

## **An Arbitration agreement in a void contract need not be Void**

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In some cases, at the stage of appointment of Arbitrator under S.11 of the Arbitration and Conciliation Act, 1996 (The Act) or reference to Arbitration under S.8 of the Act, the Court may conclude that the underlying contract is void. In such cases, the question arises, whether the arbitration agreement survives after such a declaration by a court of law. As per S 16(1) of the Act which is based on *kompetenz kompetenz* principle, the arbitral tribunal would be competent to rule its own jurisdiction including ruling on any objection regarding the validity of the arbitration agreement. The Act emphasizes that an arbitration clause which forms part of a contract shall be treated as an agreement independent of the terms of the contract. It further provides that a decision by the Arbitral tribunal that the contract is null and void shall not entail *ispo jure* the invalidity of the arbitration clause.

The above issue came up for consideration before a seven-judge bench of the Supreme Court of India in *SBP case*<sup>2</sup> and Supreme Court of India held that an arbitration agreement could stand independent of the main agreement and need not necessarily become otiose, even if the main agreement, of which it is a part, is declared void. Since it is the largest bench of the Supreme Court, it is the law of the country. Later in the case of *Today Homes*<sup>3</sup> case High Court of Punjab and Haryana held that since the underlying contract is void, the arbitration agreement also perished with it. In an appeal over the above said judgment of Punjab and Haryana High Court, Supreme Court emphasized the limited scope of High Court while considering application for appointment of arbitrator and upheld the separability concept of an arbitration agreement. The separability concept is a globally recognized concept by which arbitration clause even though is incorporated in a main contract, the arbitration clause is separable from the main contract.

The Supreme Court of India in another case of *Reva Electric car case*<sup>4</sup> held that the provisions of 16(1) of the Act in the back drop of *kompetenz kompetenz* were considered and it was inter alia held that under S.16(1), the legislature makes it clear that while considering any objection with regard to the existence or validity of the arbitration agreement, the arbitration clause, which formed part of the contract, had to be treated as an agreement independent of the

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<sup>2</sup> *SBP & Co Vs Patel Engineering Limited* (2005) 8 SCC 618

<sup>3</sup> *Today Homes & Infrastructure (P) Ltd Vs Ludhinana Improvement Trust* (2014) 5 SCC 68

<sup>4</sup> *Reva electric Car co (P) Ltd Vs Green Mobil* (2012) 2 SCC 93

other terms of the contract. Reference was made in the said agreement to the provisions of S.16(1)(b) of the 1996 Act, which 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. Hence it can be understood that the concept of separability of the arbitration clause/ agreement from the underlying contract has been statutorily recognized in this country under S.16 of the Act,1996. It was also held that Section 16(1)(a) of the 1996 Act presumes the existence of a valid arbitration clause and mandates the same to be treated as an agreement independent of the terms of the contract.

Hence, it can be understood that by virtue of Section 16(1)(b) of the 1996 Act, the arbitration clause continues to be enforceable, notwithstanding a declaration that the contract was null and void.