



Supreme Court confirms that pre-arbitral jurisdiction of the Supreme Court/High Court under Section 11 of the Arbitration Act is confined to determining the existence of the arbitration agreement¹

Brief Facts

The Supreme Court of India (“SC”) in *M/s Mayavti Trading Pvt Ltd v. Pradyut Deb Burman* (hereinafter “**Mayavti Trading**”), refused to exercise extraordinary jurisdiction under Article 136 of the Constitution of India given the facts of the case and dismissed the appeal.

However, since one of the parties, during the course of arguments, relied on the judgment of a Division Bench of the SC in *United India Insurance Company Ltd. v. Antique Art Exports Private Limited* (hereinafter “**United India Insurance**”),² the three-judge bench of the SC took the opportunity to overrule the judgment as not having laid down the correct law.

Issues

Issue (i): Whether the judgment in *United India Insurance* laid down the correct law in holding that that the appointment of an arbitrator by a Court under Section 11(6A) of the Arbitration and Conciliation Act, 1996 (“**Act**”) was a judicial power?

Issue (ii): What is the rationale behind omission of Section 11(6A) vide the Arbitration and Conciliation (Amendment) Act, 2019 (“**2019 Amendment**”)?

Issue (iii): What is the prescribed scope of examination and analysis by a Court exercising its power under Section 11 of the Act?

Judgment

Issue (i): The SC held that the judgment in *United India Insurance* was incorrect in holding that the “*appointment of an*

arbitrator is a judicial power and is not a mere administrative function leaving some degree of judicial intervention; when it comes to the question to examine the existence of a prima facie arbitration agreement, it is always necessary to ensure that the dispute resolution process does not become unnecessarily protracted.” The SC in *United India Insurance* had refused to appoint an arbitrator on the basis that the claim, in the SC’s view, had been settled with accord and satisfaction leaving no arbitral dispute subsisting under the agreement to be referred to the arbitrator for adjudication.

Issue (ii): The SC, relying on the report of the High Level Committee headed by Justice B.N. Srikrishna dated 30 July 2017, further held that though Section 11(6A), inserted in the Act by the Arbitration and Conciliation (Amendment) Act, 2015 (“**2015 Amendment**”), was omitted by way of the 2019 Amendment, such omission did not resuscitate the law that was prevailing prior to the 2015 Amendment. The provision was omitted only on account of the 2019 Amendment requiring that appointments of arbitrators be made by arbitral institutions and not Courts.

Issue (iii): The SC clarified that the authority of a Court under Section 11(6A) is confined to the examination of the existence of an arbitration agreement and is to be understood in the narrow sense as laid down in *Duro Felguera SA v. Gangavaram Port Limited*³ (“**Duro**”) i.e., the Court must only determine “*if the contract contains a clause which provides for arbitration pertaining to the disputes*

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which have arisen between the parties to the agreement”.

Analysis

Even though the SC in *United India Insurance* was purportedly relying on *Duro*, it was not applying the narrow interpretation of law set out in *Duro*. In fact, the SC, in determining that the claims against United India Insurance had been discharged by accord and satisfaction, was applying the law as expounded in *National Insurance Co. Ltd. v. Boghara Polyfab*⁴.

The decision of the SC in *Boghara Polyfab*, clarified the decision of the seven-judge bench of the SC in *SBP & Co. v. Patel Engineering*⁵. Both these decisions were legislatively overruled by the insertion of Section 11(6A) in 2015. In fact, the 246th Report of the Law Commission of India confirmed this and recommended the amendment to Section 11 to clarify that the position of law in relation to the nature of pre-arbitral intervention under Section 11 would be as per the decision of the SC in *Shin Etsu Chemicals Co. Ltd. v. Aksh Optifibre*⁶ i.e., issues and controversies in respect of the existence of the arbitration agreement should be examined by Courts under Section 11 only

prima facie. The Report further noted that the existence of the arbitration agreement would be finally determined by the arbitral tribunal.

The Court in *Mayavti Builders* did not agree with the reasoning in *United India Insurance* on the basis that law prior to 2015 Amendment would have included going into whether accord and satisfaction has taken place, which has since then been legislatively overruled. This shifts the burden of determining gateway issues such as the validity of the arbitration agreement and the scope of reference of the disputes, to the arbitral tribunal exercising jurisdiction under Section 16 of the Act, in line with international best practices.

What continues to remain unclear is if the scope of the Court's authority under Section 11 includes an examination of whether the subject matter of the dispute is arbitrable. This issue has been referred to a larger bench of the SC in *Vidya Drolia & Ors. v. Durga Trading Corporation*.⁷ A clarifying decision of the SC will help finally put to rest issues in relation to the scope of pre-arbitral jurisdiction of Courts under Section 11.

1 Authored by Ila Kapoor, Partner, and Niyati Gandhi and Vinuta Rayadurg, Senior Associates; M/s Mayavti Trading Pvt. Ltd. v. Pradyuat Deb Burman, Civil Appeal No. 7023 of 2019, Supreme Court, 2019 SCC OnLine SC 1164, judgment dated 5 September 2019.

Quorum: R.F. Nariman, R. Subhash Reddy and Surya Kant, JJ

2 (2019) 5 SCC 362.

3 (2017) 4 SCC (Civ) 764.

4 (2009) 1 SCC 267.

5 (2005) 8 SCC 618.

6 (2005) 7 SCC 234.

7 2018 SCC OnLine SC 3281.

PRACTICE AREA EXPERTS

Pallavi Shroff

Managing Partner and
National Practice Head Dispute Resolution
+91 98100 99911
E: pallavi.shroff@AMSShardul.com

Siddhartha Datta

Partner
+91 90070 68488
E: siddhartha.datta@AMSShardul.com

Binsy Susan

Partner
+91 96500 80397
E: binsy.susan@AMSShardul.com

Tejas Karia

Partner and Head, Arbitration Practice sub-group
+91 98107 98570
E: tejas.karia@AMSShardul.com

Ila Kapoor

Partner
+91 98717 92737
E: ila.kapoor@AMSShardul.com

Aashish Gupta

Partner
+91 98189 19857
E: aashish.gupta@AMSShardul.com

Anirudh Das

Partner
+91 98100 98329
E: anirudh.das@AMSShardul.com

Rishab Gupta

Partner
+91 98217 80313
E: rishab.gupta@AMSShardul.com

Smarika Singh

Partner
+91 97170 98075
E: smarika.singh@AMSShardul.com

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