

IS ARBITRABILITY OF A DISPUTE A PRE-CONDITION FOR AN ORDER UNDER SECTION 11 OF THE ACT?

Author - ANANYA TRIPATHI, Student at CHRIST DEEMED TO BE UNIVERSITY, BENGALURU

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ABSTRACT

Arbitration is the only way out to pendency of litigation in India. This out of court settlement procedure is speedy, cheap and desirable. But all disputes can't be sent for arbitration. Arbitrability of a dispute is always questionable. The whole success of Arbitration Act is dependent on functionality of the arbitral award. And here, the role of section 11 of the Act becomes prominent. This article seeks to interpret and define section 11 of the Act and prove how arbitrability of a dispute is a pre-condition substantiated by various judgements.

1. WHAT IS "ARBITRABILITY OF A DISPUTE"?

"Arbitrability of a dispute" refers to whether a dispute can be adjudicated by an Arbitration Tribunal. These Tribunals are "private forums" that are given task to adjudicate disputes with the consent of both litigating parties in order to reduce burden of courts and for speedy and specialized decisions as well. Consequently, they are called Alternative Dispute Resolution methods. Being private forums, they have a limited jurisdiction over the type of disputes that they can decide upon i.e., disputes that are arbitrable. There are various criteria to determine arbitrability of a dispute.

The Supreme court of India in **Booz Allen & Hamilton Inc v SBI Home Finance Ltd. & Ors.**¹⁸² held that "arbitrability" has various interpretations depending on the context.

Three facets of arbitrability were determined:

- i. While referring the matter for arbitration through arbitration agreement
- ii. When challenging the jurisdiction of arbitrator
- iii. While enforcing the arbitral award.

These are the three stages through which arbitrability of a matter is decided. In **Vidya Drolia & Ors. V Durga Trading Corporation**¹⁸³ the Supreme Court laid down a four-fold test of non-arbitrability of the issue (the disputes that cannot be decided through arbitration)-

- i. When the dispute's cause of action and subject matter are right in rem, which do not concern subordinate rights in personam derived from rights in rem.
- ii. When the basis for the claim and the focus of the conflict are the State's unassailable sovereign and public interest functions.
- iii. When the dispute's subject matter is expressly or logically impliedly non-arbitrable under a required provision.
- iv. When the dispute's subject matter and the basis for action have an erga omnes effect and call for centralized adjudication.

2. OBJECTIVE OF ARBITRATION AND CONCILIATION ACT, 1996

The main objectives of the Arbitration and Conciliation Act, 1996 are:

- To comprehensively resolve domestic, international and commercial disputes through arbitration and conciliation.

¹⁸² Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd., (2011) 5 SCC 532

¹⁸³ Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1

- To carry out efficient and just arbitral proceeding and facilitate parties to reach amicable solution.
- To define the jurisdiction of arbitration tribunal.
- To minimize Court's interference and supervision in arbitration
- To enforce arbitral awards as decree by court of law.

3. Section 11 of the Arbitration and Conciliation Act, 1996¹⁸⁴

Section 11 of Chapter III of the Act talks about:

- Procedure to appoint an arbitrator
- Eligibility of an arbitrator
- Power of Supreme Court and High Court over Arbitration Tribunals
- Remedy in case of failure to appoint an Arbitrator
- Disposal of application for appointment of arbitrator in 30 days by Arbitral institution
- Determination of fees and manner of payment to Arbitral Tribunal
- If there exists a valid agreement between the parties.

4. NECESSITY TO DETERMINE ARBITRABILITY OF THE DISPUTE UNDER SECTION 11

So, the primary goal of the Act is to provide speedy and specialized redressal with minimum interference by courts. These arbitral awards must be enforceable and hold the same value as a decree by public courts. Now the very purpose of the Act will be vanquished if "arbitrability of the dispute" is not a pre-condition for an order under section 11 of the Act.

The **246th Law Commission Report**¹⁸⁵, which was the basis for the adoption of Section 11(6-A) stated that a competent authority must follow a two-step procedure when deciding whether to refer a pending action to arbitration, as per Section 11(6-A) of the amendment. According to the change, the judicial authority will not direct

the parties to arbitration if it determines that an arbitration agreement does not exist or is void. If the authorities believes that the arbitration agreement exists at least provably, it must send the matter to arbitration and defer to the arbitral tribunal's determination of the arbitration agreement's validity. However, if the court determines that the agreement does not exist, the ruling will be final and not prima facie. The amendment also contemplates making a conclusive decision regarding whether the arbitration agreement is void.

Section 7 of the Act mentions the prerequisite of a valid arbitration agreement. Section 7(3) and 7(4) lays down that an arbitration agreement must be in writing. It is considered to be in writing if it contains:¹⁸⁶

- a. a document signed by both parties
- b. there exists a record of agreement through exchange of letters, telex, electronic means, telegrams, etc.
- c. an exchange of statements of claim and defense in which one party alleges the existence of the agreement while the other does not challenge it
- d. the arbitration clause must be part of the contract

Section 11 does not exist in isolation and depends on section 7 of the Act for its interpretation. The pre-conditions of a valid arbitration agreement are given in section 7 and thus it becomes feasible and practical to determine the arbitrability of the issue under section 11 to curb vagueness and uncertainty from arising further during enforcement.

Section 36(3) of the Act specifies enforcement of award only after the court being prima facie satisfied with existence of an arbitration agreement i.e., an arbitrable dispute. The plausibility of section 36(3) depends on determination of arbitrability of the issue under section 11. If it remains undecided at initial stages and the arbitral award is granted, the likelihood of that award being enforced is

¹⁸⁴ (India Code , n.d.)

¹⁸⁵ BSNL v. Nortel Networks (India) (P) Ltd., (2021) 5 SCC 738

¹⁸⁶ (India Code , n.d.)

unknown because the courts may consider it void and hence unenforceable after the whole process. Individual arbitrators in India may charge up to 30 Lakhs and there is minimum three arbitrators in a tribunal. Now, after an expensive process the, if the award remains unenforceable the trust of parties is broken, the process becomes time consuming and the whole purpose of the Act is defeated. In order to protect the functionality and practicality of the Act it becomes important to pre- determine arbitrability of the dispute under section 11. The Supreme Court chalked out this loophole and tried to curb it through various judgements.

5. SUPREME COURT JUDGEMENTS

i. Vidya Drolia & Ors. V Durga Trading Corporation¹⁸⁷

Issue: a. to determine the distinction between non-arbitrable claim and non-arbitrable subject.

b. The second consideration relates to the court's authority and jurisdiction at the referral stage where an application under Section 8 or Section 11 of the Arbitration and Conciliation Act, 1996 is challenged as not being arbitrable.

c. Disputes under the section 11 of Transfer of Property Act are arbitrable or not.

Judgement: a. While normally non-arbitrability of the subject matter would relate to non-arbitrability in law, non-arbitrable claim could occur due to the scope of the arbitration agreement or when the claim cannot be resolved through arbitration.

b. The court held that, the expression "existence of an arbitration agreement" in section 11 includes aspect of validity of an arbitration agreement which the court may decide by a prima facie test. Post the 2015, the amended section 8 and 11 now have similar scope and ambit. It says that only the prima facie opinion on existence of a valid arbitration agreement could be decided by judicial interference at this stage.

c. The landlord-tenant disputes when monitored by Transfer of Property Act alone is considered arbitrable but when it comes under the Rent Control legislation, it has specific forum for redressal and hence becomes non-arbitrable.

ii. DURU FELGUERA, S.A. V GANGAVARAM PORT LTD.¹⁸⁸

Issue addressed: Restrictions placed upon powers of court under section 11(6-A)

Judgement: Post 2015 amendment, power of courts is confined till determining the existence of examining validity of an arbitration agreement under section 11(6-A).

iii. BSNL V Nortel Networks of India Pvt. Ltd.¹⁸⁹

Issue addressed: Limitation period for appointment of arbitrator under section 11.

Judgement: Court can only intervene during the referral stage if it is "manifest" that the claims are ex facie time-barred and dead or if there is no ongoing dispute. 11(6-A) The Supreme Court or 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."

iv. DLF Home Developers Ltd. V Rajpura Homes Pvt. Ltd. & Anr.¹⁹⁰

Issue addressed: a. To determine the jurisdiction of this Court's authority under Section 11.

b. Whether application filed by DHDL is maintainable or not?

Judgement: a. Jurisdiction of courts under section 11 is fundamentally to determine whether the parties have a written agreement that disputes would be resolved through arbitration and if the aggrieved party has

¹⁸⁸ Duro Felguera, S.A. v. Gangavaram Port Ltd., (2017) 9 SCC 729

¹⁸⁹ BSNL v. Nortel Networks (India) (P) Ltd., (2021) 5 SCC 738

¹⁹⁰ DLF Home Developers Limited v. Rajapura Homes (P) Ltd., 2021 SCC OnLine SC 781

¹⁸⁷ Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1

shown a prima facie arbitrable case. To ascertain minimum interference of the court at Section 8 or Section 11 stage, when it is manifestly and ex facie certain that the arbitration agreement is non-existent, invalid, or that the disputes are not arbitrable, though the type and aspect of non-arbitrability would, to some extent, determine the level and nature of judicial scrutiny. The purpose of the restricted and limited review is to weed out the deadwood and safeguard parties from being forced to arbitrate where the dispute is clearly "non-arbitrable."

b. The court considered the application maintainable, only after being contended that the Petitioner-DHDL has satisfied the fundamental twin-test envisioned under Section 11(6) of the Act.

v. Vimal Kishore Shah V Jayesh Dinesh Shah¹⁹¹

Issue addressed: To decide the arbitrability of dispute under trust deed governed by the Trust Deeds Act, 1882.

Judgement: The dispute was not maintainable even after existence of an arbitration agreement because it did not fulfill conditions of section 7 of the Act. And any application made under section 11 of the Arbitration and Conciliation Act, 1996 would be dismissed at its threshold if any of the elements mentioned in section 7 of the Act were not met, rendering the arbitration agreement void and unenforceable.

The application filed under section 11 was initially rendered unmaintainable as the sine qua non for invoking the jurisdiction under Section 11 of the 1996 Arbitration Act was existence of a valid and enforceable arbitration agreement, lacked in the present case.

vi. A Ayyasamy V A Paramasivam¹⁹²

Issue addressed: What disputes cannot be held arbitrable?

Judgement: The category of disputes falling under right in rem cannot be dealt through arbitration whereas matters under the ambit of right in personam can be resolved through this.

The Supreme Court outlined several non-arbitrable dispute scenarios, including:

- i. marriage issues involving divorce, judicial separation, restitution of conjugal rights, and child custody.
- ii. conflicts relating to rights and responsibilities that give birth to or result from criminal offences.
- iii. guardianship-related issues.
- iv. bankruptcy and dissolution.
- v. testamentary issues, such as letters of administration, succession certificates, and grants of probate.
- vi. eviction or tenancy proceedings covered by special statutes, in which a tenant is given further protection against eviction and a particular court is given exclusive jurisdiction over the case.

vii. Suresh Shah V Hipad Technology India (P) Ltd.¹⁹³

Issue addressed: To determine the arbitrability of lease governed by Transfer of Property Act when it does not fall under any special statute.

Judgement: A lease does not have any specific statutory protection and hence the matter is arbitrable. Before deciding to appoint an arbitrator, it is crucial to comprehend the first part of Clause 12 (section 11(12) of the Arbitration and Conciliation Act), which provides for arbitration, in order to eliminate any legal shortfalls and take the arbitrability of the dispute relating to lease/tenancy agreements/deeds when such lease is governed by the Transfer of Property Act, 1882 ("the TP Act").

6. CONCLUSION

Lately, the courts have admitted that pre-determination of arbitrability of a dispute for an order under section 11 of the Act is fundamental to preserve the essence and the whole

¹⁹¹ Vimal Kishor Shah v. Jayesh Dinesh Shah, (2016) 8 SCC 788
¹⁹² A. Ayyasamy v. A. Paramasivam, (2016) 10 SCC 386

¹⁹³ Suresh Shah v. Hipad Technology (India) (P) Ltd., (2021) 1 SCC 529

objective of the Arbitration and Conciliation Act, 1996. Although it is not explicitly mentioned in the Act but the judicial and legislative intent is made clear through various precedents and amendments. It is significant to note that, with the caveat that this examination is to be reserved for exceptional circumstances, the scope of an investigation of the validity of an arbitration agreement includes an examination into whether the dispute's subject matter is capable of arbitration. According to recent trends, the inspection is restricted to concerns that are immediately obvious and does not include a thorough investigation. The courts may use the prima facie standard to screen and dismiss ex facie meritless, frivolous, and dishonest litigation while exercising jurisdiction under S.11 and functioning as a judicial forum. The exercise and examination should be conducted in a way that upholds the legislative intent and goal, which is known to be to minimize court involvement during the appointment of the arbitrator. It was made clear through this judgement that unless a party establishes a prima facie (summary findings) case of the non-existence of a valid arbitration agreement by summarily presenting a strong case that he is entitled to such a finding, the court is required to refer a matter to arbitration or appoint an arbitrator under Sections 8 and 11.

The courts might undoubtedly reject a plea for reference if the disagreement is unrelated to the arbitration agreement between the parties, even though the parties are not required to defend the claim or plead exhaustively regarding limitation or the claim. Therefore, rather than simply ordering the parties to arbitrate disputes, the courts will now have the authority to undertake a preliminary investigation within the boundaries specified. Thus, it is now made clear that arbitrability of a dispute should be and is a pre-condition for an order under section 11 of the Arbitration and Conciliation Act, 1996.

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