

**IMPLICATIONS ON SECTION 11 OF THE ARBITRATION AND CONCILIATION ACT, 1996 BY THE ARBITRATION AND CONCILIATION (AMENDMENT) ORDINANCE, 2015**

**I. Section 11 – Bare Text**

**a. Under The Arbitration and Conciliation Act, 1996**

*“Appointment of arbitrators. —*

*(1) A person of any nationality may be an arbitrator, unless otherwise agreed by the parties.*

*(2) Subject to sub-section (6), the parties are free to agree on a procedure for appointing the arbitrator or arbitrators.*

*(3) Failing any agreement referred to in sub-section (2), in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two appointed arbitrators shall appoint the third arbitrator who shall act as the presiding arbitrator.*

*(4) If the appointment procedure in sub-section (3) applies and—*

*(a) a party fails to appoint an arbitrator within thirty days from the receipt of a request to do so from the other party; or*

*(b) the two appointed arbitrators fail to agree on the third arbitrator within thirty days from the date of their appointment, the appointment shall be made, upon request of a party, by the Chief Justice or any person or institution designated by him.*

*(5) Failing any agreement referred to in sub-section (2), in an arbitration with a sole arbitrator, if the parties fail to agree on the arbitrator within thirty days from receipt of a request by one party from the other party to so agree the appointment shall be made, upon request of a party, by the Chief Justice or any person or institution designated by him.*

*(6) Where, under an appointment procedure agreed upon by the parties, —*

*(a) a party fails to act as required under that procedure; or*

*(b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or*

*(c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure, a party may request the Chief Justice or any person or institution designated by him to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.*

*(7) A decision on a matter entrusted by sub-section (4) or sub-section (5) or sub-section (6) to the Chief Justice or the person or institution designated by him is final.*

*(8) The Chief Justice or the person or institution designated by him, in appointing an arbitrator, shall have due regard to—*

*(a) any qualifications required of the arbitrator by the agreement of the parties; and*

*(b) other considerations as are likely to secure the appointment of an independent and impartial arbitrator.*

*(9) In the case of appointment of sole or third arbitrator in an international commercial arbitration, the Chief Justice of India or the person or institution designated by him may appoint an arbitrator of a nationality other than the nationalities of the parties where the parties belong to different nationalities.*

*(10) The Chief Justice may make such scheme as he may deem appropriate for dealing with matters entrusted by sub-section (4) or sub-section (5) or sub-section (6) to him.*

(11) Where more than one request has been made under sub-section (4) or sub-section (5) or sub-section (6) to the Chief Justices of different High Courts or their designates, the Chief Justice or his designate to whom the request has been first made under the relevant sub-section shall alone be competent to decide on the request.

(12) (a) Where the matters referred to in sub-sections (4), (5), (6), (7), (8) and (10) arise in an international commercial arbitration, the reference to "Chief Justice" in those sub-sections shall be construed as a reference to the "Chief Justice of India".

(b) Where the matters referred to in sub-sections (4), (5), (6), (7), (8) and (10) arise in any other arbitration, the reference to "Chief Justice" in those sub-sections shall be construed as a reference to the Chief Justice of the High Court within whose local limits the principal Civil Court referred to in clause (e) of sub-section (1) of section 2 is situate and, where the High Court itself is the Court referred to in that clause, to the Chief Justice of that High Court".

**b. Under The Arbitration and Conciliation (Amendment) Ordinance, 2015**

- i. In sub-sections (4), (5) and (6), for the words "the Chief Justice or any person or institution designated by him" wherever they occur, the words "Supreme Court or as, the case may be, the High Court or any person or institution designated by such Court" shall be substituted;
- ii. After sub-section (6), the following sub-sections shall be inserted, namely:
  - 6A. The Supreme Court or, as the case may be, the High Court, while considering any application under sub section (4) or sub-section (5), shall, notwithstanding any judgment, decree or order of any court, confine to the examination of the existence of an arbitration agreement.
  - 6B. The designation of any person or institution by the Supreme Court or, as the case may be, the High Court, for the purposes of this section shall not be regarded as a delegation of judicial power by the Supreme Court or the High Court.
- iii. In sub-section (7), the words "the Chief Justice or the person or institution designated by him is final", the words "the Supreme Court or the case maybe, the High Court or the person or institution designated by such Court is final and no appeal including Letters Patent Appeal shall lie against such decision" shall be substituted;
- iv. For sub-section (8), the following sub section shall be substituted, namely:
 

"(8) The Supreme Court or, as the case may be, the High Court or the person or institution designated by such Court, before appointing an arbitrator, shall seek a disclosure in writing from the prospective arbitrator in terms of sub section (1) of section 12, and have due regard to:

  - a. Any qualifications required for the arbitrator by the agreement of the parties; and
  - b. The contents of the disclosure and other considerations as are likely to secure the appointment of an independent and impartial arbitrator.";
- v. In sub-section (9), for the words "the Chief Justice of India or the person or institution designated by him", the words "Supreme Court or the person or institution designated by that Court" shall be substituted;
- vi. For sub-section (10), the following sub-section shall be substituted, namely:-
 

"(10) The Supreme Court or, as the case may be, the High Court may make such schemes as the said court may deem appropriate for dealings with the matters entrusted by sub-section (4) or sub-section (5) or sub-section (6), to it.";

- vii. In sub-section (11), for the words “Chief Justices of different High Court or their designates, the Chief Justice or his designate to whom the request has been first made”, the words “different High Courts or their designates, the High Court or its designates to whom the request has been first made” shall be substituted;
- viii. For sub-section (12), the following sub-section shall be substituted, namely:-
- ‘(12) (a) Where the matters referred to in sub-sections (4), (5), (6), (7), (8) and sub-section (10) arise in an international commercial arbitration, the reference to the “Supreme Court or, as the case may be, the High Court” in those sub-section shall be construed as a reference to the “Supreme Court”; and
- (b) where the matter referred to in sub-section (4), (5), (6), (7), (8) and sub-section (10) arise in any other arbitration, the reference to the “Supreme Court or, as the case may be, the High Court” in those sub-section shall be construed as a reference to the “High Court” within whose local limits the principal Civil Court referred to in clause (e) of sub-section (1) of section 2 is situate, and where the High Court itself is the Court referred to in that clause, to that High Court.’;
- viii. After sub-section (12), the following sub-sections shall be inserted, namely:-
- “(13) An application made under this section for appointment of an arbitrator or arbitrators shall be disposed of by the Supreme Court or the High Court or the person or institution designated by such Court, as the case may be, as expeditiously as possible and an endeavour shall be made to dispose of the matter within a period of sixty days from the date of service of notice on the opposite party.
- (14) For the purpose of determination of the fees of the arbitral tribunal and the matter of its payment to the arbitral tribunal, the High Court may frame such rules as may be necessary, after taking into consideration the rates specified in the Fourth Schedule.
- Explanation- For the removal of doubts, it is hereby clarified that this sub-section shall not apply to international commercial arbitration and in arbitrations (other than international commercial arbitration) in case where parties have agreed for determination of fees as per the rules of an arbitral institution.”

## II. INTRODUCTION

Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the “Act”) speaks about the appointment of an Arbitrator. The section begins with the assertion that there is no set requirement for a person to act as an Arbitrator under any arbitration agreement, unless there is a consensual procedure arrived at between the parties for such appointment. In the event that there is no such agreed procedure for such appointment or if the agreed procedure stipulated in the contract is not followed by either of the parties, i.e. in cases where the designated appointment mechanism fails; then the Chief Justice or his designate can be approached to intervene under the Act.

## III. WHO IS THE APPOINTING AUTHORITY WHEN THE PARTIES/ INSTITUTION FAIL TO APPOINT AN ARBITRATOR WITHIN THE TIME PERIOD AND WHO IS THE APPOINTING AUTHORITY IN CASE OF AN INTERNATIONAL COMMERCIAL ARBITRATION?

The Arbitration and Conciliation (Amendment) Ordinance, 2015 (hereinafter referred to as the “Ordinance”) has amended the provisions of Section 11 of the Act in respect of appointment of an Arbitrator by the Chief Justice and has substituted such appointments to be done by the Supreme Court or, as the case may be, the High Court or any

other person or institution designated by such Court. The change of the authority from the Chief Justice to the High Court or the Supreme Court is applicable to the entirety of Section 11 of the Act.

The matters referred to in section 11(4), 11(5), 11(6), 11(7), 11(8), and 11(10) of the Act concerning international commercial arbitration has been provided for under Section 11 (12) (a) of the Ordinance. Section 11 (12) (a) provides for all reference to the Supreme Court and the High Court to be construed as the Supreme Court. Hence the Supreme Court is the appropriate appointing authority in case of matters concerning international commercial arbitration.

**IV. WHILE APPOINTING AN ARBITRATOR, WHAT QUESTIONS SHOULD THE SUPREME COURT OR THE HIGH COURT KEEP IN MIND? ALSO WHAT RANGE OF QUESTIONS CAN THE COURT EXAMINE IN AN APPLICATION FILED UNDER THIS SECTION?**

Section 11 (6A) of the Ordinance restricts the scope of adjudication of disputes in case of any application made under Section 11 of the Act to determine the existence of an arbitration agreement. It is to be noted in this regard that in the case of *S.B.P. and Co. vs. Patel Engineering*<sup>1</sup> a Seven Judge Constitution Bench, through a six is to one majority held as under:

*The power exercised by the Chief Justice of the High Court or the Chief Justice of India under section 11(6) of the Act is not an administrative power. It is a judicial power. The implication of this is that the Court will appoint an arbitrator only if it satisfies itself that all the conditions present for the initiation of the arbitration proceedings exist. Thus, it must go into the question of the validity of the arbitration agreement, the maintainability and Arbitrability of the claim, the qualifications of the arbitrators and other jurisdictional matters.<sup>2</sup>*

Thus as per the amendment brought about by the Ordinance, the Supreme Court or the High Court as the case maybe, has to restrict itself to simply decide the issue pertaining to the existence of an arbitration agreement in case of any application which is made under sub section (4), (5) or (6) of the Act. The Courts are further bound by aforesaid restraint in view of the non obstante clause contained in Section 11 (6A) pertaining to any judgment, decree or order passed by any court, the consequence of which would thus have no inference upon the aforesaid sections.

**V. WHICH HIGH COURT IS THE COMPETENT AUTHORITY TO ENTERTAIN AN APPLICATION UNDER THIS SECTION WHEN MORE THAN ONE APPLICATION IS MADE TO DIFFERENT HIGH COURTS?**

In cases where an application has been made before different High Courts, the same is governed under Section 11(11) of the Act as amended by the Ordinance. Section 11(11) provides that the competent authority to entertain an application is the High Court or its designate before which the request was first made when such multiple applications have been made before different High Courts.

**VI. DOES AN APPOINTMENT MADE BY AN INSTITUTION OR A PERSON SO DESIGNATED BY THE COURT TO DO SO AMOUNT TO DELEGATION OF JUDICIAL POWER?**

<sup>1</sup> AIR 2006 SC 450, also at 2005 (8) SCC 618

<sup>2</sup> Opening the Pandora's Box: An Analysis of the Supreme Court's Decision in *S.B.P. v. Patel Engineering*, Student Bar Review, Vol 19(2), at Page 72

No. The insertion of Section 11 (6B) implies the intention of bestowing the powers under the said section inherently to the designate taking up the determination and not by way of delegation of judicial power by the Supreme Court or the High Court. This is in contrast to the earlier Act which stated that the power of the Chief Justice was to be delegated to a designate and any such exercise of the power by such designate Judge was considered to be that of the Chief Justice as conferred by the statute.

**VII. HAS THE INTENTION OF THE COMMISSION (246TH REPORT OF LAW COMMISSION ON THE AMENDMENTS TO THE ARBITRATION & CONCILIATION ACT, 1996) TO INCORPORATE THE PRINCIPLES LAID DOWN IN THE JUDGMENT OF SBP & CO. V. PATEL ENGINEERING LTD. AND ANR, BEEN ACHIEVED BY THE AMENDMENT.**

A perusal of the amendment brought about by the Ordinance in Section 11 and the conclusions laid down in the case of S.B.P & Co. v. Patel Engineering Ltd. shows a striking dissimilarity between the views and opinions expressed in the Judgment and the Ordinance.

The majority of the principles concerning Section 11 of the Act as laid down in the aforesaid case have been struck off by way of the Arbitration Ordinance as under:

- Delegation of powers by the the Chief Justice of the High Court to another Judge of that court has been replaced *in-toto* owing to the shift of power of the Chief Justice to the High Court and/or the Supreme Court.
- Exercise of power by the designated judge to be that of the Chief Justice as conferred by the statute is not applicable.
- The right to decide the preliminary aspects of 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 or arbitrators has been reduced to merely determining the existence of an arbitration agreement by the High Court or the Supreme Court.
- The right to appeal under Article 136 of the Constitution of India to the Supreme Court and any scope of any Letters Patent Appeal brought about by the shift of power to the High Court from the Chief Justice has been restricted by way of the amended Section 11(7) of the Act.

Thus, the intention of the Commission (246th Report of Law Commission on the Amendments to the Arbitration & Conciliation Act, 1996) to incorporate the principles laid down in the judgment of SBP & Co. v. Patel Engineering Ltd. and Anr. have not been achieved by the amendment.

**VIII. CONCLUSION**

The entire process of appointment of Arbitrators has received a major overhaul by way of the Ordinance. The Ordinance seeks to look into certain issues important for adjudication of the essential disputes and restrict and diversion of issues brought before the Court. This has been looked into by way of Section 11 (6A) of the amended Act. Another important aspect covered through the ordinance is the right of a party to approach the Supreme Court in light of the case of *SBP & Co. v. Patel Engineering Ltd.* This has been amended by way of the Ordinance through amendment of Section 11(7) by way of which any application under sub section (4), (5), or (6) of Section 11 has been made binding and conclusive on the parties with no recourse to any Letters Patent Appeal or Special Leave. Further, the much ignored issue such as payment of fees to Arbitrators, which is often a cause of burden upon the parties to an agreement on account of unscrupulous charges by the Arbitrator, has been addresses through the Ordinance.