The Ever-Shifting Paradigm of the Scope of Judicial Intervention at the Stage of Appointment of Arbitrators

Shambhu Sharan
Partner
E: shambhu@singhania.in

Ankit Jain
Senior Associate
E: ankit@singhania.in

The author of this article attempts to map the scope and principle of judicial intervention at the stage of appointment of arbitrators under Section 11 of the Arbitration and Conciliation Act, 1996 [hereinafter referred to as "***the Act***"] which gets reflected in several pronouncements by the Supreme Court and High Courts and an attempt has been made to highlight the shift in applying the principle of minimum judicial intervention at the pre-arbitral stage of appointment of the arbitrator.

Scope of Section 11: Judicial Interpretation over the years

Pre-2015 Amendment:

Examining the scope of the power of the Court under Section 11 of the Act in the matter of appointment of arbitrator (s), a seven-judge bench of the Supreme Court in *S.B.P. & Co. vs. Patel Engineering Ltd. & Ors.*[1] *inter alia* held that the power of appointing the arbitrators exercised by the Chief Justice of a High Court or the Chief Justice of India is not an administrative power but a judicial power. It further held that while exercising such power of appointment, it shall be within the jurisdiction of the Chief Justice or the designated Judge to examine the existence of a valid arbitration agreement, the existence of a live claim, existence of the condition for the exercise of such power including the conditions on qualification(s), independence, and impartiality of the arbitrator(s).

The above position was affirmed subsequently in *National Insurance Co. Ltd. vs. Boghara Polyfab Pvt. Ltd.*[2].

2015 Amendment Act: Limited scope of judicial intervention

With the increasing scope of judicial intervention, the Law Commission of India in its 246th Report[3] recommended curtailing the scope of judicial intervention by limiting it to a prima facie assessment of existence of an arbitration agreement. Consequently, the Arbitration & Conciliation

(Amendment) Act, 2015 [hereinafter referred to as "**2015 Amendment Act**"] was notified which *inter alia* minimized judicial intervention in matters pertaining to the appointment of arbitrator(s) by capping the Court's role to "examination of the existence of an Arbitration Agreement. The 2015 Amendment Act inserted a non-obstante clause in the provision i.e., Section 11(6-A), thereby rendering the earlier judicial precedents passed by the Supreme Court in Patel Engineering Ltd. (*supra*) and National Insurance Co. Ltd. case (*supra*) as no longer relevant.

Post the 2015 Amendment Act, new judicial pronouncements have minimized the extent of intervention by Courts at the stage of a Section 11 application. Notably, the Supreme Court in *Duro Felguera S.A. vs. Gangavaram Port Ltd*.[4] held that the legislative intent post the 2015 Amendment in the Act is undeniably limited to the effect that while deciding a Section 11 application, all that Courts are required to examine is the mere existence of an arbitration agreement, nothing more and nothing less.

However, despite the above, the Supreme Court subsequently passed judgments with somewhat divergent views. In *Oriental Insurance Company Ltd. vs. Narbheram Power and Steel Pvt. Ltd.*[5] and *United India Insurance Company Ltd. and Anr. vs. Hyundai Engineering and Construction Co. Ltd. and Ors.*[6], the Supreme Court delved into examining the arbitrability of claims by Courts at the stage of a Section 11 application.

In *Vidya Drolia and Ors. vs. Durga Trading Corporation*[7], the Supreme Court observed that the "validity" of an arbitration agreement is apart from its "existence". It was observed that the issue as to whether the word "existence" would include weeding out arbitration clauses in agreements that indicate that the subject matter is incapable of arbitration, was required to be authoritatively decided by a three Judges Bench of the Supreme Court.

These conflicting decisions were subsequently settled by the Supreme Court in *Mayavati Trading Pvt. Ltd. vs. Pradyuat Deb Burman*[8] wherein a three Judges Bench of the Court after meticulously examining the 246th Law Commission of India Report, Report of the High Level Committee pertaining to Institutionalization of Arbitration Mechanism in India[9] and the Statement of Objects and Reasons of the 2015 Amendment Bill, held that post 2015, the scope of the power of the Court under Section 11 of the Act is limited to examination of the existence of the arbitration agreement.

The 2019 Amendment Act:

On 09.08.2019, the President of India gave assent to the Arbitration & Conciliation (Amendment) Act, 2019 [hereinafter referred to as "**2019 Amendment Act**"]. Amongst other things, the 2019 Amendment Act sought to widen the scope of the judiciary by omitting sub-section (6-A) to Section 11 of the Act. However, interestingly, while the 2019 Amendment Act was published on the same date the enforcement of its provisions was deferred till notification by the Central Government. Vide Gazette Notification[10] dated 30.08.2019, the Central Government brought into force all amendments except Sections 2, 3, 10, 12, 14 and 16 of the 2019 Amendment Act i.e., amendments to Sections 2, 11, 50 and Fourth Schedule of the Act,

including the insertion of Part IA 'Arbitration Council of India' and the Eighth Schedule have not yet been notified.

As Section 3 of the 2019 Amendment Act (i.e., the corresponding section seeking to amend Section 11 of the Act) is yet to be notified by the Central Government, the omission of sub-section (6-A) from Section 11 of the principal Act is yet to take effect.

Post 2019 Amendment Act, the judicial trend set by the Supreme Court seems to be on a much different footing given its interpretation of sub-section (6-A) to Section 11, encompassing within itself an expansive scope of inquiry by Courts at the stage of a Section 11 application.

Post 2019 Amendment: Enlarged scope of judicial intervention

Even though Section 11(6-A) still exists in the Act meaning thereby that the scope of the Courts would be limited to the examination of the existence of an arbitration agreement, the Courts in recent pronouncements, have enlarged the scope. Three Judges Bench of the Supreme Court in *Vidya Drolia and Ors. vs. Durga Trading Corporation*[11] has held that the scope of the Court under Sections 8 and 11 of the Act is not only to examine the existence of an arbitration agreement but also to examine the prima facie validity of an arbitration agreement, which includes the examination of the following:

i. Whether the arbitration agreement was in writing? or
ii. Whether the arbitration agreement was contained in exchange of letters, telecommunication, etc.?
iii. Whether the core contractual ingredients qua the arbitration agreement were fulfilled?
iv. On rare occasions, whether the subject matter of dispute is arbitrable?

Means thereby, Courts at the referral stage would apply the prima facie test based on the principles set out in the judgment. That, in cases of debatable and disputable facts, and good reasonable arguable cases, etc., the Court would force the parties to abide by the arbitration agreement as the arbitral tribunal has primary jurisdiction and authority to decide the disputes including the question of jurisdiction and non-arbitrability.

The Supreme Court has thus held that although in rare cases, the Courts may interfere at the stage of Section 11 when it is manifestly certain that the arbitration agreement is non-existent, invalid or that the disputes are non-arbitrable. The rationale behind such limited review was to protect parties from being forced to arbitrate matters which are 'non-arbitrable'. The Supreme Court in its wisdom had noted therein the glaring differences in the statutory scheme and language of the amended Section 8 of the Act in comparison with the amended Section 11(6A), which needed ironing out to remove the disparities in two *pari materia* provisions under the Act.

Post, Vidya Drolia (*supra*), the Supreme Court in *DLF Home Developers vs. Rajapura Homes Pvt. Ltd. and Anr.*[12] observed that Courts at the stage of appointment of the arbitrator are not expected to act mechanically and merely deliver a dispute to a chosen Arbitrator; the Courts are in fact, obliged to apply their mind to the core preliminary issues, *albeit*, within the

framework of Section 11(6-A) of the Act. The intention behind such a review, is not to usurp the jurisdiction of the Arbitral Tribunal but rather to streamline the arbitration process.

Subsequently, further expounding the power of Courts, the Supreme Court in *Indian Oil Corpn. Ltd. vs. NCC Ltd.*[13] observed that the Arbitral Tribunal may have jurisdiction and authority to decide the disputes including the question of jurisdiction and non-arbitrability i,e., whether a dispute is arbitrable or not, however, the same can also be considered by Courts at the stage of deciding a Section 11 application in cases where the facts are very clear and glaring and where there is existence of specific clauses in the agreement between the parties *qua* exception of certain issues from the purview of arbitration. Even at the stage of deciding a Section 11 application, the Court may conduct a prima facie test to consider even the aspect with regard to 'accord and satisfaction' of the claims.

Most recently, in *Emaar India Ltd. vs. Tarun Aggarwal Projects LLP*[14], the Supreme Court while deciding an appeal arising out of an Order passed by the High Court in exercise of its powers under Section 11(6) of the Act, remitted the matter back to the High Court for holding a preliminary inquiry in light of the Supreme Court's earlier observations in Vidya Drolia (*supra*) and Indian Oil Corpn. Ltd. case (*supra*).

Applying the dicta laid down by the Supreme Court in its recent judicial pronouncements, the Delhi High Court vide its Judgment dated 06.10.2022 in *Janta Associates and Co. Ltd. vs. Indian Oil Foundation and Ors.*[15] declined the petitioner's request to refer the disputes to arbitration while observing the presence of an excepted matter clause in the agreement between the parties which *inter alia* specifically excluded the dispute regarding whether a claim is a Notified Claim or not, from the scope of arbitration. Recently, vide Judgment dated 16.11.2022, the Delhi High Court in *Vikram Bakshi vs. Sonia Khosla & Anr.*[16] dismissed a petition under Section 11 of the Act observing that intra-company disputes being the subject matter of the proceedings, were non-arbitrable.

Conclusion

While the scope and ambit of judicial intervention at the stage of an application under Section 11 of the Act has been widened through recent judicial pronouncements by the Supreme Court, the scope of the said examination may further get expansive, as and when the Central Government notifies the amendment to Section 11 of the Act under the 2019 Amendment Act, thereby enforcing the omission of sub-section (6A) from Section 11 of the Act. This contrasting regime is in variance to the legislative intent under Section 5 of the Act in the opinion of the author and also undermines the fundamental principle of party autonomy in the arbitration to some extent.

**Views expressed in this article are the author's personal views.*

[1] S.B.P. & Co. v. Patel Engineering Ltd. & Ors., (2005) 8 SCC 618.

[2] National Insurance Co. Ltd. v. Boghara Polyfab Pvt. Ltd., (2009) 1 SCC 267.

[3] Law Commission Of India, *Amendments to the Arbitration and Conciliation Act 1996* (Report No. 246, 2014), https://cdnbbsr.s3waas.gov.in/s3ca0daec69b5adc880fb464895726dbdf/uploads/2022/08/2022081615.pdf.

[4] Duro Felguera S.A. v. Gangavaram Port Ltd., (2017) 9 SCC 729.

[5] Oriental Insurance Company Ltd. v. Narbheram Power and Steel Pvt. Ltd., (2018) 6 SCC 534.

[6] United India Insurance Company Ltd. and Anr. v. Hyundai Engineering and Construction Co. Ltd. and Ors., (2018) 17 SCC 607.

[7] Vidya Drolia and Ors. v. Durga Trading Corporation, (2019) 20 SCC 406.

[8] Mayavati Trading Pvt. Ltd. v. Pradyuat Deb Burman, (2019) 8 SCC 714.

[9] B. N. Srikrishna, *Report of the High Level Committee to Review the Institutionalisation of Arbitration Mechanism in India* (2017), https://legalaffairs.gov.in/sites/default/files/Report-HLC.pdf.

[10] Department of Legal Affairs, *NOTIFICATION* (REGD. NO. D. L.-33004/99, 2019), https://legalaffairs.gov.in/sites/default/files/notificaiton%20arbit.pdf.

[11] Vidya Drolia and Ors. v. Durga Trading Corporation, (2021) 2 SCC 1.

[12] DLF Home Developers v. Rajapura Homes Pvt. Ltd. and Anr, 2021 SCC OnLine SC 781.

[13] Indian Oil Corpn. Ltd. v. NCC Ltd., 2022 SCC OnLine SC 896.

[14] Emaar India Ltd. v. Tarun Aggarwal Projects LLP, 2022 SCC OnLine SC 1328.

[15] Janta Associates and Co. Ltd. v. Indian Oil Foundation and Ors., MANU/DE/3812/2022.

[16] Vikram Bakshi v. Sonia Khosla & Anr., MANU/DEOR/188607/2022.