

Dispute Resolution Hotline

February 20, 2015

SUPREME COURT SHOOTS DOWN BELATED BACKDOOR CHALLENGE TO THE JURISDICTION OF AN ARBITRAL TRIBUNAL

Supreme Court

- Party to an arbitration proceeding can object to the jurisdiction of the tribunal on or before the submission of the statement of defense.
- Does not rule on the question of conflict of arbitration agreements governed by a special statute enacted by the State and a special statute of the Centre.
- The jurisdiction of a civil court can be challenged at any stage however this settled rule of law does not apply to arbitrations as they are governed under the Arbitration and Conciliation Act, 1996, which is a special law.

INTRODUCTION

The Supreme Court (“**Court**”) in the case of *M/s MSP Infrastructure Ltd v/s M.P. Road Development Corporation Ltd*¹ has, in very clear terms, elaborated on the scope of Section 16 of the Arbitration and Conciliation Act, 1996 (“**Act**”). Setting aside the order of the High Court permitting an amendment, whereby a backdoor challenge to the jurisdiction of the tribunal would be included, the Court held that all objections to the jurisdiction of an arbitral tribunal must be taken no later than the submission of the statement of defense.

FACTS

M.S.P. Infrastructure (“**Appellant**”) entered into a contract with M.P. Road Development Corporation (“**Respondent**”) for the development and upgradation of a stretch of road in Madhya Pradesh (“**Agreement**”). A dispute arose between the parties. The Respondent terminated the contract and encashed the bank guarantees. The Appellant had approached the Calcutta High Court by way of a Civil Suit against the termination and the encashment.

The High Court disposed of the suit in terms of consent terms being filed by the parties and referred the matter to arbitration under the provisions of the Arbitration and Conciliation Act, 1996 (“**Act**”). Thereafter, the arbitral tribunal passed an award on November 27, 2006 partly allowing the claims of the Appellant. The Respondent preferred a challenge to the award and filed a petition under Section 34 of the Act. Approximately two years later, the Respondent moved an amendment application seeking to add additional grounds of objection.

The amendment application was rejected by the District Court on the ground that it was filed after a period of two years of the filing of the petition under Section 34. The Respondent challenged the rejection of the amendment application before the Madhya Pradesh High Court, which was allowed by the High Court, citing that they were not going into the merits of the matter and were just allowing the amendment application. The High Court effectively allowed the Respondent to amend the petition under Section 34 to add additional grounds which challenged the jurisdiction of the arbitral tribunal to entertain a dispute arising between a private party and a Government Undertaking, as only an arbitral tribunal appointed by the State of Madhya Pradesh under the provisions of the M.P. Madhyastham Adhikaran Adhiniyam, 1983 (“**State Act**”) could entertain the dispute between the parties. The State Act is enacted to provide for the establishment of a tribunal to arbitrate on disputes to which the State Government or a Public Undertaking (wholly or substantially owned or controlled by the State Government), is a party.

Aggrieved by the order, the Appellant approached the Court.

JUDGMENT

The Court concluded that the question whether the provisions of the Act would preside over the provisions of the State Act need not be discussed if it was decided that the amendment sought by the Respondent could not have been preferred in the first place.

The Court observed that the Respondent had (i) in the Agreement, agreed to refer all disputes arising out of the Agreement to a Board of Arbitrators as per the provisions of the Act, wherein such arbitration would be held as per the rules of the Indian Council of Arbitration; (ii) filed consent terms before the Calcutta High Court, wherein they had agreed to refer the disputes to arbitration under the provisions of the Act; (iii) filed the statement of defense wherein no challenge was raised qua the jurisdiction of the arbitral tribunal; (iv) led evidence; (v) suffered an award from where they preferred a petition under Section 34 of the Act; and (vi) two years thereafter, filed an application seeking amendment of the grounds challenging the jurisdiction of the arbitral tribunal.

The Court discussed Section 16 of the Act which bestowed upon an arbitral tribunal the power to decide as to whether it had the jurisdiction to entertain the dispute referred to it by the parties. It was held that an interpretation of

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the words used in Section 16 of the Act, leaves no doubt that any challenge to the jurisdiction of the tribunal being raised by a party would have to be done at any point of time before or at the time of submission of the statement of defense.

The Court reiterated that the intention of the parliament was to prevent parties from raising a plea of lack of required jurisdiction at a belated stage as a mode of prolonging proceedings. The parties could not submit themselves to the arbitral proceedings, go through the process and finally while challenging the award of the tribunal under Section 34 of the Act raise an objection as to the inherent lack of jurisdiction of the tribunal.

The Court held that an objection to the jurisdiction of a civil court could be raised at any stage. However, this position of law was settled in relation to civil disputes in courts and not in relation to arbitrations under the Act. The Court stated that the parliament was well aware of this position of law and had consciously enacted a special rule of law to deal with arbitrations, which fixed a time limit for challenging the jurisdiction of an arbitral tribunal.

The Court held that Section 34(2)(b)(i) of the Act which states that an award could be set aside if the subject matter of the dispute was not arbitrable (under the Act) did not necessarily refer to the tribunal's lack of jurisdiction to entertain the dispute. It was held that all objections with respect to the jurisdiction of the tribunal could be raised under Section 16 of the Act and the tribunal was competent to take a decision regarding all such objections. The Court referred to the judgment of **Booz Allen and Hamilton Inc v SBI Home Finance Limited and Ors**² which had dealt with illustrative examples of subject matter which were not arbitrable and which if entertained by the tribunal could be objected to under Section 34(2)(b)(i).

Further the Court refuted the argument of the Respondent that under Section 34(2)(b)(ii) of the Act "*public policy*" would include within its purview, arbitration proceedings which were not held under the appropriate law, i.e. the provisions of the Act instead of the State Act. Consequently the Court held that "*public policy*" would imply the public policy of India as a whole and not merely the policy of an individual state.

ANALYSIS

The Court has, keeping in mind the conduct of the Respondent right from filing of consent terms up to its participation in the arbitration proceedings and suffering an award, refused to permit the Respondent to incorporate a ground challenging jurisdiction of the arbitral tribunal at a belated stage subsequent to filing of a petition under Section 34 of the Act. This is in line with the pro-arbitration stance adopted by Indian courts of late.

Having held so, it was not necessary for the Court to go into the question of whether the provisions of the State Act would prevail over the Act. That issue remains open to be contended at another stage.

— Arjun Gupta, Sahil Kanuga & Vyapak Desai

You can direct your queries or comments to the authors

¹ Civil Appeal No. 10778 of 2014;

² (2011) 5 SCC 532

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