



FACULTY OF JURIDICAL SCIENCES

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Resolution

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Lecture-11



LECTURE 11: jurisdiction of the Arbitral Tribunal when contract containing an arbitration clause is declared void

There may be cases where the arbitration agreement is not made as a separate agreement. Instead, it is embedded, as a clause, in the agreement between the parties and such contract or the agreement between the parties is pronounced void or illicit. The question which arises is that what happens to the agreement in such cases and can the arbitration clause in such cases become void?

In the case of **Jawaharlal Burman vs. Union of India**, the Hon'ble Supreme Court held that it is theoretically possible that the contract may end and the arbitration contract may not and similarly it is also theoretically possible that the contract may be valid whereas the arbitration agreement may be void and in that sense, there is a difference between the contract and its part of arbitration agreement but in the present situation, a challenge to the contract itself includes a challenge to the arbitration agreement. If there is a concluded contract the arbitration clause is also valid and if there is not a concluded contract the arbitration clause is also invalid. The Court also acknowledged that there could be a vast majority of cases in which the arbitration agreement exists as a part of the main contract itself, and challenging the validity or even existence of one would mean a challenge to the validity or existence of others.

In the case of **Waverly Jute Mills Co. Ltd. Vs. Raymon and Co. (India) Ltd.**, The Hon'ble Supreme Court opined that discourse to the legitimacy of a contract could be the subject matter of an agreement of arbitration similarly as a debate identifying with a case made under the contract. But such an agreement would be operative and effective only when it is distinct from and independent of the contract which is disputed as illegal.

In the case of **Jaikishan Dass Mull vs. Luchhimirain Kanoria & Co.**, the Hon'ble Apex Court of India opined that there cannot be any doubts that if a contract is void and illegal, then, the arbitration clause must also perish along with the contract itself. As Viscount Simon, L.C. also pointed out in **Heyman vs. Darwins Ltd.** that if one party to the contract contends that it is void ab initio, and for this view, the clause itself is void and therefore the arbitration clause cannot operate. The arbitration clause, which is an essential content of the contract, cannot stand if the contract itself is declared to be illegal.

But the position has changed after the enactment of The Arbitration and Conciliation Act in 1996. And Section 16 (1) of this Act declares that the arbitration clause even if inserted in a contract, shall be considered as an independent from the remaining of the contract and a determination made by the Arbitral Tribunal regarding the invalidity of the contract shall not require *ipso jure* invalidation of the arbitration clause.

In the case of **Olympus Superstructures vs. Meena Vijay Khaitan**, the Apex Court stated that it shall be noticed that the arbitral tribunal is now empowered under sub-section (1) of Section 16 of the Act to look and reconsider on its own jurisdiction which also includes deciding on any objection related to the validity or even existence of the arbitration agreement and for such purpose, the arbitration clause which is a part of the contract and any decision by the arbitral tribunal related to the

invalidity of the contract shall not require *ipso jure* affect the validity of the arbitration clause. It is clear from clause (b) of Section 16(1) which provides that a decision by the arbitral tribunal related to invalidation of the main contract shall not require *ipso jure* invalidation of the arbitration clause.

Loss of competence of arbitral tribunal to rule on its jurisdiction

Section 11(6) of the Act states that a party may appeal to the designate of Chief Justice or the Chief Justice himself in order to take necessary steps when concurred by the parties under an appointment procedure, one of them doesn't act as necessary under the procedure, or the two mediators fall short to stick to an agreement as contemplated of them under the procedure, or a person or institution falls short to execute a function endowed to him under the procedure.

And Section 11(7) declares that a resolution which is taken by the Chief justice or the person designated by him under Section 11(4), Section 11(5) or Section 11(6) shall be final. It shows that a limit of the tribunal to reconsider its own jurisdiction when the Chief Justice has already considered and decided it.

In the case of **Konkan Railway Corporation Ltd. vs. Rani Construction Pvt. Ltd.** the judgment held that in a case when the chief justice or any person designated by him may have nominated the arbitrator through the thirty days had not expired then the Arbitral Tribunal would not have been constituted properly and therefore be without jurisdiction. The aggrieved party, in that case, could require the Arbitral Tribunal to rule on its jurisdiction and Section 16 provides provision for this and declares that the Arbitral Tribunal may look on its jurisdiction.

In the case of **Sundaram Finance Ltd. vs. NEPC India Ltd.**, the Hon'ble Supreme Court held that an order stated under Section 11 of the Act is an administrative order. It means that no appeal could exist under Article 136(1) of the Constitution. This case shows unwillingness on the part of the Court to affect the freedom enjoyed by the arbitration process and by declaring that the functions of the Chief Justice are administrative, the Court had essentially forbidden the Chief Justice from adjudicating questions such as the validity or existence of the arbitration agreement.

Section 16 of the act cannot be declared to empower the Arbitral tribunal to take no notice of the decision which is given by the judicial authority or the Chief justice before the reference to it was made. The authority to decide does not permit the Arbitral tribunal to ignore the finality granted to an order passed earlier to its entering upon the reference by the very statute which creates it.

Thus, if the Chief Justice or a person designated by him has looked into the validity or presence of the arbitration provision and on its jurisdiction then the Arbitral Tribunal can't rethink the topic of its jurisdiction. It would in such a case be forbidden from looking into the matter of its jurisdiction.