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LIMITED SCOPE OF COURTS UNDER SECTION 11(6A) OF THE ARBITRATION AND CONCILIATION ACT, 1996 – ANALYSIS

Amit Meharia

Managing Partner, MCO Legals

LLB (Hons) King's College London, Solicitor (Supreme Court of England & Wales)

Expertise:

Corporate Due Diligence & Corporate/Commercial Arbitration

amit.m@mcolegals.co.in

Tannishtha Singh

Legal Head, MCO Legals
BSL LLB, ILS Law College, Pune

Expertise:

Civil Litigation, Commercial Arbitration, Legal Due Diligence, Statutory Compliances

tannishtha.s@mcolegals.co.in

Introduction

1. Party autonomy being the backbone of arbitration, an agreement between parties may provide for arbitration as the dispute resolution mechanism.

2. When an arbitration agreement exists, the disputes between the parties are to be settled by an arbitrator. In such cases, the parties are to serve the arbitration notice and appoint an arbitrator in the manner as provided under the arbitration agreement. The arbitrator/arbitral tribunal acts as the judge in the cause of the parties.

3. Section 11 of the Arbitration and Conciliation Act, 1996 (the said Act) deals with provisions for appointment of arbitrators.

4. The procedure for appointment of arbitrators may freely be decided by the parties themselves under Section 11(2). The procedure may be provided for under the arbitration agreement.

5. On the failure of the parties to mutually agree on the name of an arbitrator or appoint an arbitrator in terms of the arbitration agreement, the parties may make an application under Section 11 before the Supreme Court or High Court, as the case may be, for making such appointment.

Section 11(6A)

1. Sub-section 6A was inserted vide the amendment of 2015 [Arbitration and Conciliation (Amendment) Act, 2015].

2. Where the Supreme Court or the High Court considers the application of either of the parties for appointment of an arbitrator, the court shall confine to the examination of the existence of an arbitration agreement in terms of Section 11(6A).

3. Prior to the amendment, the courts dealt with the applications for appointment of arbitrator by addressing a few preliminary issues such as jurisdiction of the arbitration, nature of claims, limitation period etc. *[National Insurance Co. Ltd. vs. Boghara Polyfab Pvt. Ltd. (2009) 1 SCC 267]*

Judicial dynamics post the amendment

1. Post the amendment and insertion of Section 11(6A), a new regime was introduced for the courts to essentially not look beyond the existence of an arbitration agreement in appointment of an arbitrator.

2. Courts have since taken a minimum intervention approach in matters of appointment of arbitrator.

3. In *Duro Felguera SA vs. Gangavaram Port Ltd. [(2017) 9 SCC 729]*the Supreme Court held that as per the amended provision, Section 11(6A) of the said Act, the court must only confine its examination to the existence of an arbitration agreement.

4. The Court clarified that the intent of the legislature to minimise judicial intervention is clear from a bare reading of the provision. The courts should and need only to investigate one aspect which is the existence of an arbitration agreement, i.e., that the agreement between the parties contains a clause that provides for reference of disputes which have arisen between the parties to arbitration - *"nothing more, nothing less"*.

5. It further clarified that the position taken in National Insurance case cannot continue post the insertion of Section 11(6A).

6. In *Vidya Drolia v. Durga Trading Corpn. [(2021) 2 SCC 1]*, the Supreme Court made an in-depth analysis into the meaning of the words "existence of arbitration agreement" under Section 11(6A). The Court held that contextually an examination of existence would also lead to an examination of enforceability since an agreement that is not enforceable and binding cannot be said to be in existence.

7. The existence of an agreement presupposes a valid agreement. Thus, an agreement must also be statutorily valid, enforceable, performable, and binding in

order to be treated as an agreement in existence under which an appointment of arbitrator can be made.

8. Reference was also made to *Garware Wall Ropes Ltd. vs. Coastal Marine Constructions and Engg. [(2019) 9 SCC 209] and Oriental Insurance Co. Ltd. vs. Narbheram Power & Steel (P) Ltd. [(2018) 6 SCC 534]* on the point that existence and validity of arbitration agreement are intertwined.

9. The Court was thus in favour of a prima facie judicial review at the Section 11 stage. However, the court interpreted the provision widely and still supported the view of minimising judicial intervention in matters of arbitration. In such lines, the Court held that the arbitral tribunal has the primary jurisdiction and authority to decide the disputes including the question of jurisdiction and non-arbitrability.

10. *Mohammed Masroor Shaikh vs. Bharat Bhushan Gupta [(2022) 4 SCC 156]* further held that when a dispute is prima facie arguable, the Court must refer the parties to arbitration and the question of non-arbitrability is to be left open to be decided by the arbitral tribunal. At the Section 11 stage, the Court must only ensure the existence of the arbitration agreement in order to appoint an arbitrator and refer the adjudication of ancillary matters to arbitration.

Beyond the limited scope

1. On many occasions, the Courts have also taken an expansive view in dealing with application under Section 11 of the said Act.

2. In *United India Insurance Company Ltd. vs. Antique Art Exports Pvt. Ltd. [(2019) 5 SCC 362]*, the Court took a contradictory view and exceeded the scope of Section 11(6A) by holding that although an arbitration agreement existed between the parties, the dispute could not be referred to arbitration since there was no arbitral dispute within the scope of the agreement.

3. In *DLF Home Developers Limited vs. Rajapura Homes Private Limited (2021 SCC OnLine SC 781)* the Court held that limited jurisdiction and scope under 11(6A) does not denude the Court of its judicial function to look beyond the bare existence of an arbitration clause to cut the deadwood.

4. The Court observed that even within the limited jurisdiction the court may examine whether the aggrieved party has made out a *prima facie* arguable case at the stage of reference with a view to prevent wastage of public and private resources and to weed out frivolous and vexatious claims.

5. Similar view was taken in *Indian Oil Corporation Limited v. NCC Limited (2022 SCC OnLine SC 896)* where the Supreme Court held that although the question of arbitrability falls within the jurisdiction of the arbitral tribunal, it may also be decided by the court at the Section 11 stage. Where the question regarding the claims are very clear in view of the agreement between the parties, the court may base its decision on such considerations and arrive at the conclusion as to whether or not the arbitrator should be appointed and the dispute should be referred to arbitration.

Conclusion

1. The courts have provided differing views in matter of limited scope of judicial intervention both under Section 11 as well as Section 34 (challenge to the arbitral award) applications under the said Act.

2. However, the courts have given clear view on the point that the primary jurisdiction in adjudication of dispute lies with the arbitrator in matters of arbitration.

3. The question that is still unanswered is whether the courts have the power to make a preliminary assessment of the dispute at the referral stage.