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BOMBAY HIGH COURT ON POWERS OF ARBITRAL TRIBUNALS

Introduction

Arbitration is a private dispute resolution mechanism, whereby two or more parties agree to resolve their current or future dispute by an arbitral tribunal as an alternative to adjudication by the Courts or public Forum established by law. An arbitration agreement gives contractual authority to arbitral tribunal to adjudicate a dispute and bind the disputing parties. Bombay High Court (HC)¹ in the recent case of *Ambey Mining Pvt. Ltd. and Ors. vs. Western Coalfields Limited and Ors.* held that the Arbitration and Conciliation Act, 1996 (the “1996 Act”) empowers arbitral tribunal to rule upon its own jurisdiction, including ruling on any objection with respect to all aspects of non-arbitrability and validity of arbitration agreement.

Issue

The Respondents, Western Coalfields contended that a question whether arbitration agreement exists or not must be decided by the HC while dealing with the matter of appointment of the Arbitrator² and a condition in the arbitration clause, that no person other than the Marketing Director could be appointed as arbitrator, interferes with the power of the Chief Justice³ and his designates to appoint suitable person as an arbitrator in appropriate cases. Hence, such portion of arbitration clause is liable to be ignored as being contrary to the 1996 Act.

Findings

The Court dissected the legal position as to who decides the question of non-arbitrability under the Arbitration Act into four phases with the first phase being in force from the enactment of the Act⁴ in 1996 till the decision of Constitution Bench⁵ and phase three was referred to as the period after the Arbitration and Conciliation (Amendment) Act, 2015, which was introduced to reduce court interference retrospectively from 23.10.2015. This was affirmed by the Supreme Court.⁶ The relevant period now *i.e.*, fourth phase is in force since the Arbitration and Conciliation (Amendment) Act, 2019 after which the scope of judicial review by the court while deciding an

¹ (02.08.2021 - BOMHC): MANU/MH/1936/2021.

² Section 11(6A) of the ACA.

³ Section 11(8) of the ACA.

⁴ *Konkan Railway Corporation Ltd. and Ors. vs. Rani Construction Pvt. Ltd.* (30.01.2002 - SC): MANU/SC/0053/2002

⁵ *S.B.P. and Co. vs. Patel Engineering Ltd. and Ors.* (26.10.2005 - SC): MANU/SC/1787/2005

⁶ *Duro Felguera S.A. vs. Gangavaram Port Limited* (10.10.2017 - SC): MANU/SC/1352/2017.

application under Section 8 or 11 of the 1996 Act is no longer applicable. The general rule and principle, in view of the legislative mandate and the principle of severability and competence-competence, is that the Arbitral Tribunal is the preferred first authority to determine and decide all questions of non-arbitrability, under Section 16 of the 1996 Act.

The HC, based on the catena of judgements, held that civil or commercial dispute, whether contractual or non-contractual, which can be decided by the Court, is in principle capable of being adjudicated and resolved by arbitral tribunal unless its jurisdiction is, expressly or by necessary implication, excluded.⁷ The court therefore concluded that there is no doubt that Section 16(1) of the Act of 1996 empowers the arbitral tribunal to rule upon its own jurisdiction, including ruling on any objection with respect to all aspects of non-arbitrability, including validity of arbitration agreement.

Conclusion

It is now well settled by a series of decisions of the Supreme Court and High Courts that the legislative intent underlying the 1996 Act is to minimise the supervisory rules of courts in arbitral process and nominate/appoint arbitrator without loss of time and leaving all contentious issues to be urged and agitated before arbitral tribunal.

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⁷ *Booz Allen and Hamilton Inc. vs. SBI Home Finance Ltd. and Ors.* (15.04.2011 - SC): MANU/SC/0533/2011.