

understandings, arrangements, promises etc. On the same day, a Share Purchase Agreement (**SPA**) and various ancillary agreements were also executed.

- More than two decades later, one of the Respondents transferred their shares to another of the Respondents. The Appellant served a notice of arbitration on the Respondents invoking the Arbitration Agreement in the MOU stating that the transfer was in breach of his preemptive right under the MOU to purchase the transferred shares. The Appellant called upon the Respondents to agree to the arbitrator nominated by him. The Respondents who were allegedly in breach of the MOU took up the stand that the MOU stood superseded by the SHA and hence the Arbitration Agreement did not survive.

FINDINGS OF HC

- Accordingly, a petition under Section 11 of the Act was filed before the HC by the Appellant for appointment of an arbitrator. The HC refused to appoint an arbitrator *inter-alia*, observing that the MOU was superseded by the SHA, and if a contract is superseded by another, the arbitration clause, being a component/part of the earlier contract also perishes with it. The Court *inter-alia* placed reliance on the decisions of the SC in *Union of India v. Kishorilal Gupta & Bros*² (**Kishorilal Gupta**) and *Damodar Valley Corporation v. K.K Kar*.³ (**Damodar Valley**) in arriving at its conclusions.

FINDINGS OF SC

- When the Appellant moved a Special Leave Petition before the SC assailing the decision of the HC, the SC considered the plethora of precedents that have laid down the scope of enquiry at the time of appointment of an arbitrator. The SC noted that *Kishorilal Gupta* and *Damodar Valley* are decisions which deal with novation of an arbitration agreement in the context of the Arbitration Act, 1940, which had a scheme completely different from the scheme contained in Section 16 read with Section 11(6A) of the Act.

The SC noted that since the amendments to the Act in 2015, the law is now governed by decisions such as *Duro Felguera S.A. v. Gangavaram Port Ltd.*⁴, *Mayavati Trading (P) Ltd. v. Pradyut Deb Burman*⁵, *Vidya Drolia v. Durga Trading Corporation*⁶ ("**Vidya Drolia**"), *Pravin Electricals Pvt. Ltd. v. Galaxy infra and Engineering Pvt. Ltd.*⁷ and *Bharat Sanchar Nigam Ltd. v. Nortel Networks India Pvt. Ltd.*⁸ (**Nortel**). The SC held that the court at the referral stage can interfere only when it is manifest that the claims are *ex facie* time-barred and dead, or there is no subsisting dispute. All other cases should be referred to the arbitral tribunal for decision on merits. Similar would be the position in case of disputed "no claim certificate" or defence on the plea of novation and "accord and satisfaction". The SC agreed with the abundant case laws before it that if there is even a slightest doubt, the rule is to refer the disputes to arbitration, otherwise it would encroach upon what is essentially a matter to be determined by the arbitral tribunal.

- The SC therefore observed that judged by the test laid down in *Nortel*, it is obvious that whether the MOU has been novated by the SHA requires a detailed consideration of the clauses of the two agreements, together with the surrounding circumstances in which these agreements were entered into, and a full consideration of the law on the subject.

The SC held that none of this can be performed given the limited jurisdiction of a court under Section 11 of the Act. Further, the SC while placing reliance on *Vidya Drolia*, observed that detailed arguments on whether an agreement which contains an arbitration clause has or has not been novated cannot be decided in the exercise of a limited *prima facie* review. The SC found that the HC had encroached upon matters that were within the exclusive jurisdiction of the arbitral tribunal which was antithetical to the *kompetenz-kompetenz* principle. Therefore, the order of the HC was set aside by the SC, and an arbitrator was appointed.

² (1960) 1 SCR 493.

³ (1974) 1 SCC 141.

⁴ (2017) 9 SCC 729

⁵ (2019) 8 SCC 714

⁶ (2021) 2 SCC 1.

⁷ 2021 SCC OnLine SC 190

⁸ 2021 SCC OnLine SC 207

ANALYSIS

- The observations made by the SC in *Vidya Drolia* have seemingly expanded the scope of review of the court while hearing an application for appointment of arbitrators under Section 11 of the Act, by terming such exercise as an 'intense yet summary prima facie review'. However, the SC in the present case carefully relied only on the portion of *Vidya Drolia* wherein it was held that whether an agreement has been novated, cannot be decided on a prima facie basis. As rightly stated by the SC, the courts should be well advised to steer clear of matters falling within the exclusive domain of the arbitrator.
- Although the SC has carefully chosen the observations made in the above judgements thereby promoting the policy of minimal interference, the debate in this regard is far from over as certain observations in *Vidya Drolia* have been referred to a larger bench. Whether, in a case where the arbitration agreement is *ex-facie* superseded, the SC would adopt a hands-off approach, remains to be seen.

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