

Update

14 January 2020, Tuesday

Section 11 enquiry is limited to examining the existence of arbitration agreement (Bombay High Court)

by Editor

Shamsuddin v. Now Realty Ventures LLP

Court: Bombay High Court | **Case Number:** CAR BPL 480/2019 | **Citation:** 2020 SCC OnLine Bom 100 | **Bench:** GS Patel J | **Date:** 16 January 2020

A. Prefatory

Section 11(6A) of the Arbitration and Conciliation Act, 1996 (“ACA”) was introduced by the Arbitration and Conciliation (Amendment) Act, 2015 (“2015 Amendments”). It provides that the Supreme Court or as the case may be the High Court, while considering any application for appointment of arbitrator will notwithstanding any decree or order of any court confine itself to the examination of existence of an arbitration agreement.

Section 11(6A) has been omitted by the Arbitration and Conciliation (Amendment) Act, 2019 (“2019 Amendments”). As on the date of this update, the omission has not come into effect.

In *Mayavati Trading Private Limited v. Pradyuat Deb Burman*, (2019) 8 SCC 714 (“*Mayavati Trading*”) a 3-judge bench of the Supreme Court held that the effect of the omission would not be to resuscitate the law prevailing before the 2019 Amendments.

On 05 September 2019, another 3-judge bench of the Supreme Court in *Geo Miller and Co. Pvt. Ltd. v. Rajasthan Vidyut Utpadan Nigam Ltd.*, (2019) SCC OnLine 1137 (“*Geo Miller*”), dismissed an application under Section 11 ACA as time barred.

On 27 November 2019, a 2-judge bench of the Supreme Court in *Uttarakhand Purv Sainik Kalyan Nigam Limited v. Northern Coal Field Limited*, (2019) SCC OnLine 158 (“*Purv Sainik*”), considering an application under Section 11 ACA had held that the question whether the claim (to be raised in arbitration) was time barred or not was, given the mandate of Section 11(6A) ACA, a matter for the arbitrator.

B. Shamsuddin’s case

B1. Shamsuddin’s application under Section 11 ACA to appoint an

arbitrator was resisted on the ground that it was barred by limitation

The submissions were based on two grounds:

- a. First, Section 11(6A) has been omitted by the 2019 Amendments, and;
- b. The matter is governed by the 3-judge bench judgment in *Geo Miller*. The latter decision in *Uttarakhand Purv Sainik* case is *per incuriam*.

Rejecting both arguments, GS Patel J, held:

- a. The omission of Section 11(6A) has not yet been notified. In any case, the argument is academic because the court in *Mayavati Trading* has held that the effect of omission is not to resuscitate the law prevailing prior to the 2019 Amendments.
- b. To hold that the claim for reference to arbitration (that is, the Section 11 application) can be held to be barred by limitation would be directly against the decision of the Supreme Court in *Purv Sainik*.
- c. There is no inconsistency between *Geo Miller* and *Purv Sainik*. They dealt with entirely different situations— *Geo Miller* was decided under the old law when Section 11(6A) was not inserted in the ACA. *Purv Sainik* was decided when Section 11(6A) was present in the ACA. The situation in *Purv Sainik* is the one closer to the case at hand.
- d. Counsel may be correct in submitting that holding a Supreme Court decision to be one rendered *per incuriam* is not a special privilege confined to the Supreme Court, any court at any level is entitled to so hold, but there is no question of saying that *Purv Sainik* is rendered *per incuriam*.

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