

VIDYA DROLIA AND OTHERS V. DURGA TRADING CORPORATION
2019 SCC ONLINE SC 358

Supreme Court of India; 2-judge bench, **R.F. Nariman** and Vineet Saran JJ; decided on 28 February 2019

Does existence include arbitrability and is a tenancy dispute under the Transfer of Property Act arbitrable?

(A) PREFACE

This 2-judge bench has referred two questions to a larger bench of 3-judges. This piece looks at the court’s reasons for the referral.

When someone requests the court’s assistance for the appointment of an arbitrator under Section 11 of the ACA, the court must, under Section 11 (6A), confine itself to the “existence of an arbitration agreement.”¹³

Does the examination of ‘existence’ of arbitration agreement include arbitrability of the subject-matter?

In *Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd.*, (2011) 5 SCC 532, the 2-judge bench explained the meaning of “arbitrability” and in paragraph 36 set out well-recognized examples of non-arbitrable disputes. The list included “eviction or tenancy matters governed by special statutes ...”.

In *Himangni Enterprises v. Kamaljeet Singh Ahluwalia*, (2017) 10 SCC 706 (another 2-judge bench case) the Supreme Court applying *Booz Allen* and *Natraj* (cited *infra*) held that the tenant’s application to refer the dispute to arbitration was rightly dismissed as an arbitrator did not have jurisdiction to decide eviction/rent dispute. Further, even if the Delhi Rent Act, 1995, a special law, did not apply to the facts, it did not *ipso facto* mean that the dispute be-

¹³ “Section 11. Appointment of arbitrators. —...(6A) The Supreme Court or, as the case may be, the High Court, while considering any application under sub-section (4) or sub-section (5) or sub-section (6), shall, notwithstanding any judgment, decree or order of any court, confine to the examination of the existence of an arbitration agreement”. This sub-section has been omitted in the 2019 Amendments, but not yet notified. The question might become academic once the omission comes into effect.

came arbitrable and the ACA applied. In such a case, the court said, parties' rights would be governed by the Transfer of Property Act, 1882 ("TPA"), and a civil suit would be triable in a civil court.

Was *Himangni* wrongly decided? Should a tenancy dispute governed by the TPA be arbitrable? Does TPA exclude arbitration?

(B) THE VIDYA DROLIA CASE

This was a tenancy dispute. The landlord sought eviction, but the tenant did not vacate. The landlord invoked the arbitration clause of the tenancy agreement and filed an application in the High Court seeking appointment of an arbitrator under Section 11 ACA. The tenant objected, saying that the dispute was not arbitrable, but the High Court rejected the objections and, in September 2016, ordered the appointment of arbitrators. Several "sittings" of the arbitration were conducted. But then on 12 October 2017, the Supreme Court delivered its judgment in *Himangni*.¹⁴ Now, based on *Himangni*, the landlord petitioned the High Court for review of its order of appointment, but the petition was dismissed. The matter thus came to the Supreme Court on the landlord's appeal.¹⁵

1. Court's Reasons in Sending the Issue of Existence v. Arbitrability to Larger Bench

First, the court noted the 246th Law Commission Report which "led to the enactment of Section 11 (6A)" and which recommended a "two-step process" to be adopted by a judicial authority: to look not only at "existence" but also if the arbitration agreement was null and void. But when eventually enacted, Section 11 (6A) "retained the aspect of existence."

Then the court reproduced Section 16 ACA under which an arbitral tribunal has the competence to rule on its jurisdiction, including the existence or validity of the arbitration agreement. The court noted, therefore, that the "validity" of an arbitration agreement is apart from its "existence."

¹⁴ 2-judge bench, R.K. Agrawal and Abhay Manohar Sapre JJ.

¹⁵ The petition was first heard on 13 August 2018.

With this short discussion that the court observed “one moot question that therefore, arises, and which needs to be authoritatively decided by a Bench of three learned Judges, is whether the word “existence” would include weeding-out arbitration clauses in agreements which indicate that the subject-matter is incapable of arbitration.”¹⁶

2. Court’s reasoning in sending Arbitrability of Tenancy Disputes under the Transfer of Property Act, 1882 to a Larger Bench

First, the court examined the provisions of the TPA. It referred to Section 111 of the TPA (determination of lease); Section 114 (relief against forfeiture for non-payment of rent); and Section 114A (relief against forfeiture in certain other cases).

The court concluded that there is nothing in the TPA to show that the dispute as to the determination of a lease arising under Section 111, TPA cannot be decided by an arbitrator.

It then turned to the argument that Sections 114 and 114A (which provide statutory reliefs against forfeiture and non-payment of rent) were based on public policy in favor of tenants as a class which can be decided only by the courts. The court concluded that Section 114 and Section 114A cannot be said to be provisions conceived for relief of tenants as a class as a matter of public policy and every one of the grounds stated in Section 111, whether read with Section 114 and/or 114A, are grounds which can be raised before an arbitrator.

Having examined the matter from the point of the principle (“so far so good on principle”), the court turned to “to refer to certain decisions of this Court.”

The categories of non-arbitrable dispute set out in *Booz Allen* was then noted which included “eviction or tenancy matters governed by special statutes where the tenant enjoys statutory protection against eviction and only the

¹⁶ Then after the question was articulated, the court noted *Duro Felguera, S.A. v. Gangavaram Port Ltd.*, (2017) 9 SCC 729, where in his concurring judgment Kurian Joseph J held that after the 2015 Amendments, “all that the courts need to see is whether an arbitration agreement exists— nothing more, nothing less”.

specified courts are conferred jurisdiction to grant eviction or decide the disputes.”

Then the court proceeded to “the sheet anchor of the appellants case,” i.e., the decision in *Himangni Enterprises*. The court in *Himangni* had given two reasons to say that a tenancy dispute under the TPA is not arbitrable. Firstly: it was said that the issue was no longer *res integra* and stood answered by *Natraj Studios (P) Ltd. v. Navrang Studios*, (1981) 1 SCC 523, and *Booz Allen*. Secondly: it was said that the Delhi Rent Act does not apply to certain premises; no sooner the exemption is withdrawn or ceases to have its application, the Delhi Rent Act would become applicable. So, it cannot be said that the ACA applies *ipso facto* if the Rent Act does not apply; in such a situation, the matter would be governed by the TPA and be triable by the civil court only.

As to *Himangni's* reliance on *Natraj* and *Booz*, the court in *Drolia* reasoned that neither *Natraj* nor *Booz Allen* stands for the proposition that TPA tenancy disputes are not arbitrable: -

- (i) *Natraj* was a dispute under the Bombay Rents Act, 1947, that is, a special statute for which there was a specialized forum for adjudication.
- (ii) *Booz Allen* too, made it clear that only those tenancy matters which are governed by special statutes where the tenant enjoys statutory protection against eviction and where only specified courts are conferred jurisdiction are cases where the dispute between landlord and tenant can be said to be non-arbitrable.
- (iii) Therefore, “a Transfer of Property Act situation between a landlord and tenant ... cannot possibly be said to have been answered by the two decisions of this Court”.

As to the point in *Himangni* about the exemption, and the matter being triable only under the TPA by a civil court the court in *Drolia* reasoned: -

- (i) The mere fact that an exemption from the Rent Act is available does not mean that the matter becomes non-arbitrable.
- (ii) Persons may be exempt from a Rent Act not merely for a certain period but also because the rent contained in the agreement between the landlord and tenant is above a certain amount. When the rent is fixed

above, in the normal course, such rent can only be increased. Further, the exemption based on a rent payable may continue for many years to come.

For all these reasons, the *Droli* court held that this reasoning of *Himangni* also does not hold good.

Lastly, the *Droli* court distinguished *Vimal Kishor Shah v. Jayesh Dinesh Shah*, (2016) 8 SCC 788. In that case, the Supreme Court, after referring to *Dbulabhai v. State of M.P.*, (1968) 3 SCR 662, concluded that disputes which arose under the Indian Trusts Act, 1882, which applies only to private trusts, were also not arbitrable as this was excluded by necessary implication. The *Droli* Court added that-

- (i) Indian Trusts Act, 1882, provides an excellent instance of how arbitration is excluded by necessary implication. The statute, considered as a whole, must lead necessarily to the conclusion that the disputes which arise under it cannot be the subject matter of the arbitration.
- (ii) But, in the TPA or the Specific Relief Act, 1963, no such thing exists as has been held by *Olympus Superstructures Pvt. Ltd. v. Meena Vijay Khetan*, (1999) 5 SCC 651 and *Booz Allen*.