ELP Arbitration: Update

SUPREME COURT: COURTS CAN DETERMINE "CORE PRELIMINARY ISSUES" WITHIN THE FRAMEWORK OF SECTION 11(6-A) OF THE ARBITRATION AND CONCILIATION ACT, 1996

DLF Home Developers Limited v. Rajpura Homes Private Limited & Anr. with DLF Home Developers Limited v. Begur OMR Homes Private Ltd. & Anr [1]

Section 11 (6-A)[2] of the of the Arbitration and Conciliation Act, 1996 (**Act**) provides that the court shall "*confine to the examination of the existence of an arbitration agreement*" while determining an application under sections 11 of the Act. Recently, the Supreme Court observed that the court(s) are obliged to apply their mind to core preliminary issues within the framework of section 11(6-A) of the Act.

BACKGROUND OF DISPUTES

By a common judgment, the Supreme Court determined applications under section 11 of the Act in *DLF Home Developers Limited v. Rajapura Homes Private Ltd. & Anr*[3] (**Petition 1**) and *DLF Home Developers Limited v. Begur OMR Homes Private Ltd. & Anr*[4] (**Petition 2**). The Supreme Court examined the transactions leading to the disputes.

DHDL and Ridgewood Holdings entered into a Joint Venture. Thereafter, Ridgewood transferred its stake to Resimmo

- DLF Home Developers Limited (**DHDL**) and Ridgewood Holdings Limited (**Ridgewood**) entered into a joint venture. Ridgewood invested in four special purpose vehicles *inter alia* including Rajapura Homes Private Limited[5] (**Rajapura**) and Begur OMR Homes Private Limited[6] (**Begur**) for developing residential projects in India.

[1] Judgement dated 22 September 2021 passed by the Supreme Court in Arbitration Petition Nos. 16 of 2020 and 17 of 2020
[2] *"(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 an arbitration agreement." [Emphasis Supplied]*
[3] Arbitration Petition No. 16 of 2020
[4] Arbitration Petition No. 17 of 2020
[5] Respondent No.1 in Petition 1
[6] Respondent No.1 in Petition 2

- Ridgewood transferred its stake in the joint venture to its affiliates *i.e.*, Resimmo PCC[7], (**Resimmo**), a company incorporated under the laws of Mauritius, and Clogs Holding BV. Resimmo and Clogs were *inter alia* entitled to exercise a put option on DHDL during a specified period. While the put option was exercised, DHDL was unable to provide the exit.

Resimmo acquired Rajapura and Begur from DHDL - Parties executed Share Purchase Agreements

- In view of the above, parties agreed to a negotiated settlement under which Resimmo would acquire sole ownership and control of Rajapura and Begur from DHDL. Accordingly, share purchase agreements (**SPAs**) were executed for the transfer of DHDL's shareholdings in Rajapura and Begur respectively *i.e.*, (a) Share Purchase Agreement between Resimmo, DHDL and Rajapura (**Rajapura SPA**); and (b) Share Purchase Agreement between Resimmo, DHDL and Begur (**Southern SPA**).
- The Rajapura SPA and the Southern Homes SPA contained similar arbitration clauses which provided that arbitration would be conducted in accordance with the rules of SIAC and the venue of the arbitration shall be Singapore, which shall be the seat of arbitration.

Parties executed construction management services agreement

- The Rajapura SPA and Southern Homes SPA respectively envisaged the execution of Construction Management Services Agreements (**CMSAs**) for the projects being constructed by Rajapura and Begur as a condition precedent to close the transaction. Accordingly, the parties executed the DLF-Rajapura Homes Construction Management Services Agreement (**RCMA**); and the DLF-Southern Homes Construction Management Services Agreement (**SCMA**).
- The identical arbitration clauses in the SCMA and RCMA provided that the (i) arbitration shall be in accordance with the Act; (ii) the venue of the arbitration shall be New Delhi, which shall be the seat of arbitration and the courts of New Delhi shall have exclusive jurisdiction.
- The SCMA and RCMA provided that upon certification of completion of the projects, a "*fee*" would be payable by Resimmo to DHDL. While DHDL issued notices of completion under the RCMA and under the SCMA respectively, both Rajapura and Begur denied accepting completion of the project. Thus, disputes arose in respect of certifying the completion of the projects and payment of fees under the SCMA and RCMA.

DHDL invoked arbitration under the SCMA and RCMA

- By way of a Notice dated May 26, 2020, DHDL invoked arbitration under the SCMA and RCMA. By way of two separate emails, Resimmo, Rajapura and Begur (collectively **the Respondents**) refused to appoint a sole arbitrator on the ground that the disputes had arisen under the Rajapura SPA and Southern Homes SPA, and not under the SCMA and RCMA. In the circumstances, DHDL preferred Petition 1 and Petition 2 under sections 11(6) read with 11(12) of the Act, before the Supreme Court.

FINDINGS

Courts to examine core preliminary issues under section 11(6) of the Act

DHDL contended that courts have a narrow scope of examination under section 11(6) of the Act confined to determining the existence of an arbitrable dispute and an arbitration agreement. The Respondents contended that the court is required to examine whether the agreements in question contain an arbitration clause in respect of the disputes that have actually arisen between the parties. The Supreme Court held that:

- The Supreme Court or the High Court, as the case may be, are not expected to act mechanically merely to deliver a purported dispute raised by an applicant at the doors of the chosen arbitrator;
- On the contrary, the court(s) are obliged to apply their mind "*to the core preliminary issues, albeit, within the framework of Section 11(6-A) of the Act".*

[7] Respondent No.2 in Petition No. 1 and Petition No.2

- Such a review, is not intended to usurp the jurisdiction of the arbitral tribunal but is aimed at streamlining the process of arbitration.
- Therefore, even when an arbitration agreement exists, it would not prevent the Court to decline a prayer for reference if the dispute in question does not correlate to the said agreement.
- Section 11(6-A)[8] of the Act substantially limits the scope of interference by the courts at the stage of referral. Despite the omission of the section 11(6-A) of the Act by the Arbitration and Conciliation (Amendment) Act, 2019, the legislative intent behind the provision continues to be the guiding force for the courts while examining an application under section 11 of the Act.
- Relying upon *Vidya Drolia and Others*[9] , courts may conduct a '*prima facie review*' at the stage of reference to weed out any frivolous or vexatious claims, with a view to prevent wastage of resources.

The arbitration clause contained in the RCMA/SCMA would apply to the disputes

While DHDL contended that the disputes had arisen under the RCMA and SCMA respectively, the Respondents submitted that the disputes arose under the Rajapura SPA and Southern SPA.

Upon examining the SPAs and the CMSAs, the Supreme Court, *inter alia*, observed that (i) the purpose of the RCMA and the SCMA was to operationalize DHDL's construction related obligations; (ii) the dispute arose squarely under a clause of the RCMA and SCMA that contemplated payment of a 'fee' for certain obligations; and (iii) the existence of the arbitration clause in the RCMA and SCMA has not been challenged. The Supreme Court held that the arbitration clauses under the RCMA and the SCMA would apply.

The Supreme Court, distinguished *Olympus Superstructure*[10]. In *Olympus,* the apex court examined two different arbitration clauses in two related agreements between the same parties and observed that (i) two valid arbitration clauses existed (ii) the arbitration clause in the main agreement was worded in wide terms such as to encompass disputes arising out of the secondary agreement (iii) since disputes arising from the secondary agreement were "*connected with*" disputes arising out of the main agreement, the dispute could be adjudicated under the main agreement. Whereas, in the present instance, the arbitration clauses in the SPAs were - (i) neither wider nor did they have an overriding effect on the arbitration clause in the SCMA and RCMA; (ii) limited to issues arising out of the transaction of sale and purchase of shares. Therefore, the Supreme Court observed that the present disputes could only be arbitrated under the SCMA and RCMA, and any other interpretation would render the arbitration clauses under SCMA/RCMA nugatory.

Sole arbitrator to decide on the consolidation of disputes

DHDL contended that although the SCMA and RCMA are two separate agreements, they are inextricably linked and since the dispute pertains to the payment of "fees" under both agreements, the disputes may be referred to a consolidated arbitral tribunal. The Respondents contended that separate arbitral tribunals were required to be appointed, though it may comprise of the same sole arbitrator. The Supreme Court observed that

- The RCMA and SCMA, though interlinked and connected, are two separate agreements;
- DHDL committed breaches under both RCMA as well as SCMA, and the disputes stem from separate facts.
- Since the financial components of both the projects had to be considered to compute the "*fee*", in the interest of "*avoiding wasting of time and resources, and to avoid conflicting awards*", the disputes under Petition 1 and Petition 2 were referred to a sole arbitrator.

The court clarified that the sole arbitrator shall determine whether the disputes ought to be consolidated under a composite award, or otherwise.

[8] *Supra Note 2*
[9] *Vidya Drolia and Others v. Durga Trading Corporation,* (2021) 2 SCC 1, ¶154.2 to 154.4 and ¶ 244
[10] *Olympus Superstructure Private Limited v. Meena Vijay Khetan and Others,* (1999) 5 SCC 651

CONCLUSION AND ANALYSIS

Following the introduction of section 11(6-A) of the Act by the Arbitration and Conciliation (Amendment) Act, 2015, the Supreme Court leaned towards narrowing the scope of intervention under section 11 of the Act. Recently, in *Uttarakhand Purv Sainik*[11], the Supreme Court held that under Section 11(6-A), the court is required only to examine the existence of the arbitration agreement and all other preliminary or threshold issues are left to be decided by the arbitrator under section 16 of the Act, which enshrines the '*kompetenz-kompetenz*' principle.

In *Vidya Drolia,* albeit in different facts, while the court emphasized on a "*prima facie*" examination, it observed that "*for legitimate reasons, to prevent wastage of public and private resources"* the court *"can exercise judicial discretion to conduct an intense yet summary prima facie review while remaining conscious that it is to assist the arbitration procedure and not usurp jurisdiction of the arbitral tribunal'*[12]*.*

Relying upon *Vidya Drolia*[13], the present judgment widens the role of the court to determine "*preliminary core issues*" at the stage of reference under section 11(6-A). While the court cautions that the examination of core issues must be within the framework of section 11 (6-A), the cause of concern is that the framework of section 11(6-A) is expressly limited to examination of existence of the arbitration agreement and not "*core issues*" between the parties. Therefore, it remains to be seen if the present decision has widened the role of the court and scope of intervention.

In the interest of judicious use of time and resources, although the apex court referred the disputes under Petition 1 and Petition 2 to a common sole arbitrator and examined the facts comprehensively, in a welcome step (i) the court has left the issue of consolidation open for determination by the arbitrator; and (ii) clarified that if the arbitrator found that 'real dispute' stemmed from the Rajapura SPA and Southern SPA, the arbitrator was free to wind up the proceedings with liberty to the parties to seek redressal under the said agreements.

We hope you have found this information useful. For any queries/clarifications please write to us at insights@elp-in.com or write to our authors:

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[11] *Uttarakhand Purv Sainik Kalyan Nigam Limited* v. *Northern Coal Field Limited,* (2020) 2 SCC 455 ¶ 7.10

[12] Supra Note 8, ¶ 139

[13] In *Vidya Drolia* - despite the repeated caution of a "*prima facie"* examination, the court therein observed that *"the court may for legitimate reasons, to prevent wastage of public and private resources, can exercise judicial discretion to conduct an intense yet summary prima facie review while remaining conscious that it is to assist the arbitration procedure and not usurp jurisdiction of the arbitral tribunal'*. ; Note: In *N.N. Global Mercantile Pvt. Ltd. v. Indo Unique Flame Ltd and Ors.,* 2021 SCC OnLine SC 13, the apex court has doubted paragraph 92, the Supreme Court in *Vidya Drolia* inasmuch as it affirmed para 22 and 29 of *Garware Wall Ropes Ltd. v. Coastal Marine Constructions & Engineering Ltd.,* Civil Appeal No. 3631 of 2019 arising out of Special Leave Petition (Civil) No. 9213 of 2018