SHOULD ORDERS REJECTING THE JURISDICTIONAL PLEA UNDER THE INDIAN ARBITRATION AND CONCILIATION ACT, 1996 BE APPEALABLE?

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ABSTRACT

Similar to Article 16 of the UNCITRAL Model Law, Section 16 of the Indian Arbitration and Conciliation Act, 1996 provides that the arbitral tribunal has the power to decide upon its jurisdiction. However, while Model Law permits instant court review of arbitral tribunal's decision accepting its jurisdiction, the Act does not provide for such orders of the arbitral tribunal to be appealable. In terms of the Act, if a party is aggrieved by an order of the arbitral tribunal accepting that it has jurisdiction, it can only raise such jurisdictional issues in setting-aside proceedings under Section 34 of the Act. This may lead to jurisdictional issues attaining finality at a very belated stage, i.e., only after the arbitral award is rendered. Therefore, in order to ensure speedy and effective resolution of jurisdictional issues, this paper seeks to answer whether such orders should be made appealable under the current legislative framework.

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1. INTRODUCTION

Section 16(1) of the Arbitration and Conciliation Act, 1996 (*hereinafter* "the Act") empowers the arbitral tribunal to decide upon its jurisdiction, in line with the principle of *kompetenz-kompetenz*. Accordingly, the tribunal may either uphold a jurisdictional plea and decide that it does not have jurisdiction or reject such a plea and hold that it has jurisdiction. However, for the appeal mechanism provided in the Act for challenging such orders of the arbitral tribunal, the Act creates a distinction between both the outcomes of the plea raising jurisdictional challenges.

When a jurisdictional plea is raised under Section 16 of the Act, it can result in two scenarios- *first*, the tribunal accepts the plea and holds that it does not have jurisdiction, and *second*, the tribunal rejects such a plea and upholds its jurisdiction.

In the existing legal framework, in the first scenario, such an order is appealable under Section 37 of the Act.[1] If this appeal is rejected, the aggrieved party will evidently not have a remedy under Section 34 of the Act as the tribunal would cease to exist, and consequently, no arbitral award would be passed, which can be challenged at the stage of setting-aside proceedings under Section 34 of the Act.[2] Similarly, in the second scenario, while such an order is presently not appealable under Section 37 of the Act, the jurisdictional issues can be raised at the stage of setting aside proceedings under Section 34 of the Act. Therefore, at present, the Act only provides for a one-shot remedy in both situations, i.e., an appeal under Section 37 in cases of accepting the jurisdictional plea and a Section 34 remedy in cases of rejecting the plea raised under Section 16 of the Act.

Thus, the Act does not permit a court review of the arbitral tribunal's order accepting jurisdiction until after the passing of the final award. This is in contrast to the provisions of the UNCITRAL Model Law[3] (*hereinafter* "Model Law") which permits instant court review of tribunal's decision on jurisdiction.[4] In terms of Article 16(3) of the Model Law, if the tribunal decides that it has jurisdiction, any party may request the seat court to decide the question of jurisdiction as a preliminary question.[5] While the Act is broadly based on the

[1] The Arbitration and Conciliation Act, 1996, s37(2)(a).

[2] ibid s16(5) and s16(6).

[3] UNCITRAL, Model Law on International Commercial Arbitration, U.N. Doc. A/40/17, 24 I.L.M. 1302 (1985), with amendments adopted on July 7, 2006.

[4] ibid art. 16(3).

[5] ibid.

Model Law, it has not provided for a ruling of the tribunal upholding its jurisdiction to be subject to immediate review of the court. This is despite the fact that India expressed a view that *"a ruling by the arbitral tribunal that it has jurisdiction should be open to immediate court review"* during the discussions on the draft text of Model Law.[6]

In view of the above, the question that arises is if India should follow the Model Law approach and allow for such orders to be appealable under the Act. This article attempts to answer this question. It highlights the recourse available to a party in challenging such orders before the stage of setting-aside proceedings under Section 34 of the Act. Finally, this article suggests the need to make such orders appealable and also analyses the implications thereof.

2. IS THE RECOURSE TO WRIT REMEDY ENOUGH?

Article 227 of the Constitution provides for supervisory jurisdiction of High Courts over all Courts and tribunals in the territories in relation to which it exercises jurisdiction.[7] It is well-settled law that arbitral tribunals are also such tribunals that are amenable to writ jurisdiction of High Courts under Article 227 of the Constitution.[8] Consequently, a writ petition under Article 277 of the Constitution may be maintainable against orders passed by the arbitral tribunal in specific cases. However, the Courts have observed that usually, writ jurisdiction is excluded when there is an alternate remedy.[9] Accordingly, a writ petition against an order passed in terms of the provisions of Section 16(5) of the Act will face the challenge of availability of an alternate remedy in the form of setting-aside proceedings under Section 34 of the Act. However, this rule of exclusion of writ jurisdiction is a rule of discretion and not one of compulsion.[10]

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[6] UNCITRAL, *Analytical compilation of comments by Governments and international organizations of draft text of a model law on international commercial arbitration*, Report of the Secretary-General, U.N. Doc. A/CN.9/263 at 29 (1985).

[7] Constitution of India, 1950, art. 227.

[8] *Bhaven Construction v. Executive Engineer Sardar Sarovar Narmada Nigam Ltd. and Anr* Civil Appeal No. 14665 of 2015, para 24; *Surender Kumar Singhal v. Arun Kumar Bhalotia*, CMM 1272 of 2019, Hon'ble High Court of Delhi, decided on 25 March 2021, para 20.

[9] *Nivedita Sharma v Cellular Operators Association of India* (2011) 14 (SCC) 337, paras 15 and 16; *Whirlpool Corporation v. Registrar of Trademarks, Mumbai* (1998) 8 SCC 1, para 15; *Harbanslal Sahnia v. Indian Oil Corpn. Ltd* (2003) 2 SCC 107, para 7.

[10] Harbanslal Sahnia v. Indian Oil Corpn. Ltd (2003) 2 SCC 107, para 7; *M.P. State Agro Industries Development Corporation Limited v. Jahan Khan* (2007) 10 SCC 88, para 12.

Therefore, a party aggrieved by an order passed by the tribunal rejecting the jurisdictional issues raised under Section 16 of the Act may consider preferring a writ petition against such an order. In view of the same, it is imperative to analyse the scope and the extent of interference which is exercised by the High Courts under Article 227 of the Constitution against the orders of the arbitral tribunal.

In this regard, it is relevant to note the decision of the Hon'ble Supreme Court of India in *Deep Industries* v. *Oil and Natural Gas Limited*[11] ("Deep Industries"). In the said decision, a three-judge bench of the Apex Court was concerned with the question relating to Gujarat High Court's exercise of jurisdiction against the dismissal of an application under Section 16 of the Act by the arbitral tribunal. The Hon'ble Supreme Court reiterated that the scheme of Section 16 of the Act is such that when a Section 16 application is dismissed, the aggrieved party *"must await the passing of a final award at which stage it may be raised under Section 34".* Accordingly, it held that the Gujarat High Court had inverted the statutory scheme by entertaining the writ petition against the dismissal of a Section 16 application. The Court also laid down that "*entering into the general thicket of disputes between the parties does not behove a court exercising jurisdiction under Article 227, where only jurisdictional errors can be corrected*."

The aforesaid judicial pronouncement highlights the abject reluctance of courts to entertain a writ petition against the dismissal of a Section 16 application. However, the Court noted that Article 227 is a constitutional provision that remains untouched by the non-obstante clause of Section 5 of the Act. Accordingly, in the context of jurisdiction under Article 227 of the Constitution against judgments allowing or dismissing first appeals under Section 37 of the Act, the Supreme Court recognised the power of the High Courts to interfere under Article 227 of the Constitution and held that the High Courts should be circumspect in exercising such power and restrict its interference only to those orders passed by the arbitral tribunal, which are *"patently lacking in inherent jurisdiction."*[12]

The Court, however, did not elaborate upon the meaning of the phrase *"patently lacking in inherent jurisdiction",* the same was later clarified in *Punjab State Power Ltd.* v. *Emta Coal Ltd. & Anr*.[13] In the said case, the Hon'ble Supreme Court was seized of the question

[11] *Deep Industries v. Oil and Natural Gas* Limited (2019) SCC Online SC 1602, para 22.

[12] ibid para 17.

[13] *Punjab State Power Corporation Limited v. Emta Coal Limited and Anr Petition(s),* SLP (C) No(s).8482/2020, Hon'ble Supreme Court of India, decided on 18th September, 2020, para 4.

regarding the maintainability of the writ petition under Article 227 of the Constitution against an order passed by the arbitral tribunal dismissing the jurisdictional objections raised under Section 16 of the Act. While placing reliance upon its decision in *Deep Industries*, the Court observed that such orders could only be interfered with if they are *"so perverse that the only possible conclusion is that there is a patent lack in inherent jurisdiction."* It clarified that a patent lack of inherent jurisdiction would require no argument whatsoever, it must be the perversity of the order that must stare one in the face. Therefore, the interference of courts would be limited to orders which meet this high threshold of perversity.

In this regard, it is relevant to note that the expression "perverse" has many hues, and the Indian Courts have consistently held that perverse orders are such orders (a) that are not supported by evidence[14]; (b) which are *"not only against the weight of evidence but is altogether against the evidence itself"*[15]; (c) that no reasonable person could be said to have arrived at such a finding.[16] The said tests for determining perversity have recently also been applied by the Courts in the context of arbitral awards[17]. Thus, the standard for perversity appears to be extremely high, and until and unless such a standard is met by an order passed under Section 16 of the Act, the courts would be reluctant to interfere with such orders under writ jurisdiction.

The Hon'ble Supreme Court of India also addressed a similar issue in its recent decision of *Bhaven Construction v. Executive Engineer Sardar Sarovar Narmada Nigam Ltd*[18], wherein the Court noted that the power of the High Courts to interfere with arbitral proceedings under Article 226 and 227 of the Constitution needs to be exercised in "exceptional rarity." The Supreme Court clarified the term "exceptional rarity" by holding that such interference would be warranted in cases wherein (a) a party is left remediless under the Act; and (b) bad faith is shown by one of the parties.

In view of the aforementioned decisions, it is well settled that the Indian Courts would only interfere with orders passed by the arbitral tribunal in exceptional circumstances, given that the standard for meeting the threshold of such interference is extremely high.

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[14] *Gaya Din v. Hanuman Prasad* (2001) 1 SCC 501, para 15.

[15] *Parry's (Calcutta) Employees' Union v. Parry & Co. Ltd*. AIR 1966 Cal 31, para 58.

[16] *Triveni Rubber & Plastics v. CCE* AIR 1994 SC 1341, para 3.

[17] *PSA SICAL Terminals v. Board of Trustees, Port Trust Tuticorin* 2021 SCC OnLIne SC 508, para 45; *South East Asia Marine Engineering And Constructions Limited v. Oil India Limited* (2020) 5 SCC 164 para 15.

[18] *Bhaven* (n 8).

Even otherwise, in cases wherein the jurisdictional issues are intertwined with the substantive factual issues and determination of jurisdictional issues would require a review of the merits, the High Courts under its writ jurisdiction will not ideally interfere since such a determination may involve disputed questions of fact. It is not considered a function of the High Courts to enter into disputed questions of fact while exercising supervisory jurisdiction under Article 227 of the Constitution.[19] A disputed question of fact may be adjudicated in an Article 227 petition in exceptional cases when there exists an error apparent on the face of the record or if any other well-known principle of judicial review is found to be applicable.[20] The Hon'ble Supreme Court in *Jai Singh v. Municipal Corporation of Delhi*[21] held that principle of judicial review in the context of Article 227 would entail an order passed in "*grave dereliction of duty or in flagrant abuse of fundamental principles of law or justice.*" It further held that the power to re-appreciate evidence would only be justified *"where grave injustice would be done unless the High Court interferes."* Thus, even under this challenge to the writ jurisdiction, the aggrieved party will necessarily have to meet the high threshold of evidencing that there was an error apparent on the face of the record in the order passed by the tribunal or the tribunal abused fundamental principles of law or justice. A mere error of law will not be sufficient for the court to entertain the writ petition to adjudicate a disputed question of fact.

Therefore, it can be seen that the higher judiciary echoes the principle of minimal judicial interference in arbitration proceedings. The Courts have consistently stressed on the sparing usage of writ jurisdiction, which is a public law remedy. Consequently, unless and until the order of the arbitral tribunal passed under Section 16 of the Act, against which a writ is preferred, meets the high standard of patently lacking jurisdiction or causing grave injustice, the High Courts are not likely to interfere with such orders. It is also pertinent to note that even in cases where the high threshold is met, exercising writ jurisdiction is a rule of discretion and not a matter of right for the aggrieved party. Hence, it cannot substitute a statutory right in the form of an appeal mechanism. The next part discusses the importance of providing such an appeal mechanism in the Act.

19 *Sneh Gupta v. Devi Swarup* (2009) 6 SCC 194, para 41.

20 ibid.

21 *Jai Singh and Ors. v. Municipal Corporation of Delhi* (2010) 9 SCC 385, paras 15 and 16.

3. SHOULD INDIA FOLLOW THE MODEL LAW APPROACH?

As stated above, the Model Law allows for an immediate court review of an order passed by the tribunal upholding its jurisdiction. The approach is also followed in various pro arbitration jurisdictions such as Germany,[22] Singapore[23] and Australia.[24]

In contrast to the approach followed by Model law as also the various pro-arbitration jurisdictions, which allow for an immediate court review of an order passed by the tribunal upholding its jurisdiction, the Act only allows for raising such jurisdictional issues again in setting-aside proceedings under Section 34 of the Act. The same was done likely to uphold the principle of minimal judicial intervention and reduce the role of courts in arbitration proceedings. However, such an approach leads to jurisdictional issues attaining finality at a very belated stage, i.e., after the final award is rendered. It is pertinent to note that such issues strike at the very authority of the tribunal to pass the award. Thus, such defect must be treated as basic and fundamental and an award passed without jurisdiction is nullity.

Consequently, such issues should ideally attain finality at the earliest possible given that such issues go to the very root of the matter and challenge the very foundation of the arbitral tribunal's mandate and power to adjudicate upon the disputes in a matter.

Additionally, if such issues are decided at the stage of setting-aside proceedings under Section 34 of the Act and the court holds that the arbitral tribunal did not have jurisdiction to adjudicate upon the disputes, the same would result in wastage of time and expenses involved in the arbitration proceedings.

In the present legal framework, if an arbitral tribunal upholds its jurisdiction, passes an award and subsequently, the court decides against the tribunal's jurisdiction; the entire arbitration proceedings would be rendered futile. This would be at a stage when a substantial amount of cost and time would have been incurred in the said arbitration. As a result, the aggrieved party would only be able to approach the appropriate forum for resolving the disputes at a very belated stage, thereby defeating the very purpose of the Act to ensure speedy and effective resolution of disputes. Therefore, ensuring that jurisdictional issues raised under Section 16 of the Act attain finality at the earliest possible is in consonance with the primary of objective of objectives of resolution of disputes by arbitration—"*cost effective, economical*

[22] Tenth Book of the Code of Civil Procedure, s1040(3)

[23] International Arbitration Act, s10(3)

[24] International Arbitration Act 1974, s16 (3)

and quick."

In view of the aforementioned reasons, the policy of minimal judicial interference must not be applied in such a rigid manner such that the aggrieved party is forced to continue with arbitration proceedings and has no recourse until after the final award is rendered. Therefore, the parties should have the flexibility to approach the court against orders of the arbitral tribunal upholding its jurisdiction without waiting until the award is rendered by the arbitral tribunal. This would ensure speedy and effective resolution of jurisdictional issues. Additionally, this would also ensure legal certainty and efficient decision-making concerning jurisdictional issues. Accordingly, it is advisable to have an appropriate mechanism in the Act, allowing for an immediate court review of orders passed by the tribunal upholding its jurisdiction.

Thus, in order to bridge the gap and allow for such orders to be appealable, it is suggested that Section 37(2) of the Act should preferably be amended to allow for orders passed by the arbitral tribunal - rejecting the plea of lack of jurisdiction raised under Section 16 of the Act, to be appealable. The Act should also incorporate necessary provisions to ensure that such matters are decided expeditiously, given that the intent behind such an amendment is to ensure speedy and effective resolution of jurisdictional issues. Additionally, given that the purpose of providing the aforesaid appeal mechanism is for jurisdictional issues to attain finality at the earliest, Section 37(3) of the Act would ensure that no second appeal would lie from orders passed under Section 37(2) of the Act.

4. ADEQUATE SAFEGUARDS

It may also become relevant to address certain questions which would arise for consideration if such an appeal mechanism is provided in the Act.

4.1 WHETHER THE ARBITRATION PROCEEDINGS SHOULD CONTINUE PENDING DECISION OF THE COURT ON JURISDICTIONAL ISSUES?

First, the status of the arbitration proceedings when the court is deciding upon jurisdictional issues. It can be argued that the arbitration proceedings should continue whilst the court is deciding upon the jurisdictional challenge since the purpose behind expeditious disposal of jurisdictional issues is to ensure speedy and effective resolution of arbitration proceedings. On the other hand, it may be argued that if the court ultimately decides that the tribunal does not have jurisdiction to resolve the dispute, there would be a wastage of time and cost in

continuing with arbitration proceedings whilst such jurisdictional issue is being decided by the court. Arguably, both approaches can be justified, and there cannot be a blanket rule regarding the status of arbitration proceedings in such a case. Therefore, in such cases, an ideal approach would be to provide discretion to the arbitral tribunal to determine the status of arbitration proceedings whilst the court is deciding the jurisdictional issues. Accordingly, in line with Article 16(3) of the Model Law, the Act can provide that the arbitral tribunal "may" continue the arbitral proceedings while the court is deciding such an appeal.

4.2 WHETHER THE PROPOSED APPEAL MECHANISM SHOULD PRECLUDE THE REMEDY AT THE STAGE OF SETTING SIDE PROCEEDINGS?

Second, the other remedies which will be available to the party upon introduction of the proposed appeal mechanism under Section 37 of the Act.

Post the introduction of the proposed appeal mechanism, in the scenario where tribunal rejects a Section 16 plea and upholds its jurisdiction; an aggrieved party will now have a dual remedy: (a) in the form of appeal under Section 37 of the Act; and (b) at the stage of setting-aside proceedings under Section 34 of the Act.

This would lead to three primary problems. *First*, the aggrieved party, in a scenario where the tribunal accepts the plea and holds that it does not have jurisdiction, would only have one shot remedy before the Court under the Act, while the aggrieved party in the other scenario where will have a dual remedy under the Act. Therefore, in essence, the Act will treat the aggrieved parties differently despite them being situated in the same manner, i.e., being aggrieved by the arbitral tribunal's order on the jurisdictional plea. This differential treatment is not permissible under Article 14 of the Constitution.[25] *Second*, the provision of such a dual shot remedy will necessarily increase judicial interference in arbitration, which is against the ethos of the Act. *Third*, it would defeat the very purpose of introducing such appeal mechanism i.e. to resolve the jurisdictional issues expeditiously.

Accordingly, in order to counter the aforementioned problems, India should follow a balanced approach wherein, as a general rule, a party should be precluded from raising jurisdictional issues in setting-aside proceedings under Section 34 of the Act as it has already preferred an appeal under Section 37 of the Act. However, such a general rule should not be imposed as a blanket rule, and carving certain exceptions may become necessary. For instance, in cases wherein the parties can demonstrate discovery of a new fact that was not

[25] *Maneka Gandhi v. Union of India* (1978) 1 SCC 248, para 16.

raised in the appeal proceedings and could not have reasonably been in the knowledge of the parties, recourse in setting aside proceedings under Section 34 may be allowed. Therefore, parties should be allowed to take recourse in setting-aside proceedings under Section 34 of the Act only in exceptional circumstances – an assessment of which may be done on a case-to-case basis by the court. This approach would balance both the interests, i.e., of ensuring that jurisdictional issues attain finality at an early stage and ensure the correctness of decisions on such issues.

4.3 WHETHER THE REMEDY SHOULD BE MADE AVAILABLE AT THE STAGE OF SETTING SIDE PROCEEDINGS IF NO APPEAL IS PREFERRED AT AN EARLIER STAGE?

A final issue to be addressed in this context is a situation where a party does not prefer an appeal under Section 37 of the Act and chooses to directly raise the jurisdictional plea again in Section 34 proceedings. In this context, the paper proposes to discuss the approach of other jurisdictions in relation to Article 16(3) of the Model Law.

In many jurisdictions such as Hong Kong, Germany, and Australia, if a party fails to challenge an order of the arbitral tribunal concerning jurisdictional issues under Article 16(3) of the Model Law, the same precludes it from subsequently attempting to rely on jurisdictional issues in setting aside proceedings or enforcement proceedings.[26] Nata Ghibradze, who has examined the issue of "preclusion of remedies under Article 16(3) of Model Law" in detail, attributes this approach to the primary purpose behind Article 16(3) of the Model Law, which is to determine jurisdictional issues at an early stage with legal certainty.27 Interestingly, in contrast to the approach followed in the aforesaid jurisdictions, Singapore has allowed such a challenge to be raised later in setting-aside proceedings in cases wherein a party has not preferred an appeal under Article 16(3) of the Model Law in a certain specific factual scenario. Recently, this question of law was visited by the Court of Appeal in Singapore, albeit only in the context of non-participating respondents. In *Rakna Arakshaka Lanka Ltd.* v. *Avant Garde Maritime Services (Pte) Ltd*28 ("**Rakna**"), the Respondent, i.e., Rakhna Arakshaka Lanka Ltd. ("**RALL**"), did not participate in the arbitration proceedings since it protested against the arbitral tribunal's jurisdiction. In the proceedings challenging the arbitral tribunal's jurisdiction, the tribunal issued a preliminary award upholding its

[26] Nata Ghibradze, 'Preclusion of Remedies under Article 16(3) of the UNCITRAL Model Law' (2015) 27(1) Pace Int'l l. Rev. 345, 385-389.

[27] ibid.

[28] *Rakna Arakshaka Lanka Ltd v. Avant Garde Maritime Services (Pte) Ltd.* (2019) SGCA 33, para 74-77.

jurisdiction. However, RALL did not challenge this preliminary award but sought to set aside the final award once the same was rendered by the arbitral tribunal. In this light, the question that arose before the Court of Appeal was whether RALL could raise the jurisdictional challenge in setting-aside proceedings given that it had not raised it earlier under Article 16(3) of the Model Law. The Singapore Court of Appeal finally concluded that even if a non-participant respondent failed to avail the remedy under Article 16(3) of Model Law, it was not precluded from raising jurisdictional issues in setting-aside proceedings. Thus, while the aforesaid decision was in the context of a non-participant party, it seems to suggest that in certain exceptional circumstances, a failure to raise a challenge under the appeal mechanism provided under Article 16(3) of the Model Law would not preclude a party from raising jurisdictional issues later in setting-aside proceedings.

In light of the divergent views taken by various jurisdictions, it is suggested that generally, if an appeal against an order dismissing a Section 16 application is not made at the first instance under Section 37 of the Act, the party should be precluded from raising such jurisdictional issues at the stage of setting-aside proceedings under Section 34 of the Act. The underlying rationale of the approach is that a party who could have raised such an issue at an earlier stage but chose not to do so should not be ideally allowed to raise such issues in setting-aside proceedings later.[29]

The aforesaid approach would be in line with the observations of the Hon'ble Supreme Court in *Narayan Prasad Lohia* v. *Nikunj Kumar Lohia & ors.*[30] In the said decision, the Hon'ble Court considered if a party should be allowed to raise jurisdictional issues for the first time during setting-aside proceedings given that the same were not raised before the tribunal. In this regard, the Hon'ble Court observed that if a jurisdictional challenge is not raised under Section 16(2) before the arbitral tribunal, then such a party is deemed to have waived its right to raise such a challenge subsequently. In contrast to the aforesaid view, the Hon'ble Supreme Court in *M/s Lion Engineering Consultants* v. *State of Madhya Pradesh*[31] held that even if a party failed to raise a jurisdictional challenger under Section 16 (2) of the Act, such party may still be permitted to raise such a challenge during setting-aside proceedings under Section 34 of the Act. However, the aforesaid decisions were rendered in a slightly factual

[29] NG, Iris; NG, Melissa; SOH, Andre; and CHEN, Siyuan, 'Five recurring problems in international arbitration: The relationship between courts and arbitral tribunals' 2020 8 Indian Journal of Arbitration Law 19, 26-32.

[30] *Narayan Prasad Lohia v. Nikunj Kumar Lohia & Ors.* (2002) 3 SCC 572, para 16.

[31] *M/s Lion Engineering Consultants v. State of Madhya Pradesh*, (2018) 16 SCC 758, para 4.

scenario i.e., when a plea of jurisdictional challenge was raised for the first time only in the setting-aside proceedings. Moreover, given that both the decisions are rendered by a three-judge bench of the Supreme Court, it is unclear as to which decision holds ground. However, the author agrees with the view taken in the *Lohia* judgment in view of the aforesaid reasons.

However, taking from the *Rakna* approach, a party may be allowed to take recourse to setting-aside proceedings under Section 34 of the Act in cases where it can demonstrate that the recourse to the appeal mechanism was not effectively available to it.

5. CONCLUSION

In conclusion, although India's legal framework for commercial arbitration follows a pro-arbitration approach in line with the principle of minimal judicial interference, some modifications appear necessary to bring it in line with the Model Law approach. Introducing an appeal mechanism for orders passed by the arbitral tribunal upholding its jurisdiction under Section 16 of the Act while providing adequate safeguards to prevent excessive interference by courts – would ensure speedy and effective resolution of jurisdictional issues. The benefits of the approach are multi-fold. This will likely ensure legal certainty of jurisdictional issues at an early stage and prevent a situation where the award passed by the arbitral tribunal is nullity. As a consequence, this would prevent wastage of time and costs in arbitration proceedings in case the court decides that the tribunal does not have jurisdiction to adjudicate upon the disputes in the arbitration proceedings. In the proposed framework, the court should have the discretion to order continuation of arbitral proceedings pending decision on the issue of the tribunal's jurisdiction. Furthermore, a party should be precluded from raising jurisdictional issues in setting-aside proceedings under Section 34 of the Act if it has already preferred an appeal under Section 37 of the Act unless it can prove the existence of exceptional circumstances such as discovery of a new fact. However, in the event that a part chooses not to prefer the proposed right of appeal, it should not allowed to take recourse to setting-aside proceedings unless it can demonstrate that the recourse to the appeal mechanism was not effectively available to it.