REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.7023 OF 2019
(ARISING OUT OF SLP (CIVIL) NO. 8519 OF 2019)

M/S MAYAVTI TRADING PVT. LTD. APPELLANT(S)

VERSUS

PRADYUAT DEB BURMAN RESPONDENT(S)

J U D G M E N T

R.F. Nariman, J.

1) Leave granted.

2) We have heard Mr. Mukul Rohatgi, learned Senior Advocate appearing for the appellant and Mr. Shyam Divan, learned Senior Advocate appearing for the respondent at considerable length.

3) On the facts of this case, we do not propose to interfere with the impugned decision of 12.03.2019 and, therefore, do not find it necessary to exercise our extraordinary jurisdiction under Article 136 of the Constitution of India.

Signature Not Verified
Digitally signed by R NATARAJAN
Date: 2019.09.11 16:48:00 IST
Reason:

4) Having said this, however, during the course of argument, a recent decision of this Court was pointed out, namely, ***United***

India Insurance Company Limited vs. ***Antique Art Exports Private Limited*****,** (2019) 5 SCC 362. In this judgment, purportedly following ***Duro Felguera, S.A.*** vs. ***Gangavaram Port Limited*****,** (2017) 9 SCC 729, this Court held:

> "20. The submission of the learned counsel for the respondent that after insertion of sub-section (6-A) to Section 11 of the Amendment Act, 2015 the jurisdiction of this Court is denuded and the limited mandate of the Court is to examine the factum of existence of an arbitration and relied on the judgment in *Duro Felguera, S.A. v. Gangavaram Port Ltd. [(2017) 9 SCC 729 : (2017) 4 SCC (Civ) 764]* The exposition in this decision is a general observation about the effect of the amended provisions which came to be examined under reference to six arbitrable agreements (five agreements for works and one corporate guarantee) and each agreement contains a provision for arbitration and there was serious dispute between the parties in reference to constitution of Arbitral Tribunal whether there has to be Arbitral Tribunal pertaining to each agreement. In the facts and circumstances, this Court took note of sub-section (6-A) introduced by the Amendment Act, 2015 to Section 11 of the Act and in that context observed that the preliminary disputes are to be examined by the arbitrator and are not for the Court to be examined within the limited scope available for appointment of arbitrator under Section 11(6) of the Act. Suffice it to say that 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.
>
> 21. In the instant case, prima facie no dispute

> subsisted after the discharge voucher being signed by the respondent without any demur or protest and claim being finally settled with accord and satisfaction and after 11 weeks of the settlement of claim a letter was sent on 27-7-2016 for the first time raising a voice in the form of protest that the discharge voucher was signed under undue influence and coercion with no supportive prima facie evidence being placed on record in absence thereof, it must follow that the claim had been settled with accord and satisfaction leaving no arbitral dispute subsisting under the agreement to be referred to the arbitrator for adjudication."

5) Section 11 (6A) was added by the amendment Act of 2015 and states as follows:

> "11. (6A) The Supreme Court or, as the case may be, the High Court, while considering any application under sub-section (4) or sub-section (5) or sub-section (6), shall, notwithstanding any judgment, decree or order of any Court, confine to the examination of the existence of an arbitration agreement."

6) Mr. Mukul Rohatgi, learned Senior Advocate, has pointed out that by an amendment Act of 2019, which has since been passed, this sub-section has now been omitted. Section 3 of the amendment Act of 2019 insofar as it pertains to this omission has not yet been brought into force. The omission is pursuant to a High Level Committee Review regarding institutionalization of arbitration in India, headed by Justice B. N. Srikrishna. The Report given by this Committee is dated 30th July, 2017. The omission of

the sub-section is not so as to resuscitate the law that was prevailing prior to the amendment Act of 2015. The reason for omission of S. 11(6A) is given in the Report as follows:

> "Thus, the 2015 amendments to section 11 are geared towards facilitating speedy disposal of section 11 applications by: (a) enabling the designation of any person or institution as an appointing authority for arbitrators in addition to the High Court or Supreme Court under section 11; (b) limiting challenges to the decision made by the appointing authority; and (c) requiring the expeditious disposal of section 11 applications, preferably within the prescribed 60-day time period.
>
> While these amendments no doubt facilitate the speedy disposal of section 11 applications to a large extent, they do not go all the way in limiting court interference. Pursuant to the amendments, the appointment of arbitrators under section 11 may be done: (a) by the Supreme Court or the High Court; or (b) by a person or institution designated by such court in exercise of an administrative power following section 11(6B). In either case, the amendments still require the Supreme Court / the High Court to examine whether an arbitration agreement exists, which can lead to delays in the arbitral process as extensive evidence and arguments may be led on the same.
>
> The Committee notes that the default procedure for appointment of arbitrators in other jurisdictions do not require extensive court involvement as in India.
>
> For instance, in Singapore, the relevant provision of the IAA provides that where the parties fail to agree on the appointment of the third arbitrator, within 30 days of the receipt of the first request by either party to appoint the arbitrator, the appointment shall be made by the appointing authority (the President of the SIAC) by the request of the parties. (See section 9A(2) read

with sections 2(1) and 8(2), IAA)

The arbitration legislation of Hong Kong incorporates Article 11 of the UNCITRAL Model Law relating to the appointment of arbitrators. Like in the case of Singapore where the SIAC is the appointing authority for arbitrators, the default appointment of arbitrator(s) is done by the HKIAC. (Section 13(2) read with section 24, AO)

In the United Kingdom, in the case of default of one party to appoint an arbitrator, the other party may appoint his arbitrator as the sole arbitrator after giving notice of 7 clear days to the former of his intention to do so. (Section 17, AA) The defaulting party may apply to the court to set aside the appointment. (Section 17(3), AA) In case of a failure of the appointment procedure, any party may apply to the court to make the appointment or give directions regarding the making of an appointment. (Section 18(2), AA)

The Committee recommends the adoption of the practice followed in Singapore and Hong Kong in the Indian scenario — apart from avoiding delays at court level, it may also give impetus to institutional arbitration.

xxx xxx

Recommendations

1. In order to ensure speedy appointment of arbitrators, section 11 may be amended to provide that the appointment of arbitrator(s) under the section shall only be done by arbitral institution(s) designated by the Supreme Court (in case of international commercial arbitrations) or the High Court (in case of all other arbitrations) for such purpose, without the Supreme Court or High Courts being required to determine the existence of an arbitration agreement."

Thus, it can be seen that after the amendment Act of 2019, Section 11(6A) has been omitted because appointment of arbitrators is to be done institutionally, in which case the Supreme Court or the High Court under the old statutory regime are no longer required to appoint arbitrators and consequently to determine whether an arbitration agreement exists.

7) Prior to Section 11(6A), this Court in several judgments beginning with ***SBP & Co.*** vs. ***Patel Engineering Ltd. and Anr.*** (2005) 8 SCC 618 has held that at the stage of a Section 11(6) application being filed, the Court need not merely confine itself to the examination of the existence of an arbitration agreement but could also go into certain preliminary questions such as stale claims, accord and satisfaction having been reached etc.

8) In ***ONGC Mangalore Petrochemicals Limited*** *vs.* ***ANS Constructions Limited and another,*** (2018) 3 SCC 373, this Court in a case which arose before the insertion of Section 11(6A) dismissed a Section 11 petition on the ground that accord and satisfaction had taken place in the following terms: -

> "31. Admittedly, no-dues certificate was submitted by the contractee company on 21-9-2012 and on their request completion certificate was issued by the appellant contractor. The contractee, after a gap of

> one month, that is, on 24-10-2012, withdrew the no-dues certificate on the grounds of coercion and duress and the claim for losses incurred during execution of the contract site was made vide letter dated 12-1-2013, i.e. after a gap of 3 ½ (three-and-a-half) months whereas the final bill was settled on 10-10-2012. When the contractee accepted the final payment in full and final satisfaction of all its claims, there is no point in raising the claim for losses incurred during the execution of the contract at a belated stage which creates an iota of doubt as to why such claim was not settled at the time of submitting final bills that too in the absence of exercising duress or coercion on the contractee by the appellant contractor. In our considered view, the plea raised by the contractee company is bereft of any details and particulars, and cannot be anything but a bald assertion. In the circumstances, there was full and final settlement of the claim and there was really accord and satisfaction and in our view no arbitrable dispute existed so as to exercise power under Section 11 of the Act. The High Court was not, therefore, justified in exercising power under Section 11 of the Act."

9) The 246th Law Commission Report dealt with some of these judgments and felt that at the stage of a Section 11(6) application, only "existence" of an arbitration agreement ought to be looked at and not other preliminary issues. In a recent judgment of this Court, namely, ***Garware Wall Ropes Ltd.*** *vs.* ***Coastal Marine Constructions & Engineering Ltd.,*** (2019 SCC OnLine SC 515), this Court adverted to the said Law Commission Report and held: -

> "14. The case law under Section 11(6) of the Arbitration

Act, as it stood prior to the Amendment Act, 2015, has had a chequered history. In *Konkan Railway Corporation Ltd. v. Mehul Construction Co.*, (2000) 7 SCC 201 ["**Konkan Railway I**"], it was held that the powers of the Chief Justice under Section 11(6) of the 1996 Act are administrative in nature, and that the Chief Justice or his designate does not act as a judicial authority while appointing an arbitrator. The same view was reiterated in *Konkan Railway Corporation Ltd. v. Rani Construction (P) Ltd.*, (2002) 2 SCC 388 ["**Konkan Railway II**"].

15. However, in *SBP & Co.* (supra), a seven-Judge Bench overruled this view and held that the power to appoint an arbitrator under Section is judicial and not administrative. The conclusions of the seven-Judge Bench were summarised in paragraph 47 of the aforesaid judgment. We are concerned directly with sub-paragraphs (i), (iv), and (xii), which read as follows:

> "*(i)* The power exercised by the Chief Justice of the High Court or the Chief Justice of India under Section 11(6) of the Act is not an administrative power. It is a judicial power.
>
> xxx xxx xxx
>
> *(iv)* The Chief Justice or the designated Judge will have the right to decide the preliminary aspects as indicated in the earlier part of this judgment. These will be his own jurisdiction to entertain the request, the existence of a valid arbitration agreement, the existence or otherwise of a live claim, the existence of the condition for the exercise of his power and on the qualifications of the arbitrator or arbitrators. The Chief Justice or the designated Judge would be entitled to seek the opinion of an institution in the matter of nominating an arbitrator qualified in terms of Section 11(8) of the Act if the need arises but the order appointing the arbitrator could only be that of the Chief Justice or the designated Judge.
>
> xxx xxx xxx

(xii) The decision in *Konkan Rly. Corpn. Ltd. v. Rani Construction (P) Ltd.* [(2002) 2 SCC 388] is overruled."

16. This position was further clarified in *Boghara Polyfab* (supra) as follows:

"22. Where the intervention of the court is sought for appointment of an Arbitral Tribunal under Section 11, the duty of the Chief Justice or his designate is defined in *SBP & Co.* [(2005) 8 SCC 618]. This Court identified and segregated the preliminary issues that may arise for consideration in an application under Section 11 of the Act 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.

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."

17. As a result of these judgments, the door was wide open for the Chief Justice or his designate to decide a large number of preliminary aspects which could otherwise have been left to be decided by the arbitrator under Section 16 of the 1996 Act. As a result, the Law Commission of India, by its Report No. 246 submitted in August 2014, suggested that various sweeping changes be made in the 1996 Act. Insofar as *SBP & Co.* (supra) and *Boghara Polyfab* (supra) are concerned, the Law Commission examined the matter and recommended the addition of a new sub-section, namely, sub-section (6A) in Section 11. In so doing, the Law Commission recommendations which are relevant and which led to the introduction of Section 11(6A) are as follows:

"28. The Act recognizes situations where the intervention of the Court is envisaged at the pre-arbitral stage, i.e. prior to the constitution of the arbitral tribunal, which includes sections 8, 9, 11 in the case of Part I arbitrations and section 45 in the case of Part II arbitrations. Sections 8, 45 and also section 11 relating to "reference to arbitration" and "appointment of the tribunal", directly affect the constitution of the tribunal and functioning of the arbitral proceedings. Therefore, their operation has a direct and significant impact on the "conduct" of arbitrations. Section 9, being solely for the purpose of securing interim relief, although having the potential to affect the rights of parties, does not affect the "conduct" of the arbitration in the same way as these other provisions. It is in this context the Commission has examined and deliberated the working of these

provisions and proposed certain amendments.

29. The Supreme Court has had occasion to deliberate upon the scope and nature of permissible pre-arbitral judicial intervention, especially in the context of section 11 of the Act. Unfortunately, however, the question before the Supreme Court was framed in terms of whether such a power is a "judicial" or an "administrative" power – which obfuscates the real issue underlying such nomenclature/description as to –

> – the scope of such powers – i.e. the scope of arguments which a Court (Chief Justice) will consider while deciding whether to appoint an arbitrator or not – i.e. whether the arbitration agreement exists, whether it is null and void, whether it is voidable etc.; and which of these it should leave for decision of the arbitral tribunal.
>
> – the nature of such intervention – i.e. would the Court (Chief Justice) consider the issues upon a detailed trial and whether the same would be decided finally or be left for determination of the arbitral tribunal.

30. After a series of cases culminating in the decision in *SBP v. Patel Engineering*, (2005) 8 SCC 618, the Supreme Court held that the power to appoint an arbitrator under section 11 is a "judicial" power. The underlying issues in this judgment, relating to the scope of intervention, were subsequently clarified by RAVEENDRAN J in *National Insurance Co. Ltd. v. Boghara Polyfab Pvt. Ltd.,* (2009) 1 SCC 267, where the Supreme Court laid down as follows –

"1. The issues (first category) which 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?

2. The issues (second category) which the Chief Justice/his designate may choose to decide 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?

3. The issues (third category) which the Chief Justice/his designate should leave exclusively to the arbitral tribunal are:

(a) Whether a claim 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)?

(b) Merits of any claim involved in the arbitration."

31. The Commission is of the view that, in this context, the same test regarding scope and nature of judicial intervention, as applicable in the context of section 11, should also apply to sections 8 and 45 of the Act – since the scope and nature of judicial intervention should not change upon whether a party (intending to defeat the arbitration agreement) refuses to appoint an arbitrator in terms of the arbitration agreement, or moves a proceeding before a judicial authority in the face of such an arbitration agreement.

32. In relation to the nature of intervention, the exposition of the law is to be found in the decision of the Supreme Court in *Shin Etsu Chemicals Co. Ltd. v. Aksh Optifibre*, (2005) 7 SCC 234, (in the context of section 45 of the Act), where the Supreme Court has ruled in favour

of looking at the issues/controversy only prima facie.

33. It is in this context, the Commission has recommended amendments to sections 8 and 11 of the Arbitration and Conciliation Act, 1996. The scope of the judicial intervention is only restricted to situations where the Court/Judicial Authority finds that the arbitration agreement does not exist or is null and void. In so far as the nature of intervention is concerned, it is recommended that in the event the Court/Judicial Authority is prima facie satisfied against the argument challenging the arbitration agreement, it shall appoint the arbitrator and/or refer the parties to arbitration, as the case may be. The amendment envisages that the judicial authority shall not refer the parties to arbitration only if it finds that there does not exist an arbitration agreement or that it is null and void. If the judicial authority is of the opinion that prima facie the arbitration agreement exists, then it shall refer the dispute to arbitration, and leave the existence of the arbitration agreement to be finally determined by the arbitral tribunal. However, if the judicial authority concludes that the agreement does not exist, then the conclusion will be final and not prima facie. The amendment also envisages that there shall be a conclusive determination as to whether the arbitration agreement is null and void. In the event that the judicial authority refers the dispute to arbitration and/or appoints an arbitrator, under sections 8 and 11 respectively, such a decision will be final and non-appealable. An appeal can be maintained under section 37 only in the event of refusal to refer parties to arbitration, or refusal to appoint an arbitrator."

18. Pursuant to the Law Commission recommendations, Section 11(6A) was introduced first by Ordinance and then by the Amendment Act, 2015. The Statement of Objects and Reasons which were appended to the Arbitration and Conciliation (Amendment) Bill, 2015 which introduced the Amendment Act, 2015 read as follows:

"STATEMENT OF OBJECTS AND REASONS

xxx xxx xxx

6. It is proposed to introduce the Arbitration and Conciliation (Amendment) Bill, 2015, to replace the Arbitration and Conciliation (Amendment) Ordinance, 2015, which inter alia, provides for the following, namely:-

(i) to amend the definition of “Court” to provide that in the case of international commercial arbitrations, the Court should be the High Court;

(ii) to ensure that an Indian Court can exercise jurisdiction to grant interim measures, etc., even where the seat of the arbitration is outside India;

(iii) an application for appointment of an arbitrator shall be disposed of by the High Court or Supreme Court, as the case may be, as expeditiously as possible and an endeavour should be made to dispose of the matter within a period of sixty days;

(iv) to provide that while considering any application for appointment of arbitrator, the High Court or the Supreme Court shall examine the existence of a prima facie arbitration agreement and not other issues;

(v) to provide that the arbitral tribunal shall make its award within a period of twelve months from the date it enters upon the reference and that the parties may, however, extend such period up to six months, beyond which period any extension can only be granted by the Court, on sufficient cause;

(vi) to provide that a model fee Schedule on the basis of which High Courts may frame rules for the purpose of determination of fees of arbitral tribunal, where a High Court appoints arbitrator in terms of section 11 of the Act;

(vii) to provide that the parties to dispute may at any

stage agree in writing that their dispute be resolved through fast track procedure and the award in such cases shall be made within a period of six months;

(viii) to provide for neutrality of arbitrators, when a person is approached in connection with possible appointment as an arbitrator;

(ix) to provide that application to challenge the award is to be disposed of by the Court within one year.

7. The amendments proposed in the Bill will ensure that arbitration process becomes more user-friendly, cost effective and lead to expeditious disposal of cases.

xxx xxx xxx"

19. A reading of the Law Commission Report, together with the Statement of Objects and Reasons, shows that the Law Commission felt that the judgments in *SBP & Co.* (supra) and *Boghara Polyfab* (supra) required a relook, as a result of which, so far as Section 11 is concerned, the Supreme Court or, as the case may be, the High Court, while considering any application under Section 11(4) to 11(6) is to confine itself to the examination of the existence of an arbitration agreement and leave all other preliminary issues to be decided by the arbitrator."

10) This being the position, it is clear that the law prior to the 2015 Amendment that has been laid down by this Court, which would have included going into whether accord and satisfaction has taken place, has now been legislatively overruled. This being the position, it is difficult to agree with the reasoning contained in the aforesaid judgment as 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 has been laid down in the judgment *Duro Felguera, S.A.* (supra) – see paras 48 & 59.

11) We, therefore, overrule the judgment in *United India Insurance Company Limited* (supra) as not having laid down the correct law but dismiss this appeal for the reason given in para 3 above.

12) Mr. Rohatgi now requests us for an extension of the *status quo* order granted by the trial court for a period of one week from today so that he may adopt other proceedings. This request is granted.

…….. J.
(ROHINTON FALI NARIMAN)

…….. J.
(R. SUBHASH REDDY)

…….. J.
(SURYA KANT)

New Delhi;
September 05, 2019.