

## Objection to Arbitral Tribunal's Jurisdiction : A Study

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1. The arbitral tribunal is required to decide the dispute in accordance with the terms of the contract.<sup>1</sup> Disputes relating to the applicability of 'arbitration clause' to the facts of the case must be raised before the arbitrator for decision, though such a dispute goes to the root of the jurisdiction.<sup>2</sup> In other words, the arbitrator's jurisdiction is strictly confined to the terms of the contract and has no authority to go beyond the terms of the contract.
2. The 'arbitration clause' contained in a contract between the parties is crucial to determine whether the parties intended that a dispute arising out of the contract shall be decided by reference to an arbitrator. In the first instance, whether the contract has arisen at all must be determined before the 'arbitration clause' contained in it, is made applicable. Arbitrator is conferred with jurisdiction to decide the issue, as is evident from the arbitration law<sup>3</sup> that the arbitrator<sup>3A</sup> can rule on its own jurisdiction.

The apex court ruled<sup>4</sup> thus:-

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<sup>1</sup> Food Corporation of India Vs. Indian Council of Arbitration, AIR 2003 SC P.3011.

<sup>2</sup> Hindustan Petroleum Corporation's case, AIR 2003 SC P.2881.

<sup>3</sup> See for details Sec 16 of the Indian Arbitration and Conciliation Act, 1996.

<sup>3A</sup> The expression arbitrator or arbitrators refers to Arbitral Tribunal throughout this study.

<sup>4</sup> Renuagar Power Co. Ltd., Vs. General Electric Co., (1984) 4 SCC P.679.

- i) The arbitration law does not prevent the arbitrators from deciding questions of their own jurisdiction;
- ii) The decision of the arbitrator is provisional or tentative;
- iii) In case, he decides that he has jurisdiction, he can proceed with the case and make an award; and
- iv) The decision of the arbitrator is not final, as it is subject to final decision by the courts; and
- v) If the court finds that the arbitrator's decision is well in order, there is no interference by court. However, if the court finds it is not so, then the award will not be given effect to.

In other words, the decision of the arbitrators on the issue of jurisdiction is not final and it would be subject to the power of courts to set-aside.<sup>5</sup> However, it is useful to remember that there are matters, which are not arbitrable. They may be stated thus:-<sup>6</sup>

- a) disputes relating to rights and liabilities which give rise to or arise out of criminal offence;
- b) matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights, child custody;

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<sup>5</sup> See Sec 16 and Sec 34 of the Indian Arbitration and Conciliation Act. Sec 16 is a statutory conferment of power on arbitrators to rule on their own jurisdiction and Sec 34 of the Act deals with power of the court to set aside the awards made by the arbitrators.

<sup>6</sup> Booz Allen and Hamilton Inc. Vs. SBI Home Finance Ltd., & Others, (2011) 5 SCC P.532.

- c) guardianship matters;
- d) insolvency and winding up matters;
- e) testamentary matters; and
- f) eviction or tenancy matters governed by special statute which gives statutory protection to tenants.

It follows, that there can be no arbitration with regard to the above non-arbitrable issues and the arbitrators have no jurisdiction whatsoever on such matters.

3. The arbitration law empowers the arbitrators to decide the question relating to their jurisdiction and the objections relating to the existence or validity of the arbitration agreement.<sup>7</sup> The “arbitration clause” which confers the jurisdiction on arbitrators will be treated as an independent agreement, though it is a part of the contract entered into by parties. This being so, the question whether the contract being treated as null and void, ‘ipso facto’ renders ‘arbitration clause’ as invalid? In view of the ‘arbitration clause’ being independent of contract, it could not render ‘arbitration clause’ invalid through the contract may be invalid. In other words, the arbitrators have to decide whether a particular dispute comes within their purview in the first instance.<sup>8</sup> The party objecting to the jurisdiction of arbitrators has to raise the

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<sup>7</sup> See for details Sec 16(1) of the Indian Arbitration & Conciliation Act, 1996.

<sup>8</sup> Centrotrade Minerals & Metals Inc., Vs. Hindustan Copper Ltd., (2006)11 SCC P.245.

objection, as soon as the arbitration proceeding is initiated and the arbitrators have to answer this issue as a preliminary issue,<sup>9</sup> as such an issue goes to the root of its jurisdiction.<sup>10</sup>

4. It is open to the parties to challenge the arbitrator's jurisdiction by asserting that they have no jurisdiction to entertain the reference by filing objection. The statutory provision<sup>11</sup> states that such an objection must be filed along with or before the submission of the statement of defence. The apex court held in Travancore Devasthanam Board's<sup>12</sup> case, also affirmed the statement of law that a party will not be estopped from raising the plea of lack of jurisdiction merely because he was a party to the appointment of the arbitrator<sup>13</sup> or that he participated in the arbitration proceedings.
5. The plea of 'want of jurisdiction' or 'lack of jurisdiction' must be raised at the beginning and normally not later than the statement of defence. The object of this provision appears to be as follows:-
  - a) Arbitrators jurisdiction issue goes to the root of the proceedings of arbitration and if they have no jurisdiction to arbitrate, the award would be a nullity;

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<sup>9</sup> MC Dermott International Inc., Vs. Burn Standard Co. Ltd., (2006)11 SCC P.181.

<sup>10</sup> See for details Secur Industries Ltd., (2004) 3 SCC P.447.

<sup>11</sup> Sec 16(2) of the Indian Arbitration & Conciliation Act, 1996.

<sup>12</sup> (2004)13 SCCP.510.

<sup>13</sup> See Sec 16(2) of the Indian Arbitrate & Conciliation Act and also the Foot Note.10

- b) Issue relating to jurisdiction must be decided at the earliest, so that remedial measures were found to deal with the issue;
  - c) The time and expenses in the proceedings could be saved and the parties will be relieved of the same; and
  - d) Continuing the proceedings before the arbitrator, where there is no jurisdiction to arbitrate will cause frustration to parties, if eventually the award is set aside under 34 of the Act.<sup>14</sup>
6. When the High Court has held in a given case that the arbitrators have jurisdiction to arbitrate, the question of jurisdiction need not be again determined by the arbitrators.<sup>15</sup> The arbitrators can also decide questions relating to the law of limitation.<sup>16</sup> In other words, the arbitrators have the power to condone delays even after the period fixed, provided, if ‘sufficient cause’ is shown for not filing in time. This discretionary power has to be exercised judiciously and any arbitrary exercise of power in condoning delay will be held void under Art 14.
7. The mere ground that the arbitrator’s jurisdiction is challenged cannot be a ground for the arbitrator’s refusal to act on the reference and leave the matter for the courts to decide finally. The arbitrators have to decide on the question of jurisdiction in the

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<sup>14</sup> Gas Authority of India Ltd., Vs. Keti Construction (P) Ltd., (2004) 13 SCC P.510.

<sup>15</sup> Vipin Kumar Gadhok Vs. Ravinder Nath Khanna (2007) 10 SCC P.623.

<sup>16</sup> Food Corporation of India’s case, AIR 2007 SC P.829.

very first instance. In case, they hold the view that they have the jurisdiction, proceed with the reference and decide the issue and in case they do not have the jurisdiction not to act. However, the courts have the final power to decide the issue.

8. The apex court in a recent case<sup>17</sup> firmly ruled the statement of law on this issue relating to arbitrator's jurisdiction by holding that the objection with regard to jurisdiction of Arbitral Tribunal is not permissible after stage of submission of written statement or not later than submission of statement of defence. The apex court laid down the following principles:-

- (i) Sec 16 of the Act mandates that plea that Tribunal does not have jurisdiction shall be raised not later than submission of statement of defence;
- (ii) It would be quite undesirable to allow arbitrator's to proceed in same manner as civil suits with all well-known draw-backs of delay and endless objections or even after passing of decree;
- (iii) The plea that the award is in conflict with public policy cannot be equated with Arbitrator's jurisdiction; and
- (iv) No amendment application should be allowed by raising a ground contrary to law.

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<sup>17</sup> MSP Infrastructure Ltd., Vs. M.P.Road Development Corporation Ltd., (Criminal appeal No. 10778 of 2014 decided on 5-12-2014).

