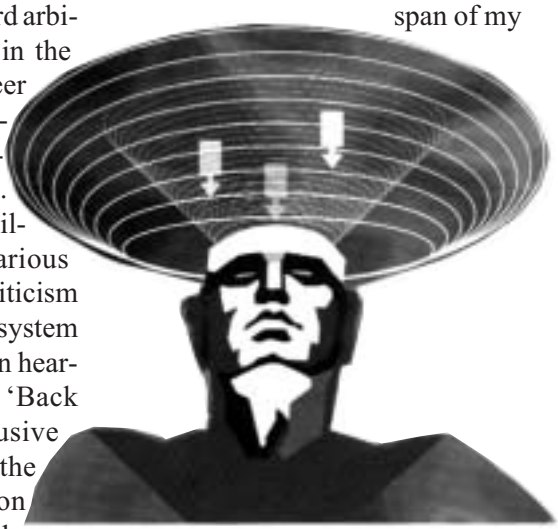
Competence of Arbitral Tribunal to rule on its own jurisdiction

There are an estimated 30 million cases pending in various courts in the country. And in this backdrop, ADR is today more preferred by businesses. Considering the speed and comparative low cost, ADR is meant to be far superior to a black letter law. This article deals with a crucial aspect of Arbitral Tribunal.

—Bhupendra Shah

In all walks of life, it is usual to come across disputes, more so in business dealings. In olden days informal system of Arbitration existed in the shape of Panchayats. The Father of Nation Mahatma Gandhi was also a staunch believer of arbitral process for resolving the problems in our predominantly rural society at affordable costs via Panchayat Raj. The word 'Arbitration' appears to have originated from the word arbitrary. The parties involved in the disputes refer them to a peer who is supposed to be a person of nobility having capability to resolve the disputes. There are an estimated 30 million cases pending in various courts in the country. The criticism against the justice delivery system is continuous and we keep on hearing related phrases like 'Back Breaking delay', 'Elusive Justice', and ' System on the verge of brink'. Arbitration system is a means to provide an easy and expedient mechanism for dispute resolution without the need of resorting to a long drawn litigation. *This is meant to be Justice without law. It is meant to be far superior to a black letter law.* Arbitration seeks to remove blockade caused by chocking legal pollution.

Arbitration started as a delegalization reform to resolve conflict with mutual love and trust. Even late Shri Nani Palkhiwala remarked succinctly, " If I were appointed a dictator of this country, in the short span of my



appointment and assassination, I would promulgate a law making all commercial disputes compulsorily referable to arbitration."

With the long British Rule in India, we had two enactments for Arbitration, viz. the Act of 1899 and 1940.After independence of India, it was observed that the Act of 1940 has outlived its utility and was not in line with economic reforms introduced in India. Hence the Arbitration and Conciliation Act, 1996 came into force on 25-1-1996. In the PREAMBLE of the act, it stated that, "Whereas the United Nations Commission on International Trade law has adopted the UNCITRAL Model Law on International Commercial Arbitration in 1985; and whereas the General Assembly of the United Nations has recommended that all countries give due consideration to the said Model Law, in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice; AND WHEREAS the UNCITRAL has adopted the UNCITRAL Conciliation Rules in 1980; AND WHEREAS the General Assembly of the United

The author is a Member of ICAI and Indian Council of Arbitration besides being on panel of arbitrators of FICCI and Bombay Stock Exchange. He can be reached at bhupendrashahca@hotmail.com

Nations has recommended the use of the said Rules in cases where a dispute arises in the context of international commercial relations and the parties seek on amicable settlement of that dispute by recourse to conciliation; AND WHEREAS the said Model Law and Rules make significant contribution to the establishment of a unified legal framework for the fair and efficient settlement of disputes arising in international commercial relations; AND WHEREAS it is expedient to make law respecting arbitration and conciliation, taking into account the aforesaid Model Law and Rules;" For the first time a novel provision has been introduced under 16.

This section 16 provides that:

'(1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections, with respect to the existence or validity of the arbitration agreement, and for that purpose-

(a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the terms of the contract; and

(b) a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence; however, a party shall not be precluded from raising such a plea merely because

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that he has appointed, or participated in the appointment of, an arbitrator.

(3) A plea that the arbitral tribunal is exceeding 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 arbitral proceedings.

(4) The arbitral tribunal may, in either of the cases referred to in sub-section (2) or sub-section (3), admit a later plea if it considers the delay justified.

(5) The arbitral tribunal shall decide on a plea referred to in sub-section (2) of sub-section (3) and, where the arbitral tribunal takes a decision rejecting the plea, continue with the arbitral proceedings and make an arbitral award.

(6) A party aggrieved by such an arbitral award may make an application for setting aside such an arbitral award in accordance with section 34.Before filing statement of defence, a party can challenge jurisdiction of Arbitral Tribunal, which it is bound to decide. It is manifest and goes without saying that the arbitrator being a creature of the agreement, must operate within the four corners of the said agreement and can not travel beyond the same. This power u/s 16 is unique in the Act. Now the Act itself provides that the arbitral tribunal can rule on its jurisdiction. It is axiomatic that no ruling can be given only after hearing both the parties. If the challenge succeeds, the appeal lies u/s 37[2][a]. If the challenge is rejected, the same can be challenged u/s 34[2][a][v] of the Act. The language employed u/s 16 of the Act clearly shows that the said provision is only an enabling one conferring the requisite powers on the Arbitral Tribunal to decide whether there is any existence of clause in the arbitration agreement. However, mere attendance on earlier dates in the arbitral proceedings does not debar the party from raising objections only if statement of defence is yet not filed. In case of illegal contract, the parties by acquiescence cannot confer jurisdiction on court.

When the question is raised about non-existence or invalidity

of the arbitration agreement, the arbitral tribunal is bound to decide. Arbitration clause contained in the agreement being an integral part of the same, would automatically perish if that agreement itself were non-est. An admitted liability can be no ground for arbitration since it is devoid of dispute. Ordinarily the courts do not interpret an arbitration agreement by applying strict rules of construction, which are normally applied to a conveyance and other formal documents. In such cases, it is necessary to apply a common sense approach and not be allowed to be thwarted by a narrow pedantic or too legalistic view. Arbitrability is certainly an issue, which can be objected to by the party. The Chapter IV of the Act is titled as 'Jurisdiction of the Arbitral Tribunals'. Under that chapter, Section 16 is enacted which bears the title 'Competence of Arbitral Tribunal to rule on its own Jurisdiction.' The Arbitral Tribunal is now empowered under the new Act to rule on its own jurisdiction, including ruling on any objections with respect to existence or validity of the Arbitration Agreements. The party can now contest that; the Arbitral Tribunal is lacking the powers necessary to adjudicate upon this reference. A procedure laid down in Section 16 of the Arbitration and Conciliation Act, 1996 cannot be bypassed, as all the parties to the reference are duly clothed with the inherent rights to object to the jurisdiction, domain, precincts, confines, portal,

boundaries, realm of the Arbitral Tribunal and its authority. The Arbitration and Conciliation Act, 1996 mandates that prior to assumption of the jurisdiction, the plea u/s 16 shall be decided as it strikes at very authority. The Arbitral Tribunal cannot acquire, possess and get seized of the jurisdiction when the claim has become time barred. The contention goes to the very root of the jurisdiction of the Arbitral Tribunal, when the Arbitral Tribunal suffers from inherent want of the jurisdiction because of Time barred claim. Consequently, the jurisdiction is taken away. The party can advert the attention of the arbitrator to the foundation or substratum or bedrock or the jurisdictional facts necessary for conferring of or vesting in the jurisdiction to this Arbitral Tribunal by making an averment that a claim has to be within the framework of the Byelaws of the NSE. This is *sine qua non* for giving the jurisdiction to the Arbitral Tribunal in the reference. Apropos the ratio of judgments heavily relied upon by the party it should be noted that any judgments and orders of courts cannot be construed or interpreted like acts of parliament or as mathematical theorems. The concluding words alone cannot be blindly applied de hors the actual findings and directions contained in the judgments. On the other hand, the averments of the party are not sufficient to clothe the Arbitral Tribunal with the jurisdiction necessary to initiate this reference. Be that as it may, there ought to be merit in the contentions advanced by the party. It is a well-settled proposition that a proceeding is a nullity when the authority conducting it has no power to have seisin over the reference. The Arbitral Tribunal ought to be fortified by the arguments advanced and the plea raised by the party ought to be quite tenable and sustainable in the eyes of law. The Arbitral Tribunal must be persuaded to accede to the submissions and then only accordingly uphold the preliminary objection for interdiction at the very threshold. There must be a clear-cut case to prove that the reference is totally devoid of the jurisdiction, dominion and portal. The Limitation Act, 1963 applies to the Arbitration and Conciliation Act, 1996. The law does not help one who sleeps over his rights to the alleged claim. Delay defeats Justice and equity adds only promptitude and resultant consequences. Defaulting

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party should bear the hardship of his own default in lodging the time barred claims and ought not transmit the hardship to the other party after the impugned claim is allowed to be time barred. U/S 16(5) of the Act, the Arbitral Tribunal shall pass an order whenever, a plea is raised u/s 16(2). Section 16 is undoubtedly an enabling Section. Under the circumstances, the Arbitral Tribunal ought to refuse to deal with the matter at all, if it comes to a conclusion that, it has no jurisdiction to deal with the matter in this reference. Thus when the alleged dispute is not Arbitrable and falls outside the purview of the Honourable Arbitral Tribunal because the claim travels beyond the time barred jurisdiction and no jurisdiction can be arrogated in such a case. Although the decision u/s 16 is not award, it is always a good practice to record reasoning u/s 31[3] so that the same can form part of final award and shall enable all parties to convince the court to translate the logic behind the same when put to challenge u/s 34.

The order embodying the decision u/s 16(5) pursuant to the application u/s 16(2) is not an interim award. As was held in the case of *Uttam Singh* v/s *Hindustan Steel* [AIR 206 MP 1982]. Even the Honourable High Court having Judicature at Bombay had also an occasion to substantiate this ratio in a recent case wherein they refused to treat that as an Interim Award and hence not challengeable u/s 34 of the Act. When a party raises a preliminary issue to be decided in priority, the Arbitral tribunal cannot proceed with the merits without passing a speaking order u/s 16(5) r.w.s. 16(2) of the Act. This view is held in the case of *Southern Gas Ltd* v/s *Visveswariya Iron & Steel Ltd* [9 SCC 555] by the Apex Court of India, which is binding on all the authorities functioning there under. In the case of *Premier Fabricators* v/s *Heavy Engineering Corp.* [4 SCC 319], the Supreme Court held that, " Where the Arbitrator was required to decide in the first place with reasons the question of Arbitrability, but he gave a composite award consisting of a lump sum, it was held that the whole award was vitiated because it could not be said that the question of Arbitrability was considered as implication." Thus, the importance of preliminary issue was clearly upheld by the Apex Court also in the case of T. N. Electricity v/s *Bridge Tunnel Constructions* [4 SCC 121].

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- However, it would be wrong to assume that this power given to arbitrator precludes the Chief Justice or his designate to decide a question as to the existence of arbitration clause u/s 11. *Wellington Associates* vs. *Kirit Mehta* [2000 III AD 153 SC].
- In the case of *Perfect Equipment Pvt. Ltd* vs. *Prestige Enterprises* [44 SCL 74 (MUM)] it was held that, "Even if agency agreement [containing Arbitration clause] is terminated, respondent is entitled to refer dispute to Arbitration u/s 16(1)(a)" and after agreeing to appointment of an Arbitrator, the petitioner cannot complain that respondent should have first right to resolve dispute amicably."
- In the case of *D-Ionic India Pvt. Ltd.* Vs. *State of Rajasthan* [44 SCL 67 (Del)] it was held that, "Section 16 confers power upon arbitrator to rule on its own jurisdiction including any objection with respect to existence or valid-

ity of Arbitration Agreement."

❖ Even though the contract may be void, the Arbitral clause has to be considered as an independent agreement and will not suffer the consequences of being void. Hence it will be open to the Arbitral Tribunal to decide the issue of voidness of the contract while considering the dispute under the arbitral clause. [*G.R. Didwania* vs. *A.C.Choksey* 4 CLA-BL SUPP-SNR-7 BOM].

❖ In the case of Pharmaceutical Products of India Ltd. Vs Tata Finance Ltd. [41SCL 259] the Bombay High Court held that, 'A decision on a question whether proceedings before arbitrators should be stayed or not cannot be subject matter of a final arbitral award, not even an interim award. It would be simply a decision u/s 16." In the case of *East Coast Boat Builders* [AIR 1999 DEL 44] it was held that, 'Where the jurisdiction of an arbitrator is challenged, and the arbitrator rejects it, his decision is not appealable. It is not an interim award."

❋ Normally the power of granting specific performance is discretionary and the discretion has been conferred by Specific Relief Act only on civil courts. Merely because the sections of the Specific Relief confer discretion on courts to grant specific performance of a contract does not mean that parties cannot agree that the discretion will be exercised by arbitral tribunal of their choice. *Olympus Superstructures pvt. Ltd*. Vs *Meena Khetan* [2 ARB LR 695 SC].

❋ An Arbitration clause is severable from and independent of other terms of contract. The decision of the Arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the Arbitration clause. Thus even if the contract is non-est, the arbitration clause is not rendered invalid. It is still within its competence to decide its validity. *Brawn Lab Ltd.* vs. *Fitty Int'* [1 GmBH (2000) 2 Arb LR 64 DEL]. Decision of the arbitrator that the contract was null and void or termination of main contract by performance or otherwise, will not render the arbitration clause invalid. *Olympus Superstructures Pvt. Ltd.* Vs. *Meena Khetan* [2 ARB LR 695 SC].

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❋ In the case of *S.N. Transport vs. GCM. Synthetics* [1999(3) MLJ 216] it was held that a party can always raise the challenge to existence or validity of the Arbitration Agreement u/s 16[5] at any stage and the arbitrator is bound to decide the same.

❋ Section 16 conspicuously avoids adverbial clause 'unless otherwise agreed' so that the parties cannot modify the power. Under the enabling section 16[1], the arbitral tribunal has discretion to exercise power conferred due to word 'May' therein. However, section 16[5] uses word 'shall', hence mandatory. U/s 16[2], the objection as to jurisdiction is to be raised not later than the submission of the statement of defence but u/s 16[3], objection as to scope of authority is to be raised as soon as a matter alleged to be beyond the scope of its authority is raised. U/s 16[4], the Arbitral Tribunal is authorised to admit the plea even later if it considers that the delay was justified. U/s 16[6], the aggrieved party is already given the right to challenge the award u/s 34. The effect of conjoint reading of various sections like 16, 34 etc. is that if no plea is raised u/s 16, the party cannot raise it later u/s 34.But this is a grey area where later proceedings u/s 34 is barred or not is subject to interpretations.

❋ When an application is made u/s 11[6] for an appointment of an arbitrator, no objection can be raised that the claim fell outside the purview of arbitration; hence they could not be referred to arbitration because this power rests with the Arbitrator himself. [*Sharma & Sons* vs. *E-in-C.Army* [2 ARB LR 31 AP].

❋ The Supreme Court observed that section 16[5] does not violate the basic structure of the Constitution as the order thereunder is certainly subject to any judicial scrutiny even if after award is passed as per the time and manner laid down by the Act passed by the Parliament. *Babar Ali* vs. *Union of India* [2 SCC 178]

Thus the power of the Arbitral Tribunal to rule on its jurisdiction is unique. ■