GRAVITAS LEGAL

# Arbitration in Landlord-Tenant disputes - Permissible

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The law on Arbitration in our country has witnessed rapid changes; most of these changes being largely attributable to the growing need to make India a pro-arbitration country in the International commercial and business world. Several other evolvements in the field of Arbitration Law have been mostly effectuated for achieving the object behind ADR, being speedy and efficient resolution of disputes. The thrust of both the Legislature as well as the Judiciary has been towards minimizing the interference of the Courts in the arbitration process and accord finality to the arbitral awards which would in turn result in generating trust and confidence of the litigants in the ADR mechanism. The judgment under analysis is yet another landmark contribution of the Judiciary in this direction. The judicial pronouncement has settled and put to rest several legal dilemmas and issues surrounding the law of Arbitration in the country. Before carrying out a dissection and thorough analysis, it would be apposite to identify the various issues that have been adjudicated and decided upon by the Apex Court in the judgment under analysis, which are as follows:

Firstly "non-arbitrability of a subject matter" and Secondly "who would be the appropriate authority to decide the non-arbitrability, whether the Court at reference stage or the Arbitral Tribunal itself?" The opportunity for the judgment was presented before the Apex Court when a reference2 was made to it for ascertaining and determining the validity of an earlier decision of the Apex Court in Himangni Enterprises v. Kamaljeet Singh Ahluwalia3 wherein it was held that landlord-tenant disputes, governed by the provisions of the Transfer of Property Act, 1882, are not arbitrable as the same would be contrary to public policy. The Court on a deeper penetration of the issue opined that in order to appropriately answer the question referred to it, it must firstly examine the meaning of "non-arbitrability of a subject matter" and secondly decide the ancillary issue as to "who would be the appropriate authority to decide the non-arbitrability, whether the Court at reference stage or the Arbitral Tribunal itself?"

## Non-arbitrability of subject matter of a dispute

As the issue at hand necessitated so, the Court not only referred and interpreted the various provisions which were involved but also cited its various earlier decisions which have dealt with the issue of "non-arbitrability".

The landmark decision relating to the said issue is the judgment in Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd.4 wherein the Court had observed that any civil or commercial dispute which can be decided by a court, is in principle, capable of being adjudicated and resolved by an arbitral tribunal unless the jurisdiction of the arbitral tribunal is either expressly or by necessary implication excluded. The Court in Vidya Drolia (supra) noted that exclusion or non-arbitrability when clearly expressed would pose no difficulty and should be respected, however, exclusion or non-arbitrability of subjects or disputes from the purview of a private forum like arbitration by necessary implication requires setting out the principles that should be applied. Further, the Court also noted that the principle identified and applied in the case of Booz Allen & Hamilton Inc. was drawing a distinction between rights in personam and rights in rem, whereby the former are considered to be amenable to arbitration and the latter are required to be adjudicated by the courts and public tribunals as they are unsuitable for private arbitration.

Thereafter the Court in Vidya Drolia (supra) noted the relevant observations in A. Ayyasamy v. A. Paramasivam and Ors.5 wherein it was observed classes of disputes which fall within the exclusive domain of special fora under legislation which confers exclusive jurisdiction to the exclusion of an ordinarily civil court are not arbitrable and that such disputes are not arbitrable dovetails with the general principle that a dispute which is capable of adjudication by an ordinary civil court is also capable of being resolved by arbitration. However, if the jurisdiction of an ordinary civil court is excluded by the conferment of exclusive jurisdiction on a specified court or tribunal as a matter of public policy such a dispute would not then be capable of resolution by arbitration.

Proceeding further the Court in Vidya Drolia (supra) also made a reference to the judgment in Vimal Kishor Shah v. Jayesh Dinesh Shah and Ors.6 Wherein relying on the principle of necessary implication it was held that disputes arising under the Indian Trusts Act cannot possibly be referred to arbitration.

After profitably referring to the earlier decisions on the issue of non-arbitrability the Court in Vidya Drolia (supra), firstly, excluded actions in rem from arbitration by providing the following sound reasoning:

*"Exclusion of actions in rem from arbitration, exposits the intrinsic limits of arbitration as a private dispute resolution mechanism, which is only binding on 'the parties' to the arbitration agreement. The courts established by law on the other hand enjoy jurisdiction by default and do not require mutual agreement for conferring jurisdiction. The arbitral tribunals not being courts of law or established under the auspices of the State cannot act judicially so as to affect those who are not bound by the arbitration clause. Arbitration is unsuitable when it has erga omnes effect, that is, it affects the rights and liabilities of persons who are not bound by the arbitration agreement." The Court further observed: "Prime objective of arbitration to secure just, fair and effective resolution of disputes, without unnecessary delay and with least expense, is crippled and mutilated when the rights and liabilities of persons who have not consented to arbitration are affected or the collective resolution of the disputes by including non-parties is required. Arbitration agreement as an alternative to public fora should not be enforced when it is futile, ineffective, and would be a no result exercise."*

Secondly, the Court in Vidya Drolia (supra) excluded Sovereign functions of the State being inalienable and non-delegable as non-arbitrable as the State alone has the exclusive right and duty to perform such functions.

Thirdly, with regard to the non-arbitrability of disputes for which separate fora or tribunal has been created, the Court has observed that mere creation of a specific forum as a substitute for civil court or specifying the civil court, may not be enough to accept the inference of implicit non arbitrability. Conferment of jurisdiction on a specific court or creation of a public forum though eminently significant, may not be the decisive test to answer and decide whether arbitrability is impliedly barred. The Court categorically observed thus:

*"Implicit non-arbitrability is established when by mandatory law the parties are quintessentially barred from contracting out and waiving the adjudication by the designated court or the specified public forum. There is no choice. The person who insists on the remedy must seek his remedy before the forum stated in the statute and before no other forum."*

After analyzing thus the Court laid the following four-fold test for determining when the subject matter of a dispute in an arbitration agreement is not arbitrable:
*"(1) when cause of action and subject matter of the dispute relates to actions in rem, that do not pertain to subordinate rights in personam that arise from rights in rem.*
*(2) when cause of action and subject matter of the dispute affects third party rights; have erga omnes effect; require centralized adjudication, and mutual adjudication would not be appropriate and enforceable;*
*(3) when cause of action and subject matter of the dispute relates to inalienable sovereign and public interest functions of the State and hence mutual adjudication would be unenforceable; and*
*(4) When the subject-matter of the dispute is expressly or by necessary implication non-arbitrable as per mandatory statute(s)."*

After laying down the aforesaid test, the Court not only went on to answer the reference question, that is issue of arbitrability of landlord-tenant dispute, but also applied the test to various other subject-matters which in effect overruled some of the earlier pronouncements of the Apex Court. In the next part of this Article we shall reflect upon each of these dicta separately.

**Arbitrability of landlord-tenant disputes**

The Court finally put to rest the controversy revolving around this issue by answering the reference by holding that the landlord-tenant disputes are arbitrable and, therefore, overruled the ratio in Himangi Enterprises (supra). However, the Court subjected this rule to the exception that landlord-tenant disputes covered and governed by rent control legislation would not be arbitrable when specific court or forum has been given exclusive jurisdiction to apply and decide special rights and obligations. Such rights and obligations can only be adjudicated and enforced by the specified court/forum, and not through arbitration.

The Court emphasized that the subject matter of landlord-tenant disputes which do not fall within the rent control jurisdiction pass the muster of the fourfold test laid down by the Court. The Court held that the Transfer of Property Act does not exclude arbitration and thus made the following observations:

*"Landlord-tenant disputes governed by the Transfer of Property Act are arbitrable as they are not actions in rem but pertain to subordinate rights in personam that arise from rights in rem. Such actions normally would not affect third-party rights or have erga omnes affect or require centralized adjudication. An award passed deciding landlord-tenant disputes can be executed*

*and enforced like a decree of the civil court. Landlord-tenant disputes do not relate to inalienable and sovereign functions of the State. The provisions of the Transfer of Property Act do not expressly or by necessary implication bar arbitration. Transfer of Property Act, like all other Acts, has a public purpose, that is, to regulate landlord tenant relationships and the arbitrator would be bound by the provisions, including provisions which ensure and protect the tenants."*

**Arbitrabilty of "allegations of fraud in a dispute of civil nature"**

This issue has elicited a debate as conflicting opinions have been expressed in the case of N. Radhakrishnan v. Maestro Engineers and Others on the one hand and A. Ayyasamy v. A. Paramasivam and Others on the other. In N. Radhakrishnan (supra) the Court upheld the order rejecting the application under Section 8 of the Arbitration Act on the ground that it would be in furtherance of justice that the allegations as to fraud and manipulation of finances in the partnership firm are tried in the court of law which is more competent and has means to decide a complicated matter. However, deviating from the said view the Court in A. Ayyasamy (supra) speaking through HMJ A. Sikri held that cases of fraud are arbitrable unless there are very serious allegations of fraud which make a virtual case of criminal offense or where allegations of fraud are so complicated that it becomes absolutely essential that such complex issues can be decided only by the civil court on the appreciation of the voluminous evidence that needs to be produced, the court can sidetrack the agreement by dismissing the application under Section 8 and proceed with the suit on merits. Further, in the same case HMJ D. Y Chandrachud has also concurred with the view that allegations of fraud in a civil dispute are arbitrable, however, deviating on the point that in case of serious allegations which render the case a criminal offense the same would be rendered non-arbitrable, the Hon'ble Judge has held that the allegations of criminal wrongdoing or of statutory violation would not detract from the jurisdiction of the Arbitral Tribunal to resolve a dispute arising out of a civil or contractual relationship on the basis of the jurisdiction conferred by the arbitration agreement.

The predicament presented by these conflicting views have been resolved in the judgment under analysis by finally holding that allegations of fraud can be made a subject matter of arbitration when they relate to a civil dispute, 8however, this is subject to the caveat that fraud, which would vitiate and invalidate the arbitration clause, is an aspect relating to non-arbitrability. The Court, therefore, overruled the decision in N. Radhakrishnan (supra) and observed that if one was to accept the reasoning in N. Radhakrishnan (supra) one would have to agree that arbitration is a flawed and compromised dispute resolution mechanism that can be forgone when public interest or public policy demands the dispute should be tried and decided in the court of law. The Court made the following relevant observations:

*"Arbitrators, like the courts, are equally bound to resolve and decide disputes in accordance with the public policy of the law. Possibility of failure to abide by public policy consideration in a legislation, which otherwise does not expressly or by necessary implication exclude arbitration, cannot form the basis to overwrite and nullify the arbitration agreement."*

The Court emphatically points out that complexity is not sufficient to ward off arbitration and that in terms of the mandate of Section 89 of the Civil Procedure Code and the object and purpose behind the Arbitration Act and the mandatory language of Sections 8 and 11, the mutually agreed arbitration clauses must be enforced. The Court observed that the language of Sections 8 and 11 of the Arbitration Act are peremptory in nature.

**Arbitrability of Disputes under the DRT Act**

The Court overruling a Full Bench decision of the High Court of Delhi in HDFC Bank Ltd. v. Satpal Singh Bakshi9 observed that that the disputes which are to be adjudicated by the Debt Recovery Tribunal under the DRT Act are non-arbitrable on the ground of implicit prohibition in the statute, conferring and creating special rights to be adjudicated by the courts/public fora, which right including enforcement of order/provisions cannot be enforced and applied in case of arbitration. The Court has observed thus:

*"To hold that the claims of banks and financial institutions covered under the DRT Act are arbitrable would deprive and deny these institutions of the specific rights including the modes of recovery specified in the DRT Act. Therefore, the claims covered by the DRT Act are non-arbitrable as there is a prohibition against waiver of jurisdiction of the DRT by necessary implication. The legislation has overwritten the contractual right to arbitration."*

**Who decides Non-Arbitrability - Scope of Jurisdiction of Courts under Sections 8 and 11**

The Court has noted that the conundrum as to who decides the non-arbitrability arises as the said issue can be raised at three stages, that is, first, before the court on an application for reference under Section 11 or for stay of pending judicial proceedings and reference under Section 8 of the Arbitration 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 or its enforcement. The said issue being intricately linked with the scope of jurisdiction of Courts under Sections 8 and 11 of the Arbitration Act, the Court carried out an in-depth analysis of the provisions along with a comparison of the changes in the provisions brought out by the amendments in the arbitration Act. This entailed into an analysis of Section 8, pre and post Act 3 of 2016 and Section 11, pre and post amendments vide Act 3 of 2016 and Act 33 of 2019. Further, the Court analysed Sections 16, 34 and 43 of the Arbitration Act. That apart, the Court also cruised the entire journey of judicial pronouncements on the said aspect, starting right from Konkan Railway Construction Ltd. and Another v. Rani Construction Pvt. Ltd.10 Further, the Court also referred to the trend followed in other countries as well as the principle of separation which authorizes an arbitral tribunal to rule and decide on the existence, validity or rescission of the underlying contract without an earlier adjudication of the questions by the referral court. The Court then analyzed the principles of competence-competence have positive and negative connotations. As a positive implication, the arbitral tribunals are declared competent with reference to the Arbitration Act.

After an analysis of the entire law on the subject, the Court made the following observations:

*"The courts at the referral stage do not perform ministerial functions. They exercise and perform judicial functions when they decide objections in terms of Sections 8 and 11 of the Arbitration Act."*

The Court noted that Section 8 prescribes the courts to refer the parties to arbitration, if the action brought is the subject of an arbitration agreement, unless it finds that prima facie no valid arbitration agreement exists. Thus in an application under Section 8 the Court is only to carry out a prima facie examination which has been explained in great detail by the Court in the following terms:

*"Prima facie examination is not full review but a primary first review to weed out manifestly and ex facie non-existent and invalid arbitration agreements and non-arbitrable disputes. The prima facie review at the reference stage is to cut the deadwood and trim off the side branches*

*in straight forward cases where dismissal is barefaced and pellucid and when on the facts and law the litigation must stop at the first stage. Only when the court is certain that no valid arbitration agreement exists or the disputes/subject matter are not arbitrable, the application under Section 8 would be rejected. At this stage, the court should not get lost in thickets and decide debatable questions of facts. Referral proceedings are preliminary and summary and not a mini trial.''*

The Court further cautions that undertaking a detailed full review or a long-drawn review at the referral stage would obstruct and cause delay undermining the integrity and efficacy of arbitration as a dispute resolution mechanism and further when it appears that prima facie review would be inconclusive, or on consideration inadequate as it requires detailed examination, the matter should be left for final determination by the arbitral tribunal selected by the parties by consent.

After examining the scope of section 8, the Court proceeded to analyze Section 11 and in particular the true and correct connotation of the word "existence". The question as per the Court was whether the word 'existence' in Section 11 merely refers to contract formation (whether there is an arbitration 12agreement) and excludes the question of enforcement (validity) and therefore the latter falls outside the jurisdiction of the court at the referral stage. The Court answered the said question by stating that the existence of an arbitration agreement presupposes a valid agreement which would be enforced by the court by relegating the parties to arbitration. The Court observed thus:

*"A reasonable and just interpretation of 'existence' requires understanding the context, the purpose and the relevant legal norms applicable for a binding and enforceable arbitration agreement. An agreement evidenced in writing has no meaning unless the parties can be compelled to adhere and abide by the terms. A party cannot sue and claim rights based on an unenforceable document. Thus, there are good reasons to hold that an arbitration agreement exists only when it is valid and legal. A void and unenforceable understanding is no agreement to do anything. Existence of an arbitration agreement means an arbitration agreement that meets and satisfies the statutory requirements of both the Arbitration Act and the Contract Act and when it is enforceable in law."*

Further, the Court observed that since Section 11 does not prescribe any standard of judicial review by the court for determining whether an arbitration agreement is in existence, the prima facie standard as mentioned in section 8 would be applicable to review under section 11 as well.

Thus the Court has ruled that he Court, under Sections 8 and 11, has to refer a matter to arbitration or to appoint an arbitrator, as the case maybe, unless a party has established prima facie (summary findings) case of non-existence of valid arbitration agreement, by summarily portraying a strong case that he is entitled to such a finding. Further the Court opines that the matter should be referred to arbitration if the validity of the arbitration agreement cannot be determined on a prima facie basis, as laid down above and therefore, the rule for the Court is 'when in doubt, do refer'.

Elaborating on the standard of examination of existence and validity the Court has delineated the scope of the Court to examine the prima facie validity of an arbitration agreement to include only:

*"92. Whether the arbitration agreement was in writing? or 93. Whether the arbitration agreement was contained in exchange of letters, telecommunication, etc.? 94. Whether the core contractual ingredients qua the arbitration agreement were fulfilled? 95. On rare occasions, whether the subject matter of dispute is arbitrable?"*

Thus the aforesaid analysis of the decision in Vijay Drolia (supra) reiterates principles of ensuring independence of the Arbitral Tribunal and minimal interference of Courts in the arbitration process.

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