M/S. UTTARAKHAND PURV SAINIK KALYAN NIGAM LIMITED

v.

NORTHERN COAL FIELD LIMITED

(Special Leave Petition (C) No. 11476 of 2018)

NOVEMBER 27, 2019

[INDU MALHOTRA AND AJAY RASTOGI, JJ.]

Arbitration and Conciliation Act, 1996: s.11 – Whether the High Court was justified in rejecting the application filed under s.11 for reference to arbitration, on the ground that it was barred by limitation – Arbitration agreement between the parties – Dispute arose between them – Petitioner sent notices calling upon the Respondent to nominate a Sole Arbitrator in terms of the arbitration clause – Respondent did not respond to the notices – Petitioner filed application under s.11 invoking the default power of the High Court to make the appointment of a sole arbitrator – High Court held that the claims of the Petitioner were barred by limitation, and therefore an arbitrator could not be appointed under s.11 of the Act – Hence the instant special leave appeal – Held: Notice of Arbitration was issued on 09.03.2016 – Since the invocation took place after s.11 was amended by the 2015 Amendment Act, which came into force on 23.10.2015, the amended provision is applicable to the instant case – In view of the legislative mandate contained in s.11(6A), the Court is required only to examine the existence of the arbitration agreement – All other preliminary or threshold issues were left to be decided by the arbitrator under s.16, which enshrines the Kompetenz-Kompetenz principle – The doctrine of "Kompetenz-Kompetenz", also referred to as "Compétence-Compétence", or "Compétence de la recognized", implies that the arbitral tribunal is empowered and has the competence to rule on its own jurisdiction including determining all jurisdictional issues, and the existence or validity of the arbitration agreement – This doctrine is intended to minimize judicial intervention, so that the arbitral process is not thwarted at the threshold, when a preliminary objection is raised by one of the parties – In view of the provisions of s.16, and the legislative policy

A *to restrict judicial intervention at the pre-reference stage, the issue of limitation would require to be decided by the arbitrator – Thus, the issue of limitation is a jurisdictional issue, which would be required to be decided by the arbitrator under s.16, and not the High Court at the pre-reference stage under s.11 of the Act – In the*
B *instant case, the issue of limitation was raised by the Respondent-company to oppose the appointment of the arbitrator under s.11 before the High Court – The issue of limitation being a jurisdictional issue, the same has to be decided by the tribunal under s.16, which is based on Article 16 of the UNCITRAL Model Law which enshrines the Kompetenze principle – The order of High*
C *Court is, therefore, set aside – Retired judge of Supreme Court appointed as the Sole Arbitrator – Parties directed to appear before the Arbitrator on 02.12.2019 – Matter disposed of – Doctrine of kompetenz-kompetenz.*

Doctrines/Principles: Doctrine of kompetenz-kompetenz –
D *Applicability of, exception – Held: The doctrine is subject to the exception i.e. when the arbitration agreement itself is impeached as being procured by fraud or deception – This exception would also apply to cases where the parties in the process of negotiation, may have entered into a draft agreement as an antecedent step prior to*
E *executing the final contract – The draft agreement would be a mere proposal to arbitrate, and not an unequivocal acceptance of the terms of the agreement – s.7 of the Contract Act, 1872 requires the acceptance of a contract to be absolute and unqualified – If an arbitration agreement is not valid or non-existent, the arbitral tribunal cannot assume jurisdiction to adjudicate upon the disputes*
F *– Appointment of an arbitrator may be refused if the arbitration agreement is not in writing, or the disputes are beyond the scope of the arbitration agreement – Article V(1)(a) of the New York Convention also states that recognition and enforcement of an award may be refused if the arbitration agreement 'is not valid under the*
G *law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made' – Arbitration law – Contract Act, 1872 – s.7.*

ITW Signode India Ltd. v. *Collector of Central Excise* **(2004) 3 SCC 48 : [2003] 5 Suppl. SCR 751;** *NTPC v.*

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Siemens Atkein Gesell Schaft **(2007) 4 SCC 451 : [2007] 3 SCR 399 ;** *M/s. Indian Farmers Fertilizers Cooperative Ltd.* v. *Bhadra Products* **(2018) 2 SCC 534 : [2018] 1 SCR 848 – relied on.**

SBP & Co. v. *Patel Engineering Ltd.* **(2005) 8 SCC 618 : [2005] 4 Suppl. SCR 688 ;** *National Insurance Co. v. Boghara Polyfab (P) Ltd.* **(2009) 1 SCC 267 : [2008] 13 SCR 638 ;** *Union of India & Ors.* v. *Master Construction Co.*, **(2011) 12 SCC 349 : [2011] 5 SCR 853 ;** *Duro Felguera S.A.* v. *Gangavaram Port Limited* **(2017) 9 SCC 729 : [2017] 10 SCR 285;** *Dresser Rand SA* v. *Bindal Agro-Chem Ltd.* **(2006) 1 SCC 751 : [2006] 1 SCR 308 – referred to.**

Case Law Reference

[2005] 4 Suppl. SCR 688	**referred to**	**Para 9.4**
[2008] 13 SCR 638	**referred to**	**Para 9.4**
[2011] 5 SCR 853	**referred to**	**Para 9.4**
[2017] 10 SCR 285	**referred to**	**Para 9.7**
[2006] 1 SCR 308	**referred to**	**Para 9.9**
[2003] 5 Suppl. SCR 751	**relied on**	**Para 9.12**
[2007] 3 SCR 399	**relied on**	**Para 9.12**
[2018] 1 SCR 848	**relied on**	**Para 9.12**

CIVIL APPELLATE JURISDICTION: Special Leave Petition (Civil) No. 11476 of 2018

From the Judgment and Order dated 11.01.2018 of the High Court of Madhya Pradesh, Jabalpur in Arbitration Case No.56 of 2016

Kailash Pandey, Ranjeet Singh, Ms. Jyoti Kumar Mishra, Ms. Sushmita Mishra (for Gaichangpou Gangmei), Advs. for the Petitioner.

Ashwani Kumar Dubey, Pankaj Sharma, Chandra Shekhar Mishra, Advs. for the Respondent.

A The Order of the Court was passed by

INDU MALHOTRA, J.

1.The issue which has arisen for consideration is whether the High Court was justified in rejecting the application filed under Section 11 for reference to arbitration, on the ground that it was barred by limi-
B tation.

2. The factual background of the case arises from an agreement dated 21.12.2010 entered into between the parties, under which the Petitioner – Contractor was to provide security to the Respondent – Company around the clock on need basis, as per the agreed contractual
C rates.

The Agreement contained an arbitration clause which reads as follows :

*"**13. Arbitration :***

D *13.1 If any dispute, difference, question or disagreement shall at any time hereafter arise between the parties hereto or the respective or assigns in connection with or arising out of or in respect of contract, application of provision thereof, anything there-under contained or*
E *arising there-under or as to rights, liabilities or duties of the said parties hereunder or any matter whatsoever incidental to this contract shall be referred to the sole Arbitration of the person appointed by Director (Pers.) of NCL. CONTRACTOR shall have no objection to any such appointment that the arbitrator so appointed is an*
F *employee of NCL or that he had dealt with the matter to which the contract related and that in the course of his duties as NCL employees he has expressed views on all or any of the matter of disputes or difference.*

13.2 If the arbitrator to whom the matter is originally by
G *referred dies or refused to act or resigns for any reason from the position of arbitrator, it shall be lawful, for Director (Pers.) of NCL to appoint another person to act as Arbitrator. Such person shall be*

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entitled to proceed with the reference from the stage at which it was left by his predecessor or to precede denovo.

13.3 It is agreed that no person other than the person appointed by Directed (Pers.) of NCL as aforesaid shall act as Arbitrator.

13.4 It is term of the contract that the CONTRACTOR shall not stop the work under this contract and the work shall continue whether the arbitration proceedings were commenced or not.

13.5 It is term of this contract that the parties invoking the arbitration shall specify the dispute to be referred for arbitration.

13.6 The Arbitrator shall give reasoned award in respect of each of the difference referred to him. The award as aforesaid shall be final and binding on all the parties to this contract in accordance with the law.

13.7 The venue of arbitration shall at Singrauli in India and subject as aforesaid, the provisions of Indian Arbitration and Conciliation Act, 1996 and any statutory modification or reenactment thereof and rules made there-under and for the time being in force shall apply to the arbitration proceedings under this clause."

(emphasis supplied)

3. Disputes arose between the parties with respect to payment of amounts under the contract by the Respondent – Company, and the deduction of the security amount from the running bills.

The Petitioner – Contractor issued a Legal Notice dated 29.05.2013demanding payment of amounts to the tune of Rs. 1,43,69,309/- alongwith interest from the Respondent – Company.

4. On 09.03.2016, the Petitioner – Contractor issued a Notice of Arbitration calling upon the Respondent – Company to nominate a Sole Arbitrator in terms of the arbitration clause, to adjudicate the disputes between the parties.

A The Respondent – Company did not respond to the Notice dated 09.03.2016.

5. The Petitioner – Contractor sent a further notice on 30.05.2016 to the Respondent – Company proposing the name of Mr. Jai Singh, a retired Additional District Judge for appointment as the Sole Arbitrator.

B The Respondent – Company did not respond to this Notice as well.

6. The Petitioner – Contractor filed an Application on 20.09.2016, under Section 11 invoking the default power of the High Court to make the appointment of a sole arbitrator.

C 7. The High Court *vide* the impugned Order held that the claims of the Petitioner – Contractor were barred by limitation, and thereforean arbitrator could not be appointed under Section 11 of the 1996 Act.

8. Aggrieved by the impugned Order dated 11.01.2018, the D Petitioner has filed the present Special Leave Petition before this Court.

9. We have heard learned Counsel for the parties and perused the pleadings.

9.1 Section 21 of the 1996 Act provides that arbitral proceedings commence on the date on which a request for disputes to be E referred to arbitration is received by the respondent.

9.2. In the present case, the Notice of Arbitration was issued by the Petitioner – Contractor to the Respondent – Company on 09.03.2016.

The invocation took place after Section 11 was amended by the F 2015 Amendment Act, which came into force on 23.10.2015, the amended provision would be applicable to the present case.

9.3. The 2015 Amendment Act brought about a significant change G in the appointment process under Section 11 : first, the default power of appointment shifted from the Chief Justice of the High Court in arbitrations governed by Part I of the Act, to the High Court; second, the scope of jurisdiction

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under sub-section (6A) of Section 11 was confined to the examination of the existence of the arbitration agreement at the pre-reference stage.

9.4. Prior to the coming into force of the 2015 Amendment Act, much controversy had surrounded the nature of the power of appointment by the Chief Justice, or his designate under Section 11.

A seven judge constitution bench of this Court in *SBP & Co.* v. *Patel Engineering Ltd.*,[1] defined the scope of power of the Chief Justice under Section 11. The Court held that the scope of power exercised under Section 11 was to first decide :

i. whether there was a valid arbitration agreement; and

ii.whether the person who has made the request under Section 11, was a party to the arbitration agreement; and

iii. whether the party making the motion had approached the appropriate High Court.

Further, the Chief Justice was required to decide all threshold issues with respect to jurisdiction, the existence of the agreement, whether the claim was a dead one; or a time-barred claim sought to be resurrected; or whether the parties had concluded the transaction by recording satisfaction of their mutual rights and obligations, and received the final payment without objection, under Section 11, at the pre-reference stage.

The decision in *Patel Engineering* (supra) was followed by this Court in *Boghara Polyfab*[2], *Master Construction*[3], and other decisions.

9.5 The Law Commission in the246th Report[4] recommended that:

"the Commission has recommended amendments to sections 8 and 11 of the Arbitration and Conciliation Act, 1996. The

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[1] (2005) 8 SCC 618.

[2] *National Insurance Co.* v. *Boghara Polyfab (P) Ltd.* (2009) 1 SCC 267.

[3] *Union of India & Ors.* v. *Master Construction Co.* (2011) 12 SCC 349.

[4] *Amendments to the Arbitration & Conciliation Act, 1996,*Report No. 246, Law Commission of India (August 2014), p. 20.

A *scope of the judicial intervention is only restricted to situations where the Court/Judicial Authority finds that the arbitration agreement does not exist or is null and void. In so far as the nature of intervention is concerned, it is recommended that in the event the Court/Judicial Authority is prima facie satisfied against the argument challenging the arbitration agreement, it shall appoint the arbitrator and/or refer the parties to arbitration, as the case may be. The amendment envisages that the judicial authority shall not refer the parties to arbitration only if it finds that there does not exist an arbitration agreement or that it is null and void. If the judicial authority is of the opinion that prima facie the arbitration agreement exists, then it shall refer the dispute to arbitration, and leave the existence of the arbitration agreement to be finally determined by the arbitral tribunal."*

(emphasis supplied)

D 9.6. Based on the recommendations of the Law Commission, Section 11 was substantially amended by the 2015 Amendment Act, to overcome the effect of all previous judgments rendered on the scope of power by a non obstante clause, and to reinforce the *kompetenz-kompetenz* principle enshrined in Section 16 of the 1996 Act.

The 2015 Amendment Act inserted sub-section (6A) to Section 11 which provides that:

F *"The Supreme Court or, as the case may be, the High Court, while considering any application under sub-section (4) or sub-section (5) or sub-section (6), shall, notwithstanding any judgment, decree or order of any Court, confine to the examination of the existence of an arbitration agreement."*

(emphasis supplied)

G By virtue of the *non obstante* clause incorporated in Section 11(6A),previous judgments rendered in *Patel Engineering* (supra) and *Boghara Polyfab* (supra), were legislatively over-ruled. The scope of examination is now confined only to the existence of the arbitration agreement at the Section 11 stage, and nothing more.

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9.7 Reliance is placed on the judgment in *Duro Felguera S.A.* v. *Gangavaram Port Limited*,[5] wherein this Court held that :

"From a reading of Section 11(6A), the intention of the legislature is crystal clear i.e. the Court should and need only look into one aspect-the existence of an arbitration agreement. What are the factors for deciding as to whether there is an arbitration agreement is the next question. The resolution to that is simple-it needs to be seen if the agreement contains a Clause which provides for arbitration pertaining to the disputes which have arisen between the parties to the agreement."

(emphasis supplied)

9.8 In view of the legislative mandate contained in Section 11(6A), the Court is now required only to examine the existence of the arbitration agreement. All other preliminary or threshold issues are left to be decided by the arbitrator under Section 16, which enshrines the *Kompetenz-Kompetenz* principle.

9.9. The doctrine of "*Kompetenz-Kompetenz*", also referred to as "*Compétence-Compétence*", or "*Compétence de la recognized*", implies that the arbitral tribunal is empowered and has the competence to rule on its own jurisdiction, including determining all jurisdictional issues, and the existence or validity of the arbitration agreement. This doctrine is intended to minimize judicial intervention, so that the arbitral process is not thwarted at the threshold, when a preliminary objection is raised by one of the parties.

The doctrine of *kompetenz-kompetenz* is, however, subject to the exceptioni.e. when the arbitration agreement itself is impeached as being procured by fraud or deception. This exception would also apply to cases where the parties in the process of negotiation, may have entered into a draft agreement as an antecedent step prior to executing

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[5] (2017) 9 SCC 729.
Refer to *T.R.F. Ltd.* v. *Energo Engineering Projects Ltd.* (2017) 8 SCC 377.

A the final contract. The draft agreement would be a mere proposal to arbitrate, and not an unequivocal acceptance of the terms of the agreement. Section 7 of the Contract Act, 1872 requires the acceptance of a contract to be absolute and unqualified[6].If an arbitration agreement is not valid or non-existent, the arbitral tribunal cannot assume jurisdiction to adjudicate upon the disputes. Appointment of an arbitrator may be refused if the arbitration agreement is not in writing, or the disputes are beyond the scope of the arbitration agreement.

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Article V(1)(a) of the New York Convention states that recognition and enforcement of an award may be refused if the arbitration agreement 'is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made'.

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9.10. The legislative intent underlying the 1996 Act is party autonomy and minimal judicial intervention in the arbitral process. Under this regime, once the arbitrator is appointed, or the tribunal is constituted, all issues and objections are to be decided by the arbitral tribunal.

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9.11. In view of the provisions of Section 16, and the legislative policy to restrict judicial intervention at the pre-reference stage, the issue of limitation would require to be decided by the arbitrator.

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Sub-section (1) of Section 16 provides that the arbitral tribunal may rule on its own jurisdiction, "<u>including any</u> objections" with respect to the existence or validity of the arbitration agreement. Section 16 is as an inclusive provision, which would comprehend all preliminary issues touching upon the jurisdiction of the arbitral tribunal. The issue of limitation is a jurisdictional issue, which would be required to be decided by the arbitrator under Section 16, and not the High Court at the pre-reference stage under Section 11 of the Act. Once the existence of the arbitration agreement is not disputed, all issues, including jurisdictional objections are to be decided by the arbitrator.

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9.12. In the present case, the issue of limitation was raised by the Respondent – Company to oppose the appointment of the arbitrator under Section 11 before the High Court.

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[6]*Dresser Rand SA* v. *Bindal Agro-Chem Ltd.* (2006) 1 SCC 751.
See also *BSNL* v. *Telephone Cables Ltd.* (2010) 5 SCC 213.
Refer to *PSA Mumbai Investments PTE Ltd.* v. *Board of Trustees of the Jawaharlal Nehru Port Trust & Anr.* (2018) 10 SCC 525.

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Limitation is a mixed question of fact and law. In *ITW Signode India Ltd.* v. *Collector of Central Excise*[7] a three judge bench of this Court held that the question of limitation involves a question of jurisdiction. The findings on the issue of limitation would be a jurisdictional issue. Such a jurisdictional issue is to be determined having regard to the facts and the law.

Reliance is also placed on the judgment of this Court in *NTPC* v. *Siemens Atkein Gesell Schaft*[8], wherein it was held that the arbitral tribunal would deal with limitation under Section 16 of the 1996 Act. If the tribunal finds that the claim is a dead one, or that the claim was barred by limitation, the adjudication of these issues would be on the merits of the claim. Under sub-section (5) of Section 16, the tribunal has the obligation to decide the plea; and if it rejects the plea, the arbitral proceedings would continue, and the tribunal would make the award. Under sub-section (6) a party aggrieved by such an arbitral award may challenge the award under Section 34.

In *M/s. Indian Farmers Fertilizers Cooperative Ltd.* v. *Bhadra Products*[9] this Court held that the issue of limitation being a jurisdictional issue, the same has to be decided by the tribunal under Section 16, which is based on Article 16 of the UNCITRAL Model Law which enshrines the *Kompetenze* principle.

10. In view of the aforesaid discussion, we set aside the impugned judgment and order dated 11.01.2018 passed by the High Court, and direct that the issue of limitation be decided by the arbitral tribunal.

11. With the consent of Counsel for the parties, we appoint Mr. Justice (Retd.) A. M. Sapre, former Judge of this Court, as the Sole Arbitrator, subject to the declarations being made under Section 12 of the 1996 Act (as amended)with respect to the independence and impartiality of the arbitrator, and the ability to devote sufficient time to complete the arbitration within the period specified by Section 29A of the 1996 Act.

12. The arbitration agreement states that the arbitration will beat Singrauli, Madhya Pradesh. Consequently, the seat of arbitration is at Singrauli, subject to any modification that may be made by consent of

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[7] (2004) 3 SCC 48
[8] (2007) 4 SCC 451
[9] (2018) 2 SCC 534.

A the parties. The arbitrator is, however, at liberty to conduct the proceedings at a convenient venue as per the convenience of the arbitrator and the parties if so required.

The Arbitrator will be paid fees in accordance with the Fourth Schedule of the 1996 Act. Both parties will share the costs of the
B arbitration equally.

13. The Registry is directed to despatch a copy of this Order to Mr. Justice (Retd.) A. M. Sapre, Former Judge, Supreme Court of India at the following address:

"Mr. Justice (Retd.) A. M. Sapre,
C Former Judge, Supreme Court of India,
C-203, Second Floor
Sarvodaya Enclave
New Delhi – 110017
Tel No.: 011-40254823
Mob. No.: 7042955488"
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The parties are directed to appear before the learned Arbitrator on 02.12.2019 at 2 p.m.

The matter is disposed of accordingly.

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Devika Gujral Matter disposed of.