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# LIMITED ENQUIRY SCOPE BY COURTS WHILE APPOINTING AN ARBITRATOR UNDER SECTION 11 OF THE ARBITRATION AND CONCILIATION ACT, 1996

- DISCUSSION ON THE 2015 AMENDMENTS VS. THE 2019  
AMENDMENTS TO THE ACT

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## Introduction

In order to broaden the scope and strengthen the status of Institutional Arbitration in our country, the Central Government constituted a High-Level Committee under the Chairmanship of Justice B.N. Shririshna. The terms of reference of the Committee, *inter-alia*, included:-

- a. Examination of the effectiveness of the existing arbitration mechanism by studying the functioning and performance of arbitral institutions in India;
- b. Devising a road map to promote the institutional arbitration mechanism in India and,
- c. Evolution of an effective and efficient arbitration eco-system for commercial dispute resolution and the suggestion of reforms in the Arbitration and Conciliation Act, 1996 ('Act').

Subsequently, the Arbitration and Conciliation (Amendment) Bill, 2019 was introduced in the Rajya Sabha by the Ministry of Law and Justice on July 15, 2019. On August 9, 2019, the President of India gave his assent to the amendments to the Act and the same has been published in the Official Gazette of India ("**2019 Amendments**"). The salient/key features of the amended Act are<sup>1</sup> :-

- d. The establishment and incorporation of an independent & autonomous body namely, the "Arbitration Council of India";
- e. An amendment to Section 11 of the Act i.e. "Appointment of Arbitrators";
- f. An amendment to Section 23 of the Act i.e. relating to Statement of Claim, Statement of Defence and the time period for completion of pleadings and,
- g. To ensure that the Arbitrator and Arbitral Institute maintain confidentiality of information.

One of the substantial amendments introduced by the 2015 amendments to the Act ("**2015 Amendment**") was insertion of sub-section (6A) to Section 11 of the Act, which was introduced to broaden the role of Arbitral Tribunal to rule on in its own jurisdiction and limit the role of the Court only to the "*examination of an Arbitration Agreement*".

The intention was to minimise judicial intervention, so that the arbitral proceeding is not thwarted at the threshold, when preliminary objections are raised by one of the parties. In the recent 2019 Amendments to the Act, sub-section (6A) has been omitted (though yet to be notified).

The objective of this article is to discuss the scope of the Court's role whilst appointing an arbitrator in the backdrop of Section 11(6A) inserted vide the 2015 Amendment and its subsequent omission in 2019. Part II of this Article seeks to analyze Section 11 (6) prior to the 2015 Amendment in lieu of the judgment passed by the Supreme Court in the matter of *SBP vs. Patel Engineering*,<sup>2</sup> and the subsequent judgment of *National Insurance vs Boghra Polycab*.<sup>3</sup> Part II also sets out the scope of the Courts subsequent to the 2015 Amendment and interpretation of the Courts thereto. Part III of the Article talks about the dual test of examining the "existence" and "validity" of an arbitration agreement under Section 11 of the Act. Part IV discusses the amendments made to the Act in the year 2019 and the recent judgments passed by the Supreme Court and Part V concludes the article.

## Nature of Section 11

### Scope of Section 11 Prior To 2015 Amendment

The Supreme Court has had the occasion to deliberate upon the *scope* and *nature* of permissible pre-arbitral judicial intervention, especially in the context of Section 11 of the Act. Whilst one of the

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<sup>1</sup> The following features have been adopted from the Statement of Objects and Reasons of the Arbitration and Conciliation (Amendment) Bill, 2019).

<sup>2</sup> (2005) 8 SCC 618.

<sup>3</sup> 2009 (1) SCC 267.

questions was framed in terms of whether such a power is a “judicial” or an “administrative” power, the real issue underlying such nomenclature/description was the scope of the Courts’ powers – i.e. the scope of arguments which a Court will consider while deciding whether to appoint an arbitrator or not – i.e. whether the arbitration agreement exists, whether it is null and void, whether it is voidable etc.; and which of these it should leave for decision of the Arbitral Tribunal, and the nature of such intervention – i.e. would the Court consider the issues in detail or whether the same be left for determination by the Arbitral Tribunal?

After a series of cases culminating in the decision in *SBP v Patel Engineering (supra)*, the Supreme Court held that the power to appoint an arbitrator under Section 11 is a “judicial” power. The judgment, *inter-alia*, also held that the Chief Justice could delegate the power to appoint arbitrators to another Judge and not an institution. Therefore, the arbitral institutions, which were qualified to act as appointing authorities, were not taken into consideration.

Following this judgment, the scope of intervention was subsequently clarified in *National Insurance Co. Ltd. v Boghara Polyfab Pvt. Ltd.*,<sup>4</sup> where the Court laid down the following –

- i. “The issues (first category) which Chief Justice/his designate will have to decide are (a) Whether the party making the application has approached the appropriate High Court? (b) Whether there is an arbitration agreement and whether the party who has applied under Section 11 of the Act, is a party to such an agreement?
- ii. The issues (second category) which the Chief Justice/his designate may choose to decide are: (a) Whether the claim is a dead (long barred) claim or a live claim? (b) Whether the parties have concluded the contract/transaction by recording satisfaction of their mutual rights and obligation or by receiving the final payment without objection?
- iii. The issues (third category) which the Chief Justice/his designate should leave exclusively to the arbitral tribunal are: (a) Whether a claim falls within the arbitration clause (as for example, a matter which is reserved for final decision of a departmental authority and excepted or excluded from arbitration)? (b) Merits of any claim involved in the arbitration.”

The scope of the judicial intervention was essentially restricted to situations where the Court/Judicial authority finds that the arbitration agreement does not exist or is null and void. In so far as the nature of intervention is concerned, it was recommended that in the event the Court/Judicial authority is *prima facie* satisfied against the argument challenging the arbitration agreement, it shall appoint the arbitrator and/or refer the parties to arbitration, as the case may be.

To summarise, prior to the 2015 Amendment, under the section the Chief Justice,<sup>5</sup> or any person or institution designated by him had the power to appoint an arbitrator where:-

- h. The parties have not agreed on a procedure for the appointment of arbitrator(s) and the default appointment procedure under Section 11(3) or Section 11(5) fails; or
- i. The parties have agreed upon an appointment procedure and such agreed procedure has not been followed.

The Courts have,<sup>6</sup> further went on to broaden its role/scope to say that the Chief Justice or his designate is bound to decide even some preliminary aspects, including on existence of a valid arbitration agreement, existence or otherwise of a live claim, and the qualification of arbitrator(s). The Courts also dealt with preliminary issues including jurisdiction, arbitration agreement, and limitation. The introduction of sub-section (6A) to Section 11 minimized the scope of the Courts.

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<sup>4</sup> [(2009) 1 SCC 267].

<sup>5</sup> Chief Justice of India in international commercial arbitrations and the Chief Justice of the relevant High Court for other arbitrations.

<sup>6</sup> *National Insurance Co. Ltd. vs. Boghara Polyfab (P) Ltd.* [(2009) 1 SCC 117].

## 2015 Amendment to the Act

By the 2015 amendment, the Act geared towards facilitating the speedy disposal of Section 11 applications by:-

- a. Enabling the designation of any person or institution as an appointing authority for arbitrators in addition to the High Court or Supreme Court under Section 11;
- b. Limiting challenges to the decision made by the appointing authority; and,
- c. Requiring the expeditious disposal of Section 11 applications, preferably within the prescribed sixty (60) days' time period.

Based on the recommendations of the Law Commission in the 246<sup>th</sup> Report,<sup>7</sup> Section 11 was substantially amended by the 2015 Amendment Act, to reduce the judicial intervention while appointing an arbitrator by *non-obstante* sub-section, and to reinforce the "*Kompetenz-kompetenz*",<sup>8</sup> principle enshrined under Section 16 of the Act.

Sub-section (6-A) as inserted under the 2015 Amendment reads as under:

**"(6-A) The Supreme Court or, as the case may be, the High Court, while considering any application under sub-section (4) or sub-section (5) or sub-section (6), shall, notwithstanding any judgment, decree or order of any court, *confine to the examination of the existence of arbitration agreement.*"**

(emphasis supplied)

As per sub-section (6-A), the power of the Court had been restricted only to the examination of the existence of an arbitration agreement. Earlier, the Courts had been given the power to examine other aspects as well i.e. limitation, whether the claims were referable for arbitration etc. However, the 2015 Amendment achieved in giving power to the arbitral tribunal to decide other preliminary issues if at all raised.

The amendment envisaged that the Courts shall not refer the parties to arbitration, only if it finds that there does not exist an arbitration agreement or that the arbitration agreement is null and void. If the Judicial authority is of the opinion that *prima facie* the arbitration agreement exists, then it shall refer the dispute to arbitration and leave the existence of the arbitration agreement to be finally determined by the arbitral tribunal. However, if the Judicial authority concludes that the agreement does not exist, then the conclusion will be final and not *prima facie*.

By virtue of the *non-obstante* clause incorporated in Section 11(6-A) previous judgments passed by the Supreme Court in *SBP & Co. vs. Patel Engineering Ltd.* (*supra*) and in *National Insurance Co. Ltd. vs. Boghara Polyfab (P.) Ltd.* (*supra*) were essentially overruled and/or no longer relevant.

## Judgments after 2015 Amendment to the Act

In the judgment passed by the Delhi High Court in the matter of *Picasso Digital Media (P) Ltd. v. Pick-A-Cent Consultancy Service (P) Ltd.*,<sup>9</sup> the Delhi High Court followed the same line of thoughts wherein it held that the Court, at the stage of appointment of arbitrator, cannot examine whether the respondent has a justified claim of misrepresentation against the petitioner as that would be a question to be examined by the arbitrator in the arbitration proceedings. This is one of the first case under Section 11(6-A) of the Act.

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<sup>7</sup> Amendments to the Arbitration and Conciliation Act, 1996, Report No. 246, Law Commission of India (August 2014),p.20.

<sup>8</sup> A doctrine whereby a Court or Arbitral Tribunal is empowered and has the competence to rule on its own jurisdiction, including determining all jurisdictional issues, and the existence or validity of an arbitration agreement.

<sup>9</sup> 2016 SCC Online Del (5581).

Subsequently, the Supreme in the matter of *Duro Felguera S.A. vs. Gangavaram Port Ltd.*,<sup>10</sup> in explicit terms clarified its role at the stage of Section 11(6-A) which is to *prima facie* examine the existence of a valid arbitration agreement and not its validity. The Apex Court concluded that:

*“The scope of the power under Section 11 (6) of the 1996 Act was considerably wide in view of the decisions in SBP and Co. (supra) and Boghara Polyfab (supra). This position continued till the amendment brought about in 2015. After the amendment, all that the Courts need to see is whether an arbitration agreement exists - **nothing more, nothing less.** The legislative policy and purpose is essentially to minimize the Court’s intervention at the stage of appointing the arbitrator and this intention as incorporated in Section 11 (6A) ought to be respected.”*

(emphasis supplied)

However, in the judgment of *United India Insurance Company Ltd. vs. Antique Art Exports Pvt. Ltd.*,<sup>11</sup> passed by the Supreme Court, the Court, while relying on *Duro Felguera S.A. (supra)*, took a contradictory view. In the present case, a petition under Section 11 of the Act was filed by the respondent before the Delhi High Court, after 11 weeks of the settlement of claim and release of discharge voucher for seeking appointment of an arbitrator, alleging that the appellant had used undue influence/coercion at the time of signing these documents. The High Court passed an order, directing the Arbitral Tribunal to adjudicate the disputes between the parties. The Apex Court by setting aside the order of the Delhi High Court stated that *prima facie* no dispute subsisted as the document in question was signed without any demur or protest. Further, there was no question of undue influence or coercion upon the execution of the letter of subrogation and the claim was settled with due accord/satisfaction leaving no arbitral dispute to be examined by an arbitrator. As apparent, the Apex Court seemed to have exceeded the intended scope/jurisdiction in deciding issues beyond merely deciding whether there existed an arbitration agreement between the parties.

In another recent judgment passed by the Supreme Court in the matter of *Garware Wall Ropes Ltd. vs. Coastal Marine Constructions & Eng. Ltd.*,<sup>12</sup> dealt with the effect of an arbitration clause contained in a contract, which is insufficiently stamped, under Section 11 of the Act. After considering the facts, it held that Courts could decide an arbitration application only after the contract containing an arbitration clause is adequately stamped. In other words, Courts cannot appoint arbitrator(s) when the contract containing the arbitration clause is insufficiently stamped. This is a landmark judgment which lays down the law that for a Court to act in any manner whatsoever upon any document/agreement/instrument, the same should be adequately stamped.

It could, however, be debated whether Courts need to analyze if an agreement is *adequately* stamped in the backdrop of sub-section (6A) of Section 11 of the Act, rather than merely decide “*existence*” of an arbitration agreement and let the Arbitral Tribunal adjudicate if the agreement is *adequately* stamped.

## Whether Section 11(6A) is confined to only deciding the “Existence” of an Arbitration Agreement?

The 246<sup>th</sup> Law Commission Report, while discussing the amendment to Section 11 of the Act, stated that the scope of the judicial intervention is only restricted to examining whether an arbitration agreement “**exists**” or is “**null and void**”. The 246<sup>th</sup> Law Commission Report has time and again emphasized on the dual test of examining the “*existence*” and “*validity*” of an Arbitration Agreement. The report further stated that if the ‘*judicial authority*’ is of the *prima facie* opinion that the arbitration agreement exists, then it shall refer the dispute to arbitration and leave the validity

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<sup>10</sup> 2017 (9) SCC 764.

<sup>11</sup> 2019 (5) SCC 362.

<sup>12</sup> 2019 (9) SCC 209. Decided on April 10, 2019.

of the arbitration to be determined by the Arbitral Tribunal. However, if the '*judicial authority*' concludes that the agreement does not exist, then the conclusion will be final and not *prima facie*. The amendment also envisages that there shall be conclusive determination as to whether the arbitration agreement is **null and void**.

However, when the Act came in force in 2015, Section 11(6A) only confined itself to only examining the "existence" of the arbitration agreement and did not include deciding the "validity" of the agreement. It is pertinent to note that the Apex Court in *Duro Felguera S.A. v. Gangavaram Port Limited (supra)* and later in *Mayavti Trading Pvt. Ltd. Vs. Pradyuat Deb Burman*<sup>13</sup> reiterated that Section 11(6A) is confined to the examination of the existence of an arbitration agreement.

Again recently, the Supreme Court on November 27, 2019 in the matter of *Uttarakhand Purv Sainik Kalyan Nigam Ltd. vs. Northern Coal Field Ltd.*,<sup>14</sup> held that Courts shall only examine existence of an arbitration agreement. All other preliminary objections including that of limitation at a pre-reference stage should be decided by the Arbitral Tribunal.

Contrast these with the decision of the Apex Court in February 2019, in the matter of *Vidya Drolia & Ors. vs. Durga Trading Corporation*,<sup>15</sup> while analyzing the jurisprudence regarding arbitrability of landlord-tenant disputes, stated that that the validity of an arbitration agreement is separate/apart from its existence. The Court while giving reference to the 246<sup>th</sup> Law Commission Report, stated that the said report speaks not only of the existence of arbitration agreement but also of its validity. However, the same has not been translated into the language of Section 11 (6A). The Apex Court, referred this issue to a larger Bench considering the importance of the moot question i.e. whether the word "existence" in Section 11(6A) of the 1996 Act would include weeding-out arbitration clauses in agreements which indicate that the subject-matter of the dispute is incapable of arbitration.

Even though the Apex Court has clarified the scope of judicial interference in the above-mentioned judgments, the Delhi Court in the following cases has applied the dual test of "existence" and "validity" in a different manner –

- (a) On January 27, 2020, the Delhi High Court in the matter of *Unique Reality Pvt. Ltd. vs. RC Infra Developers and Ors.*,<sup>16</sup> observed that the mandate of the Court under Section 11(6) of the Act, are required to examine only the "existence" and "validity" of an arbitration agreement.
- (b) In another matter of *Pave Infrastructure Pvt. Ltd. vs. WAPCOS Ltd.*,<sup>17</sup> decided on January 27, 2020, while placing its reliance on *Mayavti Trading Pvt. Ltd. Vs. Pradyuat Deb Burman (supra)*, stated that the mandate of the High Court in examining petition under Section 11(6) of the Act, will be confined to the examination of the "existence" and "validity" of the arbitration agreement.
- (c) In another judgment passed by the Delhi High Court on March 13, 2020, in the matter of *Devi Fatehpuria vs. Jugal Kishore Shyam Prakash and Co. and Ors.*,<sup>18</sup> it was held that the Court while examining a petition under Section 11(6) has to examine only the "existence" and "validity" of the arbitration agreement.

It is pertinent to note, that all the above-mentioned judgments, while referring to the dictum laid down in *Mayavti Trading Pvt. Ltd. vs. Pradyuat Deb Burman (supra)* have interpreted the judgment, to suggest that the High Court while examining a petition under Section 11(6) of the Act would

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<sup>13</sup> 2019 (8) SCC 714. Decided on September 5, 2019.

<sup>14</sup> 2020 (2) SCC 455.

<sup>15</sup> 2019 SCC Online SC 358.

<sup>16</sup> Arb. Petition No. 432 of 2019.

<sup>17</sup> Arb. Petition No. 574 of 2019.

<sup>18</sup> Arb. Petition No. 339 of 2019.

confine itself to deciding both “existence” and “validity” of the arbitration agreement. Interestingly, whilst the Delhi High Court followed *Mayavti Trading Pvt. Ltd. vs. Pradyuat Deb Burman (supra)*, *Mayavti Trading Pvt. Ltd. Vs. Pradyuat Deb Burman (supra)* has confined itself only to existence and not extended the same to validity of the agreement.

Therefore, applying the strict test of interpreting the scope of judicial interference, the Apex Court in the judgment of *Mayavti Trading Pvt. Ltd. vs. Pradyuat Deb Burman (supra)* has clarified that Section 11(6A) is confined to the examination of existence of an arbitration agreement and is to be understood in the narrow sense as has been laid down in *Duro Felguera S.A. vs. Gangavaram Port Ltd. (supra)*. Therefore, it would be safe to presume that Courts while dealing with petition under Section 11 (6A) should only restrict their interference at the stage of deciding only its “existence” and nothing more. The moot question referred to a larger bench in *Vidya Drolia & Ors. vs. Durga Trading Corporation (supra)* would eventually decide the fate of Section 11(6A) and scope of judicial interference.

## The 2019 Amendment

As stated above, the main aim of the 2019 Amendment was to promote institutional arbitration in India by strengthening the Indian Arbitral Institutions. One of the amendments to Section 11 proposed was omission of sub-section (6A). This omission (yet to be notified) was introduced pursuant to the report of the High-Level Committee to review the institutionalization of arbitration mechanism in India dated July 30, 2017, which had recommended that, in order to ensure speedy appointment of arbitrators, that Section 11 of the Act should be amended to provide that the appointment of arbitrator(s) under the Section should be done only by arbitral institution(s) designated by Courts without the courts being required to determine the existence of an arbitration agreement.

In *Mayavati Trading Pvt. Ltd. vs. Pradyuat Deb Burman*,<sup>19</sup> while discussing the 2019 Amendment [including the intended omission of sub-section (6A)], the Apex Court reiterated that it is left to the Arbitral Tribunal to decide all the preliminary questions. While hearing this matter, the three-Judge Bench of the Supreme Court examined the correctness of the decision rendered in *United India Insurance Co. Ltd. v. Antique Art Exports Pvt. Ltd (supra)* and overruled the same.

The Supreme Court, *inter-alia*, observed that the 2019 Amendment has omitted Section 11(6A) because appointment of arbitrators is to be done institutionally, in which case the Supreme Court or the High Court under the old statutory regime are no longer required to appoint arbitrators and consequently, no longer required to determine whether an arbitration agreement exists. The Court held that the law prior to the 2015 Amendment that has been laid down by this Court, which would have included going into whether accord and satisfaction has taken place, has now been legislatively overruled. Therefore, the Court was of the view that it did not agree with the reasoning contained in *United India Insurance Company Ltd. vs. Antique Art Exports Pvt. Ltd. (supra)* as Section 11(6A) is confined to the examination of the existence of an arbitration agreement and is to be understood in the narrow sense as has been laid down in the judgment *Duro Felguera, S.A. vs. Gangavaram Port Ltd (supra)*.

It may not be out of place to mention that although the headnotes of this judgment seem to suggest that that the 2015 Amendment has been *fortified, broadened and deepened* by the 2019 Amendments, the judgment is silent on this aspect. The judgment also does not explain the effect of the intended omission of sub-section (6A) after the Amended Act of 2019 *vis-à-vis* the law prevailing post the 2015 Amendment. The judgment merely states that sub-section (6A) has been omitted since the appointment of the arbitrators is to be done institutionally, in which case the Courts will no longer be required to appoint arbitrators and/or determine whether an arbitration agreement exists.

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<sup>19</sup> 2019 (8) SCC 714. Decided on September 5, 2019.

## Conclusion

Even though, the 2019 Amendments seeks to restrict the judicial interference and broadens scope of the Arbitral Institution under Section 11 in deciding preliminary questions, the challenge is to analyze the jurisdiction of the Arbitral Institutions under Section 11 of the Act. It is unclear, however, if orders passed by the Arbitral Institutions would be amenable to a challenge. If orders passed by the Arbitral Institutions are subjected to challenge, which is inevitable, will the process of appointing Arbitral Tribunal take longer time?

Also, will the Arbitral Institution be expected to follow the law laid down by the 2015 Amendment i.e. only examine the existence of the arbitration agreement? The *Mayavati Trading Pvt. Ltd. vs. Pradyut Deb Burman (supra)* judgment, though refers to the 2019 Amendment has not clarified this position. If the Legislators wanted to restrict the power/role of Arbitral Institutions (as it did for the Supreme Court or High Court, by the 2015 Amendment), it would have merely substituted the words “Supreme Court or as the case may be, the High Court” with “Arbitral Institution” in sub-section (6A). Having not done so, it is difficult to presume/predict whether the power of the Arbitral Institution would be limited to only “appointing Arbitral Tribunal” and determining “Arbitration Agreement” between the parties.

*This paper has been written by Ranjit Shetty (Senior Partner) and Vatsala Pant (Associate). The authors have not commented on the advantages of having an institutionalized arbitration process in this article and have only discussed the 2015 Amendment vis-a-viz the 2019 Amendment.*

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