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EVOLUTION OF SECTION 8 & 11 OF INDIAN ARBITRATION AND CONCILIATION ACT

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ABSTRACT

After the 2015 Amendment to the Arbitration Act, this paper explores the intricacies surrounding the concept of arbitrability in the context of Sections 8 and 11 of the 1996 Arbitration Act[1], both before and after the 2015 Amendment. In this Act, mediation by Courts was restricted with the goal that the item behind speedy justice could be all-around accomplished. To additional the aforementioned level-headed, this Act harbours many provisions. Section 8 of the Act signifies one such provision which accommodates restricted legal intercession and encourages the target by guiding the parties to engage in an intervention based on the arbitration agreement.

According to the author, there should be a clearer differentiation between the powers given on the Arbitral Tribunal and the degree of Judicial involvement in the same. In this article, we will address the uncertainty of 'Who determines Arbitrability and to what extent?' and simplify it by the use of current judgments and laws.

Keywords: Arbitration agreement, Judicial Intervention, Indian Arbitration Act, Arbitral Tribunal, Developments.

BACKGROUND

Various forms and stages of arbitration have existed in the nation for many years in various shapes and stages. In reality, the Courts and the official judicial apparatus were established much later. However, it was only with the passage of the Indian Arbitration Act, 1899, that the route of formal Arbitration hearings in India began to take shape. A year later, in 1908, an update to the Code of Civil Procedure was passed, which included the addition of Section 89, which provided the courts the authority to send problems brought before them to an alternative dispute settlement mechanism. This was, of course, subject to such a mechanism where the Court recognised a

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[1] The Arbitration and Conciliation Act, 1996 (Act 26 of 1996).

reasonable prospect of settlement between the parties and no significant source of contention. In 1940, the Indian Arbitration Act (IAA)[2] was passed, which was condemned by the judiciary and jurists of the legal profession for being ineffective. When it came to the 1940 Act in the case of 'Guru Nanak Foundation Vs Rattan Singh,'[3] the Supreme Court made several amusing observations about it, stating that "the manner in which the proceedings under the Act are conducted, and without exception challenged in the Courts, has made Lawyers laugh and legal philosophers weep." As a result of the Act's inability to meet the aspirations of alternate dispute resolution mechanisms, it gave birth to and provided a fertile ground for the Act of 1996, which ended up exceeding many expectations and making a significant contribution to the field of arbitration in India at the time. According to some, the passage of this legislation signalled a turning point in the perception of arbitration as a legitimate alternative conflict settlement process.

The purpose of establishing the complete Arbitration Act of 1996 is to guarantee that arbitration is free from the continual scrutiny of the courts. The Act has a strategy to accomplish this goal. An important underlying motivation for a person or a party to choose Arbitration is the desire for autonomy, which must be supported by the Judiciary when the decision is made to do so. In light of the fact that the Indian Arbitration Act is adopted, to a greater or lesser extent, from the UNCITRAL Model Law,[4] the majority of the essential principles are comparable. Section 5 of the Act was included as a result of the UNCITRAL Model Law's Article 5 being incorporated. This Section attempts to minimise, if not eliminate, judicial involvement to the extent that any exceptions established in Part I of the Act are applicable. Although there is no specific list of exceptions given within the Section, it is clear from a cursory review of Sections 8, 9, 11, 34, and 37 of the Act that there are a number of them. The author will devote the majority of this article to Sections 8 and 11, as well as its history, applicability, and importance in the context of Judicial Intervention.

OVERVIEW OF THE SECTIONS BEFORE 2015 AMENDMENT

If the parties have agreed to arbitrate their dispute, Section 8 of the Arbitration and Conciliation Act, 1996 covers the ability to submit the dispute to arbitration where exists a mediation agreement. The presence of the Arbitration agreement is of particular relevance in this context. It is important to underline the term "in a case that is subject to arbitration" to better appreciate the

[2] Arbitration Act, 1940 (Act 10 of 1940).
[3] Guru Nanak Foundation Vs Rattan Singh, (1981) AIR 2075.
[4] 'Uncitral Model Law on International Commercial Arbitration', [1994] PL 3.

scope of the Section. There are two elements to the word 'matter' in this phrase: issues to which the parties have consented to allude, and matters that are inside the extension and ambit of the Arbitration Agreement. Activation of Section 8, also known as the 'referral stage' before the courts, occurs when one of the parties has a disagreement with the Arbitration agreement and approaches the Court, and the party disputing the agreement seeks recourse to Section 8 in order to move to Arbitration. Subsections (1) and (2) of Section 8 of the Code of Civil Procedure[5] provide that certain requirements must be met before an application may be made to the Court. If there is currently an active lawsuit, the first and most important requirement is that the application for referral is submitted before the filing of the Statement of Defense. It is important to present this application along with a confirmed duplicate of the first Arbitration agreement.

In a similar vein, Section 11 detailed the arbitration process. Additionally, it detailed the process for appointing an Arbitrator by the Court in the event that the parties were unable to agree on one. Prior to making such an appointment, the Court will have the right to determine whether or not the matter is arbitrable by default unless the Court expressly waives this jurisdiction. In order to properly comprehend the background of the Section 11 Pre-Amendment, it is necessary to review several precedent-setting decisions. The issue in the case of "SBP & Co v. Patel Engineering"[6] was whether the function of the Courts in choosing an Arbitrator was a judicial or administrative duty. The answer was that it was both. Ultimately, the Supreme Court determined that the position would be a judicial position. Following that, the area of intervention was expanded and, rather, classified in another ruling, in which the function of the Chief Justice was expressly split into three phases, as outlined above. However, granting the Courts such broad powers of Judicial duty at the time of appointment meant that the Courts would be called upon to consider problems that went much beyond the extent of the Arbitration Agreement. This was a significant disadvantage.

On the surface, these parts seemed to be in direct opposition to the subject and underlying purpose of Section 5 of the Act. The topic of what precisely the Courts should analyse at the stage of reference was a source of worry since it was not explicitly specified in the 1996 Act, at the time of reference. For the purpose of addressing these problems, the 246th Law Commission report, entitled 'Amendment to the Arbitration and Conciliation Act of 1996,'[7] was published. A number of adjustments to the 1996 Act were proposed in this report, one of which was the alteration of

[5] The Code of Civil Procedure, 1908 (Act 05 of 1908).
[6] SBP & Co v. Patel Engineering, (2005) 8 SCC 618.
[7] The Arbitration And Conciliation (Amendment) Act, 2019 (Act 33 of 2019).

Sections 8 and 11 to the degree that the scope of the Court's function when cases are brought before it via these Sections was determined. Furthermore, this report especially refers to the judgments of 'SBP Engineering' and 'Sukanya Holdings' as well as the challenges that have emerged as a result of those rulings. Specifically, the report was reviewed in full in the case of 'Emaar MGF Land Ltd. vs. Aftab Singh'[8]. While outlining the rationale for the revision, the study noted that "judicial participation in arbitral procedures greatly increases the length of the process and ultimately defeats the purpose and advantages of arbitration." This study went on to say that the courts' sole responsibility at this point should be to decide if an Arbitration agreement exists and that they should not be involved in any other aspects of the case. When deciding the presence of an arbitration agreement, the Court only has the role to consider whether the agreement is valid on its face.[9] Once that is resolved, the remainder of the choices are to be left to the Arbitral Tribunals to consider and investigate in order to determine the finality of such existence, which will be determined by the Courts. However, if the prima facie presence of the agreement is not established, the court's determination of the agreement's non-existence will be definitive and cannot be challenged further. On the 23rd of October, 2015, an Amendment to the Act was introduced, which made a number of major modifications to the Act.

DEVELOPMENTS POST THE 2015 AMENDMENT

Hence, Sections 8 and 11 were amended as follows:

Section 8: The amended Section 8 limits the scope of the Court's role at the Referral Stage. The provision demands that upon an application for reference to Arbitration, the judicial authority shall, notwithstanding any judgment, including the ones mentioned above, decree or order of Apex Court or any Court, allude the parties to arbitration except if it observes that at first sight, no legitimate arbitration agreement exists.

Hence, in such a situation wherein Section 8 only permits determining, at first sight, the presence of the Arbitration Agreement, it needs to be read with Section 16 i.e. 'Kompetenz-Kompetenz' Principle. Section 16, which is examined in detail in the case of '*Uttarakhand Purv Sainik Kalyan Nigam Limited Vs Northern Coal Field Ltd*'[10], states that the Arbitral Tribunal will have the skill to manage in its jurisdiction, thereby including the competence to entertain any objections with regard to its jurisdiction as well.

[8] Emaar MGF Land Ltd. vs. Aftab Singh (2018) (C) 2629-2630 of 2018.

[9] Rishi Raj Mukherjee and Raj Shekhar, 'Sections 8 And 11 Of India'S Arbitration And Conciliation Act, 1996: An Analysis Of The Judicial Appeals Conundrum, Issues And Challenges' (*RMLNLU Arbitration Law Blog*, 2021)< https://rmlnluseal.home.blog/2021/05/16/1305/ > accessed 7 December 2021.

[10] Uttarakhand Purv Sainik Kalyan Nigam Limited Vs Northern Coal Field Ltd, (2018) 11476 of 2018.

Section 11: Section 11(6A) was inserted vide the 2015 Amendment, which reaffirmed the abovementioned clause by limiting the extent of Section 11 to solely *'Assessment of the presence of Arbitration agreement'*. Prior to this amendment, the courts were also given the power to examine several other aspects including that of limitation, referential aspect of claims, etc. Hence, as per the *non-obstante clause* of Section 11(6A), the judgments of '*SBP & Co v. Patel Engineering* (*Patel Engineering*)' and *'Boghara Polyfab*[11]*'* were overruled essentially.

ANALYSIS: *Vidya Drolia Vs Durga Trading Corporation'*

These provisions and Amendments still created a lot of confusion with regard to the role of Courts as even the 'assessment of the presence of Arbitration agreement' could be looked at from various perspectives. How could one determine the Existence of an Arbitration Agreement? There are several parameters that aid such an existence in the first place, so what needs to be taken into account? All these answers are more or less provided in the recent judgment of *'Vidya Drolia Vs Durga Trading Corporation'*[12]. This judgment, although pretty elaborate, has answered every little conflict that may arise with regard to the scope of intervention of the Courts and the powers given to the Arbitral Tribunal. However, as far as the subject matter of this paper is concerned, the author shall only focus on the confusion with regards to Sections 8 and 11.

Justice Chandrachud in *Para 33* of '*'Emaar MGF Land Ltd. vs Aftab Singh*[13]*'*, refers to the judgment of *Booze Allen Hamilton*, wherein the fundamentals of what is 'not arbitrable' has been categorized; *"Ordinarily every civil or commercial dispute whether based on contract or otherwise which is capable of being decided by a civil court is in principle capable of being adjudicated upon and resolved by arbitration subject to the dispute being governed by the arbitration agreement unless the jurisdiction of the Arbitral Tribunal is excluded either expressly or by necessary implication."*

Beyond these aspects, the Arbitral Tribunal will have the power to choose in its purview autonomously, with no intervention of Courts. However, we need to understand that this does not in any way mean that the Tribunals have been given 'absolute authority' over such matters, rather, they have been given the 'priority' to decide. The Courts shall always have the option of 'Second look' at the stage of Section 34 in aspects beyond the prima facie existence.

CONCLUSION

[11] *Id* at 7.
[12] Vidya Drolia Vs Durga Trading Corporation, (2019) SCC OnLine SC 358.
[13] *Id* at 9.

An important contrast between a 'Non-Arbitrable claim' and a 'Non-Arbitrable subject matter'[14] is highlighted in this ruling, and the author wants to draw attention to it in the closing note. An arbitration agreement's scope is defined by whether or not a claim is arbitrable, and therefore whether or not the claim meets the criteria for being resolved via an alternative dispute resolution method. A non-arbitrable topic matter, on the other hand, demonstrates that the topic of the arbitration is not legally viable for arbitration. This difference clarified the extent of the function of the Courts throughout the referential/appointment stages of the process. The Arbitral Tribunal shall have the authority to determine whether or not a subject matter is arbitrable in the first instance. The courts, on the other hand, will be called into action if the matter is one of 'deadwood.' In this context, deadwood refers to a determination made after a prima facie assessment to the result that the case is not legally viable for arbitral proceedings. As a result, the deadwood must be removed as soon as possible, or else the whole tree of the basics of arbitration would be destroyed.

[14] Kingshuk Banerjee, 'Non-Arbitrable Disputes - The Law In India' (*Ibanet.org*, 2021) < https://www.ibanet.org/nonarbdisputesindia > accessed 7 December 2021.