

**214 IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

**ARB No.314 of 2017(O&M)
Date of Decision:24.02.2020**

M/S ASHOK KUMAR

...Applicant

Versus

UNION OF INDIA AND ANOTHER

..Respondents

CORAM: HON'BLE MR. JUSTICE DEEPAK SIBAL

Present: Mr. Dheeraj Mahajan, Advocate
for the applicant.

Mr. Nitin Kumar, Advocate
for the respondents.

DEEPAK SIBAL, J. (ORAL)

Reply on behalf of the respondents to the additional affidavit (Annexure P-6) filed in Court today is ordered to be taken on record. A copy thereof has been supplied to the counsel opposite.

The present application has been filed under Section 11 of the Arbitration and Conciliation Act, 1996 (for short-the Act) for appointment of an Arbitrator.

On 18.03.2014 the parties entered into an agreement as per which the applicant was to execute works for the respondents as detailed in the agreement. Admittedly, the parties further agreed to be governed by the general conditions of contract of the Northern Railway Engineering Department as per clause 64 of which disputes between the parties were to

be settled through the mode of Arbitration.

Disputes having arisen between the parties, through legal notice dated 15.02.2016 and representation dated 11.08.2016, the applicant wrote to the respondents seeking their resolution to which no response was received. Thereafter, through legal notice dated 02.05.2017, the applicant invoked the arbitration clause and sought the respondents to appoint an independent and impartial Arbitrator. When within 30 days of the receipt of the said notice no response was received by the applicant, the present application was filed for the aforesaid relief.

In response to the present application the respondents have filed a written statement through which they have sought dismissal of the present application on the ground that the applicant's claims were time barred. It has further been submitted that the claims made by the applicant already stood settled and therefore no cause subsisted for appointment of an Arbitrator.

Learned counsel for the parties have been heard.

The objection raised by the respondents that the present application for appointment of an Arbitrator be dismissed on the ground that the claims of the applicant are time barred needs to be rejected in the light of the following observations of the Supreme Court in **“Uttarakhand Purv Sainik Kalyan Nigam Limited vs. Northern Coal Field Limited”, 2019 SCC OnLine SC 1518:-**

“27. In view of the legislative mandate contained in Section 11 (6A), the Court is now required only to examine the existence of the arbitration agreement. All other preliminary or threshold issues are left to be decided by the arbitrator under

Section 16, which enshrines the Kompetenz-Kompetenz principle.

28. The doctrine of “Kompetenz-Kompetenz”, also referred to as “Compétence-Compétence”, or “Compétence de la reconnue”, implies that the arbitral tribunal is empowered and has the competence to rule on its own jurisdiction, including determining all jurisdictional issues, and the existence or validity of the arbitration agreement. This doctrine is intended to minimize judicial intervention, so that the arbitral process is not thwarted at the threshold, when a preliminary objection is raised by one of the parties.

29. The doctrine of kompetenz-kompetenz is, however, subject to the exception i.e. when the arbitration agreement itself is impeached as being procured by fraud or deception. This exception would also apply to cases where the parties in the process of negotiation, may have entered into a draft agreement as an antecedent step prior to executing the final contract. The draft agreement would be a mere proposal to arbitrate, and not an unequivocal acceptance of the terms of the agreement. Section 7 of the Contract Act, 1872 requires the acceptance of a contract to be absolute and unqualified. If an arbitration agreement is not valid or nonexistent, the arbitral tribunal cannot assume jurisdiction to adjudicate upon the disputes. Appointment of an arbitrator may be refused if the arbitration agreement is not in writing, or the disputes are beyond the scope of the arbitration agreement.

30. Article V(1)(a) of the New York Convention states that recognition and enforcement of an award may be refused if the arbitration agreement ‘is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made’.

31. The legislative intent underlying the 1996 Act is party autonomy and minimal judicial intervention in the arbitral

process. Under this regime, once the arbitrator is appointed, or the tribunal is constituted, all issues and objections are to be decided by the arbitral tribunal.

32. In view of the provisions of Section 16, and the legislative policy to restrict judicial intervention at the pre-reference stage, the issue of limitation would require to be decided by the arbitrator.

33. Sub-section (1) of Section 16 provides that the arbitral tribunal may rule on its own jurisdiction, “including any objections” with respect to the existence or validity of the arbitration agreement. Section 16 is as an inclusive provision, which would comprehend all preliminary issues touching upon the jurisdiction of the arbitral tribunal. The issue of limitation is a jurisdictional issue, which would be required to be decided by the arbitrator under Section 16, and not the High Court at the pre-reference stage under Section 11 of the Act. Once the existence of the arbitration agreement is not disputed, all issues, including jurisdictional objections are to be decided by the arbitrator.

34. In the present case, the issue of limitation was raised by the Respondent–Company to oppose the appointment of the arbitrator under Section 11 before the High Court.

35. Limitation is a mixed question of fact and law. In ITW Signode India Ltd. v. Collector of Central Excise a three judge bench of this Court held that the question of limitation involves a question of jurisdiction. The findings on the issue of limitation would be a jurisdictional issue. Such a jurisdictional issue is to be determined having regard to the facts and the law.

36. Reliance is also placed on the judgment of this Court in NTPC v. Siemens Atkein Gesell Schaft, wherein it was held that the arbitral tribunal would deal with limitation under Section 16 of the 1996 Act. If the tribunal finds that the claim is a dead

one, or that the claim was barred by limitation, the adjudication of these issues would be on the merits of the claim. Under subsection (5) of Section 16, the tribunal has the obligation to decide the plea; and if it rejects the plea, the arbitral proceedings would continue, and the tribunal would make the award. Under subsection (6) a party aggrieved by such an arbitral award may challenge the award under Section 34.

37. In M/s. Indian Farmers Fertilizers Cooperative Ltd. v. Bhadra Products this Court held that the issue of limitation being a jurisdictional issue, the same has to be decided by the tribunal under Section 16, which is based on Article 16 of the UNCITRAL Model Law which enshrines the Kompetenz principle.

38. In view of the aforesaid discussion, we set aside the impugned judgment and order dated 11.01.2018 passed by the High Court, and direct that the issue of limitation be decided by the arbitral tribunal.”

The other objection of the respondents that in view of the alleged settlement between the parties no Arbitrator is required to be appointed is also to be overruled in view of the following opinion expressed by the Supreme Court in **“M/s Mayavati Trading Pvt. Ltd. vs. Pradyut Deb Burman”-AIR 2019 SC 4284:-**

“This being the position, it is clear that the law prior to the 2015 Amendment that has been laid down by this Court, which would have included going into whether accord and satisfaction has taken place, has now been legislatively overruled. This being the position, it is difficult to agree with the reasoning contained in the aforesaid judgment as Section

11(6A) is confined to the examination of the existence of an arbitration agreement and is to be understood in the narrow sense as has been laid down in the judgment Duro Felguera, S.A. (supra)”.

In view of the above and leaving it open for the parties to raise all claims/defences/counter claims before the Arbitrator, Mr. P.L.Ahuja, District and Sessions Judge (Retd.) is appointed as the sole Arbitrator. However, such appointment would be subject to the declaration to be made by Mr. P.L.Ahuja under Section 12 of the Act with regard to his independence and impartiality to settle the disputes between the parties.

The Arbitrator is requested to complete the proceedings within the time limit specified under Section 29A of the Act.

The Arbitrator shall be paid fee in accordance with the Fourth Schedule of the Act, as amended or as may be mutually settled by the parties and the Arbitrator.

As per agreement expressed by learned counsel for the parties, for the sake of the convenience of their respective clients as also of the Arbitrator, the venue of the Arbitration shall be at Chandigarh Arbitration Centre, Chandigarh.

A copy of the this order be forwarded to Mr. P.L.Ahuja, District and Sessions Judge (Retd.) at the given address:

H.No.705, Swastik Vihar, Patiala Road,
Zirakpur, District-SAS Nagar, Mohali,
Mob.9464542727

After seeking the convenience of the Arbitrator, the parties are directed to appear before him on 20.03.2020 or on any other date suitable to

all concerned.

The matter is disposed of in the above terms.

February 24, 2020

(DEEPAK SIBAL)
JUDGE

Jyoti-IV

Whether speaking/reasonedYes/NoWhether ReportableYes/No