

**NATIONAL ALUMINIUM COMPANY LIMITED V. SUBHASH INFRA EN-
GINEERS PVT. LTD. AND ANOTHER, 2019
SCC ONLINE SC 1091**

Supreme Court of India; 2-judge bench, Abhay Manohar Sapre and **R.
Subhash Reddy JJ**; decided on 23 August 2019

To rule on existence or validity of the arbitration agreement is the arbitrator's
domain and not of the civil court

National Aluminum Company Limited (“NALCO”), an enterprise of the Government of India had issued a tender for certain construction in the State of Odisha. Subhash Infra Engineers Pvt. Ltd. (“SIE”) submitted its offer, which NALCO accepted and issued a work order. SIE wanted some changes in the work order and later informed that the order was not acceptable. Later, SIE expressed its inability to carry out the work and disputes arose. NALCO took the position that some other agency will complete the work at the risk and cost of SIE. It later raised a claim of around five crores and demanded payment failing which it said arbitration would be invoked. SIE disputed that there was any binding contract. NALCO went ahead and sent a panel of three names to SIE to select an arbitrator. When SIE disputed the existence of an arbitration agreement, NALCO appointed one of its former Chairman as sole arbitrator.

The arbitrator initiated arbitral proceedings. In response, SIE filed a civil suit for a declaration that the appointment was null and void, and also a permanent injunction restraining the arbitrator from carrying on the arbitral proceedings. SIE also sought a temporary injunction.

The trial court refused the temporary injunction, but on SIE’s appeal against that refusal, the appellate court granted it. NALCO challenged that order before the High Court, which dismissed the petition.¹⁹

¹⁹ *NALCO v. Subhash Infra Engineers*, CR No.2471 of 2016(O&M) decided on 22 October 2016 by Raj Mohan Singh, J. A review of this judgment on the High Court’s website shows that the High Court made a detailed examination of the facts. It found that there was no arbitration agreement within the meaning of Section 7, ACA. The court recognized that the arbitral tribunal had the power to rule on the existence and validity of an arbitration agreement, but said

NALCO approached the Supreme Court, which set aside the High Court's judgment and appointed another arbitrator.

Its reasoning was as follows: -

1. Competence of Arbitral Tribunal to Rule on its Own Jurisdiction

In *Kvaerner Cementation India Limited v. Bajranglal Agarwal*, (2012) 5 SCC 214 the Supreme Court examined a similar issue and held that any objection concerning existence or validity of the arbitration agreement can be raised only by way of an application under Section 16 of the ACA and a Civil Court cannot have jurisdiction to go into such question.²⁰

If SIE wants to object about the existence or validity of the arbitration agreement, it is open for it to move an application before the arbitrator, but with such plea, it cannot maintain a suit for declaration and injunction.

2. On Appointment of Arbitrator

NALCO appointed a former Chairman-cum-Managing Director of the company itself as an arbitrator, who has commenced arbitration proceedings. But he cannot act as an arbitrator having regard to the Fifth Schedule²¹ introduced by Act 3 of 2016 (that is, the 2015 amendments with effect from 23 October 2015).

The court appointed a former judge as an arbitrator.

that "for the applicability of the same, there must be a concluded document and lawful arbitration agreement".

²⁰ A 3-judge bench of G.B. Pattanaik, S.N. Phukan and B.N. Agrawal JJ, decided on 21 March 2001. The court had held: "There cannot be any dispute that in the absence of any arbitration clause in the agreement, no dispute could be referred for arbitration to an Arbitral Tribunal. But, bearing in mind the very object with which the Arbitration and Conciliation Act, 1996 has been enacted and the provisions thereof contained in Section 16 conferring the power on the Arbitral Tribunal to rule on its own jurisdiction, including ruling on any objection with respect to existence or validity of the arbitration agreement, we have no doubt in our mind that the civil court cannot have jurisdiction to go into that question".

²¹ Several provisions relating to independence and impartiality of arbitrators were introduced by the 2015 Amendments. It included introduction of Section 12 (Grounds for Challenge); the Fifth Schedule, and the Seventh Schedule. The Fifth Schedule sets out grounds which give rise to justifiable doubts as to the independence or impartiality of arbitrators.