LEGAL LOCK JOURNAL

2583-0384

VOLUME 2 || ISSUE 2

2023

Is Arbitrability Of A Dispute A Pre-Condition For An Order Under Section 11 Of The Act?

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Introduction

Disputes between parties are commonplace in the business world, and in today's fast-paced business world, time is as valuable as money. Both parties suffer losses when disputes fall victim to lengthy and complicated legal proceedings. The solution to this is in the form of alternative dispute resolution (ADR) mechanisms that allow easier and easier resolution of disputes between parties. Arbitration is an important method of alternative dispute resolution that can be historically traced back to the Panchayat era in villages, when elders settled disputes between individuals based on the principle of natural justice. , is a method of resolving disputes between parties without going to court. Alternative Dispute Resolution, or ADR, refers to any out-of-court procedures used to resolve conflicts. Typically, the most popular ADR techniques are negotiation, arbitration, mediation, and conciliation. ADR seeks to provide a quicker and easier manner of resolving disputes when the courts are understaffed and overloaded with cases. There are four kinds of the Alternate Dispute Resolution (ADR) mechanism they are as follows:

1. Arbitration
2. Mediation
3. Negotiation
4. Conciliation

What is Arbitration?

Arbitration is outside the court settlement of a dispute by one or more (odd number) persons who are appointed as arbitrators by both the parties. According to Section 2(1)(a) of the Arbitration and Conciliation Act, 1996 ***"Arbitration means any arbitration whether or not administered by permanent arbitral institution".*** In other words, any form of arbitration irrespective of its nature has been recognized statutorily in India by bringing such arbitration under the ambit of the

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Arbitration and Conciliation Act, 1996. It consists of a simplified trial, with simplified rules of evidence and with no discovery. Arbitration hearings are usually not a matter of public record. The arbitral award is binding on the parties just like a court decree or order that are binding on the parties to dispute. In general the term Arbitration is the settlement of a dispute outside of court by one or more (odd number) persons appointed as arbitrators by both parties. In Arbitration proceedings the parties mutually decide the arbitral rules to be followed i.e. the seat of arbitration is decided by the parties. For instance the parties may agree to follow the UNCITRAL Arbitration Rules.

Section-11 of the Arbitration and Conciliation Act, 1996

According to **Section 11 of the Arbitration and Conciliation Act of 1996** addresses the appointment of arbitrators. Just as the parties can mutually decide on the number of arbitrators under Section 10 of the Act, they can also mutually decide on the procedure for appointing arbitrators and appoint any person(s) of any nationality as arbitrator(s). In addition, if the parties disagree about the appointment of arbitrators, they can file a petition the Supreme Court or High Court (depending on the arbitration agreement) to appoint arbitrator(s) for them. In the recent years, Section 11 of the Arbitration and Conciliation Act 1996 (the Arbitration Act) has been subject to various interpretations and amendments. According to the Indian courts, the scope of inquiry under section 11 of the Arbitration Act is limited to determining the existence of an arbitration agreement. When approached under section 11 of the Arbitration Act, the judiciary's scope to ascertain the details of the dispute was well established as being limited to the prima facie identification of the arbitration agreement and the dispute. A section 11 application limits the court's intervention to determining whether that there is a valid arbitration agreement between the parties, and any dispute arising out of such agreement may necessitate the appointment of an arbitrator to resolve such disputes. However, the courts have recently been reviewing the established principle. They have not only identified the arbitration agreement, but they have also examined it and resolved related prima facie questions.

A few changes and different interpretations of Section 11 of the Arbitration and Conciliation Act 1996 have been made recently. The Indian courts had insisted that section 11 of the Arbitration

Act's investigation parameters were restricted to looking into whether an arbitration agreement existed. The prevailing principle is currently being reviewed by the courts, nevertheless.

Intention of the Legislature

The 176th Law Commission Report (the 176th LC Report) noted that differing perspectives on the stage at which jurisdictional issues could be resolved had been expressed. Divergent views have also been expressed on whether orders appointing an arbitrator issued by the Chief Justice of India or his nominee, or by the Chief Justice of the High Court or his nominee, should be treated as administrative orders or judicial orders. Treating Arbitration Act orders as administrative has resulted in several writ petitions being filed before various high courts raise jurisdictional objections and, as a result, a stay of arbitration proceedings being obtained. The Law Commission also discussed whether the Chief Justice of India or the Chief Justice of the High Court is ***persona designata*** and whether the exclusion of remedy is available under Article 226 of the Indian Constitution of 1950. It was also stated that there are differing perspectives on the mandatory nature of the deadlines prescribed by sections 11(4) and (5) of the Arbitration Act. It was also stated that section 11(6) of the Arbitration Act makes no mention of a time limit. The 176th LC Report discussed the difficulties that arise if the preliminary issues are not decided under section 11 of the Arbitration Act, in addition to the benefits and drawbacks of an order under section 11 of the Arbitration Act being an administrative or judicial order. The 176th LC Report also stated that preliminary issues should be decided only if certain conditions are met as per the law.

Following that, the 246th Law Commission Report proposed that section 11 of the Arbitration Act be amended so that the high court's reference to any person or institution designated by it is not regarded as a delegation of judicial power. An affirmative judicial finding of the existence of an arbitration agreement, as well as the administrative act of appointing an arbitrator, is final and irreversible. It was also proposed that the high courts be given the authority to create their own rules regarding arbitration fees in accordance with the Sixth Schedule of the Arbitration Act. The Arbitration and Conciliation (Amendment) Act, 2015 had altered section 11 to ensure that the delegation of the power of appointment would not be viewed as a judicial act in order to address the backlog of cases before the courts. This was done to significantly shorten the amount of time

required at the beginning of the arbitration due to one party's failure to designate an arbiter. As a result, provision 11(6A) of the Arbitration Act was added. The Arbitration and Conciliation (Amendment) Act 2019 eliminated the subsection, but only after it had been in place for a short period of time due to judicial precedent (the 2019 Amendment).

Judicial Stand in India

The Supreme Court of India held in the case of **Duro Felguera v. Gangavaram Port Ltd**, that under section 11 of the Arbitration Act, the court's authority is limited to determining whether an arbitration agreement exists. It was decided that based on a cursory reading of section 11(6) of the Arbitration Act, the courts should only be required to look at one matter—namely, whether or not there is an arbitration agreement. The Supreme Court also ruled that in order to make this decision, it must be determined whether the contract contains a provision calling for arbitration of any disagreements between the parties.[2] It is important to remember that although if section 11(6A) was removed by the 2019 Amendment, the provision's judicial intent still serves as the court's guide when considering a request made under section 11 of the Arbitration Act. Because of this, section 11 only grants the court the authority to determine whether an arbitration agreement and an arbitral dispute exist.

In the case **of Garware Wall Ropes Ltd. v Coastal Marine Constructions & Engineers Ltd**, the Supreme Court held that a plain reading of section 11(6A) of the Arbitration Act, when read with section 7(2) of the Arbitration Act and section 2(h) of the Contract Act 1872, would make it clear that an arbitration clause in an agreement does not exist when it is not legally enforceable.[3] This also indicates that the Supreme Court's decision in **SMS Tea Estates (P) Ltd v Chandmari Tea Co (P) Ltd** has been unaffected by the amendment to section 11(6A) of the Arbitration Act. A groundbreaking decision by the Supreme Court declared unilateral appointments, despite an arbitration agreement between the parties, to be illegal.[4] The Court held in the case of **Perkins Eastman Architects DPC v HSCC (India) Ltd** that a party to the agreement would not be entitled to appoint an arbitrator on its own. This is because, in a case where only one party has the right to appoint a sole arbitrator, the party to the agreement's choice will always have an

[2] [2017] 9 SCC 729.
[3] [2019] 9 SCC 209.
[4] [2011] 14 SCC 66.

element of exclusivity in determining or charting the course for dispute resolution.[5] The Arbitration Act prohibits such an exclusive and unilateral power of appointment. The existence of an arbitration agreement and the extent of judicial review required and required therein has always been a source of consternation under the Arbitration Act.

The Supreme Court considered the issue of limitation in **BSNL v. Nortel Networks (India) (P) Ltd.** and decided that it is typically a mixed-law and fact subject that is in the purview of the arbitral tribunal.[6] The Court further distinguished between jurisdictional and admissibility concerns, stating that the former include challenges to an arbitrator's or tribunal's authority to hear a dispute, such as those based on lack of consent or disputes that are not covered by the arbitration agreement. On the other hand, admissibility issues concern procedural requirements, such as a failure to meet pre-arbitration requirements, such as a mandatory requirement for mediation before the start of arbitration, or a challenge to a claim or a portion of a claim being time-barred or prohibited until some pre-condition is met. An admissibility issue is not a challenge to the arbitrator's jurisdiction to decide the claim. However, in the case of issuing a notice invoking arbitration (NIA), the limitation period begins when and whether the court can determine it to be barred by limitation, and so on. Section 11 of the Arbitration Act gives the courts no authority to rule on the issue of limitation or the validity of the NIA in terms of limitation period. In Nortel Networks, the Court held that the issue of limitation concerning the "admissibility" of the claim must be decided by the arbitral tribunal either as a preliminary issue or at the final stage after the parties' evidence is presented. Recent Supreme Court decisions unambiguously broaden the scope of power available to courts under Section 11 of the Arbitration Act. The Supreme Court has now stated unequivocally that courts must consider whether the dispute in question correlates to the arbitration agreement between the parties, and if there is no correlation, the reference to arbitration can be rejected, even if the parties have a valid arbitration agreement. The Court ruled that tenancy disputes governed by the Transfer of Property Act 1882 are highly arbitrable and established the following four-part test to determine the arbitrability of the subject matter of dispute:

[5] [2019] SCC Online SC 1517.
[6] [2021] 5 SCC 738.

- When the cause of action and subject matter of the dispute relate to actions in rem that do not pertain to subordinate rights in personam that arise from rights in rem;
- When the cause of action and subject matter of the dispute affect third-party rights, have erga omnes effect, and require centralized adjudication, and where mutual adjudication would not be appropriate and enforceable;
- When the cause of action and subject matter of the dispute relate to inalienable rights;
- When the subject matter of the dispute is expressly or impliedly non-arbitrable under applicable laws.

The Supreme Court of India expanded the scope of its examination of the arbitration agreement at the pre-arbitral stage in the case of **DLF Home Developers Limited v. Rajapura Homes Private Limited**, holding that the courts cannot arbitrarily appoint an arbitrator and subject the parties to arbitration. The arbitration agreement must be examined to make sure it applies to the current dispute, and the courts can refuse the reference if there is no relation.[7]

The Supreme Court of India recently discussed the absence of a written arbitration agreement and the powers of the High Court under section 11(6) of the Arbitration Act in the case of **Swadesh Kumar Agarwal v Dinesh Kumar Agarwal & others**.[8] One of the parties petitioned the High Court of Delhi under Section 11(6) to terminate the mandate of the sole arbitrator, who had been appointed with the parties' consent. It was determined that in the absence of a written agreement between the parties on the procedure for appointing an arbitrator(s), the parties are free to agree on a procedure by mutual consent or inclusive agreement, and the dispute can be referred to an arbitrator(s) who can be appointed by mutual consent. If an agreement cannot be reached, the matter may be resolved in accordance with sections 11(2) or 11(5) of the Arbitration Act. It was further held and clarified that, in such a case, the application for the appointment of an arbitrator(s) shall be maintainable under section 11(5) of the Arbitration Act rather than section 11 of the Arbitration Act. The Court ruled that if there is a disagreement about the arbitrator's mandate being terminated for the reason(s) specified in section 14(1)(a), the dispute must be brought before the court, as defined in section 2(e) of the Arbitration Act. A dispute of

[7] [2021] SCC OnLine SC 781.
[8] CA 2935-38 of 2022.

this nature cannot be resolved through an application filed under Section 11(6) of the Arbitration Act.

Final Thoughts

It is significant to note that, with the caveat that this examination is to be reserved for exceptional circumstances, the scope of an investigation of the validity of an arbitration agreement includes an examination into whether the dispute's subject matter is capable of arbitration. According to recent trends, the inspection is restricted to concerns that are immediately obvious and does not include a thorough investigation. The exercise and examination should be conducted in a way that upholds the legislative intent and goal, which is known to be to minimize court involvement during the appointment of the arbitrator. Even though the parties are not required to justify the claim or plead exhaustively in respect of limitation or the claim, the courts can certainly decline a plea for reference if the dispute does not correspond to the parties' arbitration agreement. As a result, instead of simply directing the parties to arbitration, the courts will have the authority to conduct a preliminary examination within the defined parameters.