



ELP Arbitration: Update



SUPREME COURT ONCE AGAIN EXTENDS THE UMBRELLA WHILE DETERMINING THE EXISTENCE OF AN ARBITRATION CLAUSE.

Praveen Electricals Private Limited v. Galaxy Infra Engineering Private Limited

INTRODUCTION

- A Special Leave Petition was filed by *Praveen Electricals Pvt. Ltd. (PEPL)*, against *Galaxy Infra Engineering Pvt. Ltd. (Galaxy)*, before the Hon'ble Supreme Court of India (SC) challenging an order passed by the Hon'ble Delhi High Court (HC). Through the said order, the HC had appointed a Sole Arbitrator for adjudication of disputes between the parties under Section 11(6) of the Arbitration and Conciliation Act, 1996 (Act).
- The petition was filed by Galaxy, after it had invoked the arbitration clause, under a Consultancy Agreement (Agreement), executed between PEPL and Galaxy.

FACTS

- Through an online tender, the Chief Engineer, South Bihar Power Distribution Company Ltd. (SBPDCL) had invited bids for appointment of implementing agencies for execution of a Scheme on a turnkey basis, for strengthening, improving and augmentation of distribution systems capacities of 20 towns in Bihar. PEPL submitted its technical and financial bid and was declared the L1 bidder and was awarded the work.
- Galaxy contended that it had made substantial efforts under the Agreement, to facilitate PEPL in getting the aforesaid contract for which it was entitled to a commission. Galaxy contended that a draft of the Agreement was sent over email by PEPL, for comments and confirmation, and a final agreement was agreed upon through correspondence between the parties.
- Galaxy raised invoices on one M/s Process Construction and Technical Services Pvt. Ltd. (PCTPL) under the Agreement. The relationship of PCTPL with PEPL was disputed, however it was contented by Galaxy that PCTPL was acting on behalf of PEPL, and PEPL had the knowledge of the same. Galaxy sent the final invoice to PEPL, followed by a demand-cum-legal notice and sought payment of the amount due under the Agreement. PEPL denied the existence of the Agreement and called upon Galaxy to provide a copy of the alleged Agreement and payment details referred to in the legal notice, the same were finally supplied on 14 May 2018.

- Galaxy invoked the arbitration clause under the Agreement and nominated an arbitrator. PEPL once again denied execution of the Agreement and, refused to concur with the nomination of the arbitrator.
- Galaxy filed a petition under Section 11(6) of the Act, for appointment of a Sole Arbitrator. The HC, *inter-alia* held that the documents placed on record by Galaxy clearly evidenced that there existed an arbitration agreement between the parties as contained in the draft Agreement exchanged via emails and thus, appointed a Sole Arbitrator.

ARGUMENTS ADVANCED BY PEPL BEFORE THE SC

Aggrieved by the order of the HC, PEPL filed the SLP before the SC, contending as under:

- The Agreement is a concocted document, which was also clear from the Central Forensic Science Laboratory (CFSL) report, ordered by HC to check the signature of the Managing Director of PEPL;
- Since the Agreement itself does not exist, there cannot be an arbitration clause;
- The fact that negotiations have taken place after such an alleged Agreement shows that such alleged agreement does not in fact exist;
- The alleged Agreement is notarized at Faridabad, Haryana, while one party is from Mumbai and the other is from Bihar. PEPL also submitted that the notary's license had expired way before when notarization allegedly took place; and
- The invoices raised on PCTPL, and the subsequent payments made were only under a separate agreement entered into between Galaxy and PCTPL.

ARGUMENTS ADVANCED BY GALAXY BEFORE THE SC

- The Counsel for Galaxy contended that even if the Agreement is not relied upon, an arbitration clause exists in the draft agreement that was exchanged between the parties, which culminated in a final agreement; and
- If the correspondences between SBPDCL and the Galaxy are to be seen, the same were being marked to PEPL, and it is clear that Galaxy acted as a go-between and successfully obtained the bid for PEPL, and was thus entitled to its commission.

FINDINGS OF THE SC

Upon hearing the parties, the SC observed that:

- Due to the various conundrums that arise on the facts of this case, it is unsafe to conclude, one way or the other, that an arbitration agreement exists between the parties. The court made the following observations:
 - The parties were not *ad idem* on submission of the dispute to arbitration, in view of the fact that when the draft agreement was sent by PEPL to Galaxy, the same was sent back by Galaxy, where various terms were disputed;
 - The finding that PCTPL was a sub-contractor of PEPL, is contrary to the pleadings between the parties, where the nature of entity varies from being a joint venture partner to PEPL to having common Directors with PEPL, and thereafter to being described as the lead partner;
 - The Court also observed that correspondence between SBPDCL and Galaxy do show that there is some dealing between PEPL and Galaxy, with respect to a tender floated by SBPDCL, but not sufficient to conclude that there is a concluded contract between the parties, which contains an arbitration clause; and
 - The CFSL report did not express an opinion either way. It was therefore incumbent upon the learned Single Judge to determine as to whether the Agreement was entered into.
- The court further placed reliance on a three judge bench judgement of SC in *Vidya Drolia*¹, and observed that a deeper consideration of whether an arbitration agreement exists between the parties must be left to an Arbitrator who is to examine the documentary evidence produced before him in detail after witnesses are cross-examined on the same.
- Thereby, partially setting aside the judgment passed by the HC till the extent that the Court held that an arbitration agreement exists between the parties. Further, upholding the appointment of Justice G.S. Sistani (Retd.), as a Sole Arbitrator, who would first determine the issue existence of the arbitration agreement and then go on to decide the merits of the case, only if it is first found that such an Agreement exists.

¹ *Vidya Drolia v. Durga Trading Corporation*, (2021) 2 SCC 1.

- The Court further made another an observation in light of what has been decided in Vidya Drolia, that, a refusal to refer parties to arbitration is appealable under Section 37(1)(a) of the Act, a similar refusal to refer parties to arbitration under Section 11(6) read with Sections 6(A) and 7 of the Act, is not appealable, which creates an anomaly. Thereby, suggesting that the parliament should re-look at Section 11(7) and Section 37 of the Act, so that orders made under Sections 8 and 11 of the Act, are brought at par, qua appealability as well.

ANALYSIS

- The Law Commission of India in its [246th Report](#)² examined the extent till which a Court can interfere while appointing an arbitrator under Section 11 of the Act. Thereby, recommending the insertion of Section 11(6-A) to the Act, which lays down that while appointing an arbitrator under Section 11(6-A) of the Act, the Court should confine to the examination of the existence of an arbitration agreement. Thereby, limiting the intervention of the Court at the stage of appointment of the arbitrator.
- A 3-judge bench of SC in Mayavati Trading³ has also observed that, Section 11 (6-A) of the Act is confined to the examination of existence of the arbitration agreement and is to be understood in a narrow sense. However, the Court in the present case, while determining the existence of the arbitration has determined certain factual aspects and has not confined itself to the limited powers available to the Court under Section 11 (6-A), thereby defeating the legislative intent of the Act.
- The Court further recommended that there should be a provision of appeal from an order passed by the Court while deciding an application under Section 11 of the Act, so that the orders passed under Section 11 of the Act, can be at brought at par with the orders passed under Section 8 of the Act. It is pertinent to note that the Court under Section 8 of the Act, has been given powers to examine the validity of an agreement as opposed to the power of the Court under Section 11 of the Act, where it has to look merely at the existence of an arbitration agreement. Therefore, the Court under Section 8 of the Act, determines various factor while deciding the question of validity of an arbitration agreement as compared to the Court under Section 11 of the Act. Given the fact that the scope of inquiry may be different for a Court in a Section 11 and a Section 8 scenario, could it be said that because an appeal lies from a decision in an application under Section 8, the same should necessarily be extended to an application under Section 11? The question does arise in view of the present decision and one which as of now does not seem to have a conclusive answer. Hopefully, a judicial precedent or a legislative amendment may address this in the future.

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² [Report246.pdf \(lawcommissionofindia.nic.in\)](#)

³ *Mayavati Trading Private Limited v. Pradyuat Deb Burman* (2019) 8 SCC