



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

WRIT PETITION NO.125 OF 2024

1. M/s. Bajaj Constructions
having its registered address at
Building B, Ram Laxman Sankul,
College Road, Sindhi Chowk,
Amravati – 444 603.
2. Mr Mohan S/o. Chetandas Bajaj
Aged about 49 years, Occu.: Business,
R/o. Krishna Nagar, Lane No.1, Near
Central Warehouse, Amravati-444 603
3. Mr. Mahesh S/o. Chetandas Bajaj,
Aged about 47 years, Occ: Business,
Building B, Ram Laxman Sankul,
College Road, Sindhi Chowk,
Amravati – 444 603.

.... **PETITIONERS.**

// **VERSUS** //

1. Mr. Ramchandra S/o. Chetandas Bajaj,
Aged about 55 years, Occ.: Business,
R/o. Ram Laxman Sankul, College Road,
Sindhi Chowk, Amravati – 444 603.
2. Gulshan Chetandas Bajaj,
Aged 45 years, Occ.: Business,
R/o. Near Nankani Dharamshala,
Nanak Nagar, Rampuri Camp,
Amravati.

.... **RESPONDENTS.**

Shri Yash and Ms Gauri Venkatraman, Advocates for Petitioners.
Shri Sahil Shyam Dewani, Advocate for Respondent No.1.
Shri G.L.Agrawal, Advocate for Respondent No.2.

CORAM : ANIL S. KILOR, J.
DATED : JANUARY 16, 2024

ORAL JUDGMENT :

1. Heard learned counsel for the respective parties.

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

3. This writ petition takes exception to the order dated 06/11/2023 passed by the Sole Arbitrator rejecting the application under Section 16 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as “the Arbitration Act”), raising a question to the competence of the Arbitral Tribunal.

4. The petitioner No.1 is a partnership firm. A Partnership Deed was executed between the Petitioner No.2, Petitioner No.3, Respondent No.1, Respondent No.2 and one Chetandas Bhagwandas Bajaj. Chetandas died on 09/11/2016. After the demise of Chetandas his wife Vidyadevi was taken as a partner in the respondent No.1-firm in lieu of the share of Chetandas.

5. It is the case of the petitioners that, a dispute between the partners arose as regards the Retirement-cum-Reconstitution Deed, dated 30/04/2019, whereby the respondent Nos.1 and 2 along with Vidyadevi stood voluntarily retired. The respondent No.1 alleges that the petitioners had forged his signature on the Retirement Deed. Hence, he sought to invoke arbitration clause of the Partnership Deed.

6. On failure of the parties to reach to a consensus regarding appointment of Sole arbitrator the respondent No.1 approached to this Court under Section 11 of the Arbitration Act for appointment of Arbitrator.

7. In the said proceedings on 17/03/2023 Smt. Justice Ganediwala (Former Judge of the Bombay High Court) was appointed as Arbitrator.

8. The petitioners thereupon, filed an application under Section 16 of the Arbitration Act raising a question as regards competence of the Arbitral Tribunal on the grounds that, the arbitration clause in Partnership Deed is void, the claimant has no *locus standi* as he retired as a partner and the statement of Claim does not fall under the

scope of arbitration agreement between the parties. One more ground as regards limitation was also stated in the application.

9. The said application came to be rejected vide impugned order dated 06/11/2023. Hence, this petition.

10. I have heard the learned counsel for the respective parties.

11. At the outset, Shri Dewani, learned counsel raises a preliminary objection as regards maintainability of the present writ petition. It is submitted that, no appeal is provided against any order passed under Section 16 of the Arbitration Act. For this purpose, the learned counsel for the respondent No.1 has placed reliance on the judgment of the Supreme Court of India in the case of *Deep Industries Ltd...vs..ONGC*, reported in (2020)15 SCC 706 and *Bhaven Construction ..vs.. Sardar Sarovar Narmada Nigam Ltd.*, reported in (2022) 1 SCC 75.

12. Shri Venkatraman, learned counsel for the petitioners submits that there is no absolute bar to entertain a writ petition under Article 226 and 227 of the Constitution of India, to raise a grievance

against an order passed under Section 16 of the Arbitration Act. It is submitted that if there is a lack of inherent jurisdiction or there are exceptional circumstances or the order is perverse, the writ petition is tenable. In support of his contentions he has placed reliance on the judgment of the Delhi High Court in the case of *Surendra Kumar Singhal and others ..vs.. Arun Kumar Bhalotia & Oth.*, reported in **2021 SCC OnLine Del 3708** and in the case of *Grand Mumtaz Hotel and Resort ..vs.. Deputy Commissioner, North East Government of NCT of Delhi and Others*, reported in **(2023) SCC OnLine Del 3891**.

13. It is submitted that despite the issue of limitation was raised the Arbitrator has not decided it. It is submitted that it is a settled law that the issue of limitation would require to be decided by the Arbitrator under Section 16 of the Arbitration Act. It is submitted that, there is thus, exceptional circumstances and as the order is perverse, this Court has jurisdiction to entertain the writ petition under Article 226 and 227 of the Constitution of India. He has relied upon a judgment of the Supreme Court of India in the case of *Uttarakhand Purv Sainik Kalyan Nigam Limited..vs.. Northern Coal Field Limited*, reported in **(2020) 2 SCC 455**.

14. In reply, Shri Dewani, learned counsel for the respondent No.1 submits that if the matter is barred by time and yet the Court decreed it, the Court would be committing an illegality and the remedy is to have the decree set aside by preferring an appeal against it. However, it cannot be said that the Court has acted beyond its jurisdiction. It is submitted that the point of limitation was not argued by the petitioners though it is stated in the application filed by them under Section 16 of the Arbitration Act.

15. It is further submitted that even if the Court fails to consider the same, it would merely be an error of law and such error can be corrected only in a manner as provided under the Act. He accordingly, submitted that, the writ would not lie. In support of his submission, he has placed reliance on the judgment of the Hon'ble Supreme Court of India in the case of *IFFCO Ltd. ...vs. Bhadra Products*, reported in (2018) 2 SCC 534 and *BSNL ..vs.. Nortel Networks (India) (P) Ltd.*, reported in (2021) 5 SCC 738.

16. In light of the rival submissions, I have perused the record and the impugned order.

17. In the matter at hand, admittedly, the issue of limitation was raised in the application under Section 16 of the Arbitration Act. However, from face of the order it appears that it was not argued as argued by the learned counsel for the respondent No.1. However, the learned counsel for the petitioners is disputing this fact and states that the point of limitation was not only pleaded, but it was also argued, but, it was not answered and considered by the Sole Arbitrator.

18. The Hon'ble Supreme Court of India in the case of *IFFCO Ltd.* (supra) had an occasion to deal with an issue whether an erroneous decision on limitation can be termed as a decision 'without jurisdiction' or 'beyond jurisdiction'. The Hon'ble Supreme Court of India in the said matter has held thus :

“22. A Constitution Bench of this Court in Ittavira Mathai v. Varkey Varkey, made a distinction between an erroneous decision on limitation being an error of law which is within the jurisdiction of the Court, and a decision where the Court acts without jurisdiction in the following terms: (SCR pp.501-03 : AIR p.910, para 8)

“8. The first point raised by Mr.Paikedy for the appellant is that the decree in OS No. 59 of 1093 obtained by Anantha Iyer and his brother in the suit on the hypothecation bond executed by Ittiyavira in favour of Ramalinga Iyer was a nullity because the suit was barred by time. In assuming that the suit was barred by time, it is difficult to appreciate the contention of learned counsel that the decree can be treated as a nullity and ignored in subsequent

litigation. If the suit was barred by time and yet, the court decreed it, the court would be committing an illegality and therefore the aggrieved party would be entitled to have the decree set aside by preferring an appeal against it. But it is well settled that a court having jurisdiction over the subject-matter of the suit and over the parties thereto, though bound to decide right may decide wrong; and that even though it decided wrong it would not be doing something which it had no jurisdiction to do. It had the jurisdiction over the subject-matter and it had the jurisdiction over the party and, therefore, merely because it made an error in deciding a vital issue in the suit, it cannot be said that it has acted beyond its jurisdiction. As has often been said, courts have jurisdiction to decide right or to decide wrong and even though they decide wrong, the decrees rendered by them cannot be treated as nullities. Learned counsel, however, referred us to the decision of the Privy Council in Maqbul Ahmad v. Onkar Pratap Narain Singh and contended that since the court is bound under the provisions of Section 3 of the Limitation Act to ascertain for itself whether the suit before it was within time, it would act without jurisdiction if it fails to do so. All that the decision relied upon says is that Section 3 of the Limitation Act is peremptory and that it is the duty of the court to take notice of this provision and give effect to it even though the point of limitation is not referred to in the pleadings. The Privy Council has not said that where the court fails to perform its duty, it acts without jurisdiction. If it fails to do its duty, it merely makes an error of law and an error of law can be corrected only in the manner laid down in the Civil Procedure Code. If the party aggrieved does not take appropriate steps to have that error corrected, the erroneous decree will hold good and will not be open to challenge on the basis of being a nullity.”

23. ...

24. Interestingly, in a separate concurring judgment, P.K. Balasubramanyan, J., held : (NTPC case, SCC

pp.463-64, paras 17-19)

17. ...

18. The expression “jurisdiction” is a word of many hues. Its colour is to be discerned from the setting in which it is used. When we look at Section 16 of the Act, we find that the said provision is one, which deals with the competence of the Arbitral Tribunal to rule on its own jurisdiction. *SBP & Co. v. Patel Engg. Ltd.* in a sense confined the operation of Section 16 to cases where the Arbitral Tribunal was constituted at the instance of the parties to the contract without reference to the Chief Justice under Section 11(6) of the Act. In a case where the parties had thus constituted the Arbitral Tribunal without recourse to Section 11(6) of the Act, they still have the right to question the jurisdiction of the Arbitral Tribunal including the right to invite a ruling on any objection with respect to the existence or validity of the arbitration agreement. It could therefore rule that there existed no arbitration agreement, that the arbitration agreement was not valid, or that the arbitration agreement did not confer jurisdiction on the Tribunal to adjudicate upon the particular claim that is put forward before it. Under sub-section (5), it has the obligation to decide the plea and where it rejects the plea, it could continue with the arbitral proceedings and make the award. Under sub-section (6), a party aggrieved by such an arbitral award may make an application for setting aside such arbitral award in accordance with Section 34. In other words, in the challenge to the award, the party aggrieved could raise the contention that the Tribunal had no jurisdiction to pass it or that it had exceeded its authority, in passing it. This happens when the Tribunal proceeds to pass an award. It is in the context of the various sub-sections of Section 16 that one has to understand the content of the expression “jurisdiction” and the scope of the appeal provision. 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. In the context of Section 16 and the specific wording of Section 37(2)(a) of the Act, it would be appropriate to hold that what is made directly appealable by Section 37(2)(a) of the Act is only an acceptance of a plea of absence of jurisdiction, or of excessive exercise of jurisdiction and the refusal to proceed further either wholly or partly.
19. ...”*

19. The Hon’ble Supreme Court of India in the case of *BSNL ...vs.. Nortel Networks* (supra) has held thus :

“38. Limitation is normally a mixed question of fact and law, and would lie within the domain of the arbitral tribunal. There is, however, a distinction between jurisdictional and admissibility issues. An issue of ‘jurisdiction’ pertains to the power and authority of the arbitrators to hear and decide a case. Jurisdictional issues include objections to the competence of the arbitrator or tribunal to hear a dispute, such as lack of consent, or a dispute falling outside the scope of the arbitration agreement. Issues with respect to the existence, scope and validity of the arbitration agreement are invariably regarded as jurisdictional issues, since these issues pertain to the jurisdiction of the tribunal.

39. Admissibility issues however relate to procedural requirements, such as a breach of pre-arbitration requirements, for instance, a mandatory requirement

for mediation before the commencement of arbitration, or a challenge to a claim or a part of the claim being either time-barred, or prohibited, until some pre-condition has been fulfilled. Admissibility relates to the nature of the claim or the circumstances connected therewith. An admissibility issue is not a challenge to the jurisdiction of the arbitrator to decide the claim.

40. The issue of limitation, in essence, goes to the maintainability or admissibility of the claim, which is to be decided by the arbitral tribunal. For instance, a challenge that a claim is time-barred, or prohibited until some pre-condition is fulfilled, is a challenge to the admissibility of that claim, and not a challenge to the jurisdiction of the arbitrator to decide the claim itself.

41. ...

42. The judgment in Lesotho (supra) was followed in BBA v. BAZ wherein the Court of Appeal held that statutory time bars go towards admissibility. The Court held that the “tribunal versus claim” test should be applied for purposes of distinguishing whether an issue goes towards jurisdiction or admissibility. The “tribunal versus claim” test asks whether the objection is targeted at the tribunal (in the sense that the claim should not be arbitrated due to a defect in or omission to consent to arbitration), or at the claim (in that the claim itself is defective and should not be raised at all).”

20. It is beneficial to refer to the observations made by the Hon’ble Supreme Court of India in the case of *Deep Industries* (supra), which read thus :

“22. One other feature of this case is of some importance. As stated herein above, on 09.05.2018, a Section 16 application had been dismissed by the learned Arbitrator in which substantially the same

contention which found favour with the High Court was taken up. The drill of Section 16 of the Act is that where a Section 16 application is dismissed, no appeal is provided and the challenge to the Section 16 application being dismissed must await the passing of a final award at which stage it may be raised under Section 34. What the High Court has done in the present case is to invert this statutory scheme by going into exactly the same matter as was gone into by the arbitrator in the Section 16 application, and then decided that the two year ban/blacklisting was no part of the notice for arbitration issued on 02.11.2017, a finding which is directly contrary to the finding of the learned Arbitrator dismissing the Section 16 application. For this reason alone, the judgment under appeal needs to be set aside. Even otherwise, as has been correctly pointed out by Mr. Rohatgi, the judgment under appeal goes into the merits of the case and states that the action of putting the Contractor and his Directors “on holiday” is not a consequence of the termination of the agreement. This is wholly incorrect as it is only because of the termination that the show cause notice dated 18.10.2017 proposing to impose a two year ban / blacklisting was sent. Even otherwise, entering into the general thicket of disputes between the parties does not behove a court exercising jurisdiction under Article 227, where only jurisdictional errors can be corrected. Therefore to state that the ban order was passed under a General Contract Manual and not Clause 18 of the Agreement, besides being incorrect, would also be incorrect for the reason that the General Contract Manual does not mean that such order was issued as an administrative order invoking the executive power, but was only as an order which emanated from the contract itself. Further to state that “serious disputes” as to jurisdiction seem to have cropped up is not the same thing as saying that the Arbitral Tribunal lacked inherent jurisdiction in going into and deciding the Section 17 application. In point of fact, the Arbitral Tribunal was well within

its jurisdiction in referring to the contract and the ban order and then applying the law and finally issuing the stay order. Even if it be accepted that the principle laid down by Section 41(e) of the Specific Relief Act was infringed, in that damages could have been granted, as a result of which an injunction ought not to have been issued, is a mere error of law and not an error of jurisdiction, much less an error of inherent jurisdiction going to the root of the matter. Therefore, even otherwise, the High Court judgment cannot be sustained and is set aside.”

21. In the case of *SBP and Co. ..vs.. Patel Engineering Ltd.*, reported in **(2005) 8 SCC 618** the Hon’ble Supreme Court of India has held thus:

“45. It is seen that some High Courts have proceeded on the basis that any order passed by an Arbitral Tribunal during arbitration, would be capable of being challenged under Article 226 or 227 of the Constitution. We see no warrant for such an approach. Section 37 makes certain orders of the Arbitral Tribunal appealable. Under Section 34, the aggrieved party has an avenue for ventilating its grievances against the award including any in-between orders that might have been passed by the Arbitral Tribunal acting under Section 16 of the Act. The party aggrieved by any order of the Arbitral Tribunal, unless has a right of appeal under Section 37 of the Act, has to wait until the award is passed by the Tribunal. This appears to be the scheme of the Act. The Arbitral Tribunal is, after all, a creature of a contract between the parties, the arbitration agreement, even though, if the occasion arises, the Chief Justice may constitute it based on the contract between the parties. But that would not alter the status of the Arbitral Tribunal. It will still be a forum chosen by the parties by agreement. We, therefore, disapprove of the stand adopted by some of the High Courts that any

order passed by the Arbitral Tribunal is capable of being corrected by the High Court under Article 226 or 227 of the Constitution. Such an intervention by the High Courts is not permissible.

46. The object of minimising judicial intervention while the matter is in the process of being arbitrated upon, will certainly be defeated if the High Court could be approached under Article 227 or under Article 226 of the Constitution against every order made by the Arbitral Tribunal. Therefore, it is necessary to indicate that once the arbitration has commenced in the Arbitral Tribunal, parties have to wait until the award is pronounced unless, of course, a right of appeal is available to them under Section 37 of the Act even at an earlier stage.”

22. In the case of *Bhaven Construction* (supra) the Hon’ble Supreme Court of India held thus :

“26. It must be noted that Section 16 of the Arbitration Act, necessarily mandates that the issue of jurisdiction must be dealt first by the tribunal, before the Court examines the same under Section 34. Respondent No. 1 is therefore not left remediless, and has statutorily been provided a chance of appeal. In Deep Industries case (supra), this Court observed as follows:

“22. One other feature of this case is of some importance. As stated herein above, on 09.05.2018, a Section 16 application had been dismissed by the learned Arbitrator in which substantially the same contention which found favour with the High Court was taken up. The drill of Section 16 of the Act is that where a Section 16 application is dismissed, no appeal is provided and the challenge to the Section 16 application being dismissed must await the passing of a final award at which stage it may be raised under Section 34.” (emphasis supplied)”

23. From the above referred authorities it is evident that, the Court is bound to ascertain for itself even though the point of limitation is not referred to in the pleading, whether the suit before it was within time, it would act without jurisdiction if it fails to do so. However, it would amount to failure in performing its duty, which would be an error of law which can be corrected only in the manner laid down under the statute.

24. Moreover, such a challenge that a claim is time-barred is a challenge to the admissibility of that claim and not a challenge to the jurisdiction of the arbitrator to decide the claim itself.

25. Even otherwise in a case where the Arbitral Tribunal proceeds to pass an award overruling the objection relating to jurisdiction, it is clear from sub-Section (6) of Section 16 of the Arbitration Act that the parties have to resort to the remedy provided under Section 34 of the Arbitration Act to get rid of that award.

26. As observed by the Supreme Court of India that, the object of minimizing the judicial intervention while the matter is in the process of being arbitrated upon, will certainly be defeated if the High Court could be approached under Article 226 and 227 of the Constitution

against every order made by the Arbitral Tribunal. Therefore, once the arbitration has commenced in the Arbitral Tribunal, parties have to wait until the award is pronounced unless, of course, a right of appeal is available to them under Section 37 of the Act even at the earlier stage. The party aggrieved by any order of the Arbitral Tribunal, unless has a right of appeal under Section 37 of the Act, has to wait until the award is passed by the Tribunal.

27. In the matter at hand, admittedly, the Arbitrator has failed to go into the point of limitation and thereby failed in its duty to ascertain the said point. However, as it amounts to an error of law and further such a challenge that a claim is time-barred is a challenge to the admissibility of that claim and not a challenge to the jurisdiction of the arbitrator to decide the claim itself, the petitioners have to resort to the remedy provided under Section 34 of the Arbitration Act.

28. In the circumstances, as the petitioners fail to point out that this petition falls in any of the categories namely, lack of inherent jurisdiction, exceptional circumstances or total perversity, the judgment cited by the learned counsel for the petitioners in the case of *Surendra Kumar* (supra), *Grand Mumtaz Hotel* (supra) are of no assistance to the petitioners.

29. Having held so, I am not inclined to entertain this writ petition as the remedy after passing of the final award is available to the petitioner.

Accordingly, the writ petition is **dismissed**. No order as to costs.

Rule stands discharged.

(ANIL S. KILOR, J)

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