Board or the President of the Exchange to

enlarge time for the Arbitrators to make the award despite there being no consent of the party or parties to the agreement which provision though inconsistent with Sub-section (2) of Section 28 of the Act shall prevail and in that view of the matter, the Governing Board or the President of the Exchange has the power to enlarge the time for the Arbitrators to make the award

**The Stock Exchange, Mumbai Vs. Vinay Bubna
AIR 1999 Bom 266 (DB)**

Held: Bye laws of exchange are statutory.

By-laws of the Exchange are framed in exercise of power conferred under Section 9 of the Regulation Act. Hence, they are statutory. They would thus squarely fall under the phrase "under any other enactment" appearing in Sub-section (4) of Section 2 of the Arbitration and Conciliation Act, 1996 and the same in so far as are inconsistent with provisions of the Act would prevail.

The word "enactment" would mean and include by-laws, framed under an Act. It would, therefore, follow that the by-laws framed under the Regulation Act would form part of the Regulation Act and: the same will prevail over provisions of Section 10 of Arbitration and Conciliation Act, 1996.

A conclusion is, therefore, irresistible that by-law 249(a) is a statutory by - law. The same will operate and will apply in respect of all arbitrations

under the Regulation Act and the same will not be hit by the provisions of Section 10 of the Arbitration and Conciliation Act, 1996. Aforesaid by-law will be saved by the provisions of Section 2(4) of 1996 Act and will prevail over the provisions of Section 10 of the Act.

Bombay Stock Ex. V Jaya Sha AIR 2004 SC 55;

Bombay Stock Ex. V Jaya Sha AIR 2004 SC 55:- The apex court has decided the arbitration in relation to member and non-member and also between member. While deciding the issue the court has also set this obiter dicta in Para 38 in relation to the powers of bye-laws:

38. Rules, Bye-laws and Regulations are made by the Exchange. They although are not made under a statute but having regard to the scheme as also the purport and object thereof, have a statutory flavour, Bye-laws are required to be made for regulation and control of contracts, whereas rules relate to in general to the constitution and management of a stock exchange.

CONCLUSION:

1. The contract may contain the clauses of period of prescription clauses of period of limitation.-
2. Before the amendment of Section 28 of Contract Act in 1997, the agreements reducing the period of limitation were

distinguished from those which did not limit the time within which a party might enforce his rights, but which provided for a release or forfeiture of rights if no suit was brought within the period stipulated in the agreement; and the latter class of agreements, outside the scope of the present section, were binding between the parties.

3. Law commission in 1997th report have recommended new section 28 containing the clause "(c) which extinguishes the rights of any party thereto under... on failure to make a claim or to institute a suit or other legal proceedings within a specified period" which was aimed at making the contract void if containing the clause barring the reference to other legal proceeding within a specified time i.e. arbitration. But the said clause was not incorporated in the new section 28 of the contract act which shows the intention of the legislature not to bar contract which contained such partial restriction.
4. The section 43(3) of the arbitration act has become redundant by the operation of new section 28 of the contract act. As new section 28 of the contract act had made the perspective clause invalid, the question of application of section 43(3) does not arise at all. The 176th law commission report has also stated the same and in The Arbitration and Conciliation Bill, 2003 has omitted the said clause though the bill has not been passed by the legislature.
5. As held in the various judgements cited above, the byelaws of the NSE have the statutory flavor. The contention that section 9 of the SCRA 1956 does not provide the limitation of six month as no force as :-

- a. The remedy of recourse to arbitration has been provided under the byelaws but byelaws nowhere state that if the arbitration is not invoked within six month, the right of the parties become extinguished or any party is discharged from its liability.
- b. Even in the contractual arbitration, such clauses prescribing partial restriction are held to be valid and not hit by the section 28 of the contract act.
- c. The byelaw 3 of chapter XI of NSE is not hit by the law of limitation as it did not bar the parties to file the suit after the period of six month.