



## **Supreme Court reiterated that courts should hold a preliminary enquiry on the arbitrability of issues when exercising powers under Section 11 of the Arbitration and Conciliation Act, 1996**

The Supreme Court of India (“**Supreme Court**”) recently in the case of *Emaar India Ltd v. Tarun Aggarwal Projects LLP*<sup>1</sup>, has considered an important issue relating to the appointment of arbitrator under Section 11 of the Arbitration and Conciliation Act, 1996 (“**Arbitration Act**”).

### **Brief Facts**

Tarun Aggarwal Projects LLP (“**TAPL**”) and Emaar India Limited (“**Emaar**”) entered into a collaboration agreement dated May 7, 2009 for development of a residential colony. Thereafter, an addendum agreement dated April 19, 2011 was executed between the parties (“**Addendum Agreement**”) which contained an arbitration agreement in Clause 37.

Disputes arose between the parties, and TAPL invoked the arbitration clause for referring the disputes to arbitration and appointed an arbitrator towards the constitution of the 3 (three) member tribunal.

Emaar opposed the initiation of arbitration claiming that as per Clause 36 of the Addendum Agreement, if there was any dispute with regard to Clauses 3, 6 and 9 then the Addendum Agreement would be specifically enforceable through the appropriate court. Emaar also claimed that the dispute raised by TAPL fell under Clauses 3, 6 and 9 of the Addendum Agreement and therefore, the same were not arbitrable under Clause 37.

TAPL approached the High Court of Delhi (“**Delhi HC**”) for appointment of the arbitrators in terms of Clause 37 of the Addendum by submitting an application under Section 11(5) and Section 11(6) of the Arbitration Act.

The Delhi HC allowed the application while observing that a conjoint reading of Clauses 36 and 37 makes it clear that a party does have a right to seek enforcement of agreement before the court of law but it does not bar settlement of disputes through the Arbitration Act.

The Delhi HC found that the disputes were arbitrable, and it passed an order for appointment of the arbitrators.

Emaar challenged the order of the Delhi HC in the appeal before the Supreme Court.

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<sup>1</sup> Civil Appeal No. 6774 of 2022, judgment dated September 29, 2022

## Issues

The question for consideration before the Supreme Court was whether the Delhi HC was justified in appointing the arbitrators in the present case.

## Decision of the Court

1. The issue of non-arbitrability of a dispute is fundamental to arbitration and pertains to the arbitral tribunal's jurisdiction.
2. Placing reliance on the earlier decision in *Vidya Drolia v Durga Trading Corporation*<sup>2</sup>, the Supreme Court held that the question of non-arbitrability and whether the dispute is covered by the arbitration clause can be examined by the court at the reference stage itself, without leaving it to be decided by the arbitral tribunal.
3. In the context of the present case, the Supreme Court held that "*...when a specific plea was taken that the dispute falls within Clause 36 and not under Clause 37 and therefore, the dispute is not arbitrable, the High Court was at least required to hold a primary inquiry/review and prima facie come to conclusion on whether the dispute falls under Clause 36 or not and whether the dispute is arbitrable or not*".
4. Therefore, the Supreme Court set aside the judgment and order passed by the Delhi HC appointing the arbitrators and remanded the matter back to the Delhi HC for holding a preliminary inquiry on the question of arbitrability of dispute.

## JSA Comment

When an objection is raised relating to arbitrability of dispute then the high court under Section 11 of the Arbitration Act would be required to make a preliminary inquiry before holding that the disputes are arbitrable. As held in *Vidya Drolia* case, the arbitral tribunal is the preferred first authority to determine and decide all questions of non-arbitrability. This guiding principle was followed by the Supreme Court in the present appeal suggesting that the Delhi HC could not have itself decided that the disputes were arbitrable without making some preliminary inquiry. As per the *Vidya Drolia* judgment, the nature and facet of non-arbitrability would, to some extent, determine the level and nature of judicial scrutiny or inquiry.

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<sup>2</sup> (2021) 2 SCC 1.

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