ELP Arbitration Weekly Alert

COURT'S POWER OF EXAMINATION OF AN ARBITRATION AGREEMENT IS TO BE CONFINED TO ONLY ITS EXISTENCE AND MUST BE UNDERSTOOD IN A NARROW SENSE.

M/s Mayavti Trading Private Limited v. Pradyaut Deb Burman[1] (September 5, 2019)

Background

In the present case, the Supreme Court (**SC**) refrained from exercising its extraordinary jurisdiction under Article 136 of the Constitution of India. The core issue which arose in the present case was with respect to the correctness of another SC decision in *United India Insurance Company Limited v. Antique Art Exports Private Limited*[2].

The said decision, in the context of Section 11 and Section 11(6A) of the Act, held that appointment of an arbitrator was a judicial power and not merely an administrative function leaving some degree of judicial intervention; whenever a *prima facie* examination of the existence of an arbitration agreement is to be made, it is necessary to ensure that the dispute resolution process does not become unnecessarily protracted.

Findings of the Court

Over-ruling its decision in *United India Insurance Company Limited case*[3], by placing reliance upon *Duro Felguera, S.A. v. Gangavaram Port Limited*[4], the SC held that the power of the Court under Section 11(6A) of the Act was confined only to the examination of the existence of an arbitration agreement and that the same is to be

[1] Civil Appeal No. 7023 of 2019.
[2] (2019) 5 SCC 362.
[3] *Supra.*
[4] (2017) 9 SCC 362; Para 48 of the case states that, "**48.** *From a reading of Section 11(6-A), the intention of the legislature is crystal clear i.e. the court should and need only look into one aspect—the existence of an arbitration agreement. What are the factors for deciding as to whether there is an arbitration agreement is the next question. The resolution to that is simple—it needs to be seen if the agreement contains a clause which provides for arbitration pertaining to the disputes which have arisen between the parties to the agreement.*"

understood in a narrow sense. It is pertinent to note that the decision in *United India Insurance Company Limited* case had distinguished the *Duro Felgura case*[5] and refrained from applying its principles[6].

The SC also analyzed the following authorities on the law prior to Introduction of Section 11 (6A) of the Act i.e. before the commencement of Arbitration and Conciliation (Amendment) Act, 2015 (**2015 Amendment)** –

1. *SBP & Co. vs. Patel Engineering Ltd. and Anr.*[7], which had held that at the stage of a Section 11(6) application, the Court need not merely confine itself to the examination of the existence of an arbitration agreement but could also go into certain preliminary questions such as stale claims, accord and satisfaction having been reached etc.
2. *ONGC Mangalore Petrochemicals Limited vs. ANS Constructions Limited and another*[8], wherein this Court had dismissed a Section 11 petition on the ground that 'accord and satisfaction' had taken place between the concerned parties.
3. The recent case of *Garware Wall Ropes Ltd. vs. Coastal Marine Constructions & Engineering Ltd.*[9], wherein this Court had adverted to the 246th Law Commission Report (pursuant to which the 2015 Amendment was made) and held that upon reading the same together with the Statement of Objects and Reasons cited in 2015 Amendment, it becomes clear that the Law Commission felt that the judgments in *SBP & Co* [10] and *National Insurance Co. Ltd. v. Boghara Polyfab*[11] required a relook, as a result of which the concerned Court, while considering any application under Section 11(4) to 11(6) is to confine itself to the examination of the existence of an arbitration agreement and leave all other preliminary issues to be decided by the arbitrator."

Upon perusing the same, the SC further held that the law prior to introduction of the 2015 Amendment has now been legislatively over-ruled.[12]

As stated earlier, the SC refrained from interfering on the merits of the case and the present appeal was dismissed.

Conclusion and analysis

The nature of powers of the Court under Section 11 of the Act has always been a topic for much debate. While prior to the 2015 Amendment, it was settled that such powers would be of a judicial nature, the introduction of Section 11 (6A) by the 2015 Amendment had perhaps reopened the said issue. The recent SC decision in *Garware Wall Ropes*[13], may perhaps add to the confusion, as the SC inquired into the insufficiency of the stamp affixed on the agreement containing the arbitration clause but at the same time held that the Court should confine itself only to the existence of arbitration agreement and leave all preliminary issues to the arbitrator. The present judgment however now settles this issue by narrowing the scope of Section 11(6A) to only examination of arbitration agreement. It remains unclear if the SC has gone back to the earlier position in *Konkan Railway Corporation Ltd. v. Mehul Construction Co.*[14], where it was held that the Court's powers under Section 11 of the Act are administrative.

Pertinently, the Arbitration and Conciliation (Amendment) Act, 2019 has omitted Section 11(6A) from the scheme of the Act and appointment of arbitrators is now done by arbitration institutions so designated by the Supreme Court or the High Court. But, the said amending provision has not been notified yet and the same has indeed been recorded in the present decision too.[15]

[5] *Supra.*
[6] Paragraph 20 of *Supra* Note 2
[7] Paragraph 39 of (2005) 8 SCC 618.
[8] (2018) 3 SCC 373.
[9] 2019 SCC OnLine SC 515, Paragraph 19.
[10] *Supra* Note 6.
[11] (2009) 1 SCC 267; In the case, the SC categorized the 3 kind of issues that the Chief Justice/his designate may consider in an application under Section 11.
[12] Paragraph 10 of *Supra* Note 1.
[13] *Supra* Note 8.
[14] (2000) 7 SCC 201, the said case was further considered and upheld by the Constitution Bench in (2002) 2 SCC 388, but eventually reconsidered and overruled by a 7-judge bench in *Supra* Note 7.
[15] Paragraph 6 of *Supra* Note 1.