



Question of novation of contract cannot be examined by a court in an application under Section 11 (6) of the Arbitration Act for appointment of an arbitrator

A 2 (two) judge bench of the Supreme Court of India (“**Supreme Court**”) in *M/s Meenakshi Solar Power Private Limited vs M/s Abhyudaya Green Economic Zones Private Limited & Ors.*¹ has held that a court cannot consider issues pertaining to novation of contract while deciding an application under Section 11(6) of the Arbitration and Conciliation Act, 1996 (“**Arbitration Act**”).

Brief Facts

Meenakshi Solar Power Private Limited (“**Appellant**”) entered into a share purchase agreement (“**SPA**”) with Abhyudaya Green Economic Zones Private Limited (“**Respondent No. 1**”) and the promoters that were 100% shareholders of Respondent No.1 (“**Respondent Nos. 2 and 3**”).

By the SPA, Respondent Nos. 2 and 3 agreed to sell 100% ownership of Respondent No. 1 as a going business entity to the Appellant. The Appellant, in turn, agreed to purchase 100% equity shares and 100% preference shares of Respondent No. 1 by taking over the loans of Respondent No. 1 and paying the balance amount to Respondent Nos. 2 and 3 towards net equity value.

Thereafter, a tripartite agreement was executed between an affiliate of the Appellant (“**Respondent No. 4**”), Respondent Nos. 2 and 3, and IFCI Venture Capital Funds Limited (an entity which partly financed the power project of Respondent No. 1) (“**Tripartite Agreement**”). The Tripartite Agreement *inter alia* recorded the amount due to be paid by the Appellant to Respondent Nos. 2 and 3 pursuant to the SPA. An addendum to the SPA was also executed whereby Respondent No. 4 agreed to remit certain amounts to Respondent Nos. 1 to 3 to regularise the loan and facilitate the transfer of the project owned by Respondent No. 1.

However, disputes arose between the Appellant and Respondent Nos. 1 to 3 as a result of which the Appellant invoked the arbitration clause under the SPA and called upon Respondent Nos. 1 to 3 to appoint their nominee arbitrator.

Considering that Respondent Nos. 1 to 3 failed to appoint their nominee arbitrator, the Appellant approached the High Court of Telangana seeking appointment of an arbitrator under Section 11(6) of the Arbitration Act. The High Court of Telangana dismissed the Appellant’s application *inter alia* on grounds that the SPA (through which the arbitration was sought to be invoked) stood novated by the Tripartite Agreement (which did not contain an arbitration clause).

¹ Civil Appeal No. 8818 of 2022, judgment dated November 23, 2022.

Being aggrieved by this judgment and order of the High Court of Telangana, the Appellant preferred an appeal before the Supreme Court. In this appeal, Respondent Nos. 1 to 3 contended that since the SPA was novated by the Tripartite Agreement, the arbitration clause no longer existed. On the other hand, the Appellant contended that the matter ought to be referred to arbitration since the SPA was not novated and the arbitration clause was in existence.

Issue

Whether a court can consider questions pertaining to novation of contract while deciding an application under Section 11 (6) of the Arbitration Act?

Findings and Analysis

The Supreme Court allowed the appeal and *inter alia* made the following observations:

1. In *National Insurance Company Limited vs. Boghara Polyfab Private Limited*², the Supreme Court had already identified the issues that could be considered in an application under Section 11(6) of the Arbitration Act and segregated them into 3 (three) categories where the Chief Justice or his designate – (a) is bound to decide issues involving the existence and validity of an arbitration agreement along with the appropriate jurisdiction of the court; (b) may choose to decide issues involving limitation of claims and conclusion of contract; and (c) must leave issues involving the merits or any claim in the arbitration exclusively to the arbitral tribunal.
2. In the present case, issues relating to contract formation, existence, validity and arbitrability of an arbitration agreement are intertwined and connected with issues underlying the merits of the disputes or claims. These issues ought to be decided by an arbitral tribunal since they are factual and disputed.
3. Under Section 11(6) of the Arbitration Act, a court at the referral stage can interfere only when it is obvious that the claims are *ex-facie* time barred, dead or there exists no subsisting dispute.
4. The existence of a contract is necessary for operation of the arbitration clause contained therein. A contract can still be in existence in respect of disputes arising under or in connection with it even if the performance under the contract has come to an end.
5. Examination of issues like novation of an agreement would have a bearing on the merits of the disputes and must be left within the exclusive jurisdiction of an arbitral tribunal.

Considering the above, the Supreme Court quashed and set aside the judgment and order of the High Court of Telangana and appointed a sole arbitrator to adjudicate the disputes between the parties in this case.

JSA Comment

This judgment reiterates the settled position that a court examining an application under Section 11(6) of the Arbitration Act must exercise limited judicial intervention and leave issues which are interlinked with the merits of a dispute within the exclusive domain of an arbitral tribunal. In reasserting this position, the Supreme Court has once again clarified and delineated the matters which can be decided by a court under Section 11(6) of the Arbitration Act and those which must be left solely for an arbitral tribunal to decide.

² Civil Appeal No. 5733 of 2008, judgment dated September 18, 2008.

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