

BACKGROUND

1. It is trite law that in case of an “international commercial arbitration”, when parties are unable to agree upon the appointment of, or fail to appoint an arbitrator/ arbitral tribunal, an application under section 11 of the Arbitration and Conciliation Act, 1996 (“**the Act**”), for appointment of arbitrator would lie to the Hon’ble Supreme Court of India, pursuant to section 11(12)(a) of the Act.
2. In the present case, disputes arose between Antikeros Shipping Corporation, a body corporate incorporated in Liberia, and Adani Enterprises Limited, a company incorporated under the laws of India. Antikeros Shipping Corporation (“**Respondent**”) (the Claimant in the arbitration proceedings) filed an Application under section 11 of the Act (“**Arbitration Application**”) for the appointment of an arbitrator, before the Bombay High Court (“**High Court**”). The High Court passed an order dated 21 April 2011 (“**Order**”) under section 11 of the Act and appointed an arbitrator. It is pertinent to note that Adani Enterprises Limited (“**Petitioner**”) (the Respondent in the arbitration proceedings) did not appear before the High Court in the aforesaid Arbitration Application.
3. During the pendency of the arbitration proceedings, the Petitioner filed a Review Petition dated 24 August 2018 (“**Review Petition**”) before the High Court seeking review of the Order on the ground that the arbitration was an “international commercial arbitration” and since the High Court inherently lacked jurisdiction to appoint an arbitrator in an “international commercial arbitration”, the Order is non-est and void in law. The Petitioner also filed a Notice of Motion dated 24 August 2018 (“**Notice of Motion**”) in the Review Petition seeking condonation of delay.
4. The High Court *inter alia* held that since the arbitration was an “international commercial arbitration” within the meaning assigned to it under Section 2(1)(f) of the Act, the Respondent ought to have filed the Arbitration Application before the Hon’ble Supreme Court of India and not the High Court. The High Court *inter alia* held that the Order was non-est in law and admittedly passed without jurisdiction. The High Court condoned the delay of eight years in filing the Review Petition, allowed the Review Petition, and recalled the Order in the Arbitration Application.
5. In this write up, we have reflected upon the findings of the High Court. The issues which arose for consideration before the High Court are as follows:
 - (i) Whether the Order in the case of an “International Commercial Arbitration” as has been defined in Section 2(1) (f) of the Act is without jurisdiction, and is ab initio null and void;
 - (ii) Whether the High Court has the power of procedural review; and
 - (iii) Whether delay or laches can be a ground to deny review of an Order, which ex-facie is void ab-initio.

FACTUAL MATRIX

6. Disputes arose between the Petitioner and the Respondent, and the Respondent filed an Arbitration Application under section 11 of the Act for appointment of an arbitrator. By an Order dated 21 April 2011, the High Court appointed an arbitrator on behalf of the Petitioner. The nominee of the Respondent and the arbitrator appointed on behalf of the Petitioner under the Order appointed the presiding arbitrator. Accordingly, the arbitral tribunal was constituted.
7. The Petitioner raised a Jurisdiction Challenge to the constitution of the arbitral tribunal under Section 16 of the Act (“**Jurisdictional Challenge**”). It was urged by the Petitioner that since the arbitration between the Respondent and the Petitioner qualified as an “international commercial arbitration” within the meaning assigned to it under Section 2(1) (f) of the Act, the Arbitration Application ought to have been filed before the Supreme Court and not the High Court. Therefore, the arbitral tribunal

being improperly constituted had no jurisdiction. The arbitral tribunal rejected the Jurisdictional Challenge under an order dated 19 September 2013 (“**Section 16 Order**”), and the arbitration proceedings continued until 2018.

8. During the final hearing in the arbitral proceedings, the Petitioner filed an application dated 3 August 2018 before the arbitral tribunal for recall of the Section 16 Order passed by the arbitral tribunal in the Jurisdictional Challenge (“**Application for Recall**”). However, the same was rejected by the arbitral tribunal.
9. Thereafter, while the arbitration proceedings were pending, the Petitioner filed the present Review Petition seeking review of the Order passed by the High Court in the Arbitration Application and the Notice of Motion seeking condonation of delay.

FINDINGS OF THE COURT

Arbitration qualified as an “international commercial arbitration” under section 2(1) (f) of the Act and therefore an application under section 11 of the Act would lie before the Apex Court – Impugned Order suffers from inherent lack of jurisdiction

10. The Petitioner placed reliance upon the judgment of this Hon’ble Court in the case of *Roptonal Ltd*² (“**Roptonal Case**”). In the *Roptonal Case*, in a similar factual scenario, the High Court erroneously appointed an arbitrator in the case of an “international commercial arbitration”. Thereafter upon a review of the order, the High Court in the *Roptonal Case* recalled its order appointing the arbitrator and held that where there is a want of jurisdiction, the order passed by a Court is a nullity. Placing reliance upon the *Roptonal Case* and *Zuari Cement*³, the Petitioner submitted that when an Order is passed without jurisdiction, the order passed is a nullity.
11. Recognizing the undisputed fact that the Respondent is a body corporate incorporated outside India and therefore, section 2(1) (f) of the Act was squarely applicable to the case, the High Court concluded that admittedly, the subject matter of the present case is an “international commercial arbitration”. The High Court held that it is settled law that in case of an international commercial arbitration, an application under section 11 of the Act for appointment of arbitrator would only lie to the Hon’ble Supreme Court of India and therefore the Order inherently suffered from lack of jurisdiction.

Jurisdiction can only be vested by a statute and not by consent, acquiescence, or waiver

12. Relying upon *Sushil Kumar*⁴, *Harshad Chiman Lal*⁵, and *State of Orissa*⁶, the Petitioner submitted that when a Court lacks jurisdiction, the parties cannot by consent confer jurisdiction and in such a case, principles like waiver, estoppels and acquiescence are also not applicable. Opposing the submission of the Petitioner, the Respondent contended that the Petitioner participated in the arbitration proceedings and therefore “acted on” the Order and acquiesced to the Order. The High Court held that jurisdiction can only be conferred by statute and that waiver, consent and acquiescence cannot confer jurisdiction.

² *Roptonal Ltd. and Anr. v. Anees Bamzee*, 2016 SCC Online Bom 3555

³ *Zuari Cement Ltd. v. Regional Director, ESIC Hyderabad*, (2015) 7 SCC 690

⁴ *Sushil Kumar Mehta v. Gobind Ram Bohra (DEAD) through his LRS*, (1990) 1 SCC 193

⁵ *Harshad Chiman Lal Modi v. DLF Universal Ltd.*, (2005) 7 SCC 791

⁶ *State of Orissa & Ors. v. Brundaban Sharma & Anr.*, 1995 Supp (3) SCC 249

Section 11 of the Act is a non-derogable provision

13. The Respondent contended that the Petitioner waived its right to object to the Order under section 4 of the Act. Opposing the same, the Petitioner submitted that section 4 of the Act deals with the rights and obligations of the parties as provided under the Act or in the arbitration agreement, from which the parties can derogate or waive non-compliance thereof. Since section 11(6) relates to the powers of the Court, it is incapable of being derogated from by the parties. In this context, the Petitioner sought reliance on *Jain Studios*⁷ and *State of Maharashtra*⁸. The High Court concluded that Section 11 of the Act is not a derogable provision and therefore the question of waiver at the instance of the Petitioner would not arise.

Review Petition is maintainable as it is a procedural review and not a review on merits

14. The Petitioner submitted that since all courts have the inherent power to review and correct procedural illegality, when an Order is passed ex facie in absence of jurisdiction, the same can be reviewed and corrected by the same court at any time, and at any stage. Contesting the maintainability of the Review Petition, the Respondent stated that the Petitioner was seeking a review on merits.
15. Relying upon *Kapra Mazdoor*⁹ and *State of Maharashtra*¹⁰, the High Court traced the power of review to the fact that the High Court is a Court of record and has a duty to correct an erroneous order made by it. Drawing a distinction between a procedural review and review on substantive merits, the High Court held that the exercise of procedural review will prevent the miscarriage of justice and correct an error which may have been previously committed. Recognizing its plenary power, the High Court upheld the maintainability of the Review Petition.

Review Petition is maintainable to correct an Order passed under section 11 of the Act

16. The Respondent submitted that the Order had attained finality since the arbitration proceedings had already commenced and therefore such Order cannot be reviewed. Relying upon *Jain Studios*, *State of Maharashtra*¹¹, *Soham Shah*¹², and *Roptonal Case*, the High Court reiterated that the High Court is a court of record and possesses the necessary jurisdiction to recall its own order.
17. Referring to *MSP Infrastructure*¹³, the Respondent submitted that the Petitioner is precluded from challenging the Order since it failed to raise the issue in its Statement of Defence. Upon examining the factual matrix, the High Court concluded that in the present case the Petitioner filed a Jurisdictional Challenge and an Application for Recall before the arbitral tribunal. Recognizing the conduct of the Petitioner in this regard, the High Court rejected the plea of the Respondent.

Delay or latches is no bar to recall an order which is bad in law

⁷ *Jain Studios Ltd. through its president v. Shin Satellite Public Co. Ltd.*, (2006) 5 SCC 501

⁸ *State of Maharashtra v. Hindustan Construction Company Ltd.*, Review Petition No. 2 of 2013 in Arbitration Appeal No. 6 of 2007 in Arbitration Application No. 44 of 2003

⁹ *Kapra Mazdoor Ekta Union v. Birla Cotton, Spinning and Weaving Mills Ltd and Another.*, (2005) 13 SCC 777

¹⁰ *State of Maharashtra v. Hindustan Construction Company Ltd.*, Review Petition No. 2 of 2013 in Arbitration Appeal No. 6 of 2007 in Arbitration Application No. 44 of 2003

¹¹ *State of Maharashtra v. Hindustan Construction Company Ltd.*, Review Petition No. 2 of 2013 in Arbitration Appeal No. 6 of 2007 in Arbitration Application No. 44 of 2003

¹² *Soham Shah v. Indian Film Company Limited*, 2016 SCC OnLine Bom 147

¹³ *MSP Infrastructure Limited v. Madhya Pradesh Road Development Corporation Limited*, (2015) 13 SCC 713

18. Considering that the Review Petition was filed after delay of eight years, the Petitioner submitted that delay would not be relevant in a case where the order is wholly without jurisdiction and delay by itself cannot clothe the High Court with powers when it lacks such power under the statute. Relying upon *Urban Improvement*¹⁴, and *Shaikh Mohammad*¹⁵, the Petitioner submitted that the issue of limitation does not arise when an order is a nullity for want of jurisdiction. Opposing the submissions, the Respondent contended that the legality of an order cannot be determined till sufficient cause is shown for condonation of delay.
19. The High Court concluded that the “..I do not believe that delay and latches would prevent this Court from exercising jurisdiction in re-calling an order which is otherwise bad in law”. Limiting the scope of the Review Petition to determine whether the Order lacked jurisdiction or not, the High Court held that the Order was non-est in law and therefore the High Court ought to condone the delay and recall the Order.

CONCLUSION AND ANALYSIS

Based on the above findings, the Review Petition was allowed, the delay was condoned, and the High Court recalled its Order in the Arbitration Application as the Order was non-est.

The High Court rejected the Respondent’s claim for costs on the basis that the Respondent itself had filed the Arbitration Application in the wrong court and therefore, the Respondent cannot take advantage of its own wrong. Upon observing that both parties took eight years to remedy the ignorance of law, the High Court made no order as to costs.

Seemingly, the settled position of law that any order made without jurisdiction is non-est and a nullity weighed in on the High Court. By condoning the delay in filing the Review Petition, the High Court has held that delay or latches cannot be a ground to lend legal sanctity to an Order which is otherwise non-est and bad in law. Since the appointment of one of the members of the tribunal has been held to be null and void, the consequential appointment of the third member is also null and void, rendering the constitution of the tribunal non-est. Hence, as a result, the tribunal has no jurisdiction and the proceedings before the tribunal would stand terminated.

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¹⁴ *Urban Improvement Trust, Jodhpur v. Gokul Narain (DEAD) by Lrs. & Anr.*, (1996) 4 SCC 178

¹⁵ *Shaikh Mohammad Murughay and Anr. v. State of Maharashtra and Ors.*, 2012 (4) Mh. LJ. 771