

# Dispute Resolution Hotline

March 09, 2011

## SUPREME COURT UPHOLDS THE JURISDICTION OF THE ARBITRATOR APPOINTED BY THE HIGH COURT

The Honorable Supreme Court of India ("**Court**") by its order dated February 17, 2011 in the matter of *Ms. A.P.S.Kushwaha (SSI Unit) v. Municipal Corporation, Gwalior and others*, relying on *SBP & Co. v. Patel Engineering Ltd<sup>1</sup>* held that once the arbitrator is appointed by the designate of the Chief Justice of the High Court under section 11(6) of the Arbitration and Conciliation Act, 1996 ("**Arbitration Act**"), the arbitral tribunal could not go behind such decision and rule on its own jurisdiction or on the existence of an arbitration clause.

### FACTS:

| Sr. No. | Date              | Event   |
|---------|-------------------|---|
| 1.      | May 01, 2002      | Municipal Corporation, Gwalior (" <b>Respondent</b> ") issued a work order to A. P. S. Kushwaha (" <b>Appellant</b> ") for water supply and electrical works in different parts of Gwalior municipal corporation area.  |
| 2.      |                   | Appellant filed a writ petition before the High Court of Madhya Pradesh (" <b>High Court</b> ") claiming dues from the Respondent for the work done by the Appellant under the work order.  |
| 3.      | February 15, 2006 | High Court disposed of the writ petition filed by the Appellant with a direction to seek reference to arbitration under clause 29 of the General Rules and Directions for the guidance of the contractor, applicable to the work order.   |
| 4.      |                   | Appellant moved the High Court requesting the High Court to appoint an arbitrator under section 11(6) of the Arbitration Act.   |
| 5.      | May 11, 2007      | The designate of the Chief Justice appointed a retired Judge of the High Court as the sole arbitrator.  |
| 6.      | January 30, 2008  | Arbitrator pronounced an award allowing the claim of Appellant for INR 76,64,725 with interest at the rate of 9% per annum from the date of the award till date of payment (" <b>Award</b> ").  |
| 7.      |                   | Respondent filed an application under section 34 of the Arbitration Act before the District Judge, Gwalior for setting aside the Award.<br><br>Respondent raised a preliminary objection that the arbitrator appointed under the Arbitration Act lacked jurisdiction as the applicable law to the dispute was Madhya Pradesh Madhyastham Adhikaran Adhiniyam, 1983 (" <b>1983 Act</b> ") and not the Arbitration Act. |
| 8.      | February 09, 2009 | District Judge, Gwalior rejected the claim and objections of the Respondent and refused to set aside the Award.   |
| 9.      |                   | Respondent filed a review petition before the High Court seeking review of its order dated May 11, 2007 by which the designate of the Chief Justice had appointed the arbitrator under section 11(6) of the Arbitration Act.  |
| 10.     | July 08, 2009     | High Court dismissed the review petition filed by the Respondent.   |
| 11.     |                   | Respondent also filed a review petition before the District Judge, Gwalior seeking review of his order dated February 09, 2009.   |
| 12.     | July 17, 2009     | District Judge, Gwalior dismissed the review petition.  |
| 13.     |                   | Respondent challenged the both the orders of the District Judge, Gwalior dated February 09, 2009 and July 17, 2009 before the High Court in an arbitration appeal.  |

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| 14. | November 26, 2009 | High Court allowed the appeal and set aside the orders of the District Judge, Gwalior holding that the Award passed by the sole arbitrator was without jurisdiction.<br><br>High Court held that the dispute raised by the appellant could only be decided by the statutory arbitral tribunal constituted under the 1983 Act and therefore the sole arbitrator appointed by the designate of Chief Justice under the Arbitration Act lacked inherent jurisdiction to decide the dispute. |
| 15. |                   | Appellant filed a review petition before the High Court seeking review of the order dated November 26, 2009.   |
| 16. | April 30, 2010    | High Court dismissed the review petition filed by the Appellant.   |
| 17. |                   | Appellant challenged the orders of the High Court dated November 26, 2009 and April 30, 2010 before the Court.   |

#### ISSUE FOR CONSIDERATION

Whether the arbitrator appointed by the designate of the Chief Justice under section 11(6) of the Arbitration Act lacked the inherent jurisdiction to resolve the dispute?

#### Court's rationale

The Respondent submitted before the Court that the disputes pertaining to, or arising out of work contracts granted by the state had to be resolved through statutory arbitration under the 1983 Act and not the Arbitration Act. Consequently, the arbitrator appointed by the designate of the Chief Justice under section 11(6) of the Arbitration Act lacked the inherent jurisdiction to resolve the dispute. Hence, the Court had to choose between the 1983 Act and the Arbitration Act to determine the law of arbitration in the instant case.

#### SECTION 7(1) OF THE 1983 ACT PROVIDES AS FOLLOWS:

*Reference to Tribunal - Either party to a works contract shall irrespective of the fact whether the agreement contains an arbitration clause or not, refer in writing the dispute to the Tribunal.*

This provision clearly provides that all disputes pertaining to work contracts will have to be submitted to the statutory tribunal constituted under the 1983 Act. The Arbitration Act was enacted by the parliament subsequent to the 1983 Act in 1996. The Arbitration Act applies to all arbitrations including arbitrations pertaining to government contracts and covers all kinds of disputes including the disputes relating to work contracts.

The Court had dealt with the same issue in the matter of *V.A.Tech Escher Wyass Flovel Ltd. v. MP. S.E.Board*<sup>2</sup> and laid down the following principle,

*"The 1983 Act and the 1996 Act can be harmonised by holding that the 1983 Act only applies where there is no arbitration clause but it stands impliedly repealed by the 1996 Act where there is an arbitration clause. We hold accordingly".*

The Court relied on this ruling to opine that the provisions of the Arbitration Act would apply in cases where the contract between the disputing parties includes an arbitration clause and in all other cases the disputes pertaining to work contracts will have to be resolved under the 1983 Act. In the instant case, clause 29 of the contract between the parties was a specific arbitration clause and therefore, the applicable law of arbitration is the Arbitration Act and not the 1983 Act. Since the law of arbitration is the Arbitration Act, an arbitrator appointed under the Arbitration Act has the jurisdiction to hear and resolve the dispute in the instant case.

Court also highlighted the ruling in the matter of *SBP & Co. v. Patel Engineering Ltd.* to hold that once the Chief Justice or his designate duly appoints an arbitrator in an application under section 11 (6) of the Arbitration Act, after verifying that the conditions for exercise of power to appoint an arbitrator are present, the arbitral tribunal could not go behind such decision and rule on its own jurisdiction or on the existence of an arbitration clause.

Accordingly, Court rejected the claim of the Respondent to hold that the arbitrator had the inherent jurisdiction to hear and resolve the dispute.

#### CONCLUSION

While the Court rightly elected the Arbitration Act as the law applicable to the arbitration, the reliance of the Court on the ruling in the matter of *SBP & Co. v. Patel Engineering Ltd* needs to be closely examined.

Court has opined that *"an arbitrator duly appointed by the Chief Justice under section 11(6) of the Arbitration Act after satisfying himself that the conditions for exercise of power to appoint the arbitrator are present, could not go behind such decision and rule on its own jurisdiction or on the existence of an arbitration clause"*.

It is assumed that the appointment of an arbitrator by the Chief Justice or his designate under section 11(6) of the Arbitration Act is subject to due verification of the existence of a valid arbitration agreement, appropriate interpretation of such arbitration agreement and other circumstances that warrant the appointment of the arbitrator. However, can such assumption disentitle the arbitrator of its inherent power to confirm and rule on its own jurisdiction?

The doctrine of *Kompetenz-kompetenz* which is also incorporated under section 16 (1)<sup>3</sup> of the Arbitration Act is a fundamental principle of law of arbitration and an inherent power of the arbitrator. Section 16 (1) of the Arbitration Act clearly entitles an arbitrator to rule on its own jurisdiction irrespective of how the appointment has been made. The Arbitration Act does not identify the appointments made under section 11(6) as an exception to operation of section 16 (1) of the Arbitration Act. Therefore, in strict terms of the Act, the ruling in *SBP & Co. v. Patel Engineering Ltd* may not be accurate. However, in practicality it may be duplication of process if both Chief Justice of the High Court and the arbitrator verifies the jurisdiction of the arbitrator.

1 2005 (8) SCC 618

2 C.A. No.3746/2005 decided on 14.1.2010

3 16.Competence of arbitral tribunal to rule on its jurisdiction.- (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 other 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.

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