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# THE SCOPE OF PRELIMINARY INQUIRY UNDER SECTION 11 OF THE ARBITRATION ACT: THROUGH THE LENS OF THE 2015 AMENDMENT OF THE ACT

## A. INTRODUCTION & BACKGROUND

1. Section 11 of the Arbitration and Conciliation Act, 1996 (**‘the Act’**) enable the parties to a dispute to appoint an arbitrator, in the agreed manner, in furtherance to the arbitration agreement between the parties.
2. In case, the parties are unable to appoint an arbitrator themselves, they can resort to Section 11 Application to get the arbitrator appointed. Section 11 prescribes a procedure wherein upon request of the parties, the Supreme Court or High Court or any person or institution designated by such court is required to appoint an arbitrator subsequent to the examination of the existence of an arbitration agreement.
3. Prior to the 2015 amendment, the scope for interpretation of Section 11 of the Arbitration Act was comparatively wide and therefore, has been subject to different interpretations by courts.
4. The Seven Judge Constitution Bench of the Supreme Court in *SBP & Co. v. Patel Engg. Ltd.* [(2005) 8 SCC 619] preferred a wide interpretation of Section 11, it held that the Chief Justice under Section 11 was to decide all the threshold issues with respect to jurisdiction, the existence of an arbitration agreement, whether the claim was a dead one, or a time barred claim sought to be resurrected, or whether the parties had concluded the transaction by recording satisfaction of their mutual rights and obligations and received the final payment without objection, at the pre-reference stage.
5. The aforesaid decision was followed by a plethora of decisions of courts pertaining to Section 11 until the incorporation of the non-obstante clause in Section 11 by the 2015 Amendment to the Act.
6. The Division Bench of the Supreme Court in *Duro Felguera, S.A. v. Gangavaram Port Limited* [2017

SCC 9 729] held, subsequent to the 2015 amendment, the scope of examination under Section 11 has been confined only to the existence of the arbitration agreement and nothing more.

7. The Court further held that by virtue of the non-obstante clause under Section 11 of the Act, brought in by the 2015 amendment, and rendered the *SBP & Co. v. Patel Engg. Ltd.* judgment and other judgments that followed the said judgment, legislatively overruled.
8. Similar view was preferred by the Apex Court in *Uttarakhand Purv Sainik Kalyan Nigam Limited v. Northern Coal Field Limited* [2020 SCC 2 455] and held further that the preliminary issues or threshold issues are to be decided by the arbitrator in consonance with the doctrine of *kompetenzkompetenz*.

## B. THE PURPOSE OF THE 2015 AMENDMENT TO SECTION 11 OF THE ARBITRATION ACT

9. The 2015 Amendment to the Arbitration Act, which was the result of the 246th Law Commission Report, reinforced the doctrine of *kompetenzkompetenz* i.e. the Arbitral Tribunal has the competence and is empowered to determine all jurisdictional issues arising out of an arbitration agreement.
10. The doctrine intends to minimize judicial intervention so as to ensure that the arbitration process is not thwarted when a preliminary objection is raised by one of the parties.
11. The underlying legislative intent of the Arbitration Act, as highlighted by the Supreme Court in *Uttarakhand Purv [Supra]*, is party autonomy and that judicial intervention is minimized in the arbitral process.

## C. JURISDICTION TO INQUIRE NONARBITRABLE ISSUES

12. Though jurisdiction under Section 11 is limited, the Court may interfere at the Section 11 stage when it is manifestly and ex facie clear that the disputes are



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non-arbitrable, as the nature and facet of non-arbitrability would, to some extent, determine the level and nature of judicial scrutiny.

13. On the question of who decides the arbitrability, the Division Bench of the Apex Court in *Emaar India Ltd. v. Tarun Agarwal Projects LLP* [2022 SCC Online SC 1328] clarified and held that if the questions pertaining to nonarbitrability and whether the dispute was governed by the arbitration clause emerges, the court may examine and not leave the question unanswered for the Arbitral Tribunal to decide.
14. To that effect, it was observed and held that the expression “existence of arbitration agreement” under Section 11 of the Arbitration Act includes the aspect of the validity of the arbitration agreement.
15. However, it was also held, in case of disputable and debatable facts pertaining to the question of nonarbitrability, the Courts are required to force the parties to abide by the Arbitration Agreement as the Arbitral Tribunal has the primary jurisdiction and authority to decide the disputes relating to the question of nonarbitrability.
16. The restricted and limited review jurisdiction under Section 11 pertaining to the issue of arbitrability is to check and protect the parties from being forced to arbitrate when the matter is demonstrably non-arbitrable and to cut off the deadwood.
17. The Supreme Court in *DLF Home Developers Limited v. Rajapura Homes Private Limited* [2021 SCC Online SC 781] held that the courts, during the appointment of an arbitrator under Section 11 of the Arbitration Act, should not act mechanically in referring to a purported dispute raised by an applicant to the Arbitrator.
18. Even when an arbitration agreement exists, the Courts are not disabled from declining a prayer for reference in case the dispute in question does not correlate to the arbitration agreement.

#### **D. UNILATERAL APPOINTMENT OF ARBITRATOR**

19. A party having the sole right of appointment of an arbitrator is outside the purview of the Arbitration Act.
20. The Supreme Court in *Perkins Eastman Architects Dpc v. HSCC (India) Ltd.* [2019 SCC Online SC 1517] touched upon the aspect of unilateral appointment of arbitrator and opined that one party having the exclusive right to appoint a sole arbitrator of its own choice, will have an element of exclusivity in determining the course for dispute resolution.
21. Therefore, the person with an interest in the outcome or the decision of the dispute should not have the power to appoint a sole arbitrator. Such is the essence of the 2015 Amendment to the Arbitration Act.

#### **E. CONCLUSION**

22. With an aim to settle the confusion and highlight the objective of the statute, the legislature, via the 2015 amendment, confined the scope of inquiry to the examination of the existence of an arbitration agreement under Section 11 of the Act.
23. The Supreme Court in *DLF Home Developers Limited v. Rajapura Homes Private Limited* expanded the scope of Section 11 of the Act and held that the disputes in question should be in correlation to the Arbitration Agreement and the Courts during the pre-arbitration stage should not act mechanically and brush aside core preliminary issues within the framework of Section 11 and refer the purported dispute raised by an applicant to the Arbitrator.