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Objection to Arbitral Tribunal's Jurisdiction: A Critical and Analytical Study

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ABSTRACT

The Section 16 of the Arbitration and Conciliation Act, 1996 deals with competency of the arbitral tribunal. If the litigating parties have any objection to the arbitral tribunal then they can raise before the arbitral tribunal under Section 16 during the proceedings. The judicial authorities don't have much power to interfere in these jurisdiction matters. There are various views given by the court regarding when to raise the objection that is either at the beginning or later. That ambiguity still exists. In the project the author would highlight that issue and other related issues such as who should raise the issue, whether issue of limitation is a jurisdictional issue or not etc. The author would conclude the paper with mentioning about the 2015 & 2019 Arbitration and Conciliation Amendment Acts effect on the Section 16 of the 1996 Act.

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Introduction

The Arbitration and Conciliation Act, 1996[1] governs the current arbitration law in India with the main aim to increase the autonomy of litigating parties and decreasing the interference of the courts. This also helps in saving the valuable time of courts. Before this 1996 Act the resolution of dispute was under the purview of the Arbitration Act of 1940, the Arbitration (Protocol and Convention) Act, 1937 and the Foreign Awards (Recognition and Enforcement) Act, of 1961, which helped the courts had the discretionary power to consider whether the arbitral tribunal is the competent authority to resolve the dispute. Thus the jurisdiction of the arbitral tribunal was decided by courts. Subsequently after the 1996 Act the position got changed. The power to determine whether there is jurisdiction is given to the arbitral tribunal itself under Section 16 of the 1996 Act.

For that reason even if you want to object the jurisdiction of the arbitral tribunal then you have to raise a request before the Arbitral Tribunal under Section 16. The UNCITRAL Model and the English Rules had a magnificent impact in formulating The Arbitration and Conciliation Act, 1996. This particular provision relation to the jurisdiction of arbitral tribunal and its power to rule on its own jurisdiction which is incorporated in Section 16 of the 1996 Act is based on the rule of "Kompetenz Kompetenz"[2]. This rule exists under the Article 16 of the UNCITRAL Model Law and under Article 21 of the UNCITRAL Arbitration Rules[3].

Meaning of '*Kompetenz Kompetenz*'/ 'Competence-Competence'

This doctrine of *Kompetenz Kompetenz* elucidates the principle that the Arbitral Tribunal has the competence to decide its own competency.[4] It means that the arbitral tribunal has the power to decide upon the jurisdiction issue.[5]

[1] Act No. 26 of 1996, The Arbitration and Conciliation Act, 1996
[2] Assimilating the Negative Effect of KOMPETENZ - KOMPETENZ in India: Need to Revisit the Question of Judicial Intervention, 2 Indian J. Arb. L. 24 (2013)
[3] M/S. Wellington Associates Ltd v. Kirti Mehta, (2000) 4 SCC 272
[4] M/s. Konkan Railway Corporation Ltd v. M/s. Rani Construction Pvt. Ltd, (2000) 8 SCC 159
[5] The Rule of Competence-Competence: A Comparative Analysis of Indian and English Law, 6 Contemp. Asia Arb. J. 133 (2013)

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In *Olympus Superstructures Pvt. Ltd v. Meena Vijay Khetan*[6], the court held that

"The arbitral tribunal is vested with power under Sec 16(1) of the Arbitration and Conciliation Act, 1996 to rule on its own jurisdiction including ruling on any objection with respect to the existence or validity of arbitration agreement."

In the case of *SBP & Co. vs. Patel Engineering Ltd. and National Insurance Co. Ltd v. Boghara Polyfab (P) Ltd*.[7], the Apex Court tried to reformulate the power of the court by pushing the boundaries of the issues that are looked into courts at the time of reference to arbitration or arbitrators appointment. This attitude of the court actually undermines the purpose of Section 16 and the power granted under it to the arbitral tribunal. This significantly undervalued the principle of *Kompetenz Kompetenz* as the court tried to dilute that by usurping such control to the courts. Such judicial pronouncements defeat the basic purpose of arbitration i.e., minimal interference by the court in the arbitral proceedings[8]. In 2015 amendment Act, Section 11(6A) had been introduced which empowered courts to look into the existence of the Arbitration Agreement but it did not extend any further. Thus the order of the court in SBP Patel Engineering Case stood overruled. Consequently, the doctrine of *Kompetenz Kompetenz* was restored and returned in the Act. Further the above amendment has also been upheld in the case of *Duro Felguera S.A. v. Gangavaram Port Ltd*[9] and also in catena of other cases it is upheld.

Thus, the arbitral tribunal has the power to decide regarding its jurisdiction. It has the power to decide the validity of the arbitration agreement. There are some prerequisites that are to be considered before deciding these questions.

[6] Olympus Superstructures Pvt.Ltd v. Meena Vijay Khetan, (1999) 5 SCC 651
[7] SBP & Co. vs. Patel Engineering Ltd. and National Insurance Co. Ltd v. Boghara Polyfab (P) Ltd, 2005 (8) SCC 618
[8] Section 5 of the Arbitration and Conciliation Act, 1996 categorically provides that no judicial authority shall intervene except where it is so provided in Part I of the Act.
[9] Duro Felguera S.A. v. Gangavaram Port Ltd, Arbitration Petition No.31 of 2016.

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They are:

a) An arbitration clause should be considered differently and independently form the other clauses of the contract; and

b) A decision that the contract is null and void is not sufficient to invalidate *ipso jure* the arbitration clause.

Further in case of *M/S. Uttarakhand Purv Sainik Kalyan Nigam Limited (Upnl) v. Northern Coal Field Limited*[10] the Supreme Court held that,

"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. The doctrine of "Kompetenz-Kompetenz", also referred to as "Compétence-Compétence", or "Compétence de la recognized", 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. All other preliminary or threshold issues are left to be decided by the arbitrator under Section 16, which enshrines the *Kompetenz-Kompetenz* principle."

However, the courts still have the power to resolve the issue if the burden is placed by the arbitrators or if they are not properly resolving the matter, in order to help the litigants out of tier impasse.

Jurisdiction of Arbitral Tribunal

It is prominent to understand that the jurisdiction provided to arbitration tribunal as a matter of right or inherence or by any statute. That Arbitral Tribunal's jurisdiction is the resultant because of the Arbitration Clause or Arbitration Agreement concerning the parties. This jurisdiction is

[10] M/S. Uttarakhand Purv Sainik Kalyan Nigam Limited(Upnl) v. Northern Coal Field Limited, (2020) 2 SCC 455

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subjected to the provisions of the Arbitration and Conciliation Act, 1996 that is Section 16 of the 1996 Act.

What is included under the jurisdiction of Arbitral Tribunal?

Section 16 of the 1996 Act clearly states that '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', the use of the word 'including' demonstrates that the said provision is inclusive in nature. There are some factors that have to be considered in deciding matters regarding the jurisdiction[11]. They are:

1. There should be a Valid Arbitration Agreement.

According to Section 16 of the 1996 Act the arbitral tribunal has the power to determine the existence or validity of the Arbitration agreement. Such power to determine the validity or existence of arbitration agreement is not exclusively provided in Section 16. That power has also been provided to parties to approach judicial authorities under section 8, section 9 or section 11 of the 1996 Act[12]. According to the 246th Report of the Law Commission, it states that-

"*If the Courts are of the opinion that the Arbitration agreement prima facie exists – it shall refer the dispute to Arbitration and whether the Arbitration agreement exists or not shall be decided in finality by the Arbitral Tribunal.*

If the Courts are of the decision that the Arbitration Tribunal does not exist – such a decision shall be final."

Thus the determination of the existence of arbitral agreement by the judicial authority is in preliminary manner. The final determination of the existence or validity of Arbitration Agreement is left to the Arbitral Tribunal only to decide while dealing with other jurisdictional matters.

[11] Time Limits in Challenging a Tribunal's Jurisdiction, 23 J. Arb. Stud. 81 (2013)
[12] Judicial Intervention in Arbitral Awards: A Practitioner's Thoughts by Gourab Banerji, National Law School of India Review, Vol. 21, No. 2 (2009), pp. 39-53 (15 pages)

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In the case of *M/S. Wellington Associates Ltd v. Kirti Mehta*[13], the question arose before the court as to whether there is an 'existence' of the valid arbitration agreement. The Supreme Court held that such question should be decided only by the arbitral tribunal in view of section 16 of the Act. It clearly opined that section 33 of the old Act of 1940 states that the "existence" of the arbitration agreement was to be decided only by application to the Court and not by the arbitrator. This disability on the part of the arbitrator has now been removed by section 16 of the new Act. Now section 16 has conferred power on the arbitral tribunal to decide whether there is in 'existence' an arbitration clause. It further opined that Section 16 of the new Act permits the arbitral tribunal to treat the arbitration clause as an independent clause and section 16 says that the arbitration clause does not perish even if the main contract is declared to be null and void.

The following fundamental guidelines and principles relating to a valid arbitration agreement have been laid down by the Hon'ble Supreme Court in the case of *Jagdish Chander v. Ramesh Chander and Ors*[14] along with the reference of the cases mentioned above:

1. Where the clause provides that in the event of disputes arising between the parties, the disputes shall be referred to arbitration, it is an arbitration agreement. *But where the clause relating to settlement of disputes, contains words which specifically exclude any of the attributes of an arbitration agreement or contains anything that detracts from an arbitration agreement, it will not be an arbitration agreement.*

2. Mere use of the word 'arbitration' or 'arbitrator' in a clause will not make it an arbitration agreement, if it requires or contemplates a further or fresh consent of the parties for reference to arbitration. For example, use of words such as *"parties can, if they so desire, refer their disputes to arbitration" or "in the event of any dispute, the parties may also agree to refer the same to arbitration" or "if any disputes arise between the parties, they shall consider settlement by arbitration" in a clause relating to settlement of disputes,* indicate that the clause is not intended to be an arbitration agreement.

[13] M/S. Wellington Associates Ltd v. Kirti Mehta, (2000) 4 SCC 272
[14] Jagdish Chander v. Ramesh Chander and Ors, (2007) 5 SCC 719

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3. *Such clauses merely indicate a desire or hope to have the disputes settled by arbitration, or a tentative arrangement to explore arbitration as a mode of settlement if and when a dispute arises. Such clauses require the parties to arrive at a further agreement to go to arbitration, as and when the disputes arise.* Any agreement or clause in an agreement requiring or contemplating a further consent or consensus before a reference to arbitration is not an arbitration agreement, but an agreement to enter into an arbitration agreement in future.

Thus, from the above case law we can understand that determination of existence of Arbitration Agreement is done by the Arbitral Tribunal under Section 16 of the 1996 Act.

2. The Subject Matter of the Dispute.

There are no ascertained guidelines or any law to say what is arbitrable and non arbitrable dispute. Section 2(3) provides that the Act would not affect any other legislation under which some matters are submitted to Arbitration. Thus this provision notices the concept of subject-matter arbitrability under which certain disputes are referred to Arbitration by special judicial authorities as provided under special legislations. There is catena of landmark judgments which concluded that some disputes are not arbitrable. In the prominent case of *Booz-Allen Hamilton Inc. v. SBI Home Finance Ltd. & Ors*[15], some of the disputes are considered as non arbitrable. The court held that, "Criminal offences; Matrimonial disputes such as divorce, judicial separation, etc.; Guardianship disputes; Disputes relating to insolvency and winding up; Testamentary matters; and Eviction and Tenancy matters are non arbitrable in nature."

Matters such as revenue matters, matters regarding fraud, etc. are considered as non-arbitrable by implication. If such disputes are referred to arbitration then the arbitral tribunal does not have jurisdiction to deal with those matters even when the parties have expressly accepted to the same.

Thus, either of the parties is competent to raise a plea under Section 16 objecting the jurisdiction of the tribunal. In such circumstances, a suo-moto case can also be taken up by the Arbitral Tribunal.

[15] Booz-Allen Hamilton Inc. vs. SBI Home Finance Ltd. & Ors, Civil Appeal No.5440 of 2002

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3. The Scope of Arbitral Tribunal's Authority.

The scope of the arbitral tribunal is derived from whatever is stated in Arbitration Agreement. If any issue which is not mentioned in the arbitration agreement or falls outside the purview of the arbitrable disputes then an objection can be raised before the Arbitral Tribunal stating that there is no competency for the arbitral tribunal to decide the matter as it is outside the scope of Arbitral Tribunal's authority.

Who are competent to raise the objection to Arbitral Tribunal's Jurisdiction?

As the arbitration agreement is a type of contract, the doctrine of privity of contract is applied to it. Thus only the parties of to the Arbitration Agreement are competent to make an appeal/request under Section 16 of the 1996 Act disputing the jurisdiction of arbitral tribunal. Even when the parties actively participated in the formation or in the appointment of arbitral tribunal, the parties are empowered to raise the objection as per section 16 of the 1996 Act. This stand was affirmed by the Supreme Court in the case of *Travancore Devaswom Board v Panchami Pack Pvt. Ltd*.[16], where the court held that the involvement in the appointment of arbitral tribunal is no bar to raising an objection under Section 16 of the 1996 Act. In addition to it the court held that the tribunal can take suo-moto cognizance of the jurisdiction issue and decide the matter accordingly. For giving benefit to the parties and not prolonging proceedings the 1996 Act has prescribed the procedure and the time frame within which the request of jurisdiction issue should be raised. Now let us consider when to raise an objection to the Arbitral Tribunal.

Objection to the Jurisdiction of Arbitral Tribunal

The appeal before the arbitral tribunal regarding the issue of jurisdiction should not be raised after the submission of statement of defense. This plea to object the jurisdiction can be raised even when the party has participated in the appointment of arbitral tribunal. If the arbitral tribunal is exceeding the scope of its jurisdiction then also the plea to object the jurisdiction can be raised. In the later stage such as after the statement of defense, the plea can be raised if there is a sufficient and justified reason for such delay.

[16] Travancore Devaswom Board v Panchami Pack Pvt. Ltd, 2005 (1) KLT 690

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If the arbitral tribunal decided that it has jurisdiction and has given an arbitral award then the aggrieved parties could challenge the arbitral award under Section 34 of the 1996 Act. The said award can also be set aside as per section 34 of the 1996 Act.

In the case of *M/S Deep Industries Ltd v. Oil And Natural Gas Corporation Ltd*[17], the Supreme Court held that, "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."

The objection to the jurisdiction of the Arbitral Tribunal should be made in the form of a plea. It should include the brief facts and the grounds upon which the objection is raised. It should be in clear and precise. Such plea should be made within the time frame as per the Section 16 of the 1996 Act that is at the initiation of the proceedings or before/at the time of submitting the statement of defence.

In the case of *M/s MSP Infrastructure Ltd v/s M.P. Road Development Corporation Ltd*[18], the Supreme Court held that

"The order of the MP High Court, which permitted a party to Arbitration to amend a Section 34 Petition to raise an objection that the Arbitral Tribunal did not have jurisdiction to entertain the dispute, is set aside stating that upon a perusal of Section 16 of the Act, it is undoubtedly clear that an objection that the Arbitral Tribunal lacks jurisdiction must be raised before or at the time of submission of the Statement of Defence. Therefore, raising such an objection under Section 34 would defeat the provisions of Section 16 of the Act."

However the Supreme Court in the case of *Lion Engineering Consultants v. State of M.P*[19]., has held that:

"A fresh plea for objection to the Arbitral Tribunal's jurisdiction can be allowed to be raised under a Section 34 Petition before the Court"

[17] M/S Deep Industries Ltd v. Oil And Natural Gas Corporation Ltd, 2019 (10) SCJ 429
[18] MSP Infrastructure Ltd v/s M.P. Road Development Corporation Ltd, AIR 2015 SC 710
[19] Lion Engineering Consultants v. State of M.P, Civil Appeal Nos. 8984-8985 of 2017

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This has grossly undermined the purpose and intention of the Section 16 of the 1996 Act. However the plea should be raised before the Arbitral tribunal at the preliminary stage that is before/at the time of statement of defence. Even in the case where the tribunal is exceeding the scope of its jurisdiction then also the parties can raise the objection to jurisdiction of the arbitral tribunal as soon as that issue arises.

In the case of *Subhlaxmi Fabrics Pvt. Ltd v. Chand Mal Maradia*[20], the SC held that contentious issues should not be gone into or decided at the stage of appointment of an arbitrator and no time should be wasted in such an exercise. The remedy of the aggrieved party is to raise an objection before the arbitral tribunal as under Section 16 of the Act it is empowered to rule about its own jurisdiction.

In the case of *M/S. Wellington Associates Ltd v. Kirti Mehta*[21], the SC held that, "Section 16 does not take away the jurisdiction of the Chief Justice of India or his designate, if need be, to decide the question of the `existence of the arbitration agreement. Section 16 does not declare that except the arbitral tribunal, none else can determine such a question. Merely because the new Act permits the Arbitrator to decide this question, it does not necessarily follow that at the stage of section 11 the Chief Justice of India or his designate cannot decide a question as to the existence of the arbitration clause." In the case of *Avitel Post Studioz Limited and Ors V. HSBC Pi Holding (Mauritius) Limited*[22], the question before court is whether to follow the precedent set by *N. Radhakrishnan v. Maestro Engineers*[23]. The ratio of this case is that if during arbitration proceedings, serious allegations of fraud are raised then such dispute is not arbitral. After this judgment the legislature wanted to undo what has been done by this case through 2015 Amendment Act by inserting Section 16(7)[24] which would state that even in case of such serious fraud allegations it can be arbitrable.

[20] Subhlaxmi Fabrics Pvt. Ltd v. Chand Mal Maradia (2005) 10 SCC 704
[21] M/S. Wellington Associates Ltd v. Kirti Mehta, (2000) 4 SCC 272
[22] Avitel Post Studioz Limited and Ors V. HSBC Pi Holding (Mauritius) Limited, 2020 (9) SCALE 733
[23] N. Radhakrishnan v. Maestro Engineers, (2010) 1 SCC 72
[24] "The arbitral tribunal shall have the power to make an award or give a ruling notwithstanding that the dispute before it involves a serious question of law, complicated questions of fact or allegations of fraud, corruption etc.."

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But the 243rd law commission report [25]did not want to insert that in the amendment and hence it is did not become law. Now in this current case the question is as to which should be followed i.e., the precedent or the intention of the legislature.

The court in this case held that, it is a little difficult to apply this case to resurrect the ratio of N. Radhakrishnan case as a binding precedent as it was decided depending on case which had been decided by using 1940 Arbitration Act. That Act is completely different from 1996 Act. Hence it cannot be considered to be a binding precedent. Also the court further held that the development of the law by this Court cannot be thwarted merely because a certain provision recommended in a Law Commission Report is not enacted by Parliament. Parliament may have felt, as was mentioned by Lord Reid in British Railways Board and Herrington[26], that it was unable to make up its mind and instead, leave it to the courts to continue, case by case, deciding upon what should constitute the fraud exception. Parliament may also have thought that section 16(7), proposed by the Law Commission, is clumsily worded as it speaks of a serious question of law, complicated questions of fact, or allegations of fraud, corruption, etc. *N. Radhakrishnan* (supra) did not lie down that serious questions of law or complicated questions of fact are non-arbitrable. For this reason also, Parliament may have left it to the courts to work out the fraud exception.

In the case of *Hythro Power Corporation Ltd v. Delhi Transco Ltd*[27], the SC held that, "The jurisdiction of the nominee of the Chief Justice of India to decide the question is not excluded by Section 16 of the Act and such a power can be exercised in a suitable case. On this basis, it is no doubt permissible under Section 11 of the Act to decide a question as to the existence or otherwise of the arbitration agreement but when the correspondence or exchange of documents between the parties are not clear as to the existence or no-existence of an arbitration agreement, in terms of Section 7 of the Act the appropriate course would be that the arbitrator should decide such a question under Section 16 of the Act rather the Chief Justice of India or his nominee under Section 11 of the Act."

[25] 243 Law Commission Report, 2012
[26] British Railways Board and Herrington, 1972 A.C. 877 [House of Lords]
[27] Hythro Power Corporation Ltd v. Delhi Transco Ltd, (2003) 8 SCC 35

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However, later in the case of *National Insurance Co. Ltd. v. M/S. Boghara Polyfab Pvt.Ltd*[28], the SC took a different stand when an issue regarding raising plea of objection to jurisdiction arose before it. It held that,

"Section 16 is said to be the recognition of the principle of *Kompetenz - Kompetenz*. The fact that the arbitral tribunal has the competence to rule on its own jurisdiction and to define the contours of its jurisdiction only means that when such issues arise before it, the Tribunal can and possibly, ought to decide them. This can happen when the parties have gone to the arbitral tribunal without recourse to Section 8 or 11 of the Act. But where the jurisdictional issues are decided under these Sections, before a reference is made, Section 16 cannot be held to empower the arbitral tribunal to ignore the decision given by the judicial authority or the Chief Justice before the reference to it was made. The competence to decide does not enable the arbitral tribunal to get over the finality conferred on an order passed prior to its entering upon the reference by the very statute that creates it. That is the position arising out of Section 11(7) of the Act read with Section 16 thereof. The finality given to the order of the Chief Justice on the matters within his competence under Section 11 of the Act, are incapable of being reopened before the arbitral tribunal."

Hence in such circumstances and depending on case to case basis the Arbitral Tribunal should be careful while considering the objection to its jurisdiction.

Whether determination of objection to jurisdiction is to be determined as preliminary issue?

The section 16 of the 1996 Act does not give any clarity as how to determine the jurisdiction issue. The controversy or ambiguity here is that whether the jurisdiction issue should be determined as a preliminary issue before jumping into the merits of the matter or it should be dealt at later stages of the proceedings. The section 16(5) states that an arbitral tribunal can proceed with the dispute after considering the plea of objection to jurisdiction if raised in the proceedings. Then it can pass an award in that regard. The interpretation of this clause is done liberally in some pronouncements such that they went on to state that the plea of jurisdiction should be decided in the beginning itself.

[28] National Insurance Co. Ltd. v. M/S. Boghara Polyfab Pvt.Ltd, (2008) 4 CTC 854 (SC)

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In the case of *Kvaerner Cementation India Limited v. Bajranglal Agarwal*[29], the Supreme Court held that the arbitral tribunal is advised to deal with the issues regarding jurisdiction in the initial stages of Arbitration.

But there is no statutory mandate as to when that should be dealt and in some cases they have given the power to arbitral tribunal to decide when to deal with jurisdictional issue. There is another judgment where Supreme Court gave a decision contrary to the above case. In the case of *Maharshi Dayanand University & Ors v. Anand Coop. L/C Society Ltd. & Ors*[30], the Supreme Court held that "The Arbitral Tribunal is at liberty to decide on jurisdictional issues at any stage of proceedings, but must strictly decide the same while it proceeds to pass the final award."

This is also upheld by the Delhi HC in the case of *Pankaj Arora v. AVV Hospitality LLP & Ors.*[31], where the court stated that the section 16(5) cannot be interpreted as a legal mandate on the arbitral tribunal to decide a matter in the beginning of the proceedings. However both these courts are of the opinion that the jurisdiction matter should be dealt before rendering final award.

In the case of *McDermott International Inc. v. Burn Standard Co. Ltd*[32], the Supreme Court held that 'the jurisdictional challenge is required to be determined as a preliminary ground'. Though the court did not given any reasoning as why it is referring he challenge as a preliminary matter.

There is another prominent judgment of Delhi High Court in *Steel Authority of India v. Indian Council of Arbitrators*[33], where the Delhi High Court held that the arbitral tribunal has the discretion to decide upon the issue of jurisdiction as preliminary one or not. Even in the latest case that is in *Ayyaswami v. A. Paramasivam*[34], [where the parties to this litigation, who are brothers, had entered into a deed of partnership dated 01.04.1994 for carrying on hotel business and this partnership firm has been running a hotel with the name 'Hotel Arunagiri' located at Tirunelveli, Tamil Nadu. Some disputes arose out of the said partnership deed between the parties. Partnership

[29] Kvaerner Cementation India Limited v. Bajranglal Agarwal, (2012) 5 SCC 214
[30] Maharshi Dayanand University & Ors v. Anand Coop. L/C Society Ltd. & Ors, (2007) 5 SCC 295
[31] Pankaj Arora v. AVV Hospitality LLP & Ors, [MANU/DE/1405/2020]
[32] McDermott International Inc v. Burn Standard Co. Ltd, (2006) 11 SCC 181
[33] Steel Authority of India v. Indian Council of Arbitrators, Civil Miscellaneous Appeal No. 13822 of 2013
[34] Ayyaswami v. A. Paramasivam, (2017) 2 LW 169

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Deed contains an arbitration clause i.e. Clause (8) which stipulates resolution of disputes by means of arbitration], the Supreme Court upheld the ratio of Kvaerner Cementation case and considered that the jurisdictional challenge issue should be dealt as the preliminary issue.

In England the law regarding the issue of jurisdictional challenge is ascertained[35]. In the case of *Brown v. Genossenschaft Osterreichischer Waldbesitzer*[36] held that the arbitral tribunal should decide upon the jurisdiction challenge as preliminary one before delving into the arbitration proceedings. Hence the position in England is very clear. However, this is not the case in India. So we have conflicting judgments.

The problem would raise when the arbitration tribunal continue proceedings without dealing with jurisdiction challenge then later if they understood that it does not have jurisdiction then the entire proceedings which are done till then would be of no use[37]. But the commission came to a conclusion that the arbitral tribunal would be a better to decide when to deal with jurisdictional issue. As in some cases the jurisdictional challenge is so inter-wined with substantial claim then it would not be practical possible to decide the jurisdiction challenge beforehand. This position is reiterated in Maharishi Dayananda case and Steel Authority of India case.

Because of these ambiguities there is scope for the parties to prolong the matter and delay proceedings. This would defeat the main purpose of the arbitration. This unsettled principle in the arbitration act would be a hindrance in attracting foreign investors. According to Model Law there is liberty for the tribunal to decide when to deal with the jurisdictional issue and such clear stand should be included in the 1996 Act.[38]

[35] The Rule of Competence-Competence: A Historical & Comparative Analysis between English-Indian Law, 26 Willamette J. Int'l L. & Disp. Resol. 75 (2019)
[36] Brown v. Genossenschaft Osterreichischer Waldbesitzer, [1953] 1 Lloyd's Rep. 495
[37] The Failure of Arbitration in India: Derailment in Fast Track Dispute Resolution, 2010 Lawasia J. 129 (2010)
[38] Section 16 of the 1996 Act is similar to Article 16 of the Model Law but the section 16 does not contain the diction of the Article 16.

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In the case of *M/S Lion Engineering Consultants v. State of M.P. & Ors*[39] the court held, when a matter arising out of a dispute in execution of a works contract was referred to the Arbitrator by the High Court, that,

"All objections to jurisdiction of whatever nature must be taken at the stage of the submission of the statement of defence, and must be dealt with under Section 16 of the Arbitration Act, 1996. However, if one of the parties seeks to contend that the subject matter of the dispute is such as cannot be dealt with by arbitration; it may be dealt under Section 34 by the Court. It further opined that there is any bar to plea of jurisdiction being raised by way of an objection under Section 34 of the Act even if no such objection was raised under Section 16."

Hence, the arbitral tribunal has the power to decide when it should determine the plea of objection to its jurisdiction. However it should be done before the conclusion of the case. The award of arbitral tribunal given under Section 16 is not final and an appeal can be filed against it.

And also it is apparent that the court cannot interfere in between arbitral tribunal's proceedings and decide the jurisdiction issue of the arbitral tribunal. It should be decided by the arbitral tribunal itself as per Section 16 of the 1996 Act.

Aftermath of issue of jurisdiction

As already stated, the issue of jurisdiction should first be raised before the Arbitral Tribunal only. If any party is aggrieved by the decision of arbitral tribunal regarding the jurisdiction issue then it can have the recourse to the judicial authorities. There are two scenarios that would arise when an objection to jurisdiction is raised. They are:

1. Agreeing to the Plea of Objection to Jurisdiction:

Under Section 37(2)(a) of the 1996 Act, if the arbitral tribunal after accepting the objection to the jurisdiction passes any award then it can be challenged to a competent court under that provision.

[39] M/S Lion Engineering Consultants V. State of M.P. & Ors (2018) 16 Scc 758

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As the purpose of the arbitration proceedings is to minimize the court intervention, the Act allows only limited appeals in the form of one tier of appellate mechanism[40]. Hence there is no second time appeal against the order or award passed by arbitral tribunal under Section 37(3). However the special leave petitions to Supreme Court are not barred under the Section 37 of 1996 Act.[41]

2. Disallowing the Plea of Objection to Jurisdiction:

If the arbitral tribunal does not entertain the objection [considering that it has jurisdiction] and proceeded to decide the matter then petition to set aside the award can be filed under Section 34 of the 1996 Act. The plea under Section 34 should contain brief facts, grounds on which it is asked to set aside as the arbitral tribunal is exceeding the jurisdiction and a prayer for setting aside the Award passed by the arbitral tribunal. Such appeal should be for setting aside the previous order within 3 months from the date of receipt of the award by the aggrieved party. There is another imposition on the court that it should dispose such matter within a period of 1 year from the time when the other party is notified that the aggrieved party wants to invoke Section 34 of the 1996 Act. Further if the order accepted or refused for setting aside by the competent authority then an appeal against that can be filed as per Section 37(1)(b). Unless the party files for a stay on enforcement of award under section 36 of the 1996 Act, the award can be enforced even when an application to set aside the same is pending before the competent authority.

Waiving of Right to Object the Jurisdiction of the Arbitral Tribunal

As already stated above, the parties should file the appeal objecting the jurisdiction of the arbitral tribunal within the time frame mentioned as per Section 16 of the 1996 Act otherwise the right to object jurisdiction would not be available for the parties. If there is delay in filing such plea then that delay should be justified. Such plea can be admitted by the tribunal at its discretion. However, the objection to jurisdiction of Arbitral Tribunal is waived by means of waiver as per Section 4 of the 1996 Act. Section 4 of the 1996 act states that, "Any party who has knowledge of non-compliance with any statutory or contractual provision, and continues with the arbitration

[40] REVIEW OF RECENT DECISIONS, National Law School of India Review, Vol. 26, No. 1 (2014), pp. 1-12 (12 pages)
[41] 1996: The Jurisprudence of the Supreme Court and Implications for the Jurisdiction of an Arbitral Tribunal by Gautam Bhatia, National Law School of India Review, Vol. 21, No. 2 (2009), pp. 65-75 (11 pages)

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proceedings without objecting to such non-compliance timely shall be deemed to have waived his right to object thereto."

In *S.N. Malhotra & Sons vs. Airport Authority of India & Ors*.,[42] the Delhi High Court has dealt with the interpretation of Section 4 and held that, "The provision prescribes four pre-conditions to constitute a deemed waiver of the right to object. Applying those postulates to section 16, there is deemed waiver of the right to object to the jurisdiction of the Arbitral Tribunal, if:

1. The Arbitral Tribunal is lacking or exceeding jurisdiction;

2. Either of the parties to the Arbitration Agreement has knowledge of such want or excess of jurisdiction;

3. The said party continues with the Arbitration proceedings without raising an objection to jurisdiction;

4. The said party raises an objection with delay that is not justified; or after the submission of Statement of Defence or not as soon as the matter which is beyond the scope of authority of the Arbitral Tribunal is raised during the proceedings"

Also in the case of *Quippo Construction Equipment Limited v Janardan Nirman Pvt. Limited*[43], the Supreme Court held that, "When a party does not participate in the Arbitration proceedings, he is deemed to waive his right to object resultantly and cannot object to the jurisdiction of the Arbitral Tribunal at a later stage."

In the case of *Narayan Prasad Lohia v. Nikunj Kumar Lohia* [44] the court held that, "A conjoint reading of Sections 4, 10 and 16 indicates that if an objection is not taken before the arbitral tribunal, within the time laid down under Section 16(2), then the party would be deemed to have waived its right to object by virtue of Section 4. Section 16(2) makes it clear that such a challenge can be taken even though the party may have participated in the appointment of the arbitrator and/ or may have himself appointed the arbitrator. Needless to state a party would be free, if he so choose, not to raise such a challenge. It is derogable because a party is free not to object within the

[42] S.N. Malhotra & Sons vs. Airport Authority of India & Ors, 2008(2)ARBLR76(Delhi).
[43] Quippo Construction Equipment Limited v Janardan Nirman Pvt Limited, Civil Appeal No.2378 of 2020
[44] Narayan Prasad Lohia v. Nikunj Kumar Lohia, (2002) 3 SCC 572

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time prescribed in Section 16(2). If a party chooses not to so object there will be a deemed waiver under Section 4. In our view Section 10 has to be read along with Section 16 and is, therefore, a derogable provision."

Also, in the case *of Union of India v. M/S. Pam Development Pvt. Ltd*[45], the Supreme Court held that Section 16 of the Arbitration Act, 1996 provides that the Arbitral Tribunal may rule on its own jurisdiction. Section 16 clearly recognizes the principle of *kompetenz-kompetenz*. Section 16(2) mandates that a plea that the Arbitral Tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence. Section 4 provides that a party who knows that any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay shall be deemed to have waived his right to so object.

In the view of the circumstances stated above it is clear that sometimes the parties are precluded from raising an objection to the jurisdiction of the tribunal because of the rule of estoppel.

Effect of 2015 & 2019 Amendment Acts on Section 16

Based on the recommendations of the Law Commission, Section 11 was substantially amended by the 2015 Amendment Act, to overcome the effect of all previous judgments rendered on the scope of power by a non obstante clause, and to reinforce the *kompetenz- kompetenz* principle enshrined in Section 16 of the 1996 Act.[46]

By virtue of 2019 amendment Act, Section 11(6A) has been omitted with the intention to establish Arbitral institutions instead of referring to judicial authorities. In the case of *M/s Mayavti Trading Pvt. Ltd. v. Pradyuat Deb Burman*[47], the Supreme Court held that, "The omission of Section 11(6A) does not imply the revival of the law existing prior to insertion of such section, wherein courts expanded the boundary of intervention in the Arbitration proceedings. Therefore, Section 16 still remains the only recourse to raise a jurisdictional objection against the Arbitral Tribunal."

[45] Union Of India v. M/S. Pam Development Pvt. Ltd, (2014) 11 SCC 366

[46] M/S. Uttarakhand Purv Sainik Kalyan Nigam Limited(Upnl) v. Northern Coal Field Limited, (2020) 2 SCC 455
[47] M/s Mayavti Trading Pvt. Ltd. v. Pradyuat Deb Burman, 2019 (8) SCC 714

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Conclusion

All issues pertaining to the jurisdiction of the Arbitral Tribunal shall be decided only by the Arbitral Tribunal once it has been constituted. The judicial authorities are only required to intervene, in a limited capacity, either when the Arbitral Tribunal has not been yet constituted or becomes *functus officio*. The anatomy of the provisions facilitating the process of raising objection to the jurisdiction of the Arbitral Tribunal is indicative of the pro-arbitration approach of India and the desire to constitute effective Alternative Dispute Resolution machinery devoid of any lacunae. Section 16, thus, is one of the key provisions of the Arbitration and Conciliation Act, 1996, which furthers the objective of making Arbitration a process which is characterized by self-sufficiency and minimal court intervention.

Recommendations

1. The author recommends using the diction of Article 16 of the Model Law in the Section 16 of the 1996 Act as after such amendment it would serve the purpose of the Arbitration Proceedings in India.

2. To deal the jurisdiction issue as preliminary in most of the cases depending on the facts and circumstances of the dispute.

3. The author recommends construing the issue of limitation as jurisdictional issue and also urges to clear the position of the Supreme Court on that issue.