

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR.**

WRIT PETITION NO. 1648 OF 2021

1. M/s. Ambey Mining Pvt. Ltd.,
Circular Court, 9th Floor, Block No.92,
8 A.J.C. Bose Road, Kolkata – 700 017
Through its Authorized Signatory.
2. Mr. Avishek Agarwal,
Director of petitioner No.1 having his
Office at 8 AJC Bose Road, 9th Floor,
Circular Court Building, Kolkata-700 017

.... **PETITIONERS.**

// VERSUS //

1. Western Coalfields Limited,
through the Chairman Cum Managing
Director (CMD), Coal Estate, Civil Lines,
Nagpur- 440001.
2. Area General Manager,
Western Coalfields Limited (WCL),
Office of the Area General Manager,
Pench Area, P.O. Parasia,
Dist. : Chhindwara, Madhya Pradesh-480441.
3. Coal India Limited,
Civil Engineering Division,
Through the Chairman Cum Managing
Director (CMD), having its registered
office at Coal Bhawan, Premises No.04-
1111, AF-III, Action Area 1A, New Town,
Rajarhat – 700 156, Kolkatta (West Bengal)

.... **RESPONDENTS.**

Shri Shreehari Aney, Senior Advocate a/b. Shri H.N.Verma, Advocate
for petitioners.

Shri G.E.Moharir, Advocate for Respondents.

CORAM : SUNIL B.SHUKRE AND ANIL S. KILOR, JJ.
DATE OF RESERVING THE JUDGMENT : 19/06/2021.
DATE OF PRONOUNCING THE JUDGMENT: 2/08/2021

ORAL JUDGMENT : (Per : Anil S. Kilor, J.)

1. Heard.

2. **RULE.** Rule made returnable forthwith. Heard finally by consent of the learned counsel for the parties.

3. By this petition the petitioners are seeking issuance of directions to the respondent No.1 to proceed with resolution of disputes raised by petitioners No.1, through Arbitration in accordance with the “Settlement of Disputes” clause in the contract and also in the Circular dated 7th April 2017, issued by Respondent No.3, Coal India Ltd. (CIL).

4. Brief facts for appreciation of the grievance enunciated in this petition, are as follows:

5. The Respondent No.1-Western Coalfields Limited awarded a work for crushing of ROM Coal by hired Semi Mobile crusher, discharging (-100 mm size) crushed coal at radial stacker including supply, installation, erection, commissioning, maintenance & operation

of Semi Mobile crusher suitable for -100 mm size output crushed coal to be installed at BG Siding of Pench Area, vide 'Work Order' Dated 09/05/2018, to the petitioner No.1, a Private Limited Company.

6. It is the grievance of the petitioners that the respondent Nos. 1 and 2 deliberately and falsely represented that the respondent No.1 would provide a total quantity of 31000 tons of coal with minimum daily quantity of 3000 tons of coal crushing. Whereas, during the course of three years since the issuance of the Work Order, merely an average of approximately 188.42 tons of coal per day was provided, resultantly the manpower and crusher of the petitioner No.1 remained largely unutilized, causing heavy financial losses. It was thus, requested by the petitioner for foreclosure of the contract or settlement of dispute as per the clause under NIT or by any other machinery for dispute settlement including arbitration as provided in the circular dated 7th April 2017, issued by CIL. However, the respondent Nos. 1 and 2 did not reply to any of the correspondence/ representations, which led the petitioner to file the present petition.

7. Respondent Nos. 1 and 2 filed their submissions, opposing the present petition on the ground that in view of Section 12(5) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Act of 1996") the arbitration clause in the circular is inoperative as the

said circular states that no person other than the person appointed by Competent Authority of CIL/CMD of Subsidiary Company should act as an Arbitrator.

8. It is further contended that, a question whether Arbitration Agreement exists or not is to be decided by the Court while dealing with the matter of appointment of the Arbitrator as provided by subsection (6A) of Section 11 of the Act of 1996 and as a result the petition is not maintainable.

9. We have heard the learned counsel for the respective parties.

10. On maintainability of writ petition under Article 226 of the Constitution of India, Shri Aney, learned Senior Advocate submitted that the respondent No.3-Coal India Limited issued the circular dated 7th April 2017, addressing its subsidiaries including the respondent Nos. 1 and 2 herein, providing thereby mechanism for settlement of disputes, differences arising out of the contract with the contractors other than the government agencies through arbitration. It is submitted that the interpretation of the aforesaid circular is necessary for the reason that, if this Court holds the arbitration clause invalid as claimed by the WCL, the petitioners would be free to take steps as

available under the law for resolution of their grievances. However, if it is held as valid, the only question as to who will be the Arbitrator, will remain for which a remedy under Section 11(6) of the Act, 1996, would be availed. It is submitted that, otherwise the petitioner will require to run from pillar to post for the aforesaid purpose and to avoid this the present petition has been filed.

11. It is argued that right to arbitration survives even if one part of the arbitration agreement goes away as in such cases Doctrine of Severability would apply. For this purpose, he has placed heavy reliance on the judgment of the Hon'ble Supreme Court of India in the case of *TRF Limited ..vs.. Energo Engineering Projects Ltd.*¹.

12. It is submitted that acting as an Arbitrator, and exercising powers for appointment of an Arbitrator, are different and distinct. It is contended that bar to act as an arbitrator placed upon an employee of any of the parties, which is the State or its instrumentalities, cannot *per se* be a bar operating on the arbitration proceedings. For this purpose, he has placed reliance on a judgment of the Hon'ble Supreme Court of India in the case of *Indian Oil Corpn. Ltd. vs.. Raja Transport (P) Ltd.*²

13. The learned Senior Advocate, further states that a condition in the arbitration clause, that no person other than the Director of Marketing could be appointed as an Arbitrator, interferes

¹ (2017) 8 SCC 377

² (2009) 8 SCC 520

with the power of the Chief Justice and his designates under Section 11(8) of the Act of 1996 to appoint a suitable person as an Arbitrator in appropriate cases, and hence, such portion of arbitration clause is liable to be ignored as being contrary to the Act. For this purpose, reliance has been placed on the judgments in the case of *Indian Oil Corporation* (Supra) and *Perkins Eastman Architects DPC and Another..vs..HSCC (India) Ltd.* (supra)

14. Lastly it is argued that in a similar writ petition before the High Court of Madhya Pradesh, the respondents agreed to resolve the dispute by arbitration as contemplated by a circular dated 07/04/2017. It is submitted that if similar course is adopted in this case, the petition can be disposed of with observations that the parties to take recourse to arbitration under the Act 1996. Attention of this Court has been drawn for this purpose to the order dated 23/03/2018 passed in Writ Petition No.20634 of 2018 by the Division Bench of the Madhya Pradesh High Court.

15. Per contra, Shri Moharir, learned counsel appearing for the respondent Nos.1 and 2 opposed the petition on the ground that the petition is not maintainable. It is submitted that the Act of 1996 is a complete Code in itself, therefore, any action as provided under the Act can only be taken as per the provisions of the Act. It is contended that a

question as regards arbitrability has to be decided by the Court u/s 11 (6A) or u/s 16 of the Act of 1996.

16. It is urged that, undisputedly it is the case of the petitioners that the circular dated 07/04/2017 provides for resolution of grievance by way of arbitration, and the same is binding on the respondent Nos. 1 and 2. Hence, the only remedy left with the petitioners is to file an application under Section 11(6) of the Act of 1996.

17. It is submitted that CMD is not eligible to be appointed or act as an Arbitrator in view of sub-section (5) of Section 12 of the Act of 1996. Moreover, no steps have been taken by the petitioners as contemplated under the proviso to Section 12(5) of the Act of 1996, for waiving the applicability of Section 12(5) of the Act of 1996. By arguing so, he prays for dismissal of the writ petition.

18. To consider the rival contentions of the parties, we have perused the record and also gone through the relevant judgments.

19. Before advertng on merits of the matter, we will first deal with the point of maintainability of this petition under Article 226 of the Constitution of India.

20. At this juncture, therefore, to appreciate the grievance of the petitioner it is necessary to refer to the few relevant paras of the petition and prayer clauses which read thus .

“(J) That the Respondent No.1 has failed to proceed in terms of the requirements of Circular dated April 07, 2017 for resolution of disputes between the parties through arbitration. The Respondent No.1 has till date not even replied to the Petitioner No.1’s letter dated March 12, 2021 wherein the Petitioner No.1 conveyed its intention to proceed with arbitration in terms of ‘Settlement of Disputes’ clause of the Contract read with the CIL Circular which provides for settlement of disputes between the Petitioners and the Respondents through arbitration under the Arbitration and Conciliation Act, 1996. It is submitted that Respondent No.1 is bound by the said Circular and is accordingly required to act in terms of the said Circular. However, despite this, the Respondent No.1 has failed to act or even respond to the repeated requests of the Petitioners. It is pertinent to note that disputes relating to contracts similar to the present Contract have also been referred to arbitration in terms of the said Circular. The Petitioners crave leave to refer to and reply upon material in this regard.

XX XX XX

26. As stated above, the cause of action for this Petition is the refusal by the Respondents to constitute and submit to a forum for dispute resolution as sought to be invoked by these Petitioner No.1 under their letters dated February 23, 2021 and March 12, 2021. The Petitioners have no recourse except to invoke the extraordinary jurisdiction of this Hon’ble Court under Article 226 for appropriate Writ including a Writ in the nature of Mandamus directing the Respondent Nos.1 to act upon the aforestated provisions in the Contract as well as the CIL Circular and in accordance thereof, proceed with resolution of disputes with Petitioner No.1 through Arbitration.”

XX XX XX XX

Prayer clauses:

*“(a) This Hon’ble Court be pleased to issue a writ of Mandamus and/ or a Writ in the nature of Mandamus or any other appropriate writ directing the Respondent No.1 to proceed with resolution of disputes raised by petitioner No.1 through Arbitration in accordance with the “Settlement of Disputes” clause in the Contract read with the CIL Circular dated April 07, 2017;
(b) Further be pleased to grant such other and further reliefs as the nature and circumstances of the case may require and as thought fit by this Hon’ble Court; and
(c) Be pleased to saddle the cost of the petition upon the respondents. And for this act of kindness, the petitioners shall ever pray.”*

21. The above referred prayer clauses and paragraphs make it clear that it is the case of the petitioners that the respondent No.1 has failed to proceed in terms of the requirements of circular dated April 7, 2017 for resolution of dispute between the parties through arbitration. Thus, even though there was no arbitration clause in the NIT, the entirety of the grievance of the petitioners, is based on the circular dated 7th April 2017 issued by CIL, as regards settlement of dispute through arbitration as per the provisions of the Arbitration and Conciliation Act 1996.

22. Arbitration is a private dispute resolution mechanism, whereby two or more parties agree to resolve their current or future dispute by Arbitral Tribunal as an alternative to adjudication by the Courts or public Forum established by law. The Arbitration Agreement

gives contractual authority to the Arbitral Tribunal to adjudicate the disputes and bind the parties.

23. In the case of *Booz Allen & Hamilton Inc...vs.. SBI Home Finance Ltd.*¹, the Hon'ble Supreme Court of India observes that civil or commercial dispute, whether contractual or non-contractual, which can be decided by the Court, is in principle capable of being adjudicated and resolved by Arbitral Tribunal unless the jurisdiction of the Arbitral Tribunal is either expressly or by necessary implication excluded.

24. In the above referred backdrop, at this stage we think it is appropriate to refer to Section 7 of the Act of 1996, which defines "Arbitration Agreement", the same reads thus:

"7. Arbitration agreement. -(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.

(2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(3) An arbitration agreement shall be in writing.

(4) An arbitration agreement is in writing if it is contained in

(a) a document signed by the parties;

(b) an exchange of letters, telex, telegrams or other means of telecommunication [including

¹ (2011) 5 SCC 532

communication through electronic means] which provide a record of the agreement; or

(c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.

(5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.”

25. Sub-section (1) of Section 7 is in respect of the dispute arising from defined legal relationship, whether contractual or not. Sub-section (2) states that an arbitration clause may be in the form of a separate agreement. Sub-section (3) states that the arbitration agreement shall be in writing. Sub-section (4) terms ‘Arbitration Agreement” in writing would include any agreement by letters, telex, telegrams, electronic mails or communications which provide record of the agreement or exchange of statements of claim and defence in which one party claims existence of the agreement and the other party does not deny it. Further sub-section (5) states the reference in a contract to a document containing an arbitration clause that forms a part of the contract.

26. The term “Agreement” is not defined in the Act of 1996, however, it is defined in Section 10 of the Contract Act, 1872, as the contracts made by pre-consent of the parties competent to contract, for a lawful consideration and that lawful object and are not thereby

expressly declared to be void. Thus, the arbitration agreement must specify the objective mandates of the Law of Contract to qualify as an agreement.

27. In a recent judgment in the case of *Vidya Drolia ..vs.. Durga Trading Corpn.*¹, the Hon'ble Supreme Court of India, has answered the reference relating to two aspects namely (1) meaning of non-arbitrability and when the subject matter of the dispute is not capable of being resolved through arbitration, and (b) The Conundrum - "who decides" - Whether the Court at the reference stage or the Arbitral Tribunal in the arbitration proceedings would decide the question of non-arbitrability. The Apex Court has discussed four different phases since inception of Act of 1996, relating to the legal position as to who decides the question of non-arbitrability under the Arbitration Act in para 86, which reads thus:

86. The legal position as to who decides the question of non-arbitrability under the Arbitration Act can be divided into four phases. The first phase was from the enforcement of the Arbitration Act till the decision of the Constitution Bench of seven Judges in Patel Engg.Ltd. On 26-10-2005. For nearly ten years, the ratio expressed in Konkan Railway Corpn. Ltd. v. Mehul Construction Co., affirmed by the Constitution Bench of five Judges in Konkan Railway Corpn. Ltd. v. Rani Construction (P) Ltd., had prevailed. The second phase commenced with the decision in Patel Engg. Ltd. till the legislative amendments, which were made to substantially reduce court interference and overrule the legal

¹ (2021) 2 SCC 1

effect of Patel Engg. Ltd. vide Act 3 of 2016 with retrospective effect from 23-10-2015. The third phase commenced with effect from 23-10-2015 and continued till the enactment of Act 33 of 2019 with effect from 9-8-2019, from where commenced the fourth phase, with a clear intent to promote institutionalized arbitration rather than ad hoc arbitration. The amendments introduced by Act 33 of 2019 have been partially implemented and enforced. In the present case, we are primarily concerned with the legal position in the third phase with effect from 23-10-2015 when amendments by Act 3 of 2016 became operative.”

28. In the first phase as discussed by the Apex Court in *Vidya Drolia* (supra), till the decision of the Constitution bench in *SBP and Co. -vs- Patel Engineering Ltd. and another*¹, the law laid down in *Konkan Railway Corporation Ltd -vs- Rani Construction(P) Ltd.*² had prevailed. The same reads thus:

“18. There is nothing in Section 11 that requires the party other than the party making the request to be noticed. It does not contemplate a response from that other party. It does not contemplate a decision by the Chief Justice or his designate on any controversy that the other party may raise, even in regard to its failure to appoint an arbitrator within the period of thirty days. That the Chief Justice or his designate has to make the nomination of an arbitrator only if the period of thirty days is over does not lead to the conclusion that the decision to nominate is adjudicatory. In its request to the Chief Justice to make the appointment the party would aver that this period has passed and, ordinarily, correspondence between the parties would be annexed to bear this out. This is all that the Chief Justice or his designate has to see. That the Chief Justice or his designate has to take into account the qualifications required of the arbitrator by the agreement between the parties

¹ (2005) 8 SCC 618

² (2002) 2 SCC 388

(which, ordinarily, would also be annexed to the request) and other considerations likely to secure the nomination of an independent and impartial arbitrator also cannot lead to the conclusion that the Chief Justice or his designate is required to perform an adjudicatory function. That the word “decision” is used in the matter of the request by a party to nominate an arbitrator does not of itself mean that an adjudicatory decision is contemplated.

19. As we see it, the only function of the Chief Justice or his designate under Section 11 is to fill the gap left by a party to the arbitration agreement or by the two arbitrators appointed by the parties and nominate an arbitrator. This is to enable the Arbitral Tribunal to be expeditiously constituted and the arbitration proceedings to commence. The function has been left to the Chief Justice or his designate advisedly, with a view to ensure that the nomination of the arbitrator is made by a person occupying high judicial office or his designate, who would take due care to see that a competent, independent and impartial arbitrator is nominated.”

29. However, a Constitution Bench of seven Judges vide majority judgment in *SBP and Co. -vs- Patel Engg. Ltd.* (supra) overruled this ratio and held:

“38... But the basic requirement for exercising his power under Section 11(6), is the existence of an arbitration agreement in terms of Section 7 of the Act and the applicant before the Chief Justice being shown to be a party to such an agreement. It would also include the question of the existence of jurisdiction in him to entertain the request and an enquiry whether at least a part of the cause of action has arisen within the State concerned. Therefore, a decision on jurisdiction and on the existence of the arbitration agreement and of the person making the request being a party to that agreement and the subsistence of an arbitrable dispute require to be decided and the decision on these aspects is a prelude

to the Chief Justice considering whether the requirements of sub-section (4), sub-section (5) or sub-section (6) of Section 11 are satisfied when approached with the request for appointment of an arbitrator.....

39. It is necessary to define what exactly the Chief Justice, approached with an application under Section 11 of the Act, is to decide at that stage. Obviously, he has to decide his own jurisdiction in the sense whether the party making the motion has approached the right High Court. He has to decide whether there is an arbitration agreement, as defined in the Act and whether the person who has made the request before him, is a party to such an agreement. It is necessary to indicate that he can also decide the question whether the claim was a dead one; or a long-barred claim that was sought to be resurrected and whether the parties have concluded the transaction by recording satisfaction of their mutual rights and obligations or by receiving the final payment without objection. It may not be possible at that stage, to decide whether a live claim made, is one which comes within the purview of the arbitration clause. It will be appropriate to leave that question to be decided by the Arbitral Tribunal on taking evidence, along with the merits of the claims involved in the arbitration. The Chief Justice has to decide whether the applicant has satisfied the conditions for appointing an arbitrator under Section 11(6) of the Act. For the purpose of taking a decision on these aspects, the Chief Justice can either proceed on the basis of affidavits and the documents produced or take such evidence or get such evidence recorded, as may be necessary. We think that adoption of this procedure in the context of the Act would best serve the purpose sought to be achieved by the Act of expediting the process of arbitration, without too many approaches to the court at various stages of the proceedings before the Arbitral Tribunal.”

30. In *Patel Engg. Ltd.* (supra) the Hon’ble Apex Court also held that Section 16 of the Act of 1996 makes it clear, that the Arbitral

Tribunal has the jurisdiction to rule on its own jurisdiction, including ruling on objections to existence or validity of the arbitration agreement, but this provision would apply when the parties have gone to the Arbitral Tribunal without recourse to Sections 8 or 11 of the Arbitration Act and not when the court at the reference stage has decided the jurisdictional issues. However, when an Arbitral Tribunal has been constituted by the parties without having taken recourse to a court order, the Arbitral Tribunal will have the jurisdiction to decide all matters contemplated by Section 16 of the Act of 1996.

31. Thereafter, in phase three vide Act 3 of 2016 legislative amendments were made to reduce court interference, with retrospective effect from 23/10/2015. Post enforcement of 2015 amendment the Hon'ble Supreme Court of India in a case of *Duro Felguera, S.A. -vs- Gangavaram Port Ltd.*¹, has held thus:

“48. Section 11(6A) added by the 2015 Amendment, reads as follows:

“11.(6A) The Supreme Court or, as the case may be, the High Court, while considering any application under sub-section (4) or sub-section (5) or sub-section (6), shall, notwithstanding any judgment, decree or order of any Court, confine to the examination of the existence of an arbitration agreement.” (Emphasis Supplied)

From a reading of Section 11(6-A), the intention of the legislature is crystal clear i.e. the court should and need only look into one aspect - the existence of an arbitration agreement. What are the factors

¹ (2017) 9 SCC 729

for deciding as to whether there is an arbitration agreement is the next question. The resolution to that is simple - it needs to be seen if the agreement contains a clause which provides for arbitration pertaining to the disputes which have arisen between the parties to the agreement.”

XX

XX

XX

59. The scope of the power under Section 11(6) of the 1996 Act was considerably wide in view of the decisions in SBP and Co. and Boghara Polyfab. This position continued till the amendment brought about in 2015. After the amendment, all that the courts need to see is whether an arbitration agreement exists - nothing more, nothing less. The legislative policy and purpose is essentially to minimize the Court's intervention at the stage of appointing the arbitrator and this intention as incorporated in Section 11(6-A) ought to be respected.”

32. In the fourth phase sub section (6A) of section 11 of the Act of 1996 was omitted vide Act 33 of 2019 w.e.f. 09/08/2019. The Hon’ble Apex Court in a case of *Vidya Drolia* (supra) after discussing catena of judgments concluded that it would be wrong to accept that post omission of sub-section (6-A) of Section 11 the ratio in *Patel Engg. Ltd.* (supra) would become applicable.

33. The Hon’ble Apex Court in the case *Vidya Drolia* (supra), has further noted thus:

154. Discussion under the heading “Who decides Arbitrability?” can be crystallized as under:

154.1. Ratio of the decision in Patel Engg. Ltd. on the scope of judicial review by the court while deciding

an application under Sections 8 or 11 of the Arbitration Act, post the amendments by Act 3 of 2016 (with retrospective effect from 23.10.2015) and even post the amendments vide Act 33 of 2019 (with effect from 09.08.2019), is no longer applicable.

154.2 Scope of judicial review and jurisdiction of the court under Sections 8 and 11 of the Arbitration Act is identical but extremely limited and restricted.

154.3 The general rule and principle, in view of the legislative mandate clear from Act 3 of 2016 and Act 33 of 2019, and the principle of severability and competence-competence, is that the Arbitral Tribunal is the preferred first authority to determine and decide all questions of non-arbitrability. The court has been conferred power of “second look” on aspects of non-arbitrability post the award in terms of sub-clauses (i), (ii) or (iv) of Section 34(2)(a) or sub-clause (i) of Section 34(2)(b) of the Arbitration Act.

154.4 Rarely as a demurrer the court may interfere at the Section 8 or 11 stage when it is manifestly and ex facie certain that the arbitration agreement is non-existent, invalid or the disputes are non-arbitrable, though the nature and facet of non-arbitrability would, to some extent, determine the level and nature of judicial scrutiny. The restricted and limited review is to check and protect parties from being forced to arbitrate when the matter is demonstrably “non-arbitrable” and to cut off the deadwood. The court by default would refer the matter when contentions relating to non-arbitrability are plainly arguable; when consideration in summary proceedings would be insufficient and inconclusive; when facts are contested; when the party opposing arbitration adopts delaying tactics or impairs conduct of arbitration proceedings. This is not the stage for the court to enter into a mini trial or elaborate review so as to usurp the jurisdiction of the Arbitral Tribunal but to affirm and uphold integrity and efficacy of arbitration as an alternative dispute resolution mechanism.”

34. Thus, in view of the above referred touch-stone, it is clear that ratio of the decision in *Patel Engg. Ltd.* (supra) on the scope of judicial review by the court while deciding an application under Sections 8 or 11 of the Act of 1996, post the amendments vide Act 33 of 2019 (with effect from 09.08.2019), is no longer applicable. Moreover, the general rule and principle, in view of the legislative mandate and the principle of severability and competence-competence, is that the Arbitral Tribunal is the preferred first authority to determine and decide all questions of non-arbitrability, under Section 16 of the Act of 1996.

35. In the case of *A. Ayyasamy ..vs.. A. Paramasivam*¹, the Hon'ble Apex Court has in express terms held that under Section 16 of the Act of 1996 the Arbitral Tribunal can go into the issue of arbitrability and its own jurisdiction. Paragraph 33 reads thus:

“33. Section 16 empowers the arbitral tribunal to rule upon its own jurisdiction, including ruling on any objection with respect to the existence or validity of an arbitration agreement. Section 16(1) (b) stipulates that a decision by the arbitral tribunal that a contract is null and void shall not entail ipso jure the invalidity of the arbitration clause. Hence, the invalidity of the contract between the parties does not render the arbitration agreement invalid as a consequence of law. This recognises as inhering in the arbitrator the jurisdiction to consider whether the main contract (other than the arbitration clause) is null and void. The arbitration agreement

¹ (2016) 10 SCC 386

survives for determining whether the contract in which the arbitration clause is embodied is null and void, which would include voidability on the ground of fraud. The severability of the arbitration agreement is a doctrinal development of crucial significance. For, it leaves the adjudicatory power of the arbitral tribunal unaffected, over any objection that the main contract between the parties is affected by fraud or undue influence.”

36. The Hon’ble Supreme Court of India in a case of *Fuerst Day Lawson Ltd. ..Vs.. Jindal Exports Ltd.*¹, in paragraph No.89 the Court has observed thus :

“89. It is, thus, to be seen that Arbitration Act 1940, from its inception and right through 2004 (in P.S. Sathappan) was held to be a self-contained code. Now, if the Arbitration Act, 1940 was held to be a self-contained code, on matters pertaining to arbitration, the Arbitration and Conciliation Act, 1996, which consolidates, amends and designs the law relating to arbitration to bring it, as much as possible, in harmony with the UNCITRAL Model must be held only to be more so. Once it is held that the Arbitration Act is a self-contained code and exhaustive, then it must also be held, using the lucid expression of Tulzapurkar, J., that it carries with it "a negative import that only such acts as are mentioned in the Act are permissible to be done and acts or things not mentioned therein are not permissible to be done". In other words, a Letters Patent Appeal would be excluded by the application of one of the general principles that where the special Act sets out a self-contained code the applicability of the general law procedure would be impliedly excluded.”

37. The Hon’ble Supreme Court of India, thus, time and again in catena of judgments has held that the Arbitration Act from its

¹ (2011) 8 SCC 333

inception in 1940 to the Act of 1996, is a self-contained and exhaustive one. And only acts as are mentioned in the Act are permissible to be done and the acts or things not mentioned therein are not permissible to be done.

38. It is now well settled by a series of decisions of the Hon'ble Supreme Court of India and this Court that the legislative intent underlying the Act of 1996 is to minimize the supervisory rules of Courts in arbitral process and nominate/appoint the Arbitrator without wasting time, leaving all contentious issues to be urged and agitated before the Arbitral Tribunal itself.

39. Thus, there is no doubt that Section 16(1) of the Act of 1996 empowers the Arbitral Tribunal to rule upon its own jurisdiction, including ruling on any objection with respect to all aspects of non-arbitrability, including validity of arbitration agreement.

40. In the teeth of above referred well settled position of law and having considered the grievance of the petitioners and prayer seeking issuance of directions to the respondent No.1 to proceed with resolution of dispute raised by petitioner No.1 through arbitration in accordance with settlement of disputes clause and contract, read with CIL Circular, dated 7th April, 2017, we have no hesitation to hold that the relief sought in this petition could be sought under Section 11(6) of

the Act of 1996 and in case of any issue relating to arbitrability, the Arbitral Tribunal is empowered to rule on its own jurisdiction, including validity of the arbitration agreement.

41. Furthermore, as the Act of 1996 being self-contained and exhaustive one, and only such acts as are mentioned in the Act of 1996 are permissible to be done and the acts not mentioned therein are not permissible to be done, we are of the considered view that the present petition under Article 226 of the Constitution of India is not maintainable.

42. The arguments advance by the learned counsel for the respondent Nos.1 and 2 as regards sub-section (6-A) of Section 11 of the Act of 1996 cannot be accepted in view of a simple reason that sub-section (6-A) of Section 11 of the Act of 1996 has been omitted by way of Amendment Act 33 of 2019 (w.e.f. 09.08.2019).

43. The contention of the learned counsel for the petitioners that the similar course may be adopted, as adopted by the Madhya Pradesh High Court in Writ Petition No.20634 of 2018, cannot be accepted in the light of the fact that in the said matter, in view of willingness shown by the respondents the parties were permitted to take recourse to arbitration under the Act of 1996. However, in the present matter, the respondents have not shown any willingness to

refer the matter to the arbitrator. In that view of the matter, the similar course, as adopted in the said case, cannot be adopted in the present case.

44. Having held that the present writ petition is not maintainable, we have not dealt with the contentions advanced by the learned counsel for the respective parties, on merits of the matter and the same are kept open to be adjudicated and resolved by the appropriate forum, as per law.

45. Accordingly, we pass the following order:

The writ petition is **dismissed**. No order as to costs.

(ANIL S. KILOR, J)

(SUNIL B. SHUKRE, J)

RRaut..