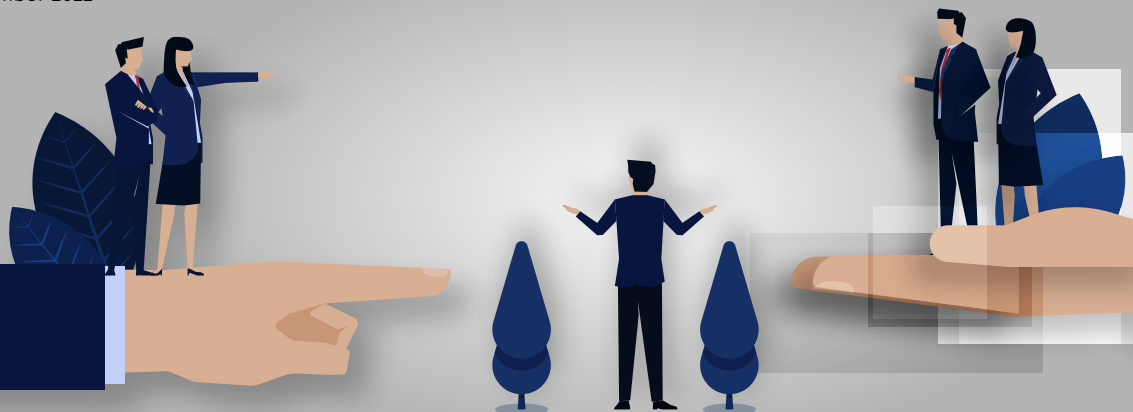


November 2022



High Court of Delhi clarifies the scope of judicial scrutiny under Section 45 of the Arbitration and Conciliation Act, 1996¹

Brief Facts

The plaintiff and the defendant executed a sole distribution agreement (“**Agreement**”) for supply of certain goods. In terms of the Agreement, the defendant issued a purchase order on the plaintiff for supply of the said goods. Pursuant to the purchase order, the plaintiff supplied the goods and raised three invoices on the defendant. When the defendant failed to make full payments in terms of the invoices, the plaintiff filed a summary suit under Order XXXVII of the Code of Civil Procedure, 1908 (“**CPC**”) before the High Court of Delhi (“**Court**”) seeking recovery of the balance payment along with *pendente lite* and future interest from the defendant.

Upon summons being issued in the suit, the defendant filed an application seeking leave to defend. The defendant also filed an application under Section 45 of the Arbitration and Conciliation Act, 1996 (“**Act**”) on the basis that the dispute was covered under the scope of the arbitration clause and therefore, the parties should be referred to arbitration.

Issues

Issue (i): Whether the plaintiff’s claim is covered under the purview of the arbitration clause in the Agreement?

Issue (ii): Whether the Court should refer the parties to arbitration, considering that the defendant also sought to file a counterclaim against the plaintiff?

Judgment

Issue (i): The Court analysed the dispute resolution clause of the Agreement (“**DR Clause**”) and observed that the parties intended that only disputes relating to termination or grounds for termination of the Agreement would be referred to arbitration. All other disputes will be “*excepted matters*” and will not be covered under the arbitration clause. The Court observed that the intention of the parties was that suits relating to injunction as well as recovery suits could be filed by the plaintiff before the competent courts in India. Accordingly, the Court held that the dispute between the parties cannot be referred to arbitration as the dispute was concerned with unpaid invoices, which was not covered under the scope of the arbitration clause in the Agreement. Therefore, the present suit filed seeking recovery of monies was maintainable before this Court.

The Court placed reliance on the Supreme Court’s judgments in **Vidya Drolia and Ors. v. Durga Trading Corporation**,² **Indian Oil Corporation Limited v. NCC Limited**³ and **Emaar India Ltd v. Tarun Aggarwal Projects LLP and Anr.**⁴ In these cases, it was observed that in an application filed under Section 8 or Section 45 of the Act, the court is required to hold a preliminary enquiry as to whether the dispute between the parties is *ex facie* arbitrable. If on a limited review, the court finds that the dispute is in relation to ‘*excepted matters*’, i.e., matters which are excluded by the parties from the purview of the arbitration clause, the parties cannot be forcefully referred to arbitration. The Court also referred to the judgment in **Ms. Sancorp Confectionary Pvt. Ltd. & Anr. v. M/s Gumlink A/S**,⁵ wherein while considering an application filed by the defendant under Section 45 of the Act, it was held that a court has to examine and record a *prima facie* finding as to whether there is an arbitration clause or not and whether the disputes which are sought to be referred to arbitration are covered by an arbitration agreement or not.

In this Issue

Brief Facts

Issues

Judgment

Analysis





Issue (ii): The Court observed that the parties agreed for arbitration only in respect of disputes arising out of termination or expiration of the Agreement. In respect of all other disputes, the jurisdiction was given to the civil courts under the Agreement. Accordingly, the Court held that if the parties had consciously decided to have separate remedies with respect to different disputes under the Agreement, the intention of the parties must be honoured.

Analysis

The Court applied the legal position laid down by the Supreme Court's decisions with respect to the extent of judicial scrutiny while considering an application filed under Section(s) 8 and 45 of the Act. In terms of the *kompetenz-kompetenz* doctrine, the arbitral tribunal has the preferred first authority to determine and decide all questions of non-arbitrability. However, in case of an application under Section(s) 8 and 45 of the Act, the court may interfere when it is manifestly and *ex facie* certain that the arbitration agreement is non-existent, invalid or the disputes are non-arbitrable. The Court also emphasised that the limited judicial review under Section 8 and Section 45 of the Act is to protect the parties from being forced to arbitrate when the subject matter of the dispute is clearly non-arbitrable. However, when the court is in doubt, parties should be referred to arbitration.

In this Issue

Brief Facts

Issues

Judgment

Analysis

Endnotes

1 Authored by Binsy Susan, Partner, Neha Sharma, Senior Associate and Palak Kaushal, Associate; *Sorin Group Italia S.R.L. v. Neeraj Garg*, CS (COMM) No. 92/2020, I.A. No. 2712/2020, I.A. No. 1795/2021, High Court of Delhi, 2022 SCC OnLine Del 3544, judgment dated 28 October 2022.

Coram: Amit Bansal, J.

- (2021) 2 SCC 1.
- (2022) SCC OnLine SC 896.
- (2022) SCC OnLine SC 1328.
- (2012) SCC OnLine Del 5507.

PRACTICE AREA EXPERTS

Pallavi Shroff

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

Rishab Gupta

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

Binsy Susan

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

Gauhar Mirza

Partner
+91 70423 98844
E: gauhar.mirza@AMSShardul.com

Bikram Chaudhuri

Partner
+91 84339 48356
E: bikram.chaudhuri@amsshardul.com

Tejas Karia

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

Siddhartha Datta

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

Aashish Gupta

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

Shruti Sabharwal

Partner
+91 98107 46183
E: shruti.sabharwal@AMSShardul.com

Shreya Gupta

Partner
+91 9930543295
E: shreya.gupta@amsshardul.com

Anirudh Das

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

Ila Kapoor

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

Smarika Singh

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

Karan Joseph

Partner
+91 98452 11270
E: karan.joseph@amsshardul.com

Aditya Mukherjee

Partner
+91 98717 92744
E: aditya.mukherjee@amsshardul.com

Disclaimer

This is intended for general information purposes only. It is not a substitute for legal advice and is not the final opinion of the Firm. Readers should consult lawyers at the Firm for any specific legal or factual questions.