THE RISE AND FALL OF THE POWER OF APPOINTMENT UNDER SECTION 11 OF THE ARBITRATION AND CONCILIATION ACT, 1996

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ABSTRACT

The power of courts for appointment of an arbitrator under Section 11 of the Arbitration and Conciliation Act, 1996 has been the subject of judicial scrutiny for quite some time. This has led to a lengthy debate on what issues a court must determine while appointing an arbitrator and what issues must be left to the arbitrator. This article traces the history of judgments of the Supreme Court of India and their approach towards appointment of arbitrators. It highlights the changes brought in by the amendments to the Arbitration and Conciliation Act, 1996 in relation to Section 11. It also analyses the Supreme Court's recent judgment in *Vidya Drolia* v. *Durga Trading Corporation*, where while discussing whether landlord-tenant disputes governed by the Transfer of Property Act, 1882 are arbitrable, the Supreme Court also discussed the scope of inquiry by courts in determining questions of arbitrability at the stage of appointment of an arbitrator under Section 11 of the 1996 Act. This is followed by the study of the recent judgments relating to appointment of arbitrators and an analysis of some issues that remain unresolved despite these judgments. The article analyses the need (rather the lack of it) to delve into various issues at the stage of appointment and explores how best to balance the various interests that are relevant at such a stage.

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INTRODUCTION

The power of the Chief Justice or designate for appointment of an arbitrator under Section 11 of the Arbitration and Conciliation Act, 1996 (**"1996 Act"**) has been the subject of judicial scrutiny for more than two decades. Though one of the first of the many burning issues scrutinized by courts under the 1996 Act, the issue surrounding this power remains continually unsettled. The see-saw in judicial and legislative approach towards the power to appoint an arbitrator continues even today and we are yet to see the position at rest.

This article examines the evolution of the law regarding the power to appoint an arbitrator over the years. In particular, the article explores the recent developments including the Supreme Court's landmark decision in *Vidya Drolia* v. *Durga Trading Corporation*[1] and the impending amendments to the 1996 Act.

1. POWERS OF APPOINTMENT OF AN ARBITRATOR UNDER THE ARBITRATION ACT 1940 AND THE 1996 ACT

Prior to the 1996 Act, domestic arbitration proceedings were governed by the Arbitration Act, 1940 (**"1940 Act"**). The 1996 Act was ushered in to move India to an updated regime of arbitration in line with the corresponding global shift. The 1996 Act was based on the United Nations Commission on International Trade Law ("**UNCITRAL**") Model Law on International Commercial Arbitration, 1985 which prioritized party autonomy and limited intervention of courts in the arbitral process. The 1996 Act was thus adopted to make the arbitral process expeditious with a view to encourage foreign investment, trade and commerce. The 1996 Act consciously departed from the earlier approach towards arbitration so much so that courts subsequently held that referring to the 1940 Act while interpreting the 1996 Act would amount to a misconstruction[2].

The intent behind the 1996 Act was not only to make arbitration faster, but to provide for a self-contained code[3] to keep arbitration independent of courts, except where court intervention was

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[1] *Vidya Drolia* v. *Durga Trading Corporation*, (2021) 2 SCC 1

[2] *Sundaram Finance Ltd.* v. *NEPC India Ltd.*, (1999) 2 SCC 479, ¶ 9.

[3] *Fuerst Day Lawson Ltd.* v. *Jindal Exports Ltd.*, (2011) 8 SCC 333**,** ¶ 81, 89; *Deep Industries Ltd.* v. *ONGC*, (2020) 15 SCC 706, ¶ 23.

seen as essential to maintain the integrity of the regime[4]. This move towards a self-contained and independent code is reflected in several provisions of the 1996 Act. The 1996 Act provides expressly in Section 5 that no judicial authority shall intervene with respect to matters governed by Part I of the 1996 Act except where so provided[5]. The provisions seen previously in the 1940 Act, such as Sections 14 (award to be filed before court and the court after hearing pronounce its opinion which shall form part of the award), 15 (power of court to modify the award), 16 (power of court to remit the award for reconsideration), 17 (power of court to pronounce judgment according to the award), 19 (power of court to supersede arbitration where award becomes void or is set aside), 20 (power of court to direct filing of arbitration agreement, referring disputes and appointing arbitrator), 36 (power of court to order that a provision making an award a condition precedent to an action shall not apply to a difference between parties), and 43 (power of court to issue processes to appear before the arbitrator) providing for intervention of courts were no longer part of the scheme. Court intervention was limited to very specific and narrow grounds such as for grant of interim measures of protection (Section 9), appointment of an arbitrator (Section 11), termination of the mandate of an arbitrator due to inability to perform functions or due to failure to act without undue delay (Section 14), setting aside of an arbitral award (Section 34), enforcement of an arbitral award (Section 36), and appeal against orders (Section 37). Interestingly, even where the 1996 Act permitted court intervention by way of an appeal it did so selectively. Illustratively, in relation to orders on jurisdictional challenges, the 1996 Act permits appeals only where the arbitral tribunal *upholds* a jurisdictional challenge. In cases where the arbitral tribunal holds that it has jurisdiction, there is no appeal remedy[6]. The 1996 Act requires the losing party in such a case to accept the mandate of the arbitrator, go through the arbitration process and raise this issue, if relevant, at the post-award stage[7].

The power for appointment of arbitrators under the 1940 Act and 1996 Act is also at variance. Looking at the provisions of the 1940 Act, the point of view broadly is one of reference - i.e.

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[4] *P. Anand Gajapathi Raju* v. *P.V.G. Raju*, (2000) 4 SCC 539.

[5] **Section 5 of the 1996 Act – Extent of judicial intervention. –** Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part.

[6] Section 16(5) read with Section 37(2) of the 1996 Act.

[7] Section 16(5) read with Section 16(6) of the 1996 Act.

where the court *refers* a matter to the arbitral tribunal[8]. As against that, in the 1996 Act, there is no such reference. All arbitrations are considered arbitrations without intervention of courts. Even under Sections 8 and 45 of the 1996 Act, the judicial authority does not refer any matter to arbitration. In contradistinction, Section 89 of the Code of Civil Procedure, 1908 provides for such power *albeit* with the consent of the parties. Under Section 8 and 45 of the 1996 Act, the authority merely refrains from entertaining a matter, where the matter is covered by an arbitration clause and refer *parties* to arbitration in view of an applicable arbitration agreement.

The language used in Section 11 of the 1996 Act is in line with this approach. The Chief Justice or designate under Section 11 merely appoints an arbitrator where the contractual mechanism for appointment has failed to result in constitution of an arbitral tribunal. Section 11 does not require the Chief Justice or designate to look into the dispute or otherwise comment on the dispute. The aim of Section 11 is only to constitute the arbitral tribunal and kickstart the arbitral process. The court has no supervisory role with respect to the arbitration or over what ultimately is referred to arbitration. Once the arbitral tribunal is constituted, all remedies lie before the arbitral tribunal. Illustratively, where the arbitrator is biased, a party may file an application before the arbitral tribunal (Section 13). Similarly, where the subject matter of dispute is beyond the jurisdiction of the arbitral tribunal, a party may file an application before the arbitral tribunal (Section 16). After constitution of the arbitral tribunal and until the making of an award, court intervention is only envisaged for interim reliefs (that too only when an application before the arbitral tribunal is not efficacious), for assistance in taking evidence and for appeals in certain specific cases. In all other cases, the parties must accept the mandate of the arbitral tribunal.

Despite the clear scheme of the 1996 Act, judicial decisions indicate that courts have found it difficult to neatly categorize and delineate the powers of appointment. Since the power of the Chief Justice or designate is exercised by a judge or a bench exercising other regular judicial functions, it appears that it has been difficult to keep at bay the judicial function of deciding issues in the process of appointment. The decisions also indicate that an important consideration in the judicial mind has been to prevent abuse of arbitration. The courts have been concerned that a party should not be prejudiced by having to go through arbitration proceedings in cases where it has not consented for an arbitration or where the dispute is not amenable to arbitration.

[8] Refer Section 20(4) and Section 23 of the 1940 Act; *Banwari Lal Kotiya* v. *P.C. Aggarwal*, (1985) 3 SCC 255, ¶ 7.

2. JUDICIAL DECISIONS REGARDING THE POWERS OF APPOINTMENT

As early as the year 1999, a division bench of the Supreme Court in the judgment of *Sundaram Finance Ltd.* v. *NEPC India Ltd.*[9], while discussing the differences between the 1940 Act and the 1996 Act in the context of the powers of the court to grant interim reliefs under Section 9 opined that under Section 11 of the 1996 Act the Courts are not required to pass a "judicial order" to appoint arbitrators.

Soon after, the question was specifically considered by a three-judge bench of the Supreme Court in *Konkan Railway Corporation Ltd. and Another* v. *Mehul Construction Co. Ltd.*[10] (**"Mehul Construction"**). In this case, the Supreme Court was considering a reference stemming from the decision in *Ador Samia Pvt. Ltd. v. Peekay Holdings Ltd.*[11] where it was held that the power of the Chief Justice or designate was "administrative" in nature and therefore a special leave petition under Article 136 of the Constitution of India would not lie against such an order. In *Mehul Construction,* the Supreme Court agreed that the power was administrative and not one requiring application of judicial mind. In other words, the Chief Justice or designate is not required to "decide" any issue under Section 11, but merely carries out the administrative act of appointing an arbitrator. The Supreme Court further held that if the Chief Justice or designate fails to exercise such administrative power to appoint an arbitrator, the remedy lies in the High Court's or Supreme Court's writ jurisdiction compelling the authority to act. The Supreme Court came to this conclusion after analyzing in detail the intent behind the 1996 Act and the conscious departure from the previous regime. The Supreme Court noted that the power to appoint is provided to aid the constitution of the arbitral tribunal and kickstart the arbitration proceedings immediately. Further, it was also held that the legislature had consciously chosen to confer the power on the Chief Justice and not a court and therefore it was apparent that the order passed by the Chief Justice or designate was an administrative one.

This judgment in *Mehul Construction* was affirmed by a five-judge bench of the Supreme Court of India in *Konkan Railways Corporation* v. *Rani Construction Pvt. Ltd.* (**"Rani**

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[9] *Sundaram Finance Ltd.* v. *NEPC India Ltd.,* (1999) 2 SCC 479.

[10] *Konkan Railway Corporation Ltd. and Another* v. *Mehul Construction Co. Ltd*., (2000) 7 SCC 201.

[11] *Ador Samia Pvt. Ltd. v. Peekay Holdings Ltd.,* (1999) 8 SCC 572.

Construction").[12] Apart from agreeing with *Mehul Construction* regarding the nature of power, the Supreme Court made two important findings. Firstly, it was held that no special leave petition could lie against an order under Section 11, since there was no adjudicatory function performed by the Chief Justice or designate while appointing an arbitrator. Secondly, this was a matter between the applicant and the Chief Justice or designate and therefore no notice was required to be given to the other party. The rationale was once again, the need for an expeditious dispute resolution mechanism.

The matter however was not settled for long and in 2005, the Supreme Court in a bench of no less than seven judges reconsidered the issue.

In *SBP & Co.* v. *Patel Engineering Ltd. and Another*[13] ("**Patel Engineering**"), the majority of a seven-judge bench of the Supreme Court of India held that the power of Chief Justice or their designate under Section 11 of the 1996 Act was judicial and not administrative and the judgment in *Rani Construction* was overruled[14]. The Supreme Court held that the 1996 Act vested the Chief Justice or designate with an authority which confers on it the power to adjudicate and make a decision regarding the appointment of an arbitrator. It was held that normally when any authority is conferred with a power to act under a statute and the statue makes a decision in this regard final, such authority has the jurisdiction to satisfy itself of fulfilment of the conditions for exercise of the power.[15] It was held that the Chief Justice or designate was bound to decide whether there is jurisdiction to entertain the request for appointment, whether there is a valid arbitration agreement in terms of Section 7 of the 1996 Act and whether the person before them with the request is a party to the arbitration agreement and whether there was a subsisting dispute capable of being arbitrated upon.[16] In addition, the Chief Justice or designate could also decide the question of whether the claim was a dead one or a long barred claim that was sought to be

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[12] *Konkan Railways Corporation* v. *Rani Construction Pvt. Ltd.,* (2002) 2 SCC 388

[13] *SBP & Co.* v. *Patel Engineering Ltd. and Another*, (2005) 8 SCC 618

[14] *SBP & Co.* v. *Patel Engineering Ltd. and Another*, (2005) 8 SCC 618, ¶ 47(i) and (xii). However, in the minority opinion written by Justice C.K. Thakker, it was held that the decision in *Rani Construction* was the correct law and that the power of the Chief Justice or his designate was that of an administrative one and that it was neither judicial nor quasi-judicial in nature. However, Justice Thakker disagreed that no notice was required to be given to the counterparty and held that such notice was necessary in the interests of fairness.

[15] *SBP & Co.* v. *Patel Engineering Ltd. and Another*, (2005) 8 SCC 618, ¶ 9

[16] *SBP & Co.* v. *Patel Engineering Ltd. and Another,* (2005) 8 SCC 618, ¶ 25

resurrected and whether the parties have concluded the transaction by recording the satisfaction of their mutual rights and obligations or by receiving the final payment without objection.[17]

The decision in *Patel Engineering* opened the floodgates to raising a variety of defences by parties in an attempt to prevent the constitution of a tribunal for adjudication of disputes. In an attempt to delineate the power, following *Patel Engineering,* the Supreme Court in the case of *National Insurance Company Limited* v. *Boghara Polyfab Private Limited*[18] (**"Boghara Polyfab"**) analysed the various categories of issues that could be considered at the appointment stage[19]:

(i) ***Category 1: Issues which the Chief Justice / his designate will have to decide.***

(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 1996 Act is a party to such an agreement?

(ii) ***Category 2: Issues which the Chief Justice / his designate may choose to decide (or leave them to the decision of the Arbitral Tribunal).***

(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 obligations or by receiving the final payment without objection?

(iii) ***Category 3: Issues which the Chief Justice / his designate should leave exclusively to the Arbitral Tribunal.***

(a) Whether a claim made falls within the arbitration clause?

(b) Merit or any claim involved in the arbitration.

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[17] *SBP & Co.* v. *Patel Engineering Ltd. and Another,* (2005) 8 SCC 618, ¶ 39

[18] *National Insurance Company Limited* v. *Boghara Polyfab Private Limited,* (2009) 1 SCC 267

[19] *National Insurance Company Limited* v. *Boghara Polyfab Private Limited,* (2009) 1 SCC 267, ¶ 22.1, 22.2 and 22.3

It was also held that if the issues as mentioned in Category 2 are raised, then the Chief Justice or designate may decide them by taking evidence.[20]

By this time, the power to appoint had travelled far from the intent of the 1996 Act as discussed in *Mehul Construction* and *Rani Construction*. This transformation resulted in an extraordinary situation where the Chief Justice or designate could take evidence and decide questions of fact even before constitution of an arbitral tribunal meant for the very purpose of deciding such disputed questions of fact.

Whatever the philosophy may have been behind such expansion, the aim of expeditious resolution of disputes by arbitration was certainly impacted. Parties continued to raise frivolous challenges at the appointment stage to stall arbitration proceedings. As a result, decisions on appointments were delayed and a large pendency of Section 11 applications resulted.[21] Commencing arbitration itself became a challenge.

3. ARBITRATION AND CONCILIATION (AMENDMENT) ACT, 2015 AND PRECEDENTS THEREAFTER

The legislature sought to bring some resolution to the prevailing position by the Arbitration and Conciliation (Amendment) Act, 2015 (**"2015 Amendment"**).

The 2015 Amendment amended Section 11 to replace the term "Chief Justice or his designate" with "Supreme Court" (in the case of international commercial arbitration) and "High Court" (in the case of arbitrations other than international commercial arbitrations) (collectively referred to as **Courts**). Additionally, Section 11 (6A) and (6B)[22] were inserted. As per Section 11(6A) the

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[20] *National Insurance Company Limited* v. *Boghara Polyfab Private Limited*, (2009) 1 SCC 267

[21] See Para 24 of the 246th Law Commission Report, dated August 2014

[22] **Section 11 (6A) and (6B) of the Arbitration and Conciliation Act, 1996 as amended by the Arbitration and Conciliation (Amendment) Act, 2015 -**

(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.

Courts were to confine themselves to the examination of the existence of an arbitration agreement and as per Section 11(6B) any delegation of such power of appointment of an arbitrator of the Courts was not to be considered as a delegation of judicial powers. This balance struck by the 2015 Amendment is significant in three aspects: firstly, the move from the Chief Justice or designate implied that the power was a judicial one; secondly, an express limitation on this "judicial" power was placed; and thirdly, a delegation of such power was not to be considered delegation of judicial powers. Evidently, it was decided that the only question worthy of scrutiny at the appointment stage was the existence of an arbitration agreement. All other matters were left conclusively to the arbitral tribunal.

The 2015 Amendment thus legislatively overruled *Patel Engineering* and *Boghara Polyfab.* This was clarified in *Duro Felguera S.A.* v. *Gangavaram Port Ltd*.[23] (**"Duro Felguera"**) and confirmed in *Mayavati Trading (P) Ltd.* v. *Pradyuat Deb Burman*[24] (**"Mayavati Trading"**). In *Mayavati Trading*, the Supreme Court overruled its own 2019 decision in *United India Insurance Company Ltd.* v. *Antique Art Exports Pvt. Ltd.*[25] (**"Antique Arts"**). In *Antique Arts*, the division bench of the Supreme Court while deciding an application under Section 11 of the 1996 Act went into the question of whether the claim had been settled with accord and satisfaction. This essentially referred to the position of law in *Patel Engineering* and *Boghara Polyfab.* Fortunately, a quick correction came through in *Mayavati Trading* confirming the law laid down in *Duro Felguera* and that the Courts are only required to confine itself to the examination of the existence of an arbitration agreement.

4. RECENT DEVELOPMENTS

Though the balance struck by the 2015 Amendments, as clarified in *Duro Felguera* and *Mayavati Trading* ought to have settled matters, the position has remained in flux as seen from certain recent developments.

(6B) The designation of any person or institution by the Supreme Court or, as the case may be, the High Court, for the purposes of this section shall not be regarded as a delegation of judicial power by the Supreme Court or the High Court.

[23] *Duro Felguera S.A.* v. *Gangavaram Port Ltd*., 2017 (9) SCC 729.

[24] *Mayavati Trading (P) Ltd.* v. *Pradyuat Deb Burman*, (2019) 8 SCC 714

[25] *United India Insurance Company Ltd.* v. *Antique Art Exports Pvt. Ltd*., 2019 (5) SCC 362

4.1 Arbitration and Conciliation (Amendment) Act, 2019

The Arbitration and Conciliation (Amendment) Act, 2019 (**"2019 Amendment"**) was introduced on 9 August 2019. The 2015 Amendment had gone a long way in resolving many issues and the 2019 Amendment was more limited in scope and geared towards clarifying certain issues that had arisen from the 2015 Amendment. However, the 2019 Amendment did introduce one radical change - which is yet to be notified - the introduction of Arbitral Council of India (**"Arbitration Council"**), an institution to monitor and grade arbitral institutions and conferring the power of appointment on such arbitral institutions.

The 2019 Amendment also brought in amendments to the powers of appointment. Section 11 (6A) was omitted to make way for designation of a person or institution to make appointment of an arbitrator. Further, Section 11(6) was substituted[26] to provide that the appointment of an arbitrator under Section 11 of the 1996 Act shall be made on an application of the party to an arbitral institution designated by the Courts. The power to appoint an arbitrator has been moved away from the Courts altogether.

4.2 Judgment in Vidya Drolia

Pending the 2019 Amendment, it appears that the Supreme Court has departed from what seemed to be the settled position pursuant to the 2015 Amendment and the not-so-still waters have been stirred yet again. While the decision in *Vidya Drolia* is largely pro-arbitration and expresses agreement with the position of law laid down in *Duro Felguera* and *Mayavati Trading*[27], some of its observations have resulted in expansion of scope of review while appointing arbitrators.

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[26]**Section 3(iv) of the Arbitration and Conciliation (Amendment) Act, 2019 -** in sub-section (6), in the long line, for the portion beginning with ‘‘party may request” and ending with ‘‘designated by such Court”, the following shall be substituted, namely:—

“the appointment shall be made, on an application of the party, by the arbitral institution designated by the Supreme Court, in case of international commercial arbitration, or by the High Court, in case of arbitrations other than international commercial arbitration, as the case may be”

[27] *Vidya Drolia* v. *Durga Trading Corporation*, (2021) 2 SCC 1, ¶ 144, 147.9

The Supreme Court in *Vidya Drolia*[28] while discussing whether landlord-tenant disputes governed by the Transfer of Property Act, 1882 are arbitrable, also discussed the scope of inquiry by courts in determining questions of arbitrability at the "pre-arbitration" / "reference" stage under Sections 8 and 11 of the 1996 Act, by interestingly, dividing the issues to be determined in the judgment into two subsets - (i) meaning of non-arbitrability and when the subject matter of the dispute is not capable of being resolved through arbitration; and (ii) the conundrum – "who decides" – whether the court at the reference stage or the arbitral tribunal in the arbitration proceedings would decide the question of non-arbitrability.[29]

The Supreme Court noted that the issue of non-arbitrability could be raised at three stages. First, before the Courts on an application for reference under Section 11 of the 1996 Act or for stay of pending judicial proceedings and reference under Section 8 of the 1996 Act; secondly, before the arbitral tribunal during the course of the arbitration proceedings; or thirdly, before the court at the stage of the challenge to the award under Section 34 of the 1996 Act or its enforcement. Therefore, the question that arises is – '*Who decides non- arbitrability?*' and, in particular, what would be the jurisdiction of the Court at the referral stage?[30] In this context, the Supreme Court examined the contours of powers of Courts under Section 11 of the 1996 Act.

(i) **Ruling on Section 11 of the 1996 Act**

(a) *Prima Facie Test*

The Supreme Court noted that the Law Commission's 246th Report (**"Law Commission Report"**) which had given reasons for the amendment to Section 8 and 11 of the 1996 Act, including insertion of sub-section (6A) to Section 11; was of the view that the 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 1996 Act – since the scope and nature of judicial intervention should not change based on whether a party (intending to defeat the arbitration agreement)

[28] *Vidya Drolia* v. *Durga Trading Corporation*, (2021) 2 SCC 1

[29] ibid ¶ 2.2

[30] ibid, ¶ 82

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.[31]

The Supreme Court observed that Courts at the referral stage do not perform ministerial functions, but exercise and perform judicial functions when they decide objections in terms of Sections 8 and 11 of the 1996 Act.[32] Section 8 empowers the courts to refer the parties to arbitration, if the action brought before it is the subject of an arbitration agreement, unless it finds that *prima facie* no valid arbitration agreement exists.[33] In the context of Section 11, the Supreme Court noted that Courts can exercise judicial discretion to conduct an intense yet summary *prima facie* review while remaining conscious that it is to assist the arbitration procedure and not usurp jurisdiction of the arbitral tribunal.[34] It also noted the alternative - that if the court becomes too reluctant to intervene, it may undermine the effectiveness of both the arbitration and the Courts, and hence in some cases the *prima facie* examination may require a deeper consideration.[35] Only when it appears that *prima facie* review would be inconclusive, or on consideration inadequate as it requires detailed examination, should the matter be left for final determination by the arbitral tribunal selected by the parties by consent.[36] The rationale, the Supreme Court noted, was not to delay or defer and to discourage parties from using referral proceeding as a ruse to delay and obstruct.[37]

The Supreme Court observed that *Mayavati Trading* had rightly held that *Patel Engineering* had been legislatively overruled and hence would not apply even post omission of sub-section (6A) to Section 11 of the 1996 Act.[38] The Court noted that the omission of sub-section (6A) by the 2019 Amendment was done with the object that the High Court and the Supreme Court shall have the power to designate the arbitral institutions which have been graded by an Arbitration Council under Section 43-I. Where a graded arbitral institution is not available, the concerned

[31] ibid, ¶ 124

[32] ibid ¶ 132

[33] ibid ¶ 132

[34] ibid ¶ 139

[35] ibid ¶ 139

[36] ibid ¶ 140

[37] ibid

[38] ibid ¶ 144

High Court shall maintain a panel of arbitrators for discharging the function and thereupon the High Court shall perform the duty of an arbitral institution for reference to the arbitral tribunal.[39] In this context, the Supreme Court noted that it would be wrong to accept that post omission of sub-section (6A) to Section 11, the ratio in *Patel Engineering* would become applicable.

(b) *Meaning of 'existence' in the context of Section 11 of the Act*

The Supreme Court noted that a reasonable and just interpretation of 'existence' required understanding the context, the purpose and the relevant legal norms applicable for a binding and enforceable arbitration agreement.[40] As per the Supreme Court, an agreement evidenced in writing has no meaning unless the parties can be compelled to adhere to and abide by the terms, and therefore, a party cannot sue and claim rights based on an unenforceable document.[41] Therefore, the existence of an arbitration agreement means an arbitration agreement that meets and satisfies the statutory requirements of both the 1996 Act and the Contract Act and when it is enforceable in law.[42]

(c) *Court's power under Section 11*

The Supreme Court discussed three approaches that could be adopted by Courts while interpreting an arbitration agreement - pro-arbitration, restrictive, and the intention of the parties by considering the strict language and circumstance of the case in hand. [43]

While concluding that the decision in *Patel Engineering* was no longer applicable, the Supreme Court summarised the following points that the Courts must take into consideration while determining an application under Section 8 or Section 11 of the 1996 Act:

(i) The general rule and principle, in view of the legislative mandate is clear from the 2019 Amendment and the principle of severability and competence-competence is that the arbitral tribunal is the *preferred* first authority to determine and decide all questions of

[39] ibid ¶ 145

[40] ibid ¶ 146

[41] ibid

[42] ibid

[43] ibid ¶ 151

non-arbitrability. The court has been conferred power of "second look" on aspects of non-arbitrability post the award in terms of Section 34 of the 1996 Act.[44]

(ii) Rarely as a demurrer the court may interfere at the Section 8 or 11 stage when it is manifestly and *ex facie* certain that the arbitration agreement is non-existent, invalid or the disputes are non-arbitrable, though the nature and facet of non-arbitrability would, to some extent, determine the level and nature of judicial scrutiny.[45] The restricted and limited review is to check and protect parties from being forced to arbitrate when the matter is demonstrably 'non-arbitrable'.[46] The Courts by default would refer the matter when contentions relating to non-arbitrability are plainly arguable; when consideration in summary proceedings would be insufficient and inconclusive; when facts are contested; and when the party opposing arbitration adopts delaying tactics or impairs conduct of arbitration proceedings.[47] The Supreme Court noted that proceedings in relation to applications under Section 8 or Section 11 was not the stage for the Courts to enter into a mini trial or elaborate review so as to usurp the jurisdiction of the arbitral tribunal but to affirm and uphold integrity and efficacy of arbitration as an alternative dispute resolution mechanism.[48]

4.3 Position after the recent developments

While *Vidya Drolia* is largely a pro-arbitration decision, the observation that arbitrability may be decided at the stage of appointment seems to have taken the scope of review beyond the question of existence of an arbitration agreement.

However, in recent judgments, the Supreme Court has continued to apply the principles laid down in *Vidya Drolia* in a pro-arbitration manner. For instance, in *Bharat Sanchar Nigam Limited v. Nortel Networks India Private Limited*[49], while discussing the limitation period to file an application under Section 11 of the 1996 Act, the Supreme Court also referred to the

[44] ibid, at ¶ 154.3

[45] ibid, at ¶ 154.4

[46] ibid

[47] ibid

[48] ibid

[49] *Bharat Sanchar Nigam Limited v. Nortel Networks India Private Limited,* Civil Appeal No. 833-844 of 2021

judgment in *Vidya Drolia.* The Supreme Court concluded that a court may interfere 'only' when it is 'manifest' that the claims are *ex facie* time barred and dead, or there is no subsisting dispute[50]. The Court clarified that Courts should refuse to refer a dispute to arbitration under Section 11 only in very limited category of cases - where there is not even a vestige of doubt that the claim is *ex facie* time-barred, or that the dispute is non-arbitrable[51]. A similar such observation was also made in *Sanjiv Prakash v. Seema Kukreja and Others*[52].

However, the issues discussed in *Vidya Drolia* are also not at rest. A three-judge bench of the Supreme Court in *N.N. Global Mercantile Private Limited v. Indo Unique Flame Ltd. and Others*[53] (**"N.N. Global"**), has referred the findings in *Vidya Drolia* (which affirmed the decision of the division bench of the Supreme Court in *Garware Wall Ropes Ltd. v. Coastal Marine Constructions & Eng. Ltd.*[54]) with regard to the meaning of the terms "existence" and "validity" of an arbitration agreement to a larger bench

5. ANALYSIS

Evidently, the power to appoint arbitrator through the court process has been fraught with more questions than answers. An analysis of the power to appoint indicates that such debate was not necessary and that *Rani Construction* correctly and purposively interpreted the law.

(a) Section 11 of the 1996 Act: Reference of a dispute to arbitration or appointment of an arbitrator?

The decisions reflect some confusion between the concept of reference of a matter or a dispute to arbitration[55] (as more prevalent under the 1940 Act) and the mere appointment of an arbitrator. Section 11 of the 1996 Act, like Section 8 of the 1940 Act, only bestows the power to the Courts to make an appointment of the arbitrator and does not refer to any powers of the Courts to make

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[50] ibid, ¶ 36

[51] ibid

[52] *Sanjiv Prakash v. Seema Kukreja and Others,* Civil Appeal No. 975 of 2021 ibid, ¶ 9

[53] *N.N. Global Mercantile Private Limited v. Indo Unique Flame Ltd. and Others,* 2021 (1) CTC 868

[54] *Garware Wall Ropes Ltd. v. Coastal Marine Constructions & Eng. Ltd.,* 2019 (9) SCC 209

[55] *Vidya Drolia* v. *Durga Trading Corporation*, (2021) 2 SCC 1, ¶ 82, *National Insurance Company Limited v. Boghara Polyfab Private Limited* ¶ 28

a reference of the disputes between parties. It is implicit in Section 11 of the 1996 Act that the parties by entering into an arbitration agreement have already referred disputes to arbitration. Therefore, the scope of powers of the Courts under Section 11 of the 1996 is merely restricted to appointing an arbitrator and as observed in *Mehul Construction*, to kickstart the arbitration process without delay. Of course, where there is obviously no such agreement borne out by the record, then the question of appointing an arbitrator may not arise.

(b) Is a second look required if the courts view their powers under Section 11 merely for appointment of an arbitrator and not for reference of a dispute to arbitration?

One question that deserved to be looked into more deeply, was whether a "second look" was necessary to answer the question regarding appointment of an arbitrator. For instance questions such as (i) an issue of a barred claim; (ii) whether the parties have concluded the contract / transaction by recording satisfaction of their mutual rights and obligations; (iii) whether a claim made falls within the arbitration clause; (iv) merits or any claim involved in the arbitration, etc. are all issues which need not be decided by the Courts at the time when it is considering the question of appointment of an arbitrator. The Courts have no duty to weed out bad claims from being adjudicated upon by the arbitral tribunal under the 1996 Act and certainly not at the appointment stage. If such a duty existed, it would be putting an unfair burden on the Courts. Valid and invalid claims must go through the process of arbitration once parties have agreed on the arbitration mechanism. It is for this very reason that the 1996 Act under Section 16 provides the arbitral tribunal with the power to rule on its own jurisdiction including the existence of and validity of an arbitration agreement. All issues beyond *prima facie* existence of an arbitration agreement can be determined and disposed of by an arbitral tribunal keeping all defences of the objecting party open. Appropriate appeal remedies have also been provided.

(c) How much Courts should be concerned with protecting a party from wrongful invocation of arbitration?

Does any party really have a right to stop an arbitration before it starts? If a right to prevent an arbitration does not exist, can a party seek to do so by raising objections to appointment of an arbitrator? If the invocation of arbitration is manifestly wrongful, it is open to parties to file an anti-arbitration injunction suit and demonstrate that the standards required for anti-arbitration

injunction are met. Of course, this is a high threshold[56], rarely met, and errant parties prefer the easier option - to misuse the powers of appointment.

The second question is what harm is really caused to a party by having to go through an arbitration? It is common practice (certainly in international commercial arbitration) to divide the arbitration into stages to make the process efficient. Therefore, where there are serious questions as to jurisdiction and / or binding nature of an agreement, the proceedings may be bifurcated and an award on jurisdiction may obviate further proceedings. The 1996 Act also recognizes the power to issue interim awards and it is entirely consistent with Indian civil procedure to frame and decide certain issues as preliminary issues. Sufficient tools are available to minimize a lengthy and inefficient arbitration. One solution could be that of awarding actual costs incurred by the successful party to it. Such a mechanism will act as a deterrent to and will protect parties from wrongful invocation of arbitration agreements.

(d) Do the provisions of Section 34 of the 1996 Act provide the necessary comfort to enable parties and Courts to limit the power of appointment to just that - the power to appoint?

Where an arbitral tribunal has decided questions not within jurisdiction of the tribunal, or issues that are non-arbitrable or there are other infirmities in the award, parties can seek to set aside the award under Section 34 of the 1996 Act. For instance, Section 34(2)(a)(ii) of the 1996 Act allows for a challenge to the award passed by an arbitral tribunal if the arbitration agreement is invalid. Section 34(2)(a)(iii) allows for a challenge to the award passed by an arbitral tribunal if a party was not given proper notice of appointment of an arbitrator or of the arbitral proceedings. Section 34(2)(a)(iv) allows a challenge to the award passed by an arbitral tribunal where the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, i.e. a dispute that is not arbitrable by the arbitral tribunal.[57] Thus, it is evident that

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[56] *National Aluminum Company Ltd v. Subhash Infra Engineering Pvt. Ltd* 2019 (5) Arb.LR 254 (SC), *Chatterjee Petrochem Co. and Ors. v. Haldia Petrochemicals Ltd. and Ors.* 2013 (4) Arb.LR 456 (SC), *Himachal Sorang Power Private Limited and Ors. v. NCC Infrastructure Holdings Limited*, CS (COMM) 12/2019

[57] **Section 34 (2) of the 1996 Act**: An arbitral award may be set aside by the Court only if — (a) the party making the application furnishes proof that —

(i) a party was under some incapacity, or

the 1996 Act itself provides a recourse to parties to deal with the various issues that parties tend to raise at the stage of appointment of an arbitrator.

(e) Would a robust costs regime help?

If the Supreme Court's primary concern through the years has been to protect a party from being unnecessarily dragged through arbitration, perhaps the key remedy to this is a robust costs regime, where the winning party gets real costs of the endeavour. Though a rigorous costs regime is common in foreign arbitrations, we are yet to see a movement towards such a regime in India. A rigorous costs regime that largely (even if not fully) provides compensation to the winning party significantly lightens the burden of arbitration. If, in addition to real costs in arbitration, the losing party in a Section 11 proceeding is made to pay real costs of the proceeding, perhaps we would see transformed party behaviour. Very frequently, the purpose of raising objections in a Section 11 proceeding is not a genuine concern as to jurisdiction or arbitrability, but a strategy to delay and disrupt arbitration proceedings. A robust costs regime would strongly disincentivise such parties and also continue to uphold the principles of party autonomy and minimal intervention of courts.

6. CONCLUSION

The sheer amount of judicial and legislative attention given to the question of appointment of arbitrators reflects - rightly or wrongly - that this is no longer a simple issue. While on the one hand the mere appointment of an arbitrator should be non-controversial, requesting the Courts to

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(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or

(b) the Court finds that — (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force or (ii) the arbitral award is in conflict with the public policy of India.

do so has certainly brought in a fair amount of controversy. The power has travelled from being administrative to judicial; then to judicial only for the purpose of ascertaining a *prima facie* existence of an arbitration agreement; and to now ready to be moved away from the Courts to arbitral institutions.

However, it remains to be seen whether the Courts will be freed from this dilemma which has been alive from the year 1999; rather if the Courts will stay away from exercising power of judicial review despite the constitution of arbitral institutions.

If conduct of parties is any metric to go by, the likely scenario will be a spate of writ petitions being filed before the High Courts and Supreme Court seeking intervention in the exercise of (non-judicial) power by the arbitsral institution. At that stage, the need of the hour will be for the Courts to come down heavily on such parties, insist that all parties go through the arbitration process and accept the mandate of the arbitrator, to be challenged only as provided in the 1996 Act and at the right stage.