

An issue as to jurisdiction like limitation should be decided by the arbitrator, not court considering an application under Section 11 to appoint arbitrator (Supreme Court of India)

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Uttarakhand Purv Sainik Kalyan Nigam Limited v. Northern Coal Field Limited

Court: Supreme Court of India | **Case Number:** SLP(C) No. 11476 of 2018 | **Citation:** 2019 SCC OnLine SC 1518 | **Bench:** Ajay Rastogi & Indu Malhotra JJ | **Date:** 26 November 2019

The petitioner invoked arbitration in September 2016 and later applied to the Madhya Pradesh High Court for the appointment of arbitrator under Section 11 of the Arbitration and Conciliation Act, 1996 (“ACA”). The High Court rejected the application on the ground of limitation.

The matter reached the Supreme Court, and in answer, the court first remarked that amendments made to the ACA in 2015 would apply since arbitration was invoked after 23.10.2015, the date when the amendments came into effect.¹ It then examined Section 11 (as amended in 2015) and came to the following conclusions:

- (a) The 2015 amendments significantly changed the appointment process under Section 11, that is court’s jurisdiction under sub-section (6A) of Section 11 was now confined to “examination of the existence of the arbitration agreement.”
- (b) Before the 2015 amendments: –
 - (i) The Chief Justice was required to decide all threshold issues with respect to jurisdiction (existence of the agreement, whether the claim was time-barred, whether there was a settlement, etc.) [citing to *SBP & Co. Patel Engineering Ltd.*, (2005) 8 SCC 618; *National Insurance Co. v. Boghara Polyfab (P) Ltd.* (2009) 1 SCC 267; *Union of India v. Master Construction Co.*, (2011) 12 SCC 349].
 - (ii) The 246th Law Commission Report recommended amendment to Section 11 envisaging parties will *not* be referred to arbitration only if the arbitration agreement did not exist. Based on these recommendations, Section 11 was substantially amended, and sub-section 6(A) inserted to overcome all previous judgments to reinforce the *kompetenz-kompetenz* principle enshrined in Section 16 of the ACA.
 - (iii) This non-obstante clause legislatively overruled *Patel Engineering* and *Boghara Polyfab* and confined only to the existence of the arbitration agreement and nothing more [citing to *Duro Felguera S.A. v. Gangavaram Port Limited*, (2017) 9 SCC 729].

¹ Sub-section 6A to Section 11 was inserted with effect from 23 October 2015. The sub-section states: “The Supreme Court or, as the case may be, the High Court, while considering any application under subsection (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”. This provision has been omitted in the 2019 amendments to the ACA, but the omission has not come into effect as of 20 December 2019. A 3-judge bench of the Supreme Court in *Mayavati Trading (P.) Ltd. v. Pradyut Deb Burman*, (2019) 8 SCC 714 (R F Nariman, R Subhash Reddy & Surya Kant JJ) has, however, held that “the omission of the sub-section is not so as to resuscitate the law that was prevailing prior to the Amendment Act of 2015”. The reason for omission, the court noted, was because appointment of arbitrators is to be done institutionally (under other amended provisions, which too are yet to be notified) and not by the Supreme Court or the High Court; *cf.* paras 5, 6.

- (iv) The legislative intent underlying the 1996 Act is party autonomy and minimal judicial intervention in the arbitral process. The legislative policy behind Section 16 is to restrict judicial intervention at the pre-reference stage. It is an inclusive provision within which all preliminary issues touching upon the jurisdiction of the arbitral tribunal falls. Therefore, once the existence of the arbitration agreement is not disputed, all issues, including jurisdictional objections, are to be decided by the arbitrator.
- (v) Limitation is a mixed question of fact and law. It involves a question of jurisdiction, which the arbitral tribunal must decide. [citing to *ITW Signode India Ltd. Collector of Central Excise*, (2004) 3 SCC 48; *NTPC v. Siemens Atkein Gesell Schaft*, (2007) 4 SCC 451; *Indian Farmers Fertilizers Cooperative Ltd. v. Bhadra Products*, (2018) 2 SCC 534].
- (vi) However, the court also referred to situations where the appointment of arbitrator may be refused:
 - (1) Fraud or deception, which the court said is an exception to kompetenz-kompetenz.
 - (2) If the arbitration agreement is not valid.
 - (3) If the disputes are beyond the scope of the arbitration agreement.

Editorial notes- The High Court had rejected the application for appointment of arbitrator, saying that the application was limitation-barred. See the High Court's judgment [here](#). Therefore, the issue before the Supreme Court was whether a Section 11-court could consider the question if the application for appointment (in other words, a request that the matter is referred to arbitration) was barred by limitation? This is noted in the opening paragraph of the judgment: "The issue which has arisen for consideration is whether the High Court was justified in rejecting the application filed under Section 11 for reference to arbitration, on the ground that it was barred by limitation".

But the remaining part of the judgment is confusing because it proceeds on the premise that the High Court rejected the application for appointment, holding that the *potential claim to be raised in the arbitration proceedings* was itself limitation barred. At paragraph 11, the Supreme Court notes: "[T]he High Court vide the impugned Order held that the claims of the Petitioner – Contractor were barred by limitation, and therefore an arbitrator could not be appointed under Section 11 of the 1996 Act." Nonetheless, this analysis is outside the scope of this update, and it focuses on what the court said.