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SUPREME COURT RULES ON THE ARBITRABILITY OF CONSUMER DISPUTES

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The Supreme Court of India (Supreme Court), *vide* its judgment in *M/s Emaar MGF Land Limited v Aftab Singh* (Review Petition (C) Nos 2629-2630 of 2018 in Civil Appeal Nos 23512-23513 of 2017), has conclusively decided that if a dispute brought before the consumer forum (consumer dispute/s) arises from an agreement which has an arbitration clause, the consumer forum will be the appropriate forum for hearing the dispute. The decision was based on the premise that consumer disputes are of a public nature and consequently, the remedies under the Arbitration and Conciliation Act, 1996 (Arbitration Act) for the same are barred by implication. The Supreme Court placed reliance on various landmark judgments on the subject of "arbitrability". It further demonstrated how the amendments made to Section 8(1) of the Arbitration Act *vide* the Arbitration and Conciliation (Amendment) Act, 2015 (2015 Amendment) did not bar the National Consumer Dispute Redressal Commission (NCDRC) from refusing to refer the dispute to arbitration.

Factual Background

A consumer dispute regarding the delivery of possession of a flat by M/s Emaar MGF Land Limited (Appellant) and deficiency of services stemming from the same was brought before a Single Bench of the NCDRC by Aftab Singh (Respondent). The Appellant, in turn, filed an application before the Single Bench of the NCDRC under Section 8(1) of the Arbitration Act to refer the dispute to arbitration because of the existence of an arbitration clause in the agreement from which the dispute arose. Several similar applications under Section 8(1) of the Arbitration Act were grouped together with it. The Single Bench of the NCDRC referred all these applications to a three-member Bench of the NCDRC because it was of the opinion that the dispute posed a significant question of law regarding the arbitrability of consumer disputes.

The three-member Bench of the NCDRC decided that consumer disputes were not capable of being submitted to arbitration because the Consumer Protection Act, 1986 (CPA) was enacted in light of certain public policy concerns and for the benefit of consumers. Accordingly, it dismissed the Appellant's application. The Appellant filed connected appeals before the Delhi High Court, but the Delhi High Court did not entertain it for want of jurisdiction. All the Civil Appeals filed before the Supreme Court were dismissed because the Supreme Court found no grounds to interfere with the impugned order of the NCDRC. Therefore, the Appellant filed a Review Petition before the Supreme Court stating that the matter posed a significant question of law as to whether consumer disputes are arbitrable and whether a judicial authority may dismiss

an application under the *amended* Section 8(1) of the Arbitration Act on the ground that a dispute is not arbitrable.

Arguments Advanced

The Appellant's main contention in support of its application was the wording of Section 8(1) of the Arbitration Act after the 2015 Amendment. The amended Section 8(1) of the Arbitration Act unequivocally states that a judicial authority is bound to refer a dispute to arbitration **unless it finds that prima facie no valid arbitration agreement exists, "notwithstanding any judgment, decree or order of the Supreme Court or any Court."** Therefore, any other ground, such as the arbitrability of the subject matter, is immaterial for the purposes of the NCDRC's consideration of an application under Section 8(1) of the Arbitration Act.

On the other hand, the Respondent's contention was based on the CPA being a legislation enacted in public interest, which envisages beneficial remedies that are separate from those that are available in private arbitration. He further contended that it was never the legislative intent for the amended provisions of Section 8(1) of the Arbitration Act to override all other statutes which provide such specific remedies and make disputes related to criminal law, trusts, tenancy, family law, telecom, IPR, etc, "arbitrable" subjects, contrary to landmark judgments like *A Ayyasamy v A Parasivam & Ors* ((2016) 10 SCC 729) (*Ayyasamy*) and *Booz Allen Hamilton Inc v SBI Home Finance Limited & Ors* ((2011) 5 SCC 532) (*Booz Allen*).

View of the Supreme Court

The Supreme Court thoroughly analysed the jurisprudence of Section 8(1) of the Arbitration Act, both prior to and post the 2015 Amendment, and that of the reference of consumer disputes to arbitration. Prior to the 2015 Amendment, it was well-settled law, as laid down in *Fair Air Engineering Pvt. Ltd & Anr v N K Modi* ((1996) 6 SCC 385), *National Seeds Corporation Limited v Madhusudhan Reddy & Anr* ((2012) 2 SCC 506) and *Rosedale Developers Private Limited v Aghore Bhattacharya & Ors* ((2018) 11 SCC 337), that even if a dispute arose from a contract with an arbitration clause, the clause's existence will not impede a party's right to file a complaint under the CPA before a consumer forum. The rationale of these judgments was that Section 3 of the CPA states that the provisions of the CPA are "*in addition to, and not in derogation of any other law for the time being in force.*"

The Supreme Court went on to acknowledge that the 2015 Amendment had severely restricted any judicial authority's power to refuse to refer a dispute to arbitration under Section 8(1) of the Arbitration Act or appoint an arbitrator under Section 11(6A) of the Arbitration Act. Such refusal can be made *only if* the judicial authority determines that *prima facie* no valid arbitration agreement exists between parties. In light of the phrase "*notwithstanding any judgment, decree or order of the Supreme Court or any Court*", a judicial authority may no longer determine whether various conditions are fulfilled by the arbitration agreement (such as proper and necessary parties, multiple issues, only one of which is to be referred to arbitration, etc.), thereby invalidating earlier precedent such as *Sukanya Holdings (P) Ltd v Jayesh H Pandya & Anr* ((2003) 5 SCC 531).

However, the Supreme Court also kept in mind Section 2(3) of the Arbitration Act, which states that Part I of the Arbitration Act "*shall not affect any other law for the time being in force, by virtue of which certain disputes may not be submitted to arbitration.*" Accordingly, this section clearly gives primacy to the arbitrability of a subject matter over any other provision in Part I, including Section 8(1) and 11(6A) of the Arbitration Act. The Supreme Court has already held in landmark judgments, such as *Lucknow Development Act v M K Gupta* ((1994) 1 SCC 243), that the CPA is a beneficial legislation that provides expeditious and economical remedies to aggrieved consumers. However, in the present case, the Supreme Court went a step further by affirming the decision of the NCDRC and specifically stating that consumer disputes

are also a subject matter wherein disputes cannot be referred to arbitration because it pertains to rights *in rem* (public rights). In other words, the Supreme Court has brought consumer disputes within the ambit of "non-arbitrable" disputes, as defined in *Booz Allen and Ayyasamy*, such as disputes related to criminal law, trusts, tenancy, family law, telecom, insolvency and winding up, IPR, and in certain cases, fraud. The Supreme Court also went on to state that the legislative intent of the 2015 Amendment could not have been to override Section 2(3) of the Arbitration Act, and other statutes with public remedies like the CPA.

It must also be noted that at the very end of its judgment, the Supreme Court also expressed that its decision should not be interpreted to be a bar against consumer disputes being submitted to arbitration in general, but only a bar against arbitration when a consumer files a consumer complaint.

Comment

This judgment ensures that consumers, who often have lesser bargaining power than service providers, are not put through the relatively cumbersome process of arbitration when there exist more efficacious and affordable public law remedies. However, despite the Supreme Court's disclaimer about its judgment not being a bar against consumer disputes being submitted to arbitration in general, the judgment has not been specific about the implications that designating consumer disputes as "non-arbitrable" might have on the execution and enforcement of awards pertaining to consumer disputes. The Supreme Court has been amply clear that the CPA is a special legislation with public law remedies, which deal with rights that are under the umbrella of "rights *in rem*" as espoused by *Booz Allen*. Accordingly, such disputes fall within the ambit of Section 34(2)(b)(i), which states that an award may be challenged if the "subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force". The Supreme Court has reiterated that *Booz Allen and Ayyasamy* hold good for consumer disputes as well, in which case, it remains to be seen if awards that are rendered in consumer disputes which have consensually been submitted to arbitration, are susceptible to challenges under Section 34(2)(b)(i).

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