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Dissect or Forward? Appointment of Arbitrators and the Journey of Section 11(6)A

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The Arbitration and Conciliation Act, 1996 ('Act', '1996 Act') was amended by way of the Arbitration & Conciliation (Amendment) Act, 2015 pursuant to the 246th Report of the Law Commission of India, where changes were made to several provisions therein. This article delves into significant changes allied to the appointment process under Section 11 of the Act and the judicial treatment of that issue. The most noteworthy facet with regards to Section 11 was the insertion of sub-section 6A, requiring the judicial authority to confine itself to determining the existence of the arbitration agreement and to not delve further into its merits. Subsequent judicial pronouncements have simmered the strength of this amendment and are discussed hereunder.

The developmental stages of the current question began with the Supreme Court grappling with whether the power under Section 11 (prior to the amendment) was judicial or administrative in its nature. It began when a three judge bench in *Konkan Railway Corporation Ltd. v. Mehul Construction Co.*[1] held that the Chief Justice or his designate does not act in a judicial capacity when appointing an arbitrator and merely performs an administrative function. It highlighted the need to prioritize the legislative intent of the Act and perform the said administrative function in an expeditious manner so as to aid the speedy resolution of disputes before the arbitrator. This decision was later ratified in *Konkan Railway Corporation v. Rani Construction*[2].

The first instance of widening the scope of Section 11 took place when a seven judge bench of the Supreme Court in *SBP & Co. v. Patel Engineering Ltd.*[3] overruled the aforesaid and held that the function of appointment was indeed a judicial function and not an administrative one.

[1] (2000) 7 SCC 201.
[2] (2002) 2 SCC 388.
[3] (2005) 8 SCC 618.

It held that the designation by a Chief Justice of the High Court could only be to another judge of the same court and by a Chief Justice of India to another judge of the Supreme Court. It went on to hold that the Chief Justice or the designated judge, in the carriage of this function, would also have the power to decide the preliminary aspects of the issue, "*his own jurisdiction, to entertain the request, the existence of a valid arbitration agreement, the existence or otherwise of a live claim, the existence of the condition for the exercise of his power and on the qualifications of the arbitrator of arbitrators.*"[4] This holding was met with further extrapolation in *National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd.*[5] where the preliminary issues, as detailed above, were divided into three categories.

Deliberation on the current question continued as the 1996 Act and the Supreme Court decision in *N. Radhakrishnan v. M/s Maestro Engineers & Ors.*[6] reiterated that any dispute which involved an allegation of fraud could not go forward into arbitration. Later, in *World Sport Group (Mauritius) Ltd. v. MSM Satellite (Singapore) Pte. Ltd.*[7], the Apex Court clarified that the earlier judgement in N. Radhakrishnan did not apply to international commercial arbitrations with foreign seats, restricting the scope of the *N. Radhakrishnan*[8] judgement to disputes that were either domestic in nature or to arbitrations that had India as the seat.

A single judge bench of the Supreme Court in *Swiss Timing Ltd. v. Organizing Committee*[9] then went on to declare the judgement in *N. Radhakrishnan*[10] *per incuriam* for an array of reasons including its failure to appreciate the provisions of the 1996 Act which underlined the severability of the arbitration clause and the competence of an arbitral tribunal to rule on its own jurisdiction. Before this, in *Booz Allen and Hamilton Inc. v. SBI Home Finance Ltd.*[11], the Supreme Court, drew a distinction between the powers enunciated under Section 8 and 11 stating that arbitrability of the disputes was to be left to the arbitral tribunal. This observation later received affirmation in *Arasmeta Captive Power v. Lafarge India Pvt. Ltd.*[12]

[4] *Ibid*, para 46.
[5] (2009) 1 SCC 267.
[6] 2009 (77) ALR 490.
[7] AIR 2014 SC 968.
[8] *Supra*, note 6.
[9] AIR 2014 SC 3723.
[10] *Supra*, note 6.
[11] (2011) 5 SCC 532.
[12] (2013) 15 SCC 414.

That fact that the bench in the aforesaid case of *Swiss Timing*[13] was only a single judge bench caused a great amount of ambiguity, which went on to be addressed by a Division Bench of the Supreme Court in *A. Ayyasamy v. A. Paramasivam*[14], **after the amendment of 2015**. The Division Bench upheld the view of the single bench in *Swiss Timing*[15] and overruled all contradictory views. The Division Bench underlined the requirement of a distinction between allegations of fraud that were simple in nature and those that were complex, holding that the former could be sent forward for arbitration but the latter could not.

The ruling of the Division Bench, a coordinate bench to the bench in the *N. Radhakrishnan*[16] judgement, was criticized for lacking the authority to overrule as above. A reaffirmation was then seen from the Supreme Court in the *Rashid Raza v. Sadaf Akhtar*[17] judgement, by a three judge bench on September 09, 2019, where the yardstick laid down in *A. Ayyaswamy*[18] was extrapolated upon and upheld.

Post the amendment of 2015, the Supreme Court continued to grapple with the scope of the newly inserted Section 11(6A). First, it affirmed the sanctity of the amendment in *Duro Felgura S.A. v. Gangavaram Port Ltd.*[19], where a two judge bench held that in furtherance of the legislative purpose, which was to minimize the intervention of courts, the amendment restricted the powers of the court to just analyze the existence (or lack thereof) of an arbitration agreement. In *Oriental Insurance v. Narbheram Power and Steel Private Ltd.*[20], a three judge bench dismissed a Section 11 application, after examining the arbitrability of the dispute, holding that when there is a clear contract stipulating the instances where there can be no arbitration, the court may put to rest such disputes where the facts are clear. Later, placing reliance on the aforesaid, in *United Insurance Company Ltd. v. Hyundai Engineering and Construction Company Ltd.*[21], where an insurance policy contained an arbitration clause stating that disputes would not be arbitrable if the liability was disputed by the insurance company, a

[13] *Supra*, note 9.
[14] AIR 2016 SC 4675.
[15] *Supra*, note 9.
[16] *Supra*, note 6.
[17] (2019) 8 SCC 710.
[18] *Supra*, note 14.
[19] AIR 2017 SC 5070.
[20] (2018) 6 SCC 534.
[21] 2018 SCC OnLine SC 1045.

three judge bench held that the matter was not arbitrable as the insurance company had indeed raised a dispute as contemplated in the agreement.

Further, in *United India Insurance v. Antique Art Exports*[22], the Supreme Court drew a distinction between the judgement in *Duro Felgura*[23] stating that the observation therein was merely general; and held that the power under Section 11 was judicial and not administrative in nature. It expounded on this view stating that the while examining the existence of an arbitration agreement prima facie, the court must also shroud the resolution process from being met with unnecessary delay. This judgement was overruled by a three judge bench in *M/s Mayavati Trading Pvt. Ltd. v. Pradyut Deb Burman*[24] where it was held that the power was confined only to the existence of the agreement and not the arbitrability of the underlying dispute. Here the Supreme Court covered the implications of the deletion of Section 11(6A) from the Arbitration and Conciliation (Amendment) Act, 2019 and underlined that the said Section had not been deleted for the earlier law to be revived.

In *Oriental Insurance Co. Ltd. v. Dicitex Furnishing Ltd.*[25], the Supreme Court, by way of a two judge bench, held that an arbitration clause may be invoked by a party that is aggrieved if the no objection certificates or discharge vouchers stand executed. It upheld the concept of 'economic duress' as per *Boghara Polyfab*[26] reiterating that a court ought to be convinced (prima facie) that the plea of coercion is genuine while assessing whether an arbitrable dispute indeed exists.

Thereafter on November 27, 2019, in the matter of *M/s Uttrakhand Purv Sainik Kalyan Nigam Ltd. v. Northern Coal Field Ltd.*[27], the Supreme Court's resolution was sought on the issue of whether a High Court could reject a Section 11 application for being barred by limitation. It was reiterated that the scope of examination stood limited to the presence of the arbitration agreement, and that other preliminary issues were to be left to the arbitrator under Section 16, which manifests the *Kompetenz-Kompetenz* principle. It further observed that if the arbitration agreement itself was impeached for being procured fraudulently or in deceit, or if the arbitration

[22] (2019) 5 SCC 362.
[23] *Supra*, note 19.
[24] AIR 2019 SC 4284.
[25] 2019 (6) Arb LR 302 (SC).
[26] *Supra*, note 5.
[27] 2019 (6) Arb LR 237 (SC).

agreement was only entered into as a precursor to the execution of the final contract, the principle discussed above would not apply. Answering the question of limitation, the court held that it was to be adjudicated upon by the arbitrator, so as to limit judicial intervention at the outset.

It appears that the close of the aforesaid discrepancy would finally be arrived at with the advent of the new Arbitration and Conciliation (Amendment) Act of 2019. Though the newest judgments are reflective current stand of the Supreme Court on the issue, the section in question, Section 11(6A), has not been notified in the new Amendment Act which instead contains a provision for an Arbitral Institution[28]. The said institution would carry out the function of appointment of arbitrators, removing the aspect from the purview of the courts altogether and putting the aforesaid discrepancy to rest.

[28] Section 1(ca), Arbitration and Conciliation (Amendment) Act, 2019.