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JURISDICTION OF ARBITRAL TRIBUNAL UNDER SECTION 16 OF ARBITRATION AND CONCILIATION ACT 1996

By

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The Arbitration and Conciliation Act 1996, has been passed to consolidate and amend the law relating to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral award and also to define law relating to conciliation and for matters connected therewith or incidental thereto. The conciliation has been introduced for the first time in India for settlement of commercial disputes. The 1996 Act is very different from the Arbitration Act, 1940. The provisions of this Act have therefore; to be interpreted and construed independently and in fact reference to 1940 Act may actually lead to misconstruction. In other words, the provisions of 1996 Act have to be interpreted being, uninfluenced by the principles underlying the 1940 Act. In order to get help in construing these provisions, it is more relevant to refer to Article 6 of the UNICTRAL Model Law rather than the 1940 Act.

In Arbitration Act 1940, there is no provision akin to Section 16 of Act 1996. The Act 1996 was enacted basing the UNCITRAL Model Law on International Commercial Arbitration, 1985. The Model Law is designed to assist States in reforming and modernizing their laws on arbitral procedure so as to take into account the particular features and needs of international commercial arbitration. It covers all stages of the arbitral process from the arbitration agreement, the composition and jurisdiction of the arbitral Tribunal and the extent of Court intervention through to the recognition and enforcement of the arbitral award. It reflects worldwide consensus on key aspects of international arbitration practice having been accepted by States of all regions and the different legal or economic systems of the world.

The UNCITRAL Model Law on International Commercial Arbitration, 1985.

With regard to jurisdiction of Arbitral Tribunal, there exists a provision in Article 16 of the UNCITRAL Model Law on International Commercial Arbitration, 1985. It runs as follows:

"**Chapter IV**

Jurisdiction of Arbitral Tribunal

Article 16. Competence of arbitral Tribunal to rule on its jurisdiction.—(1) The arbitral Tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral Tribunal that the contract is *null* and *void* shall not entail *ipso jure* the invalidity of the arbitration clause.

(2) A plea that the arbitral Tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence. A party is not precluded from raising such a plea by the fact that he has appointed, or participated in the appointment of, an arbitrator. A plea that the arbitral Tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The arbitral Tribunal may, in either case, admit a later plea if it considers the delay justified.

(3) The arbitral Tribunal may rule on a plea referred to in paragraph (2) of this article either as a preliminary question or in an award on the merits. If the arbitral Tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the Court specified in Article 6 to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral Tribunal may continue the arbitral proceedings and make an award."

Article 16 of the UNCITRAL Model Law is considered as one of pillars of the Model Law. The two principles covered by it represent a fundamental part of the Model Law. The principles are 'competence-competence' and autonomy of the arbitration clause.

Section 16 of Arbitration and Conciliation Act 1996:

"*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.

(2) A plea that the arbitral Tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence; however, a party shall not be precluded from raising such a plea merely because that he has appointed, or participated in the appointment of, an arbitrator.

(3) A plea that the arbitral Tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.

(4) The arbitral Tribunal may, in either of the cases referred to in sub-section (2) or sub-section (3), admit a later plea if it considers the delay justified.

(5) The arbitral Tribunal shall decide on a plea referred to in sub-section (2) or sub-section (3) and, where the arbitral Tribunal

takes a decision rejecting the plea, continue with the arbitral proceedings and make an arbitral award.

(6) A party aggrieved by such an arbitral award may make an application for setting aside such an arbitral award in accordance with Section 34".

The law in India and England was on the same lines.

The English Arbitration Act 1996

The provision relating to jurisdiction of Arbitral Tribunal is contained in three Sections, *viz*., Sections 30, 31 and 32. They are reproduced as follows:

"Section 30. Competence of Tribunal to rule on its own jurisdiction.—(1) Unless otherwise agreed by the parties, the arbitral Tribunal may rule on its own substantive jurisdiction, that is, as to—

(a) whether there is a valid arbitration agreement,

(b) whether the Tribunal is properly constituted, and

(c) what matters have been submitted to arbitration in accordance with the arbitration agreement.

(2) Any such ruling may be challenged by any available arbitral process of appeal or review or in accordance with the provisions of this Part".

"Section 31. Objection to substantive jurisdiction of Tribunal.—(1) An objection that the arbitral Tribunal lacks substantive jurisdiction at the outset of the proceedings must be raised by a party not later than the time he takes the first step in the proceedings to contest the merits of any matter in relation to which he challenges the Tribunal's jurisdiction.

A party is not precluded from raising such an objection by the fact that he has appointed or participated in the appointment of an arbitrator.

(2) Any objection during the course of the arbitral proceedings that the arbitral Tribunal is exceeding its substantive jurisdiction must be made as soon as possible after the matter alleged to be beyond its jurisdiction is raised.

(3) The arbitral Tribunal may admit an objection later than the time specified in sub-section (1) or (2) if it considers the delay justified.

(4) Where an objection is duly taken to the Tribunal's substantive jurisdiction and the Tribunal has power to rule on its own jurisdiction, it may—

(a) rule on the matter in an award as to jurisdiction, or

(b) deal with the objection in its award on the merits.

If the parties agree which of these courses the Tribunal should take, the Tribunal shall proceed accordingly.

(5) The Tribunal may in any case, and shall if the parties so agree, stay proceedings whilst an application is made to the Court under Section 32 (determination of preliminary point of jurisdiction)."

"Section 32. Determination of preliminary point of jurisdiction.—(1) The Court may, on the application of a party to arbitral proceedings (upon notice to the other parties), determine any question as to the substantive jurisdiction of the Tribunal.

A party may lose the right to object (see Section 73).

(2) An application under this section shall not be considered unless—

(a) it is made with the agreement in writing of all the other parties to the proceedings, or

(b) it is made with the permission of the Tribunal and the Court is satisfied—

(i) that the determination of the question is likely to produce substantial savings in costs,

(ii) that the application was made without delay, and

(iii) that there is good reason why the matter should be decided by the Court.

(3) An application under this section, unless made with the agreement of all the other parties to the proceedings, shall state the grounds on which it is said that the matter should be decided by the Court.

(4) Unless otherwise agreed by the parties, the arbitral Tribunal may continue the arbitral proceedings and make an award while an application to the Court under this section is pending.

(5) Unless the Court gives leave, no appeal lies from a decision of the Court whether the conditions specified in sub-section (2) are met.

(6) The decision of the Court on the question of jurisdiction shall be treated as a judgment of the Court for the purposes of an appeal.

But no appeal lies without the leave of the Court which shall not be given unless the Court considers that the question involves a point of law which is one of general importance or is one which for some other special reason should be considered by the Court of Appeal."

Before enacting English Arbitration Act of 1996, it was almost a recognised practice for the Arbitral Tribunal to decide the objections taken on their jurisdiction, as an inherent power. English Law always had taken the view that the Arbitral Tribunal cannot be the final adjudicator of its own jurisdiction. The final decision as to the substantive jurisdiction of the Tribunal rests with the Court. The principle of 'Kompetenz – Kompetenz' had also been recognised by English Law before 1996, but Section 30 of the English Act 1996 puts this on a statutory basis. Any such ruling can be challenged by the aggrieved in any arbitral process of appeal as per the provisions of English Act 1996, either under Section 32 or by a challenge to the award under Section 67 of the said Act.

The comparative study of Sections 16 of the Model Law, Section 16 of Arbitration and Conciliation Act 1996 and Sections 30, 31 and 32 of English Arbitration Act 1996 are given below for ready reference.

Sections 16 of the Model Law	Section 16 of Arbitration and Conciliation Act 1996	Sections 30, 31 and 32 of English Arbitration Act 1996
Article 16. Competence of arbitral Tribunal to rule on its jurisdiction.- (1) The arbitral Tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral Tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause.	Section 16 of Arbitration and Conciliation Act 1996: "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	Section 30 "30. Competence of Tribunal to rule on its own jurisdiction. (1) Unless otherwise agreed by the parties, the arbitral Tribunal may rule on its own substantive jurisdiction, that is, as to— (a) whether there is a valid arbitration agreement, (b) whether the Tribunal is properly constituted, and (c) what matters have been submitted to arbitration in accordance with the arbitration agreement.

(2) A plea that the arbitral Tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence. A party is not precluded from raising such a plea by the fact that he has appointed, or participated in the appointment of, an arbitrator. A plea that the arbitral Tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The arbitral Tribunal may, in either case, admit a later plea if it considers the delay justified.

(3) The arbitral Tribunal may rule on a plea referred to in paragraph (2) of this article either as a preliminary question or in an award on the merits. If the arbitral Tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the Court specified in Article 6 to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral Tribunal may continue the arbitral proceedings and make an award."

ipso jure the invalidity of the arbitration clause.

(2) A plea that the arbitral Tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence; however, a party shall not be precluded from raising such a plea merely because that he has appointed, or participated in the appointment of, an arbitrator.

(3) A plea that the arbitral Tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.

(4) The arbitral Tribunal may, in either of the cases referred to in sub-section (2) or sub-section (3), admit a later plea if it considers the delay justified.

(5) The arbitral Tribunal shall decide on a plea referred to in sub-section (2) or sub-section (3) and, where the arbitral Tribunal takes a decision rejecting the plea, continue with the arbitral proceedings and make an arbitral award.

(6) A party aggrieved by such an arbitral award may make an application for setting aside such an arbitral award in accordance with Section 34".

(2) Any such ruling may be challenged by any available arbitral process of appeal or review or in accordance with the provisions of this Part".

Section 31

"31 Objection to substantive jurisdiction of Tribunal.
(1) An objection that the arbitral Tribunal lacks substantive jurisdiction at the outset of the proceedings must be raised by a party not later than the time he takes the first step in the proceedings to contest the merits of any matter in relation to which he challenges the Tribunal's jurisdiction.

A party is not precluded from raising such an objection by the fact that he has appointed or participated in the appointment of an arbitrator.

(2) Any objection during the course of the arbitral proceedings that the arbitral Tribunal is exceeding its substantive jurisdiction must be made as soon as possible after the matter alleged to be beyond its jurisdiction is raised.

(3) The arbitral Tribunal may admit an objection later than the time specified in sub-section (1) or (2) if it considers the delay justified.

(4) Where an objection is duly taken to the Tribunal's substantive jurisdiction and the Tribunal has power to rule on its own jurisdiction, it may—

(a) rule on the matter in an award as to jurisdiction, or

(b) deal with the objection in its award on the merits.

If the parties agree which of these courses the Tribunal should take, the Tribunal shall proceed accordingly.

(5) The Tribunal may in any case, and shall if the parties so agree, stay proceedings whilst an application is made to the Court under Section 32 (determination of preliminary point of jurisdiction)."

Section 32.

"32 Determination of preliminary point of jurisdiction.—(1) The Court may, on the application of a party to arbitral proceedings (upon notice to the other parties), determine any question as to the substantive jurisdiction of the Tribunal.

A party may lose the right to object (see Sec.73).

(2) An application under this section shall not be considered unless—

(a) it is made with the agreement in writing of all the other parties to the proceedings, or

(b) it is made with the permission of the Tribunal and the Court is satisfied—

(i) that the determination of the question is likely to produce substantial savings in costs,

(ii) that the application was made without delay, and

(iii) that there is good reason why the matter should be decided by the Court.

(3) An application under this section, unless made with the agreement of all the other parties to the proceedings, shall state the grounds on which it is said that the matter should be decided by the Court.

(4) Unless otherwise agreed by the parties, the arbitral Tribunal may continue the arbitral proceedings and make an award while an application to the Court under this section is pending.

(5) Unless the Court gives leave, no appeal lies from a decision of the Court whether the conditions specified in sub-section (2) are met.

(6) The decision of the Court on the question of jurisdiction shall be treated as a judgment of the Court for the purposes of an appeal.

But no appeal lies without the leave of the Court which shall not be given unless the Court considers that the question involves a point of law which is one of general importance or is one which for some other special reason should be considered by the Court of Appeal."

Insofar as Section 16 of Indian Arbitration and Conciliation Act 1996, this section integrates the separability and Kompetenz-kompetenz doctrines, which reinforce the autonomy of the arbitral process. In pursuance of this section Arbitral Tribunal is entitled to decide the questions and rule on arbitral Tribunal's own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement. The recognition of these doctrines reflects the efforts of the Legislature to protect and preserve the jurisdictional authority and party autonomy in the arbitral process. But, it is, with very much constraint, point out that some of the Arbitral Tribunal's is/are misusing this power and despite vehement objections/contentions relating to the jurisdiction of the Arbitral Tribunal, either rejecting the said plea at that stage or keeping silent in deciding the said issue. This act of not deciding the issue relating to the jurisdiction of the Arbitral Tribunal, which goes to the very root of the matter, is also contrary to the decision of the Hon'ble Supreme Court in the case

of *National Thermal Power Corporation Ltd. v. Siemens Atkeingesellschaft,* reported in AIR 2007 SC 1491 = AIR 2007 SCW 1985 = 2007 (2) Supreme 987 = 2007 (4) JT 202 = 2007 (3) WBLR 280 = 2007 (95) DRJ (SC) 277 = 2007 (1) ALR 377 = 2007 (3) AWC (SC) 2232 = 2007 (4) SCC 451, wherein it was observed in Para 12 as:

'Sub-sections (2) and (3) of Section 16 deal with jurisdiction. Sub-section (2) of Section 16 says that a plea of lack of jurisdiction of the Tribunal should be raised at the earliest *i.e.*, not later than submission of statement of defence and it further says that a party shall not be precluded from raising such a plea merely because he has appointed, or participated in the appointment of an arbitrator. Sub-section (3) says that the plea that the arbitral Tribunal is exceeding the scope of its authority shall be raised during the arbitral proceedings. A reading of sub-sections (2) and (3) of Section 16 makes it clear that it deals with jurisdiction *i.e.*, that the arbitral Tribunal has no jurisdiction or that the arbitral Tribunal has exceeded its jurisdiction. In either of the two situations, a direct appeal is maintainable under sub-section (2) of Section 37. Therefore, in the light of this legal position we shall examine whether the Tribunal while awarding an interim award has exceeded its jurisdiction or it had no jurisdiction whatsoever'.

Further, in Paras 5 and 6 of the said decision, the Hon'ble Supreme Court observed as:

'5. In the larger sense, any refusal to go into the merits of a claim may be in the realm of jurisdiction. Even the dismissal of the claim as barred by limitation may in a sense touch on the jurisdiction of the Court or Tribunal. When a claim is dismissed on the ground of it being barred by limitation, it will be, in a sense, a case of the Court or Tribunal refusing to exercise jurisdiction to go into the merits of the claim. In *Pandurang Dhoni Chougule v. Maruti Hari Jadhav*, (1966) 1 SCR 102, this Court observed that:

"It is well-settled that a plea of limitation or a plea of *res judicata* is a plea of law which concerns the jurisdiction of the Court which tries the proceedings. A finding on these pleas in favour of the party raising them would oust the jurisdiction of the Court, and so, an erroneous decision on these pleas can be said to be concerned with questions of jurisdiction which fall within the purview of Section 115 of the Code".

In a particular sense, therefore, any declining to go into the merits of a claim could be said to be a case of refusal to exercise jurisdiction.

6. The expression jurisdiction is a word of many hues. Its colour is to be discerned from the setting in which it is used. When we look at Section 16 of the Act, we find that the said provision is one, which deals with the competence of the Arbitral Tribunal to rule on its own jurisdiction. *SBP & Co. v. Patel Engineering Ltd. and another*, (2005) 8 SCC 618, in a sense confined the operation of Section 16 to cases where the Arbitral Tribunal was constituted at the instance of the parties to the contract, without reference to the Chief Justice under Section 11(6) of the Act. In a case where the parties had thus constituted the Arbitral Tribunal without recourse to Section 11(6) of the Act, they still have the right to question the jurisdiction of the Arbitral Tribunal including the right to invite a ruling on any objection with respect to the existence or validity of the arbitration agreement. It could therefore rule that there existed no arbitration agreement, that the arbitration agreement was not valid, or that the arbitration agreement did not confer jurisdiction on the Tribunal to adjudicate upon the particular claim that is put forward before it. Under sub-section (5), it has the obligation to decide the plea and where it rejects the plea, it could continue with the arbitral proceedings and make the award. Under sub-section (6), a party aggrieved by such an arbitral award may make an application for setting aside such arbitral award in accordance with Section 34. In other words, in the challenge

to the award, the party aggrieved could raise the contention that the Tribunal had no jurisdiction to pass it or that it had exceeded its authority, in passing it. This happens when the Tribunal proceeds to pass an award. It is in the context of the various sub-sections of Section 16 that one has to understand the content of the expression jurisdiction and the scope of the appeal provision. In a case where the Arbitral Tribunal proceeds to pass an award after overruling the objection relating to jurisdiction, it is clear from sub-section (6) of Section 16 that the parties have to resort to Section 34 of the Act to get rid of that award, if possible. But, if the Tribunal declines jurisdiction or declines to pass an award and dismisses the arbitral proceedings, the party aggrieved is not without a remedy. Section 37(2) deals with such a situation. Where the plea of absence of jurisdiction or a claim being in excess of jurisdiction is accepted by the Arbitral Tribunal and it refuses to go into the merits of the claim by declining jurisdiction, a direct appeal is provided. In the context of Section 16 and the specific wording of Section 37(2)(a) of the Act, it would be appropriate to hold that what is made directly appealable by Section 37(2)(a) of the Act is only an acceptance of a plea of absence of jurisdiction, or of excessive exercise of jurisdiction and the refusal to proceed further either wholly or partly'.

The said judgment of the Hon'ble Supreme Court was followed by the Madhya Pradesh judgment in the case of *Lords Wear Pvt. Ltd. v. Anand Kumar Devendra Kumar and another,* reported in 2010 (7) RAJ 311 (MP), the Madhya Pradesh High Court observed as:

"In view of Section 16, it was the duty of Arbitral Tribunal to decide issue relating to jurisdiction and after deciding the said question in favour of respondent only, Arbitral Tribunal was empowered to proceed with the case. Since objection raised by appellant was not decided, the whole action of Arbitral Tribunal was without jurisdiction. Thus impugned order as well as the award liable to be set aside". In Para 6 of the said judgment, it was mentioned as: "In the matter of *Arati Dhar v. S.K. Dutta*, 2002 (3) LHM 171 = 2003 (4) RAJ 98 (Cal.), wherein it was held that it is clear from the conjoint reading of the aforesaid three sub-sections of Section 16 of the Act, 1996 that the arbitrator is under an obligation to decide the plea of jurisdiction and his authority to continue the arbitration depends on his decision rejecting the plea about his jurisdiction. In other words, sub-section (5) of Section 16 envisages that the arbitrator may reject the plea about jurisdiction and then to continue with the proceedings and make an award. It was further observed that in the instant case, without rejecting the question to his jurisdiction the arbitrator has proceeded with the award and as such committed grave error of law. Reliance was also placed on a decision in the matter of *National Thermal Power Corporation Ltd. v. Siemens Atkeingesellschaft* reported in (2007) 4 SCC 451 = 2007 (2) RAJ 1, wherein Hon'ble apex Court has held that under Section 16(5), the Arbitral Tribunal has the obligation to decide the plea referred to in Section 16(2) or (3) and when it rejects the plea, it could continue with the arbitral proceedings and make the award". In Para 8 of the said judgment, it was mentioned as: "In the said objections the appellant submitted that the learned Tribunal is having no territorial jurisdiction as the appellant was carrying on business at Nagpur and the order was placed at Nagpur itself.————————After making such objections the appellant remained absent and no decision was taken by the learned Tribunal on the said objection. Keeping in view sub-section (2) of Section 16 of the Act and also keeping in view the law laid down by the Hon'ble apex Court, it was duty of respondent No.2 to decide the issue relating to territorial jurisdiction. After deciding the question of jurisdiction in favour of respondent only the Tribunal was empowered to proceed with the case. Since the objection raised by the appellant was not decided and raised by the appellant was not decided and the respondent No.2 proceeded with the case without deciding

the objection which goes to show that whole action of respondent No.2 was without jurisdiction. In the facts and circumstances of the case, learned Court below committed error in not deciding the objection filed by the appellant.————————The impugned order passed by the learned Court below and the award passed by payment of cost of Rs.10,000/- in all the three cases and also upon furnishing solvent security for a sum of Rs.5 lakhs before the learned Court below on or before 16.6.2008 to the effect that in case final award is passed by the respondent No.2 against the appellant, the same shall be satisfied by the appellant".

Competence of Arbitral Tribunal to rule on its own jurisdiction:

The competence of the Arbitral Tribunal has been described as 'kompetenz-kompetenz', in a modified form, has been borrowed from Article 16(1) of the Model Law, which provides that the Tribunal has the authority to rule on questions pertaining to the principle or scope of its jurisdiction. It extends to the matters involving (i) the validity of the agreement to arbitrate, (ii) matters involving the interpretation of the coverage or range of the agreement to arbitrate, (iii) can also decide claims that the dispute in question is not covered by the arbitration clause. However, these rulings on Arbitral Tribunal's jurisdiction are subject to judicial review under Section 34 of the Act 1996.

Meaning of the term 'jurisdiction':

The term 'jurisdiction' has not been defined in the Act 1996 or in the UNCITRAL Model Law on International Commercial Arbitration, 1985. But the jurisdiction of the Arbitral Tribunal has been worded differently under the act as 'authority', 'mandate', and 'competence'. However, under the English Arbitration Act 1996, Section 31 dealt with 'Objection to substantive jurisdiction of Tribunal' (which has been extracted at pages 3 and 4 supra).

The term 'jurisdiction' has been comprehensively defined in Stroud's Judicial Dictionary, Seventh Edition, as: "Jurisdiction" is a dignity which a man hath by a power to do justice in causes of complaint made before him" (*Termes de la Ley*).

In its narrow and strict sense, the 'jurisdiction' of a validly constituted Court connotes the limits which are imposed upon its power to hear and determine issues between persons seeking to avail themselves of its process by reference (1) to the subject-matter of the issue or (2) to the persons between whom the issue is joined or (3) to the kind of relief sought, or to any combination of these factors.

In its wider sense, it embraces also the settled practice of the Court as to the way in which it will exercise its power to hear and determine issues which fall within its jurisdiction (in the strict sense) or as to the circumstances in which it will grant a particular kind of relief which it has 'jurisdiction' (in the strict sense) to grant, including its settled practice to refuse to exercise such powers, or to grant such relief in particular circumstances."

The language of the arbitration agreement determines whether the Arbitral Tribunal has jurisdiction to hear the dispute.

What can be referred to arbitration to fall within its jurisdiction?

The following matters can be referred to arbitration for adjudication. (a) Any dispute, whether contractual or not, can be referred to arbitration; (b) Arbitration clause in the Agreement should be drafted in such a manner to reflect the intentions of the parties to the contract to decide the disputes; (c) If the intention of the parties that certain matters are to be excluded from the jurisdiction of the Arbitral Tribunal it should be specifically spelt out and (d) Any matters "arising out of" or "in respect of" or "in connection with" or "in relation to" or "in consequence of" or "concerning" or "relating to" the contract, may be agreed between the parties to the contract for reference to be adjudicated by the Arbitral Tribunal.

What cannot be referred to arbitration to fall outside its jurisdiction?

The following matters cannot be referred to arbitration for adjudication. (a). Matrimonial matters; (b) Matters relating to guardianship of minors or other person under disability; (c) Testamentary matters; (d) Insolvency matters; (e) Criminal matters; (f) Questions relating to charities or chartable trusts; (g) Matters falling under MRTP Act and (h) Dissolution or winding up of Companies.

Decisions of Supreme Court under Section 16 of Act 1996:

In *Olympus Superstructures Pvt. Ltd. v. Meena Vijay Khetan*, reported in 1999 (5) SCC 651 = 1999 (6) SRJ 383 the Court that held that the Court shall accordingly deal with the merits of the question of jurisdiction of the arbitrator. Under Section 16(1) of the Act, 1996 the Arbitral Tribunal is vested with the power to rule on its own jurisdiction including ruling on any objection with respect to the existence or validity of the arbitration agreement. For that purpose the arbitration clause which forms part of the contract is to be treated as an agreement independent of the other terms of the contract. It is clear from Section 16(1)(b) of Act, 1996 that any decision by the Arbitral Tribunal that the contract is *null* and *void* shall not entail *ipso jure* the validity of the arbitration clause. Questions regarding jurisdiction of arbitrator not raised under Section 16, whether may be raised at the stage of Section 34, have been considered and stated that the question as to what would be the consequences of not raising the objections at that stage left open. ————————Question whether objector precluded at the stage of Section 34 from raising the objection left open in view of the fact that party-seeking arbitration had argued on merits that arbitrator did have jurisdiction regarding disputed stemming from related subsidiary contracts. The words 'terms of the submission to arbitration' in Section 34(2)(a)(iv) refer to the terms of the arbitration clause. It becomes apparent that such is the meaning of the word 'submission' if one refers to Section 28 which uses the words 'dispute submitted to arbitration' and to Section 43(3) which uses the words 'submit future disputes to arbitration". ———————— It may be argued on one side that the time limits set in Arbitration clauses (2) and (3) of Section 16 are mandatory and do not permit the said question to be raised at a later point of time even under Section 34 of Act 1996. An opposite view could be that these being jurisdictional issues, the fact that they were not raised earlier could not preclude the questions being raised under Section 34 inasmuch as consent, express or implied could not confer jurisdiction. The Court did not think it necessary to decide this question in view of the fact though Section 16 was referred to during course of hearing, the Senior Counsel for respondents had argued on merits that the arbitrator had jurisdiction to decide the disputes/differences concerning the interior design agreements also and that even if the appellant could be permitted to raise these issues at the stage of Section 34, there was no substance in the said contentions. The Court, therefore, proceeded to decide the question of jurisdiction on the assumption that the appellant is not precluded from raising these questions at the stage of Section 34 though these issues have not been raised before the arbitrator as per sub-clauses (2) and (3) of Section 16. Court observed that objections relating to jurisdiction must be raised before the arbitrator as provided in Section 16(2) and (3).

In *Steel Authority of India Ltd. v. J.C. Budharaja, Government & Mining Contractor*, reported in 1999 (8) SCC 122 (SC), the Court held that even if arbitrator has jurisdiction to entertain the claim, he may be prohibited by the terms of the contract to pass an award on a specific item and in such case award passed on that item ignoring the prohibition would amount to jurisdictional error. Award passed in disregard of express terms of the contract would be arbitrary, capricious and without jurisdiction. Contract

for construction stipulated that no claim for delay in giving the entire site or giving it gradually would be tenable. Corporation only obligated to extend the time for completion. Award of damages for alleged delay in handing over of work site was, on the face of it, is against the terms of the contract.

In *Rajasthan State Mines & Minerals Ltd. v. Eastern Engineering Enterprises*, reported in AIR 1999 SC 3627 = 1999 (9) SCC 283, the Court held that where fundamental terms of agreement between the parties are ignored by the arbitrator, held such arbitrator exceeds his jurisdiction even where the arbitration clause itself is widely worded. Such deliberate departure from the contract amounts not only to manifest disregard of the authority or misconduct, but may be tantamount to *mala fide* action. Situation would give raise to jurisdictional error which could be corrected by the Court and for that limited purpose the agreement between the parties would be required to be considered by the Court. So, if the agreement specifically bars certain claims from being raised and yet an award has been made then Court must not uphold such award. Two particular clauses (17 and 18) of the agreement setting out clearly and unambiguously on both positive and negative terms that respondent No.1- contractor was to be paid fixed rates and that he would not be entitled to any extra payment on any account irrespective of increased cost under any item of work. Respondent No.1- contractor claimed reimbursement under several heads including increase in the actual cost of excavation, higher cost of explosives and transportation and arbitrator allowed claims in a non-speaking award and held that the High Court in appeal erred in upholding the award. ———— Arbitrator cannot presume to decide a question of law not referred to him. Decision in such situation would not be final even though it may be within his jurisdiction. However, where a specific question of law touching upon jurisdiction of arbitrator is referred to arbitrator then finding of arbitrator in that question may be binding on parties. ——— The contention that the arbitrator acted beyond his jurisdiction in ignoring the stipulations of the contract, held, would be covered by issues raising the questions whether the award was perverse, whether the arbitrator failed to apply his mind to pleadings, documents and evidence as well as to particular clauses of the contract'. ———— It is settled law that the arbitrator is the creature of the contract between the parties and hence if he ignores the specific terms of the contract, it would be a question of jurisdictional error which could be corrected by the Court and for that limited purpose the agreement is required to be considered. For deciding whether the arbitrator has exceeded his jurisdiction reference to the terms of the contract is a must. To find out whether the arbitrator has travelled beyond his jurisdiction, it would be necessary to consider the agreement between the parties containing the arbitration clause. The arbitrator acting beyond his jurisdiction is a different ground from the error apparent on the face of the award. ————In order to determine whether arbitrator has acted in excess of his jurisdiction what has to be seen is whether the claimant could raise a particular claim before the arbitrator. If there is a specific term in the contract or the law which does not permit or give the arbitrator the power to decide the dispute raised by the claimant or there is a specific bar in the contract to the raising of the particular claim then the award passed by the arbitrator in respect thereof would be in excess of jurisdiction. ———— The arbitrator is not a conciliator and cannot ignore the law or misapply it in order to do what he thinks just and reasonable. As to the distinction with the ground of error apparent on the face of the award with jurisdictional error, held, the arbitrator acting beyond his jurisdiction is a different ground from the error apparent on the face of the award.

In *Himachal Pradesh State Electricity Board v. R.J. Shah*, reported in 1999 (2) RAJ 163 = 1999 (4) SCC 214, the Court held that in

order to determine whether the arbitrator has acted in excess of jurisdiction what has to be seen is whether the claimant could raise a particular dispute or claim before an arbitrator. If the answer is in the affirmative then it is clear that the arbitrator would have the jurisdiction to deal with such a claim. On the other hand, if the arbitration clause or a specific term in the contract or the law does not permit or give the arbitrator would have the jurisdiction to deal with such a claim. On the other hand if the arbitration clause or a specific term in the contract or the law does not permit or give the arbitrator the power to decide or to adjudicate on a dispute raised by the claimant or there is a specific bar to the raising of a particular dispute or claim then any decision given by the arbitrator in respect thereof would clearly be in excess of jurisdiction. In order to find whether the arbitrator has acted in excess of jurisdiction the Court may have to look into some documents including the contract as well as the reference of the dispute made to the arbitrators limited for the purpose of seeing whether the arbitrator has the jurisdiction to decide the claim made in the arbitration proceedings.

In *Executive Engineer, R.E.O. v. Suresh Chandra Panda*, reported in 1999 (9) SCC 92 = 2000 (1) RAJ 489 (SC), the Court held that when an arbitration clause specifically excluded from its purview, those disputes would not be within the ambit of the arbitration clause. Arbitration clause, in the instant case, containing the words 'except as otherwise provided in the contract' all disputes would be referred to arbitration. In respect of claims of additional work, as per the agreement, Engineer In charge was to determine the rates and decision of the Superintending Engineer was final in the event of a dispute. Arbitrator adjudicating the said dispute even though the same was not arbitrable. Award in respect of the said claims, held, without jurisdiction and void. Impugned award and decree modified accordingly'————————Award without jurisdiction is an invalid award. When an arbitration clause specifically excluded from its purview, those disputes would not be within the ambit of the arbitration clause. Arbitration clause, in the instant case, contained the words 'except as otherwise provided in the contract' all disputes would be referred to arbitrator. In respect of claims of additional works, as per the agreement, Engineer-in-Chief was to determine the rates and decision of the Superintending Engineer was final in the event of a dispute. Arbitrator adjudicated the said dispute even though the same was not arbitrable. Award in respect of the said claims, held without jurisdiction and void. Impugned award and decree modified accordingly.

In *Wellington Associates Limited v. Kirit Mehta* reported in AIR 2000 SC 1379 = 2000 (4) SCC 272, the Court held that the provisions of Section 16 do not take away the jurisdiction of 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. Provision of Section 16 is only an enabling one, which unlike Section 33 in the old Act of 1940 permits the Arbitral Tribunal to decide a question relating to the existence of the arbitration clause. Merely because the new Act permits the arbitrator to decide the 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. Source of the jurisdiction of the arbitrator emanates from the arbitration clause. It is clear from Section 33 of the Arbitration Act, 1940 that any question as to 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 Arbitration and Conciliation Act of 1996. Now Section 16 has conferred power on the Arbitral Tribunal to decide whether there is in 'existence' an arbitration clause'. ———————— Section 16 corresponds

to Article 16 of the UNCITRAL Model Law and Article 21 of the UNCITRAL Arbitration Rules.'

In *Kvaerner Cementation India Ltd v. Bajranglal Agarwal*, reported in 2001 (3) RAJ 414 = 2001 (6) Supreme 265 the Court held that a bare reading of Section 16 makes it explicitly clear that the Arbitral Tribunal has the power to rule on its own jurisdiction even when any objection with respect to existence or validity of the arbitration agreement is raised and a conjoint reading of sub-sections (2), (4) and (6) of Section 16 would make it clear that such a decision would be amenable to be assailed within the ambit of Section 34 of the Act. In this view of the matter, the Court sees no infirmity with the impugned order so as to be interfered with by the Court. The petitioner who is a party to the arbitral proceedings may raise the question of jurisdiction of the Arbitrator as well as the objection on the ground of non-existence of any arbitration agreement in the so called dispute in question and such an objection being raised, the Arbitrator would do well in disposing of the same as a preliminary issue so that it may not be necessary to go into the entire gamut of arbitration proceedings'.

In *Konkan Railway Corporation Ltd. v. Rani Construction Pvt. Ltd.*, reported in AIR 2002 SC 778 = 2002 (2) SCC 388, the Court held that it might also be that in a given case the Chief Justice or his designate may have nominated an arbitrator although the period of thirty days had not expired. If so, the Arbitral Tribunal would have been improperly constituted and be without jurisdiction. It would then be open to the aggrieved party to require the Arbitral Tribunal to rule on its jurisdiction. Section 16 provides for this. It states that the Arbitral Tribunal may rule "on any objections with respect to the existence or validity of the arbitration agreement' shows that the Arbitral Tribunal's authority under Section 16 is not confined to the width of its jurisdiction, as was submitted by the Counsel for the appellants, but goes to the very root of its jurisdiction. There would, therefore, be no impediment in contending before the Arbitral Tribunal that it had been wrongly constituted by reason of the fact that the Chief Justice or his designate had nominated an arbitrator although the period of thirty days had not expired and that, therefore, it had no jurisdiction.

In *Narayan Prasad Lohia v. Nikunj Kumar Lohia*, AIR 2002 SC 1139 = 2002 (3) SCC 572, the Court held that 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 an arbitrator. Needless to state a party would be free, if he so choose, not to raise such a challenge. Thus a conjoint reading of Sections 10 and 16 of Act 1996 shows that an objection to the composition of the Arbitral Tribunal is a matter, which is derogable. It is derogable because a party is free not to object within the time prescribed in Section 16(2). If a party chooses not to object there will be a deemed waiver under Section 4. Thus, the Court is unable to accept the submission that Section 10 is a non-derogable provision. In the view of the Court, Section 10 has to be read along with Section 16 and is, therefore, a derogable provision. On failure to raise objection under Section 16, also held that the respondents must be deemed to have waived their right to object. See also AIR 2003 SC 1065 = 2003 (2) SCC 251 = 2003 (1) Supreme729 = 2003 (4) SRJ 545 = 2003 (1) ALR 332 = 2003 (1) RAJ 162

In *S.P.B. & Co v. Patel Engineering Limited* reported in 2005 (3) RAJ 388 = 2005 (8) SCC 618, the Court held that by virtue of Section 16(6), a person aggrieved by rejection of his objection by Tribunal has to wait until the award is made to challenge that decision in an appeal against arbitral award itself in accordance with Section 39 of Act. But an acceptance of an objection to jurisdiction could be challenged then and there under Section 37 of the Act. Arbitral Tribunal has power and jurisdiction to rule 'on its own jurisdiction' under Section 16(1)

and where the Arbitral Tribunal holds that it has jurisdiction, it shall continue with arbitral proceedings and make an arbitral award. Once it is held that there is an adjudicatory function to the Chief Justice by the Act, the right of Arbitral Tribunal to go behind the order passed by Chief Justice would take another hue and would be controlled by Section 11(7) of 1996 Act. However, in case where an Arbitral Tribunal has been constituted by the parties without having recourse to Section 11(6); the Arbitral Tribunal will have the jurisdiction to decide all matters as contemplated by Section 16 of the Act. Once the matter reaches the Arbitral Tribunal or the sole arbitrator, High Court would not interfere with orders passed by the arbitrator or the Arbitral Tribunal during the course of the arbitration proceedings and the parties can approach the Court only in terms of Section 37 or under Section 34 of the 1996 Act. Section 16 of the Act makes explicit what is, even otherwise implicit, namely, that the Arbitral Tribunal constituted under the Act has the jurisdiction to rule on its own jurisdiction, including ruling on objection with respect to the existence or validity of the arbitration agreement. Sub-section (1) also directs that an arbitration clause, which forms part of a contract, shall be treated as an agreement independent of the other terms of the contract. It also clarifies that a decision by the Arbitral Tribunal that the contract is *null* and *void* shall not *ipso jure* the invalidity of the arbitration clause. Section 16(2) enjoins that a party wanting to raise a plea that the Arbitral Tribunal does not have jurisdiction, has to raise that objection not later than the submission of the statement of defence, and that the party shall not be precluded from raising the plea of jurisdiction merely because he has appointed or participated in the appointment of an arbitrator. Section 16(3) lays down that a plea that the Arbitral Tribunal is exceeding the scope of its authority, shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. When the Tribunal decides these two questions, namely, the question of jurisdiction and the question of exceeding the scope of authority or either of them, the same is open to immediate challenge in an appeal, when the objection is upheld and only in an appeal against the final award, when the question is overruled. Section 16(5) enjoins that, if the Arbitral Tribunal overrules the objections under sub-sections (2) and (3), it should continue with the arbitral proceedings and make an arbitral award. Section 16(6) provides that a party aggrieved by such an arbitral award overruling the plea on lack of jurisdiction and exceeding of the scope of authority, may make an application on these grounds for setting aside the award in accordance with Section 34 of the Act. The question, in the context of Section 11(7) is, what is the scope of the right conferred on the Tribunal to rule upon its own jurisdiction and the existence of the arbitration clause, envisaged by Section 16(1), once the Chief Justice or the person designated by him had appointed an arbitrator after satisfying himself that the conditions for the exercise of power to appoint an arbitrator are present in the case. *Prima facie*, it would be difficult to say that in spite of the finality conferred by Section 11(7) of the Act to such a decision of the Chief Justice, the Arbitral Tribunal can still go behind that decision and rule on its own jurisdiction or on the existence of an arbitration clause. It also appears to the Court to be incongruous to say that, after the Chief Justice has appointed an Arbitral Tribunal, the Arbitral Tribunal can turn round and say that the Chief Justice had no jurisdiction or authority to appoint the Tribunal, the very creature brought into existence by the exercise of power by its creator, the Chief Justice. The argument of senior Counsel that Section 16 has full play only when an Arbitral Tribunal is constituted without intervention under Section 11(6) of the Act is one way of reconciling that provision with Section 11 of the Act, especially in the context of sub-section (7) thereof. The Court was inclined

to the view that the decision of the Chief Justice on the issue of jurisdiction and the existence of valid arbitration agreement would be binding on the parties when the matter goes to the Arbitral Tribunal and at subsequent stages of the proceedings except in an appeal in the Supreme Court in the case of the decision being by the Chief Justice of the High Court or by a Judge of the High Court designated by him. 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 the competence under Section 11 of the Act, are incapable of being reopened before the Arbitral Tribunal. The Chief Justice or the designated Judge will have the right to decide the preliminary aspects. These will be, his own jurisdiction to entertain the request, the existence of valid arbitration agreement, the existence or otherwise of a live claim, the existence of the condition for the exercise of his power and on the disqualifications of the arbitrator or arbitrators. Section 16 deals with the competence of an Arbitral Tribunal to rule on its jurisdiction. An Arbitral Tribunal may rule on its own jurisdiction, including ruling on any objection with respect to existence or validity of arbitration agreement. By virtue of Section 16(6), a person aggrieved by rejection of his objection by Tribunal has to wait until the award is made to challenge that decision in an appeal against arbitral award itself in accordance with Section 39 of Act. But an acceptance of objection to jurisdiction could be challenged then and there under Section 37 of the Act.

In *Shree Shublaxmi Fabrics Pvt. Ltd v. Chand Mal Baradia* reported in AIR 2005 SC 2161 = 2005 (10) SCC 704, the Court held that the apex Court held that the contentious issue should not be gone into or decided at the stage of appointment of arbitrator and no time to be wasted in such an exercise. Remedy of aggrieved party is to raise an objection before Arbitral Tribunal as under Section 16 it is empowered to rule about its jurisdiction. Therefore, it is open to an aggrieved party to raise all the pleas before arbitrator including plea of absence of arbitration agreement between the parties for referring any dispute for arbitration'.

In *M/s. Centrotrade Minerals & Metal Inc. v. Hindustan Copper Ltd.* reported in 2006 (2) RAJ 531 (SC), the Court held that after the 1996 Act, came into force, under Section 16 of the Act the party questioning the jurisdiction of the arbitrator has an obligation to raise the said question before the arbitrator. Such a question of jurisdiction could be raised if it is beyond the scope of his authority. Such a question was required to be raised during arbitration proceedings or soon after initiation thereof as a preliminary issue. Such a decision would be subject to challenge under Section 34 of the Act. In the event, the arbitrator opined that he had no jurisdiction in relation thereto, an appeal there against was provided for under Section 37 of the Act. A jurisdiction issue can be raised in two ways. A party to an arbitration proceeding may take part in arbitral proceedings and raise the question of jurisdiction before the Arbitral Tribunal. He may also challenge the jurisdiction of the arbitrator without participating in the arbitral proceedings.

In *Food Corporation of India v. M/s Chandu Construction and another*, reported in 2007 (2) RAJ 496 (SC), the Court held that an arbitrator derives his authority from the contract and if he acts in disregard of the contract, he acts without jurisdiction. A deliberate departure from contract amounts to not only manifest disregard of his authority or misconduct on his part, but it may tantamount to a *mala fide* action. In a construction contract, award of extra payment for supply of sand came in question. Claim awarded by arbitrator is contrary to unambiguous terms of contract. This error on his part cannot be said to be on account of misconstruing of the terms of contract but it was by way of disregarding the contract, manifestly ignoring clear stipulation in contract. Arbitrator misdirected and mis-conducted himself by doing so. Award, therefore, is beyond his jurisdiction and illegal and to be set aside. ————————Having accepted the terms of the agreement dated 19th September, 1989, they were bound by its terms and so was the arbitrator. It is, thus, clear that the claim awarded by the arbitrator is contrary to the unambiguous terms of the contract. The Court is of the view that the arbitrator was not justified in ignoring the express terms of the contract merely on the ground that in another contract for a similar work, extra payment for material was provided for. It was not open to the arbitrator to travel beyond the terms of the contract even if he was convinced that the rate quoted by the claimants was low and another contractor, namely, by awarding extra payment for supply of sand, the arbitrator has out-stepped confines of the contract. This error on his part was by way of disregarding the contract, manifestly ignoring the clear stipulations in the contract. In the Court's opinion, by doing so, the arbitrator misdirected and mis-conducted himself. Hence, the award made by the arbitration in respect of claim illegal and needs being set aside. Error within the jurisdiction of arbitrator and error beyond his jurisdiction, explained as, if the arbitrator commits an error in construction of contract, that is an error within his jurisdiction. But if he wanders outside contract and deals with matter not allotted to him, he commits an error beyond his jurisdiction.

M/s. Rashtriya Chemicals & Fertilizers Ltd. v. M/s Chowgule Brothers and others, reported in 2010 (8) SCC 563 = 2010 (4) RAJ 424 (SC), the Court held that the arbitrators have no jurisdiction to make an award against the specific terms of the contract executed between the parties.

In the case of *Andhra Pradesh Tourism Development Corporation Ltd. v. Pampa Hotels Ltd.* reported in AIR 2010 SC 1806 (SC), the Court considered the issue as to whether the question as to the existence or validity of the arbitration agreement, has to be decided by the Chief Justice/ Designate when considering the petition under Section 11 of the Act or by the arbitrator. This issue had arisen because the Designate of the Chief Justice of Andhra Pradesh allowed the application filed by the respondent under Section 11 of the Act by order dated 16.8.2005 and appointed a retired Judge of the said High Court as arbitrator, with the observation that the appellant herein is entitled to raise all its pleas including the validity of the arbitration agreement before the arbitrator. After noticing that there was no arbitration agreement, held that having regard to the decisions in *Konkan Railway Corporation Ltd. v. Mehul Construction Co.*, 2000 (7) SCC 201 and *Konkan Railway Corporation Ltd. v. Rani Construction Pvt. Ltd.*, 2002 (2) SCC 388, he had only a limited administrative role under Section 11 of the Act, that is, to appoint the arbitrator as per the agreed procedure, leaving all contentious issues including whether there was any arbitration agreement or not, to be decided by the arbitrator. The said order is challenged in this appeal by special leave. The Court considered the question as to who should decide the question whether there is an existing arbitration agreement or not. Should it be decided by the Chief Justice

or his Designate before making an appointment under Section 11 of the Act, or by the arbitrator who is appointed under Section 11 of the Act? This question is no longer *res integra*. It is held in *SBP & Co. v. Patel Engineering Ltd.*, 2005 (8) SCC 618 and *National Insurance Co. Ltd. v. Boghara Polyfab Pvt. Ltd.*, 2009 (1) SCC 267, that the question whether there is an arbitration agreement and whether the party who has applied under Section 11 of the Act, is a party to such an agreement, is an issue which is to be decided by the Chief Justice or his Designate under Section 11 of the Act before appointing an arbitrator. Therefore there can be no doubt that the issue ought to have been decided by the Designate of the Chief Justice and could not have been left to the arbitrator. But as noticed above, the learned Designate proceeded on the basis that while acting under Section 11 of the Act, he was not acting under a judicial capacity but only under an administrative capacity and therefore he cannot decide these contentious issues. He did so by following the two decisions in *Konkan Railway's* case (supra), which were then holding the field. On account of the prospective overruling direction in SBP, any appointment of an arbitrator under Section 11 of the Act made prior to 26.10.2005 has to be treated as valid and all objections including the existence or validity of the arbitration agreement, have to be decided by the arbitrator under Section 16 of the Act. The legal position enunciated in the judgment in SBP will govern only the applications to be filed under Section 11 of the Act from 26.10.2005 as also the applications under Section 11(6) of the Act pending as on 26.10.2005 (where the arbitrator was not yet appointed). In view of this categorical direction in SBP, it is not possible to accept the contention of the appellant that this case should be treated as a pending application. In fact we may mention that in *Maharishi Dayanand University v. Anand Coop. L/C Society Ltd. and another*, 2007 (5) SCC 295, this Court held that if any appointment has been made before 26.10.2005, that appointment has to be treated as valid even if it is challenged before this Court. In view of the above, we are not in a position to accept the contention of the appellant. But the arbitrator will have to decide the issue as to whether there is an arbitration agreement, with reference to the legal position explained by us in regard to the existence of arbitration agreement. Though such an exercise by the arbitrator will only be an academic exercise having regard to our decision in this case, such an exercise becomes inevitable in view of the peculiar position arising out of the specific direction contained in Para 47(k) of the decision in SBP and the subsequent decision in *Maharishi Dayanand University*.

In *Reva Electric Car Co. v. Green Mobil*, reported in AIR 2012 SC 739 = 2012 (2) SCC 93, the Court held that Section 16(1)(a) of the Arbitration and Conciliation Act, 1996 provides that an arbitration clause which forms part of the contract shall be treated as an agreement independent of the other terms of the contract. The plain meaning of the aforesaid clause would tend to show that even on the termination of the agreement/contract, the arbitration agreement would still survive. It also seems to be the view taken by this Court in *Everest Holdings Ltd*. Accepting the submission of Ms. *Ahamadi* that the arbitration clause came to an end as the MOU came to an end by efflux of time on 31st December, 2007 would lead to a very uncertain state of affairs, destroying the very efficacy of Section 16(1). The aforesaid section provides as under:

"*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."

34. The aforesaid provision has been enacted by the Legislature keeping in mind the provisions contained in Article 16 of the UNCITRAL Model Law. The aforesaid Article reads as under:

"*Article 16 - Competence of arbitral Tribunal to rule on its jurisdiction* :—(1) The arbitral Tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral Tribunal that the contract is *null* and *void* shall not entail *ipso jure* the invalidity of the arbitration clause.

(2).....

(3)....."

Under Section 16(1), the Legislature makes it clear that while considering any objection with respect to the existence or validity of the arbitration agreement, the arbitration clause which formed part of the contract, has to be treated as an agreement independent of the other terms of the contract. To ensure that there is no misunderstanding, Section 16(1)(b) further provides that even if the arbitral Tribunal concludes that the contract is *null* and *void*, it should not result, as a matter of law, in an automatic invalidation of the arbitration clause. Section 16(1)(a) presumes the existence of a valid arbitration clause and mandates the same to be treated as an agreement independent of the other terms of the contract. By virtue of Section 16(1)(b), it continues to be enforceable notwithstanding a declaration of the contract being *null* and *void*. In view of the provisions contained in Section 16(1) of the Arbitration and Conciliation Act, 1996, it would not be possible to accept the submission of Ms. *Ahmadi* that with the termination of the MoU on 31st December, 2007, the arbitration clause would also cease to exist. As noticed earlier, the disputes that have arisen between the parties clearly relate to the subject-matter of the relationship between the parties which came into existence through the MoU. Clearly, therefore, the disputes raised by the petitioner needs to be referred to arbitration. Under the arbitration clause, a reference was to be made that the disputes were to be referred to a single arbitrator. Since the parties have failed to appoint an arbitrator under the agreed procedure, it is necessary for this Court to appoint the arbitrator.

In *Assam Urban Water Supply & Sew. Board v. M/s. Subash Projects & Marketing Ltd.*, [2012] 1 ALR 222 = [2012] 2 SCC 624 = [2012] 1 JT 362 = [2012] 1 SCALE 642 = [2012] 3 SCJ 384, the Court considered the fact that (i) Two contracts were entered into between the appellants and the respondents - (i) for construction of Tezpur Town Water Supply Scheme and (ii) for construction of Tinsukia Town Water Supply Scheme. Certain disputes arose between the parties concerning these contracts and to resolve such disputes, sole arbitrator was appointed by the Chief Justice of Guwahati High Court on March 26, 2002 under Section 11 of the Arbitration and Conciliation Act, 1996. On May 10, 2002 the appellants filed application under Section 16 of the 1996 Act questioning the jurisdiction of the sole arbitrator as according to the appellants there was no arbitration clause in the agreement. This application came to be rejected by the sole arbitrator. Thereafter, the sole arbitrator proceeded with the arbitration and passed two awards in relation to the above contracts in favour of the respondents on August 22, 2003. The awards were received by the appellants on August 26, 2003. On January 2, 2004, the appellants made two applications for setting aside the awards dated August 22, 2003 under Section 34 of the 1996 Act. These applications were accompanied by two separate applications for extension of time

under Section 34(3) of the 1996 Act. The District Judge, Kamrup, Guwahati, dismissed the appellants' applications under Section 34 of the 1996 Act on June 1, 2004 and June 5, 2004 on the ground of limitation. The appellants challenged the above orders of the District Judge, Kamrup, Guwahati, in the Guwahati High Court in two separate Arbitration Appeals, being Arbitration Appeal Nos.6 of 2004 and 7 of 2004. The Division Bench of that Court upheld the view of the District Judge, Kamrup, Guwahati and dismissed the above Arbitration Appeals. Counsel for the appellants, submitted that the Division Bench gravely erred in applying the decision of this Court in *Union of India v. Popular Construction Co.*, (2001) 8 SCC 470, to the facts of the present case, by saying that the judgment of the Court in *Popular Construction Co.'s* case (supra), was rendered on the question of applicability of Section 5 of the Limitation Act, 1963 and has no application to the peculiar facts of the present case where extension was sought by the appellants under Section 4 of the 1963 Act. In support of his argument, Counsel, referred to Section 2(j) of the 1963 Act that defines 'period of limitation' and Section 43 of the 1996 Act that makes the 1963 Act applicable to arbitration matters. Senior Counsel for the respondents, on the other hand, submitted that the High Court did not commit any error in upholding the view of the District Judge, Kamrup, Guwahati, by saying that the High Court's view is consistent with Section 34(3) of the 1996 Act, particularly proviso (3) thereof. Section 34(3) of the 1996 Act provides that an application for setting aside an award may be made within three months of the receipt of the arbitral award. The proviso that follows sub-section (3) of Section 34 provides that on sufficient cause being shown, the Court may entertain the application for setting aside the award after the period of three months and within a further period of 30 days but not thereafter. The judgments in *Popular Construction Co.*, was examined. Recently, in the *State of Maharashtra v. Hindustan Construction Company Limited*, (2010) 4 SCC 518, a two Judge Bench of this Court emphasised the mandatory nature of the limit to the extension of the period provided in proviso to Section 34(3) and held that an application for setting aside arbitral award under Section 34 of the 1996 Act has to be made within the time prescribed under sub-section (3) of Section 34, *i.e.*, within three months and a further period of 30 days on sufficient cause being shown and not thereafter. Section 43(1) of the 1996 Act provides that the 1963 Act shall apply to arbitrations as it applies to proceedings in Court. The 1963 Act is thus applicable to the matters of arbitration covered by the 1996 Act save and except to the extent its applicability has been excluded by virtue of the express provision contained in Section 34(3) of the 1996 Act.

(ii) The facts in this case are peculiar that the arbitral awards were received by the appellants on August 26, 2003. No application for setting aside the arbitral awards was made by the appellants before elapse of three months from the receipt thereof. As a matter of fact, three months from the date of the receipt of the arbitral award by the appellants expired on November 26, 2003. The District Court had Christmas vacation for the period from December 25, 2003 to January 1, 2004. On reopening of the Court, *i.e.*, on January 2, 2004, admittedly, the appellants made applications for setting aside those awards under Section 34 of the 1996 Act. If the period during which the District Court, Kamrup, Guwahati, remained closed during Christmas vacation, 2003 is extended and the appellants get benefit of that period over and above the cap of thirty days as provided in Section 34(3), then the view of the High Court and the District Judge cannot be sustained. But this would depend on the applicability of Section 4 of the 1963 Act. The question, therefore, that falls for our determination is - whether the appellants are entitled to extension of time under Section 4 of the 1963 Act in the above facts.

(iii) Section 4 of the 1963 Act was also examined. The crucial words in Section 4 of the 1963 Act are 'prescribed period'. What is the meaning of these words? Section 2(j) of the 1963 Act defines 'period of limitation' which means the period of limitation prescribed for any suit, appeal or application by the Schedule, and 'prescribed period' means the period of limitation computed in accordance with the provisions of this Act. Section 2(j) of the 1963 Act when read in the context of Section 34(3) of the 1996 Act, it becomes amply clear that the prescribed period for making an application for setting aside arbitral award is three months. The period of 30 days mentioned in proviso that follows sub-section (3) of Section 34 of the 1996 Act is not the 'period of limitation' and, therefore, not 'prescribed period' for the purposes of making the application for setting aside the arbitral award. The period of 30 days beyond three months which the Court may extend on sufficient cause being shown under the proviso appended to sub-section (3) of Section 34 of the 1996 Act being not the 'period of limitation' or, in other words, 'prescribed period', in our opinion, Section 4 of the 1963 Act is not, at all, attracted to the facts of the present case. Seen thus, the applications made by the appellants on January 2, 2004, for setting aside the arbitral award dated August 26, 2003 were liable to be dismissed and have rightly been dismissed by the District Judge, Kamrup, Guwahati, as time barred. The dismissal of the Arbitration Appeals (6 of 2004 and 7 of 2004) by the High Court, thus, cannot be legally flawed for the reasons we have indicated above. The Appeal has no force and is dismissed.

In *Hindustan Copper Ltd. v. Monarch Gold Mining Co. Ltd.*, [2012] 7 Supreme 415 = [2012] 10 SCC 167 = [2012] 10 JT 345 = [2012] 10 SCALE 168 = [2012] 7 SCJ 464 (SC). the Court examined the facts that (i) these appeals have raised the question about the procedure that is being followed by Calcutta High Court in consideration of the applications under Section 11 of the Arbitration and Conciliation Act, 1996. When the special leave petition filed by M/s. Choudhury Construction came up for consideration before the Bench, the learned Counsel for the petitioner submitted that the procedure adopted by the Designate Judge while hearing petition under Section 11 of 1996 Act was unknown in law and not sanctioned by Section 11 inasmuch as although the Designate Judge has held that there are live disputes between the parties which have to be resolved through arbitration, yet the matter has been ordered to be placed before the Chief Justice for appointment of the arbitrator. In light of the submission made by the learned Counsel, Registrar General, Calcutta High Court was ordered to be impleaded as party respondent. In the matter of Hindustan Copper Limited, by an order dated 18.7.2012 the Court felt that the views of the Registrar General, Calcutta High Court were necessary as the issue involved was whether an application under Section 11(6) of the 1996 Act for appointment of an arbitrator could be considered in piecemeal by two Designate Judges. In the matter of Hindustan Copper Limited, one Designate Judge first passed the order on 9.6.2011 holding that the request for appointment of the arbitrator was proper and then ordered that the application should be referred to Hon'ble Delegate of the Chief Justice for appointment of an arbitrator. The relevant part of the order dated 9.6.2011 reads as under: "Therefore, the request for appointment of arbitrator was proper. There is an arbitral dispute between the parties, as held above. The Court noticed that the petitioner have not appointed their arbitrator, which they ought to have done by this time. Therefore, in the circumstances, the Court thought that this application should be referred to the Hon'ble Delegate of the Hon'ble the Chief Justice for appointment of an arbitrator/arbitrators to adjudicate the disputes between the parties as mentioned in the letter of the petitioner dated 28th December, 2009. When the matter came up

before another Designate Judge, he appointed the arbitrator by an order dated 8.7.2011. In the appeal of M/s. Choudhury Construction, the Designate Judge on 6.9.2011 passed the following order: "The State does not dispute the existence of the arbitration agreement but says that matters specifically excepted by the agreement cannot be made the subject-matter of any arbitral reference. If there is any excepted matter which is raised by the petitioner as claimant, it will be open to the State to object thereto, *inter alia*, under Section 16 of the Arbitration and Conciliation Act, 1996. Since it appears that there are live disputes to go to arbitration and the parties have failed to agree in the composition of the arbitral Tribunal, AP No.394 of 2009 is directed to be placed before the Hon'ble Designate of the Hon'ble The Chief Justice for constitution of an arbitral Tribunal in accordance with the agreement between the parties to adjudicate upon the disputes covered thereby.

(ii) Senior Counsel for the Registrar General, High Court, submitted that Section 11 of the 1996 Act did not put any embargo for piecemeal consideration of the matter and it is permissible that the Designate Judge considers the general power of the Court to determine whether the pre-conditions for the exercise of that power have been fulfilled leaving the power of naming the arbitrator under Section 11 to the exclusive jurisdiction of the Chief Justice. He submits that this is in conformity with the Division Bench decision of the Calcutta High Court in *Modi Korea Telecommunication Ltd. v. APPCON Consultants Pvt. Ltd.*, 1999 (II) Cal. H.C. Notes 107. Section 11 of 1996 Act was examined in this connection. The Division Bench of the Calcutta High Court in *Modi Korea Telecommunication Ltd.'s* case (supra), was concerned with the question of the jurisdiction of a Single Judge who has been given the power for determination to entertain, hear and dispose of arbitration matters under Section 11 of the 1996 Act. The Division Bench dealt with the scheme of the 1996 Act, particularly, with reference to Sections 5, 8, 11, 16 and 37(1). In the opinion of the Division Bench, Section 11 makes a distinction between the procedure for appointment of arbitrator and the actual appointment of the arbitrator. Keeping that distinction in mind, the Division Bench proceeded to consider Section 14 of the High Court Act, 1861, Clause 36 of the Letters Patent, Chapter V Rule 1 of the Original Side Rules and Article 225 of the Constitution of India and the Court found merit in the submission of Senior Counsel for one of the appellants that the view taken by the Division Bench of Calcutta High Court in *Modi Korea Telecommunication Ltd.'s* case (supra), is completely knocked out by a majority decision of this Court in *SBP & Co. v. Patel Engineering Ltd. and another*, (2005) 8 SCC 618.

(iii) In *SBP & Co.*, a seven-Judge Bench of this Court was concerned with the question in relation to the nature of function of Chief Justice or his Designate under Section 11 of the 1996 Act, as a three-Judge Bench of this Court in *Konkan Railway Corporation Limited and others v. Mehul Construction Company*, (2000) 7 SCC 201, as approved by a five-Judge Bench of this Court in *Konkan Railway Corporation Limited and another v. Rani Construction (P) Ltd.*, (2002) 2 SCC 388, had taken the view that the function of the Chief Justice or his Designate under Section 11 was purely an administrative function; it was neither judicial nor quasi-judicial and the Chief Justice or his nominee performing the function under Section 11(6) cannot decide any contentious issues between the parties. The majority in SBP & Co. held that looking at the scheme of the 1996 Act as a whole and the object with which it was enacted, it seemed proper to view the conferment of power on the Chief Justice as a conferment of judicial power to decide on the existence of the conditions justifying the constitution of an arbitral Tribunal. In the majority judgment, it was also observed that the power had been conferred under Section 11(6) on the highest judicial authority in their capacities as Chief Justices to pass

an order contemplated under Section 11 of the Act. The exposition of law by a seven-Judge Bench of this Court in *SBP & Co.'s* case (supra), leaves no manner of doubt that the procedure that is being followed by the Calcutta High Court with regard to the consideration of the applications under Section 11 of the 1996 Act is legally impermissible. The piecemeal consideration of the application under Section 11 by the Designate Judge and another Designate Judge or the Chief Justice, as the case may be, is not contemplated by Section 11. The function of the Chief Justice or Designate Judge in consideration of the application under Section 11 is judicial and such application has to be dealt with in its entirety by either Chief Justice himself or the Designate Judge and not by both by making it a two-tier procedure as held in *Modi Korea Telecommunications Ltd's* case (supra). The distinction drawn by the Division Bench of Calcutta High Court in *Modi Korea Telecommunications Ltd.'s* case (supra), between the procedure for appointment of arbitrator and the actual appointment of the arbitrator is not at all well founded. *Modi Korea Telecommunications Ltd.* to the extent it is inconsistent with *SBP & Co's* case (supra), stands overruled. In view of the above, the impugned orders are set aside. The arbitration petitions are restored to the file of the High Court for appropriate consideration, as noted above. The appeals are allowed to the above extent.

Points emerged from the above rulings:

The following points are emerged in view of the various decisions of the Hon'ble Supreme Court.

1. A plea of lack of jurisdiction of the Tribunal should be raised at the earliest *i.e.*, not later than submission of statement of defence and it further says that a party shall not be precluded from raising such a plea merely because he has appointed, or participated in the appointment of an arbitrator. Sub-section (3) says that the plea that the arbitral Tribunal is exceeding the scope of its authority shall be raised during the arbitral proceedings.

2. In a case where the parties had constituted the Arbitral Tribunal without recourse to Section 11(6) of the Act, they have the right to question the jurisdiction of the Arbitral Tribunal including the right to invite a ruling on any objection with respect to the existence or validity of the arbitration agreement.

3. It could rule that there existed no arbitration agreement, that the arbitration agreement was not valid, or that the arbitration agreement did not confer jurisdiction on the Tribunal to adjudicate upon the particular claim that is put forward before it.

4. Under sub-section (5), where it rejects the plea, it could continue with the arbitral proceedings and make the award and under sub-section (6), a party aggrieved by such an arbitral award may make an application for setting aside such arbitral award in accordance with Section 34. The party aggrieved could raise the contention that the Tribunal had no jurisdiction to pass it or that it had exceeded its authority, in passing it. This happens when the Tribunal proceeds to pass an award.

5. In a case where the Arbitral Tribunal proceeds to pass an award after overruling the objection relating to jurisdiction, it is clear from sub-section (6) of Section 16 that the parties have to resort to Section 34 of the Act to get rid of that award, if possible. But, if the Tribunal declines jurisdiction or declines to pass an award and dismisses the arbitral proceedings, the party aggrieved is not without a remedy. Section 37(2) deals with such a situation.

6. If the objection was not decided by the Arbitral Tribunal, the whole action of Arbitral Tribunal was without jurisdiction and the impugned order as well as the award liable to be set aside. From the conjoint reading of the three sub-sections of Section 16 of the Act, 1996 that the arbitrator is

under an obligation to decide the plea of jurisdiction and his authority to continue the arbitration depends on his decision rejecting the plea about his jurisdiction, and without rejecting the question as to his jurisdiction, if the arbitrator has proceeded with the award, he commits a grave error of law.

7. The Chief Justice or his Designate may nominate an arbitrator although the period of thirty days had not expired, if so, the Arbitral Tribunal would have been improperly constituted and be without jurisdiction. It would then be open to the aggrieved party to require the Arbitral Tribunal to rule on its jurisdiction.

8. The Arbitral Tribunal may rule 'on any objections with respect to the existence or validity of the arbitration agreement' shows that the Arbitral Tribunal's authority under Section 16 is not confined to the width of its jurisdiction, as was submitted by the Counsel for the appellants, but goes to the very root of its jurisdiction.

9. A challenge can be taken even though the party may have participated in the appointment of the arbitrator and/or may have himself appointed an arbitrator. A conjoint reading of Sections 10 and 16 of Act 1996 shows that an objection to the composition of the Arbitral Tribunal is a matter, which is derogable. It is derogable because a party is free not to object within the time prescribed in Section 16(2). If a party chooses not to object there will be a deemed waiver under Section 4. On failure to raise objection under Section 16, also held that the respondents must be deemed to have waived their right to object.

10. Sub-section (1) also directs that an arbitration clause, which forms part of a contract, shall be treated as an agreement independent of the other terms of the contract. It also clarifies that a decision by the Arbitral Tribunal that the contract is *null* and *void* shall not *ipso jure* invalidate the arbitration clause.

11. Section 16(3) lays down that a plea that the Arbitral Tribunal is exceeding the scope of its authority, shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.

12. When the Tribunal decides these two questions, namely, the question of jurisdiction and the question of exceeding the scope of authority or either of them, the same is open to immediate challenge in an appeal, when the objection is upheld and only in an appeal against the final award, when the question is overruled.

13. Section 16(5) enjoins that, if the Arbitral Tribunal overrules the objections under sub-sections (2) and (3), it should continue with the arbitral proceedings and makes an arbitral award.

14. Section 16(6) provides that a party aggrieved by such an arbitral award overruling the plea on lack of jurisdiction and exceeding of the scope of authority, may make an application on these grounds for setting aside the award in accordance with Section 34 of the Act. The question, in the context of Section 11(7) is, what is the scope of the right conferred on the Tribunal to rule upon its own jurisdiction and the existence of the arbitration clause, envisaged by Section 16(1), once the Chief Justice or the person designated by him had appointed an arbitrator after satisfying himself that the conditions for the exercise of power to appoint an arbitrator are present in the case. *Prima facie*, it would be difficult to say that in spite of the finality conferred by Section 11(7) of the Act to such a decision of the Chief Justice, the Arbitral Tribunal can still go behind that decision and rule on its own jurisdiction or on the existence of an arbitration clause. It also appears to the Court to be incongruous to say that, after the Chief Justice has appointed an Arbitral Tribunal, the Arbitral Tribunal can turn round and say that the Chief Justice had no jurisdiction or authority to appoint the Tribunal, the very creature

brought into existence by the exercise of power by its creator, the Chief Justice.

15. Section 16 has full play only when an Arbitral Tribunal is constituted without intervention under Section 11(6) of the Act is one way of reconciling that provision with Section 11 of the Act, especially in the context of sub-section (7) thereof. The decision of the Chief Justice on the issue of jurisdiction and the existence of valid arbitration agreement would be binding on the parties when the matter goes to the Arbitral Tribunal and at subsequent stages of the proceedings except in an appeal in the Supreme Court in the case of the decision being by the Chief Justice of the High Court or by a Judge of the High Court designated by him. 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 the competence under Section 11 of the Act, are incapable of being reopened before the Arbitral Tribunal. The Chief Justice or the designated Judge will have the right to decide the preliminary aspects. These will be, his own jurisdiction to entertain the request, the existence of valid arbitration agreement, the existence or otherwise of a live claim, the existence of the condition for the exercise of his power and on the disqualifications of the arbitrator or arbitrators.

16. Even if arbitrator has jurisdiction to entertain the claim, he may be prohibited by the terms of the contract to pass an award on a specific item and in such case award passed on that item ignoring the prohibition would amount to jurisdictional error. Award passed in disregard of express terms of the contract would be arbitrary, capricious and without jurisdiction.

17. Where fundamental terms of agreement between the parties are ignored by the arbitrator, such arbitrator exceeds his jurisdiction even where the arbitration clause itself is widely worded. Such deliberate departure from the contract amounts not only to manifest disregard of the authority or misconduct, but may be tantamount to *mala fide* action. Situation would give raise to jurisdictional error which could be corrected by the Court and for that limited purpose the agreement between the parties would be required to be considered by the Court.

18. It is settled law that the arbitrator is the creature of the contract between the parties and hence if he ignores the specific terms of the contract, it would be a question of jurisdictional error which could be corrected by the Court and for that limited purpose the agreement is required to be considered. For deciding whether the arbitrator has exceeded his jurisdiction reference to the terms of the contract is a must. To find out whether the arbitrator has travelled beyond his jurisdiction, it would be necessary to consider the agreement between the parties containing the arbitration clause. The arbitrator acting beyond his jurisdiction is a different ground from the error apparent on the face of the award.

19. If the agreement specifically bars certain claims from being raised and yet an award has been made then Court must not uphold such award. If there is a specific term in the contract or the law which does

not permit or give the arbitrator the power to decide the dispute raised by the claimant or there is a specific bar in the contract to the raising of the particular claim then the award passed by the arbitrator in respect thereof would be in excess of jurisdiction.

20. The arbitrator is not a conciliator and cannot ignore the law or misapply it in order to do what he thinks just and reasonable. As to the distinction with the ground of error apparent on the face of the award with jurisdictional error, the arbitrator acting beyond his jurisdiction is a different ground from the error apparent on the face of the award.

21. In order to determine whether the arbitrator has acted in excess of jurisdiction what has to be seen is whether the claimant could raise a particular dispute or claim before an arbitrator. If the answer is in the affirmative then it is clear that the arbitrator would have the jurisdiction to deal with such a claim. In order to find whether the arbitrator has acted in excess of jurisdiction the Court may have to look into some documents including the contract as well as the reference of the dispute made to the arbitrators limited for the purpose of seeing whether the arbitrator has the jurisdiction to decide the claim made in the arbitration proceedings.

22. When an arbitration clause specifically excluded from its purview (say excepted matters), those disputes would not be within the ambit of the arbitration clause, and if considered the award in respect of the said claims, held, without jurisdiction and void, as award without jurisdiction is an invalid award. The Arbitrators have no jurisdiction to make an award against the specific terms of the contract executed between the parties.

23. The provisions of Section 16 do not take away the jurisdiction of Chief Justice of India or his designate, 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 the 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.

24. Source of the jurisdiction of the arbitrator emanates from the arbitration clause. Section 16 has conferred power on the Arbitral Tribunal to decide whether there is in 'existence' an arbitration clause'. An arbitrator derives his authority from the contract and if he acts in disregard of the contract, he acts without jurisdiction. A deliberate departure from contract amounts to not only manifest disregard of his authority or misconduct on his part, but it may tantamount to a *mala fide* action.

25. A party to the arbitral proceedings may raise the question of jurisdiction of the arbitrator as well as the objection on the ground of non-existence of any arbitration agreement in the so called dispute in question and such an objection being raised, the arbitrator would do well in disposing of the same as a preliminary issue so that it may not be necessary to go into the entire gamut of arbitration proceedings.

26. The contentious issue should not be gone into or decided at the stage of appointment of arbitrator and no time to be wasted in such an exercise. Remedy of aggrieved party is to raise an objection before Arbitral Tribunal as under Section 16 it is empowered to rule about its jurisdiction. Therefore, it is open to an aggrieved party to raise all the pleas before arbitrator including plea of absence of arbitration agreement between the parties for referring any dispute for arbitration'.

27. In the event, the arbitrator opined that he had no jurisdiction in relation thereto, an appeal there against was provided for under Section 37 of the Act. A jurisdiction issue can be raised in two ways. A party to an arbitration proceeding may take part in arbitral proceedings and raise the question of jurisdiction before the Arbitral Tribunal.

He may also challenge the jurisdiction of the arbitrator without participating in the arbitral proceedings.

28. When a claim is awarded by arbitrator contrary to unambiguous terms of contract, this error on his part cannot be said to be on account of misconstruing of the terms of contract but it was by way of disregarding the contract, manifestly ignoring clear stipulation in contract. Arbitrator misdirected and mis-conducted himself by doing so. Award, therefore, is beyond his jurisdiction and illegal and to be set aside. Having accepted the terms of the agreement, the parties to the contract were bound by its terms and so was the arbitrator.

29. The arbitrator was not justified in ignoring the express terms of the contract merely on the ground that in another contract for a similar work, extra payment for material was provided for. It was not open to the arbitrator to travel beyond the terms of the contract even if he was convinced that the rate quoted by the claimants was low, by awarding extra payment, the arbitrator has out-stepped confines of the contract. This error on his part was by way of disregarding the contract, manifestly ignoring the clear stipulations in the contract. By doing so, the arbitrator misdirected and mis-conducted himself. Hence, the award made by the arbitration in respect of claim illegal and needs being set aside.

30. Error within the jurisdiction of arbitrator and error beyond his jurisdiction, explained as, if the arbitrator commits an error in construction of contract, that is an error within his jurisdiction. But if he wanders outside contract and deals with matter not allotted to him, he commits an error beyond his jurisdiction.

31. On account of the prospective overruling direction in SBP case, any appointment of an arbitrator under Section 11 of the Act made prior to 26.10.2005 has to be treated as valid and all objections including the existence or validity of the arbitration agreement, have to be decided by the arbitrator under Section 16 of the Act.

32. The legal position enunciated in the judgment in SBP will govern only to the applications to be filed under Section 11 of the Act from 26.10.2005 as also the applications under Section 11(6) of the Act pending as on 26.10.2005 (where the Arbitrator was not yet appointed).

33. The arbitrator will have to decide the issue as to whether there is an arbitration agreement, with reference to the legal position explained in regard to the existence of arbitration agreement. Such an exercise becomes inevitable in view of the peculiar position arising out of the specific direction contained in Para 47(k) of the decision in SBP and the subsequent decision in the case of Maharishi Dayanand University.

34. Section 16(1)(a) of the Arbitration and Conciliation Act, 1996 provides that an arbitration clause which forms part of the contract shall be treated as an agreement independent of the other terms of the contract. The plain meaning of the aforesaid clause would tend to show that even on the termination of the agreement/contract, the arbitration agreement would still survive.

35. The Legislature makes it clear that while considering any objection with respect to the existence or validity of the arbitration agreement, the arbitration clause which formed part of the contract, has to be treated as an agreement independent of the other terms of the contract.

36. Section 16(1)(b) further provides that even if the Arbitral Tribunal concludes that the contract is *null* and *void*, it should not result, as a matter of law, in an automatic invalidation of the arbitration clause.

37. Section 16(1)(a) presumes the existence of a valid arbitration clause and mandates the same to be treated as an agreement independent of the other terms of the contract.

38. By virtue of Section 16(1)(b), it continues to be enforceable notwithstanding a declaration of the contract being *null* and *void*.