MAYAVATI TRADING PVT. LTD. V. PRADYUAT DEB BURMAN; 2019 SCC ONLINE SC 1164

Supreme Court of India; 3-judge bench, **R.F. Nariman**, Subhash Reddy and Surya Kant JJ; decided on 5 September 2019

Scope of Section 11 (6A) does not extend to examining if there is an arbitrable dispute

A petition was filed by Mayavati Trading in the High Court of Calcutta under Section 11 ACA for appointment of arbitrator. The High Court applied Section 11 (6A) of the ACA, which requires that the court while considering any application under Section 11 "shall, notwithstanding any judgment, decree, or order of any court, confine to the examination of the existence of an arbitration agreement." It found that no arbitration agreement existed and dismissed the application.

In the Supreme Court, on Mayavati Trading's petition for special leave to appeal, after hearing the matter, the court noted that it did not propose to interfere with the High Court's order. However, during argument, a "recent decision of this Court was pointed out, namely, *United India Insurance Co. Ltd.* v. *Antique Art Exports (P) Ltd.*, (2019) 5 SCC 362".

In *United India*, a 2-judge bench of A.M. Khanwilkar and Ajay Rastogi JJ : -

(i) Noted[17] the decision in *Duro Felguera, S.A.* v. *Gangavaram Port Ltd.*, (2017) 9 SCC 729 in which the court had held that the Section 11 court had only to look at the existence of the arbitration agreement, "nothing more and nothing less";

(ii) But held that the "appointment of an arbitrator is a judicial power and is not a mere administrative function leaving some degree of judicial intervention"; also "when it comes to the question to examine the existence of a prima facie arbitration agreement, it is always necessary to en-

[17] The court in *Mayavati Trading* said, in *United India* case the decision in Duro was "purportedly" followed.

sure that the dispute resolution process does not become unnecessarily protracted."

(iii) Then, examined if in the facts of that case, any arbitrable dispute existed.

It is not clear what argument was advanced based on *United India*. The court examined the current state of law and its legislative history and considered two main questions.

(A) WHAT IS THE SCOPE OF INQUIRY UNDER SECTION 11 OF THE ACA? WAS UNITED INDIA CORRECTLY DECIDED?

Overruling *United India* the court held: -

(i) Before the introduction of Section 11 (6A), the law laid down by the Supreme Court, apart from examination of the existence of arbitration agreement, included going into preliminary questions whether accord and satisfaction had taken place or not, whether the claim is a dead or a live claim. [18]

(ii) The 246th Law Commission Report dealt with some of these judgments and felt that at the stage of Section 11(6) application, only "existence" of an arbitration agreement ought to be looked at and no other preliminary issues [citing to and reproducing several passages from *Garware Wall Ropes Ltd.* v. *Coastal Marine Constructions & Engg. Ltd.*, (2019) 9 SCC 209 where the issue was discussed].

(iii) This being the position, it is clear that the law prior to the 2015 Amendments that has been laid down by this court has been legislatively overruled. Therefore, "it is difficult to agree with the reasoning of the court" in *United India*, as Section 11 (6A) is confined to the examination of the existence of an arbitration amendment and is to be understood in the narrow sense as held in *Duro Felguera, SA* v. *Gangavaram Port Ltd.*, (2017) 9 SCC 729.

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18 Citing to *SBP & Co.* v. *Patel Engg. Ltd.*, (2005) 8 SCC 618

(B) WHAT IS THE EFFECT OF THE (PROPOSED) OMISSION OF SECTION 11(6A)? DOES IT TAKE US BACK TO THE PRE-2015 AMENDMENTS POSITION?

It was pointed to the court that "by an Amendment Act of 2019, which has since been passed, this sub-section has now been omitted. Section 3 of the Amendment Act of 2019 insofar as it pertains to this omission has not yet been brought into force". What is the effect of this proposed omission?

The court said: -

(i) The proposed omission has been made as per the recommendations of a high-level committee headed by Justice B. N. Srikrishna.

(ii) The omission of the sub-section is not so as to resuscitate the law that was prevailing prior to the Amendment Act of 2015.

(iii) The omission is because the appointment of arbitrators is to be done by the newly recognized mechanism, i.e., institutionally, in which case the Supreme Court or the High Court under the old statutory regime are no longer required to appoint arbitrators and consequently to determine whether an arbitration agreement exists.