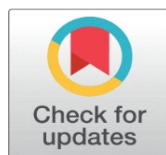


CONTOURS OF JURISDICTION UNDER INDIAN ARBITRATION ACT

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ABSTRACT

The Arbitration Act, 1940 had no provision which allowed the Arbitral Tribunal to make a decision on its own jurisdiction like Section 16 of the Arbitration and Conciliation Act, 1996 the Arbitral Tribunal has been granted the power to make a ruling on its own jurisdiction. Section 16 (1) of the Arbitration and Conciliation Act states that the Arbitral Tribunal may rule on its own jurisdiction, including ruling on any objection with respect to the existence or validity of the arbitration agreement. The legislative intent underlying the 1996 Act is to minimise judicial intervention in the arbitral process and nominate the arbitrator without wasting time, leaving all contentious issues to be decided by the arbitral tribunal itself. Section 16 of the Arbitration and Conciliation Act incorporates the principle of "Compétence-Compétence" or "Compétence de la reconnue", is a doctrine that empowers an arbitral tribunal to rule on its own jurisdiction, including ruling on any objection with respect to the existence or validity of the arbitration agreement. It is closely related to rules regarding the allocation of jurisdictional competence between arbitral tribunals and national Courts and to rules concerning the nature and timing of judicial consideration of challenges to an arbitral tribunal's jurisdiction. The doctrine empowers the arbitrators to decide on their own jurisdiction. The ruling passed in *SBP & Co. vs. Patel Engineering Ltd.* chipped away the importance of the *Kompetenz-Kompetenz* principle incorporated in Section 16 consequently, the 2015 Amendment inserted Section 11(6A) in order to restrict the powers of the courts to merely examining the existence of an arbitration agreement. The 2019 Amendment omitted Section 11(6A). now after coming of so many decisions regarding this matter the scope and area of jurisdiction of arbitral tribunal has opened many wings of debate and this chapter is an attempt to discuss all these dimensions.

Keywords: Arbitration Act, Jurisdiction, Section, Agreement, Granted

1. INTRODUCTION

Arbitration as a dispute resolution mechanism is governed by The Arbitration Act 1996. The matter related to jurisdiction of arbitral tribunal contained in section 16 of the Arbitration and Conciliation Act, 1996 which corresponds to Art. 16 of the UNCITRAL Model Law and also to Art. 21 of the UNCITRAL Arbitration Rules. It is important to mention here that there was no provision under the Arbitration Act of 1940 which allowed the Arbitral Tribunal to make a decision on its own jurisdiction and it was the job of the court to decide on the jurisdiction of the arbitral tribunal. But under Section 16 of the Arbitration and Conciliation Act, 1996 the Arbitral Tribunal has been granted the power to make a ruling on its own jurisdiction. Section 16 (1) of the Arbitration and Conciliation Act states that the Arbitral Tribunal

may rule on its own jurisdiction, including ruling on any objection with respect to the existence or validity of the arbitration agreement.

I. Arbitration Act, 1996

The legislative intent underlying the 1996 Act is to minimise judicial intervention in the arbitral process and nominate the arbitrator without wasting time, leaving all contentious issues to be decided by the arbitral tribunal itself¹. The two main bastions of the jurisdiction of the tribunal under Section 16 are (i) competence of the arbitral tribunal to make a decision on its own jurisdiction, including ruling on any objection with respect to the existence or validity of the arbitration agreement; and (ii) for that purpose to treat the arbitration clause which forms part of the substantive contract, as an agreement independent of the other terms of that contract. The decision by the arbitral tribunal that the contract is null and void shall not ipso jure invalidate the arbitration clause. Section 16 is based on the autonomy of the arbitration clause or doctrine of separability and survival of the arbitration clause². This section sets forth these two principles with remarkable clarity and precision. Both of these accord well with modern international commercial arbitration practice.

The jurisdiction of the tribunal under this section is not subject to party autonomy. This Section now makes it clear that the objections with respect to existence and validity of the arbitration agreement must, in the first instance, be raised before the arbitral tribunal itself, and decided by it. The validity of an arbitration agreement may depend upon various reasons which have been discussed under Section 7.

Section 16 is placed in Part-1, Chapter IV of the Act, which deals with the power of the arbitral tribunal to decide on its own jurisdiction. Section 16 is divided into five sub-sections :

- sub-section (1) of Section 16 is based on the twin doctrines of 'Kompetenz-Kompetenz' and 'Separability';
- sub-section (2) states that a plea of lack of jurisdiction of the tribunal, shall be raised not later than the submission of the statement of defence;
- sub-section (3) states that a plea that the arbitral tribunal is exceeding the scope of its authority, must be raised forthwith during the arbitral proceedings;
- sub-section (4) provides that if the plea in sub-sections (2) and (3) is made at a later point of time, the arbitral tribunal will have the discretion to admit the same, if it considers the delay to be justified;
- sub-section (5) provides that the tribunal shall decide the plea referred to in sub sections (2) and (3); if the plea is rejected, the tribunal will continue with the proceedings, and make the award; and
- sub-section (6) states that the party aggrieved by such an arbitral award, may challenge it at the Section 34 stage.

¹ *Food corporation of India vs ICA* AIR 2003 SC 3011

² *Olympus Superstructure Meena vs vijay* AIR 1999 SC 2102

2. DOCTRINE OF KOMPETENZ-KOMPETENZ

1) Concept Under English Law

English Law on Kompetenz-Kompetenz The usual practice under modern international law and institutional rules of arbitration is to spell out in express terms, the power of an arbitral tribunal to decide upon its own jurisdiction or, as it is often put, its competence to decide upon its own competence. The law is based on the doctrine of 'Kompetenz Kompetenz, a German expression, which implies that the arbitral tribunal has the competence to decide its own jurisdiction. English law has also taken the view that the arbitral tribunal cannot be the final adjudicator of its own jurisdiction. The final decision as to the substantive jurisdiction of the tribunal rests with the court. However, there is no reason why the tribunal should not have the power, subject to review by the court, to rule on its own jurisdiction. Indeed, such a power has been generally recognized in other legal systems.

The English Arbitration Act, 1996 now specifically empowers the arbitral tribunal to rule on its own jurisdiction. Section 30(1) of the English Arbitration Act, 1996 provides that in the absence of an agreement by the parties, the arbitral tribunal may rule on its own substantive jurisdiction.

2) Doctrine Under Indian Law

Section 16 of the Arbitration and Conciliation Act incorporates the principle of "Kompetenz-Kompetenz" sometimes also referred to as "Compétence-Compétence" or "Compétence de la reconnu", is a doctrine that empowers an arbitral tribunal to rule on its own jurisdiction, including ruling on any objection with respect to the existence or validity of the arbitration agreement. It is closely related to rules regarding the allocation of jurisdictional competence between arbitral tribunals and national Courts and to rules concerning the nature and timing of judicial consideration of challenges to an arbitral tribunal's jurisdiction. The doctrine empowers the arbitrators to decide on their own jurisdiction in the first instance. However, in case a judicial authority is moved under Section 8 before the constitution of the tribunal, the judicial authority would confine itself to render a finding whether a valid arbitration agreement exists, and thereafter refer the parties to arbitration. The authority of the arbitrator to rule on jurisdictional challenges, extends to matters involving the validity of the agreement to arbitrate, and to matters involving interpretation of the scope of the arbitrator's authority to resolve the disputes submitted for arbitration in accordance with the agreement. The tribunal can decide the claims covered by the arbitration agreement. The ruling of the tribunal on jurisdictional matters, is however, subject to judicial scrutiny after the award is passed at the Section 34 stage.

the concept of competence-competence contains two dimensions, first one reflects that without support from the courts, the tribunal may decide on its jurisdiction and secondly, it shows reluctance from the courts in deciding this issue before the tribunal has decided on this issue.

*In Olympus Superstructures Pvt.Ltd v. Meena Vijay Khetan*³, it has been held that under the Arbitration and Conciliation Act, 1996, the arbitral tribunal is vested with power under s.16(1) to rule on its own jurisdiction including ruling on any objection with respect to the existence or validity of arbitration agreement. The arbitration clause which forms part of

³ (1999)5 SCC 651

the contract and any decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure affect the validity of the arbitration clause. This is clear from clause (b) of section 16(1) which states that a decision by the arbitral tribunal that the main contract is null and void shall not entail ipso jure the invalidity of the arbitration clause⁴. In *S.B.P. and Co. v. Patel Engineering Ltd. and Anr.*⁵, the Supreme Court has held that where the Arbitral Tribunal was constituted by the parties without judicial intervention, the Arbitral Tribunal could determine all jurisdictional issues by exercising its powers of competence-competence under Section 16 of the Act.

3) OBJECTION ON JURISDICTION

Section 16(2) of the Arbitration Act states- a plea that the tribunal does not have jurisdiction must be raised no later than submission of the statement of defence. Section 16(3) states- a plea that the tribunal has exceeded the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the proceedings. However, under Section 16(4), the tribunal has the power to admit a later plea if it considers the delay justified. An objection to the jurisdiction of the tribunal can be raised by making an application to the tribunal under Section 16 of the Arbitration Act. In *M/s MSP Infrastructure Ltd v MP Road Development Corporation Ltd*⁶ the Supreme Court of India elaborated on the scope of Section 16 of the Arbitration Act and held that all objections to the tribunal's jurisdiction must be made by no later than submission of the statement of defence. If a challenge is made to the jurisdiction of the tribunal under Sections 16(2) and 16(3), the tribunal will decide on its jurisdiction under Section 16(5). If the tribunal rejects the challenge under Section 16(5) and continues with the proceedings and makes an arbitral award, a party can apply to the courts for a ruling on the jurisdiction of the tribunal while challenging the award under Section 34 of the Arbitration Act. As well as, if the tribunal concludes that it does not have jurisdiction, then it is open to the aggrieved party to go on appeal to the relevant court under Section 37(2)(a) of the Act. In *NTPC v Siemens*⁷ it was held that *In a case where the Arbitral Tribunal proceeds to pass an award after overruling the objection relating to jurisdiction, it is clear from Sub-section (6) of Section 16 that the parties have to resort to Section 34 of the Act to get rid of that award, if possible. But, if the Tribunal declines jurisdiction or declines to pass an award and dismisses the arbitral proceedings, the party aggrieved is not without a remedy. Section 37(2) deals with such a situation. Where the plea of absence of jurisdiction or a claim being in excess of jurisdiction is accepted by the Arbitral Tribunal and it refuses to go into the merits of the claim by declining jurisdiction, a direct appeal is provided.*

4) POSITION AFTER 2015 AMENDMENT

The ruling passed in *SBP & Co. vs. Patel Engineering Ltd.*⁸ ("SBP Case") chipped away the importance of the *Kompetenze-Kompetenze* principle incorporated in Section 16 consequently, the 2015 Amendment inserted Section

⁴ *ibid*

⁵ 2005 (8) SCC 618

⁶ Civil Appeal 10778 of 2014

⁷ AIR 2007 SC 1491

⁸ (2005) 8 SCC 618

11(6A) in order to restrict the powers of the courts to merely examining the existing of an arbitration agreement. Section 11(6A) and the principle of 'Kompetenze-Kompetenze' was subsequently upheld by the SCI in the case of *Duro Felguera S.A vs. Gangavaram Port Limited*.⁹ Accordingly, the SBP Case stood overruled.

In the case of *Indian Farmers Fertilizers Cooperative Limited vs. Bhadra Products*¹⁰ ("**IFFCO Case**"), The SCI (division bench), interpreted the contours of Section 16 in detail. The issues involved in the Case were: a) whether an award on the issue of limitation can be said to be an interim award and can be set aside under Section 34 of the A&C Act and b) whether a decision on a point of limitation would go to jurisdiction and, therefore, be covered by Section 16 of the A&C Act

The SCI, on the First Issue, answered in the affirmative, and on the Second Issue, made the following observations:

a) that Section 16(1) to 16(4) of the Act are based on Article 16 of the UNCITRAL Model Law and the '*Kompetenze-Kompetenze*' principle deals with the arbitral tribunal's jurisdiction in the narrow sense of ruling on objections with respect to the existence or validity of the arbitration agreement; and

b) that the language of Section 16(1) states that Arbitral Tribunal may rule on its own jurisdiction, which makes it clear that it refers to whether the arbitral tribunal may embark upon an enquiry into the issues brought forth by the parties.

3. POSITION AFTER 2019 AMENDMENT

The 2019 Amendment omitted Section 11(6A) (though yet to be notified)⁴ of the Act and the implications of this omission was taken by the SCI in the case of *Mayavti Trading Pvt. Ltd. vs Pradyut Deb Burman*¹¹, wherein it was held that 11(6A) was not deleted in order to resuscitate the law that was in place prior to 2015 Amendment, but to enable the appointment of arbitrator(s) by arbitral institutions(s) appointed by the SCI in case of international commercial arbitrations or by the High Courts in case of all other arbitrations.

The IFFCO Case clarified that issues (of preliminary nature) such as an issue of limitation or non-joinder of necessary or proper parties could not be raised under Section 16 of Act and remained a subject for determination as part of the merits of the case.

However, in *Uttarakhand Purv Sainak Kalyan Nigam Limited vs. Northern Coal Field Limited*¹² ("**UPSKNL Case**") while dealing with the issue whether the court is entitled to reject an application under Section 11, on the ground that it was

⁹ (2017) 9 SCC 729.

¹⁰ (2018) 2 SCC 534

¹¹ (2019) 8 SCC 714.

¹² (2020) 2 SCC 455

barred by limitation, Supreme Court held that the issue of limitation along with all other preliminary jurisdictional issues cannot be determined by the court under Section 11 of the Act.

Relying on the UPSKNL Case, the High Court of Bombay recently in *C. Shamsuddin vs. Now Realty Ventures LLP and others*¹³ also gave a similar finding and held that the question of limitation will be kept open for decision by the arbitral tribunal under Section 16 of Act.

In view of the divided findings of the SCI in the IFFCO and UPSKNL judgment (both division benches) and of the BHC in RVL Case, the scope of jurisdiction under Section 16 of the A&C Act remains unclear.

CONCLUSION

To sum-up, As mentioned above, the interpreting and applying the IFFCO Case in subsequent cases has left the scope of 'jurisdiction' under Section 16 in dubiety. In view of the aforesaid position, it can be said that the reliance in respect to the law on the scope of jurisdiction under Section 16 of the Act shall be placed upon the IFFCO judgment and not on UPSKNL judgment, as the IFFCO judgment has specifically dealt with the issue of scope of jurisdiction under Section 16 of the Act.

¹³ AIR2020 Bom 76