EXISTENCE, FORM, VALIDITY AND LEGALITY OF ARBITRATION AGREEMENTS

INTRODUCTION

What is the 'existence' of an arbitration agreement? What is validity? Is there a distinction between the two? How is nonarbitrability related, if at all, to existence and validity? How are these issues involved in an application for appointment of arbitrator, or an application to refer the parties to arbitration? In 2019, the Indian courts continued, and in some cases started, wrestling with a few of these and related questions.

(A) BEFORE 2015 AMENDMENTS, COURTS EXAMINED VALIDITY, EXISTENCE, ARBITRABILITY, ETCETERA IN APPLICATION FOR APPOINTMENT OF ARBITRATOR OR TO REFER PARTIES TO ARBITRATION[1]

When enacted in 1996, Section 11 ACA[2] vested the power of appointment of arbitrator(s) with the Chief Justice or any person or institution designated by him. A question often arose whether this power is judicial or administrative.[3] The answer was 'settled' six to one in a 7-judge bench decision in *SBP & Co.* v. *Patel Engineering Limited*, (2005) 8 SCC 618.

The court concluded that it is a judicial power and unless the Chief Justice was satisfied that the conditions for its exercise existed, the appointment could not be made. The majority then read into Section 11 those condi-

[1] We do not consider Section 9 ACA in this chapter

[2] Article 11 of the Model Law and Section 11 ACA provides for the procedure for the appointment of arbitrator. If the parties do not agree without involvement of the court, the court is required to appoint arbitrator(s) (following the guidelines with respect to independence, impartiality and nationality).

[3] *See*, for a brief history, O.P. Malhotra, Opening the Pandora's Box: An Analysis of the Supreme Court's Decision in *S.B.P.* v. *Patel Engineering*, 19 Student B. Rev 69 (2007).

tions, namely (i) whether there is a valid arbitration agreement in terms of Section 7 ACA[4]; (ii) whether the applicant is party to the arbitration agreement; (iii) whether the dispute was arbitrable; (iv) whether the claim was dead, or time-barred.

The court identified and segregated the preliminary issues that may arise for consideration in an application under Section 11 ACA into three categories, that is, (i) issues which the Chief Justice or his designate is bound to decide; (ii) issues which he can also decide, that is, issues which he may choose to decide; and (iii) issues which should be left to the Arbitral Tribunal to decide".

In *National Insurance Company Limited* v. *Boghara Polyfab Private Limited*, (2009) 1 SCC 267, a 2-judge bench of the Supreme Court (R.V. Raveendran and L. S. Panta JJ), following *SBP*, explained these categories.[5]

Thus, the question of validity, existence, maintainability, and arbitrability of the claims of the arbitration agreement and arbitrability (in the wider sense of the term, which includes the question if the dispute is covered by the arbitration agreement) were considered jurisdictional questions.

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4 Which mainly deals with the written form requirements of an arbitration agreement.

5 22.1. The issues (first category) which the Chief Justice/his designate will have to decide are:
(a) Whether the party making the application has approached the appropriate High Court.
(b) Whether there is an arbitration agreement and whether the party who has applied under Section 11 of the Act, is a party to such an agreement.
22.2. The issues (second category) which the Chief Justice/his designate may choose to decide (or leave them to the decision of the Arbitral Tribunal) are:
(a) Whether the claim is a dead (long-barred) claim or a live claim.
(b) Whether the parties have concluded the contract/transaction by recording satisfaction of their mutual rights and obligation or by receiving the final payment without objection.
22.3. The issues (third category) which the Chief Justice/his designate should leave exclusively to the Arbitral Tribunal are:
(i) Whether a claim made falls within the arbitration clause (as for example, a matter which is reserved for final decision of a departmental authority and excepted or excluded from arbitration).
(ii) Merits or any claim involved in the arbitration.

(B) THE SAME QUESTIONS WERE CONSIDERED IN APPLICATION TO REFER THE DISPUTE TO ARBITRATION ALSO

To enforce an arbitration agreement in cases of domestic or international arbitration also required proof of existence, validity, arbitrability, et.al.[6]

Before the 2015 Amendments, Section 8 required a judicial authority before which an action is brought in a matter which the subject of an arbitration agreement to refer the parties to arbitration on a timely application by a party. It read: "a judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration."

Since the enactment of the ACA, Section 45 requires the court to refer parties to an international commercial arbitration unless it finds the agreement is "null and void, inoperative or incapable of being performed." Thus, the question if the arbitration is valid is required to be considered by the courts in an application under Section 45 also. That apart, the courts have always considered the issue of arbitrability within the meaning of this Section.[7]

(C) THE 2015 AMENDMENTS

The 246th Law Commission Report discussed amendments to Section 8, 11, and 45 under the heading "Pre-Arbitral Judicial Intervention."[8] It was of the view that the same test should apply to Sections 8, 11, and 45. Amendments

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6 You have an arbitration agreement with another person but when disputes arise that person backs off from the arbitration agreement and goes to the court to litigate. What is your remedy? You can request the court to refer the dispute to arbitration. If all parties are 'domestic', the request is made under Section 8 ACA and in cases involving 'international' parties, under Section 45 ACA. This ability to enforce the arbitration agreement is "of fundamental importance to the efficacy of international arbitral process".

7 *See* Chapter on nonarbitrability for a discussion on validity and the difference between validity and arbitrability.

8 It also discussed Section 9 ACA which gives the court the power to grant interim measures.

to Sections 8 and 11 were recommended to restrict to an examination if the arbitration agreement existed or is null and void.

However, the test brought into Section 8 was "notwithstanding any judgment, decree or order of the Supreme Court of any Court, refer the parties to arbitration unless it finds that prima facie *no valid arbitration agreement exists*." (emphasis added)

The one brought into Section 11 *via* the introduction of sub-section (6A) was "the Supreme Court or, the case may be, the High Court, shall, notwithstanding any judgment, decree or order of any court, *confine to the examination of the existence of an arbitration agreement*".

So, when you apply under Section 8 to refer the matter to arbitration, the question before the court will be if a "valid arbitration agreement exists." If you apply for the appointment of an arbitrator, the question will be "examination of existence of arbitration agreement."

(D) ISSUES OF EXISTENCE, VALIDITY, ARBITRABILITY, AND OTHERS IN 2019[9]

1. Does 'Existence' Include Nonarbitrability? Referred to a 3-judge bench.

Earlier, in 2017 in *Duro Felguera, S.A.* v. *Gangavaram Port Limited*, (2017) 9 SCC 729 decided on 10 October 2017 a 2-judge bench of the Supreme Court (Kurian Joseph and R. Banumathi JJ) said that in an application under Section 11 ACA after the 2015 Amendments "all that the Courts needs to see is whether an arbitration agreement exists – nothing more, nothing less."

Two days later on 12 October 2017, another 2-judge bench of R. K. Agrawal and Abhay Manohar Sapre JJ in *Himangni Enterprises* v. *Kamaljeet Singh Ahluwalia*, (2017) 10 SCC 706 decided that a tenant's application under

9 *See* Chapter 3 on nonarbitrability.

Section 8 ACA to refer the dispute to arbitration could not be allowed because a tenancy dispute governed by the Transfer of Property Act, 1882 was not arbitrable. The landlord had filed a suit for eviction, and the tenant had applied to refer the matter to arbitration.

Both these cases came up for discussion in *Vidya Drolia and others* v. *Durga Trading Corporatio*n, 2019 SCC OnLine 358, before another 2-judge bench of R.F. Nariman and Vineet Saran JJ in February 2019. This concerned a tenancy dispute where an application under Section 11 was allowed by the preceding court and an arbitrator appointed. The decision in *Himangni* came later based on which a review application was filed (presumably on the ground that arbitrator should not have been appointed because the dispute was inarbitrable) but dismissed. That is how the matter traveled to the Supreme Court.

Speaking through Nariman J, the court noted (i) the Law Commission's recommendations (of including in Section 11 the requirement to examine existence and validity); (ii) the eventual amendment to Section 11 ACA (confining examination to existence); and (iii) Section 16 ACA (which gives the tribunal the competence to rule on existence and validity of an arbitration agreement).

After noting these, the court said a question that needs to be authoritatively decided by a bench of three learned judges is whether existence would include weeding out non-arbitrable matters.

The issue of whether a tenancy dispute was arbitrable or not was also referred to arbitration after an analysis of *Himangni*. Nariman J. concluded, after a sharp discussion on arbitrability, that the reasoning in *Himangni* did not hold good.

2. A 2-Judge Bench Says 'Existence' Includes Arbitrability (In the Sense Whether the Dispute Survived). Overruled By A 3-Judge Bench Which Said Confine Only To Existence

Another 2-Judge bench of the Supreme Court considering a matter under Section 11 (6A) decided in *United India Insurance Company Limited* v. *Antique*

Art Exports Private Limited, (2019) 5 SCC 362 that the court could still see if the dispute was arbitrable. This was in the context of the argument that the claim had been settled (and therefore involving the wider facet of arbitrability). It also attempted to distinguish *Duro Felguera*.

A few days later, on 05 September 2019, in *Pradyuat Deb Burman*, 2019 SCC OnLine SC 1164, a 3-Judge bench (R. F. Nariman, R. Subhash Reddy, and Surya Kant JJ) overruled *United India* and upheld *Duro Felguera*. It said the examination under Section 11 is confined only to the existence of an arbitration agreement.

3. Effect of Omission of Section 11 (6A) in 2019 Amendments

Pradyuat also considered the effect of omission of Section 11 (6A) on the 2019 Amendments (not yet brought into force as on the date of this publication). The court examined why Section 11 (6A) was omitted and concluded that the omission is not to resuscitate the law.

4. Issue as to Limitation—If Can Be Examined in a Section 11 Application

Geo Miller & Co. Pvt. Ltd. v. *Rajasthan Vidyut Utpadan Nigam Ltd.*, 2019 SCC OnLine SC 1137, a 3-judge bench decision in September 2019, also involved an application for appointment. The Chairman of the respondent electricity board had the power to decide the dispute himself or appoint another person to arbitrate. The issue in focus was the limitation to file an application under Section 11 ACA. The court held the application was time-barred.[10]

In December, a 2-judge bench in *Uttrakhand Purv Sainik* noted *Duro Felguera* and concluded that the question of limitation could not be examined after the 2015 Amendments. However, the court also referred to several situations where the appointment of an arbitrator may be refused. These, the

[10] For a discussion on reasoning of this case see the chapter on Time Limitations.

court said, included cases of fraud, deception, the validity of arbitration agreement, dispute beyond the scope of an arbitration agreement.

It should be noted here that in 2020 in *Shamsuddin* v. *Now Realty Ventures LLP*, 2020 SCC OnLine Bom 100 (decided on 14 January 2020) an argument was run before G. S. Patel J in the Bombay High Court that *Purv Sainik* was decided contrary to *Geo Miller*. The argument was rejected noting *Geo Miller* was a case under the unamended statute.

5. Does an Unstamped or Insufficiently Stamped Arbitration Agreement Exist Within the Meaning of Section 11 or Section 9 ACA?

On 04 April 2019, a 3-judge bench of the Bombay High Court in *Gautam Landscapes Pvt. Ltd.* v. *Shailesh S. Shah and Another*, 2019 SCC OnLine Bom 563 decided two questions referred by two separate single-judge benches on a preliminary issue of stamping. One matter from which the reference arose was a Section 9 petition in Arbitration Petition No. 466 of 2017 (*Gautam Landscapes Pvt. Ltd.* v. *Shailesh S. Shah*)[11] and the other was a Section 11 application in Arbitration Application No. 300 of 2018 (*Vijay Sharma* v. *Vivek Makhija*).

The 3-judge bench (also called a full-bench) held that an application under Section 9 or Section 11 of the ACA could be considered, and relief granted, even if a document containing an arbitration clause is unstamped or insufficiently stamped.[12] The matters were sent back to the respective single-judge benches for further consideration.

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[11] In *Gautam* too a Section 9 petition was filed with a Section 11 application. The order referring the matter to the full bench was on the point of Section 9 petition, though the cause title of that order (06 September 2018, S.J. Kathawalla J) suggests that the Section 9 petition and 11 application were taken up together.

[12] Bench comprising of Naresh H. Patil, CJ and R.D. Dhanuka and G.S. Kulkarni JJ Several reasons were given, including that even if an instrument is required to be stamped, which is not otherwise stamped at all or insufficiently stamped, such defect is curable on payment of requisite amount of penalty. Postponing an application for consideration, filed under Section 11 or Section 9, to indefinite period till the final decision on the issue of stamping, would not

At paragraph 120 (SCC OnLine version) the two questions framed in *Gautam* were answered as follows:

(i) Question number 1: "Whether a Court, under the Arbitration and Conciliation Act, 1996, can entertain and grant any interim or ad-interim relief in an application under Section 9 of the said Act when a document containing an arbitration clause is unstamped or insufficiently stamped? Answer: In the affirmative."

(ii) Question number 2: "Whether, inter alia, in view of Section 11(6A) of the Arbitration and Conciliation Act, 1996, inserted by Arbitration and Conciliation (Amendment) Act, 2016, it would be necessary for the court before considering and passing final orders on an application under Section 11(6) of the Act to await the adjudication by the stamp authorities, in a case where the document objected to, is not adequately stamped? Answer: In the negative."

Then, on 10 April 2019, in *Garware Wall Ropes Limited* v. *Coastal Marine Constructions & Engineering Ltd.*, (2019) 9 SCC 209, a 2-judge bench of the Supreme Court (R.F. Nariman and Vineet Saran JJ) decided in the specific context of a Section 11 application that an arbitration agreement does not exist as a matter of law unless the document which contains it is sufficiently stamped. The court in *Garware* then over-ruled *Gautam*'s answer of question number 2 (which related to Section 11 application). It said: "Question (2), having been answered contrary to our judgment, is held to be incorrectly decided" [para 30, *Garwar*e, SCC version].

Garware noted that Section 11 (6A) requires only an examination as to the existence but considered that the arbitration clause did not exist as a matter of law until stamped. It relied on a 3-judge bench decision in *United India Insurance Co. Ltd.* v. *Hyundai Engineering and Construction Company Limited*, (2018) 17 SCC 607 (Dipak Misra, A.M. Khanwilkar and Dr. D.Y. Chandra-

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be in conformity of the legislative policy and intent to provide speedy remedy under Section 11 or Section 9 of the ACA.

chud JJ). The arbitration clause in *Hyundai* applied if the insurer admitted or accepted liability. On facts, it was found that the insurer repudiated the claim. The court in *Garware* considered this 'existence' in the insurance policy and yet not 'existence' as a matter of law. Likewise, it said the arbitration clause did not exist unless duly stamped.

Getting back to *Gautam*, the decision there was taken in appeal to the Supreme Court in Special Leave Petition (C) No(s). 10232-10233/2019. On 29 April 2019, the court issued notice but said that "the Section 9 proceeding, however, may continue in the meanwhile and judgment delivered thereon shall not be implemented without the leave of this Court". This matter is still pending and will likely 'settle' the issue.

In *Saifee Developers Pvt. Ltd.* v. *Shanklesha Constructions*, Commercial Arbitration Petition No. 1060 of 2019, a single-judge bench of the Bombay High Court (G.S. Kulkarni J) had a Section 9 petition before him. It was argued based on *Garware* that no ad-interim relief could be granted because the agreement was not sufficiently stamped.

Kulkarni J held that the submission could have no bearing on the petition under Section 9. He relied on *Gautam*, referred to *Garware*, and the Supreme Court's order in appeal against *Gautam*, and concluded that the full-bench decision in *Gautam*, not having been stayed by the Supreme Court, continued to bind. Kulkarni J accordingly granted ad-interim reliefs.

The decision in *Saifee* was followed in *IREP Credit Capital Pvt. Ltd.* v. *Tapaswi Mercantile Pvt. Ltd. and another*, 2019 SCC OnLine Bom 5719, by G.S. Patel J sitting singly (decided on 20 December 2019).

G.S. Patel J followed *Garware* in *West Quay* (cited infra) and held that an agreement with an arbitration clause, stamped elsewhere if brought in Maharashtra, will have to be stamped again even if arbitration is the only thing to happen in Maharashtra. He said arbitration is a thing done or to be done under Maharashtra Stamp Act.

6. Arbitrary Arbitration Agreement

The Supreme Court's decision in *Icomm* where it struck down an arbitration agreement as arbitrary, is discussed in the Chapter on Extent of Judicial Intervention.

7. Formal Validity of Arbitration Agreement—Written Form Requirement

In *Mahanagar Telephone Nigam Limited* v. *Canara Bank and others*, 2019 SCC OnLine SC 995, the Supreme Court considered the written form requirements under Section 7 ACA and emphasized that arbitration agreement can exist in the form of exchange of statement of claims and defense, in which the existence of the agreement is asserted by one party, and not denied by the other (see the Chapter on Parties to an Arbitration Agreement).

In *Inspira I.T.* v. *Tata*, 23019 SCC OnLine Bom. 2716, the question where parties had a written arbitration agreement arose in an interesting fact situation. The arbitrator had been appointed by the court, with the consent of the parties, while hearing a company petition. He resigned mid-way of the arbitral proceedings. When Inspira, the claimant in arbitration, filed an application for his substitution, Tata Consultancy used the opportunity to argue that there was no (written) arbitration agreement within the meaning of Section 7 of the ACA. The court held that the form requirements were satisfied in the pleadings.