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EX-FACIE TIME BARRED CLAIMS: BROADENED SCOPE OF SECTION 11 RESTING ON A SHAKY FOUNDATION

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Introduction

Section 11 of the Indian Arbitration and Conciliation Act, 1996 ["**Arbitration Act**"] lays down the procedure for appointment of the Arbitral Tribunal. The section also provides, under limited scenarios, for a party to approach the Supreme Court in case of an international commercial arbitration or a High Court in case of domestic arbitration for appointment of an arbitrator. To expedite arbitral proceedings and to ensure that the courts do not infringe upon the jurisdiction of arbitral tribunals by adjudicating upon any aspect relating to dispute between the parties, the Indian legislature introduced Section 11(6A) by way of the Arbitration and Conciliation (Amendment) Act 2015 ["**2015 Amendment**"], which restricted the power of the court during the stage of appointment of an arbitrator to only examination of existence of an arbitration agreement.

However, the jurisprudence of Section 11 appears to be moving away from the objectives of the 2015 Amendment. The recent judgement passed by the Hon'ble Supreme Court titled *Elfit Arabia v Concept Hotel Barons Ltd.,*[1] ["**Elfit Arabia**"], serves as an example of the expanding role of the courts in arbitral proceedings. In *Elfit Arabia,* the petitioner, an entity based in the United Arab Emirates, had approached the Supreme Court seeking the appointment of an Arbitrator. However, the Supreme Court refused the appointment of the arbitrator on account of the claims of the Petitioner being *ex-facie* time barred[2].

This paper highlights how the courts are infringing upon the jurisdiction of the arbitral tribunal by refusing to appoint an arbitrator if it finds the claims to be *ex-facie* time barred. Further, the paper delves into how this jurisprudence is based on a shaky foundation as it contradicts the legislative intent of the Indian Legislature and international position on this issue.

[1] *Elfit Arabia v Concept Hotel Barons Ltd.,* 2024 SCC OnLine SC 1739.
[2] Ibid [10-11].

Scope Under Section 11: 246th Report of the Law Commission and 2015 Amendment

The Hon'ble Supreme in the judgement *SBP & Co. v Patel Engg.* Ltd.[3] ["**Patel Engineering"**], where it held that the power of the Chief Justice of appointment of an arbitrator is a judicial power and not an administrative one[4], had created an anomaly whereby the courts had a wide scope of examination while appointing an arbitrator under Section 11, including considering issues such as claims being time barred. This led to delays in arbitral proceedings at their inception as well as encroachment by courts to the arbitral tribunal's jurisdiction. The decision had drawn criticism as it had over-ruled the hands-off approach towards the appointment of an arbitrator, laid down earlier in *Konkan Railway Corp. Ltd. v Rani Construction (P) Ltd.*[5] ["**Rani Construction**"] by the Hon'ble Supreme Court, and permitted an intrusive adjudication by the concerned court at the very inception of the arbitration proceedings itself.

To counter this anomaly, Law Commission of India, in its 246th Report[6] recommended, among other amendments to Section 11, the introduction of sub-section 11(6A), which restricted the power of the court during the stage of appointment of an arbitrator to only the examination of the existence of an arbitration agreement. By incorporating Section 11(6A) to the Arbitration Act, *Patel Engineering* was legislatively overruled.

Following the incorporation of sub-section 11(6A), the Supreme Court showed strict adherence to the confines of the sub-section, as highlighted by the judgement *Duro Felguera, S.A. v. Gangavaram Port Ltd.*[7]. But the contours of power would still remain unsettled, and rather different positions would be taken by the Supreme Court in different cases, as in some cases, the Supreme Court would take into consideration objections beyond the contours of sub-section 11(6A)[8], yet in other cases, the Supreme Court would adopt a strict approach and would not step beyond the contours of sub-section 11(6A)[9].

The question regarding the scope of power under Section 11 would again come before the Supreme Court and would culminate into the landmark judgement *Vidya Drolia & Ors. Durga Trading Corp.*[10] ["**Vidya Drolia**"], whereupon a reference made by the two-judge bench, the

[3] *SBP & Co. v Patel Engg. Ltd.* (2005) 8 SCC 618.
[4] Ibid [47(i)], at 663.
[5] *Konkan Railway Corp. Ltd. v Rani Construction (P) Ltd.* (2002) 2 SCC 388.
[6] Law Commission of India, Report No 246 – Amendments to the Arbitration and Conciliation Act 1996 (August 2014) 3 [10] https://cdnbbsr.s3waas.gov.in/s3ca0daec69b5adc880fb464895726dbdf/uploads/2022/08/2022081615.pdf accessed (December 21, 2024).
[7] *Duro Felguera, S.A. v Gangavaram Port Ltd.* (2017) 9 SCC 729.
[8] *Garware Wall Ropes Ltd. v Coastal Marine Constructions and Engineering Limited* (2019) 9 SCC 209.
[9] *Mayavati Trading Pvt. Ltd. v Pradyuat Deb Burman* (2019) 8 SCC 714.
[10] *Vidya Drolia & Ors. Durga Trading Corp.* (2021) 2 SCC 1.

Supreme Court was to decide on the question of arbitrability of the disputes between landlord-tenant governed by the Transfer of Property Act, 1882.

Before proceeding further, it is important to note that Section 11 was further amended by Arbitration and Conciliation (Amendment) Act 2019 ["**2019 Amendment**"]. By way of Section 3 of the Arbitration and Conciliation (Amendment) Act 2019, sub-section 11(6A) has been deleted, however, the said amendment is yet to be notified.

Genesis of the Issue

In the *Vidya Drolia*, the Supreme Court would go on to opine on the role of a court during the stage of Section 11, noting that the court does not perform ministerial function but perform judicial function when they decide objections in accordance with Section 11 [and Section 8] of the Arbitration Act[11] and that the Court should carry out a "*prima facie review*" to cut the deadwood, in order to protect the parties from arbitration where the matter is "non-arbitrable"[12]. Further, the Supreme Court noted that Limitation Act, 1963 is applicable to arbitrations at it is applicable to court proceedings, by operation of Section 43 of the Arbitration Act. On the basis of the same, it would expand the scope of enquiry at the stage of appointment of an arbitrator again, holding that a court can reject a petition for such appointment when the claims are *ex-facie* time barred and dead[13]. It is important to note that the Hon'ble Court would proceed to deliver the judgement on the presumption that Section 11(6A) was omitted by 2019 Amendment[14].

The jurisprudence surrounding the time-barred claims would be further crystallized by the Supreme Court in *Bharat Sanchar Nigam Ltd. & Anr. v Nortel Networks India Pvt. Ltd.*[15] [***"Nortel Networks"***]. In *Nortel Networks,* the Supreme Court noted that ordinarily the issue of limitation of claims should be decided by the Arbitral Tribunal itself, however Court may strike out such claims that are manifestly *ex-facie* time barred. The court relied on *Vidya Drolia*, stating that the Court must undertake a review to cut out deadwood[16]. The Supreme Court would affirm the "tribunal v claim" test, relying on judgement of Court of Appeal of Singapore titled *BBA and Ors. v. BAZ and Anr.*

[11] Ibid [132], at 110.
[12] Ibid [154.4], at 121.
[13] Ibid [147.11] at 119.
[14] Ibid [143], at 114.
[15] *Bharat Sanchar Nigam Ltd. & Anr. v Nortel Networks India Pvt. Ltd.* (2021) 5 SCC 738.
[16] Ibid [45.1], at 764.

appeal'[17], holding that since the issue of claims being time barred attacks the claims itself rather than the jurisdiction of the Arbitral Tribunal, the issue should be decided by the Arbitral Tribunal[18].

Finally, in *Arif Azim Co. Ltd. v APTECH Ltd.*[19], where the Supreme Court dealt with the question whether the petition for appointment of arbitrator was barred by limitation, the Court delved into the interplay between the Limitation Act, 1963 and the Arbitration Act. While the Supreme Court would hold that the issue of limitation is an admissibility issue, it is "duty" of the Court to prima facie examine claims before it and reject the claims that are manifestly time-barred[20]. The Supreme Court enunciated the "Two-Pronged" test, where the court would have to satisfy themselves that the petition under Section 11 has been filed within the limitation period and that the claims sought to be arbitrated are not *ex-facie* time barred claims. The Supreme Court noted that if either of the question is answered against the party seeking appointment of the arbitrator, the Court may refuse the appointment[21].

It would on the basis of the principles laid down in *Vidya Drolia,* and *Arif Azim* the Supreme Court would refuse appointment of an arbitrator in *Elfit Arabia*. The case marks a clear shift in contours of power exercised by the court under Section 11, where examination required to be undertaken by a court has now travelled beyond the contours of sub-section 11(6A). However, as stated above, the increased scope of examination by court is based on shaky foundation, with two primary challenges that this current jurisprudence surrounding Section 11 encounters, which are highlighted below.

Issues with Current Jurisprudence

Vidya Drolia relies on an incorrect presumption

It was in *Vidya Drolia* the Supreme Court envisaged the role of the court appointing arbitrator as a gatekeeper of arbitration, where the court are now to ensure that the arbitrators are not appointed where the claims are *ex-facie* time barred. The Supreme Court, while clarifying that the scope of review as laid out in *Patel Engineering* judgement is not applicable even after omission of sub-section 11(6A)[22], has gone on to expand the scope of the examination under Section 11, incorporating a

[17] *BBA and Ors. v BAZ and Anr. appeal,* In the Court of Appeal of the Republic of Singapore, Civil Appeal Nos 9 and 10 of 2019 (2020).
[18] *Bharat Sanchar Nigam Ltd. & Anr. v Nortel Networks India Pvt. Ltd.* (2021) 5 SCC 738.
[19] *Arif Azim Co. Ltd. v APTECH Ltd.* (2024) 5 SCC 313.
[20] Ibid [68], at 345.
[21] Ibid [92], at 357.
[22] *Nuance Group (Australia) Pty Ltd. v Shape Australia Pty Ltd.* [2021] NSWSC 1498 (Austl.).

portion of the legal position first envisaged under *Patel Engineering* on the presumption that sub-section 11(6A) has been omitted by the 2019 Amendment.

However, the presumption is incorrect as while Section 3 of Arbitration and Conciliation (Amendment) Act 2019 did omit sub-section 11(6A), the said amendment has not been notified yet. The error would be recognised by the Supreme Court in its recent 7-Judge Bench judgment *Interplay Between Arbitration Agreements under A&C Act, 1996 & Stamp Act, 1899, In re*[23] [**'NN Clobal III'**]. The Supreme Court in *NN Global III* overruled the 5-judge bench judgement *N.N. Global Mercantile (P) Ltd. v Indo Unique Flame Ltd.*[24] and held that while an unstamped or insufficient stamped instrument is inadmissible in evidence, the instrument is not rendered void and the court under Section 11 (and Section 8) is not required to decide upon objection regarding stamping of the instrument.

In regard to *Vidya Drolia,* the Supreme Court would go on to note that the premise of the said judgement, that Section 11(6A) has been omitted, is incorrect as the omission of the sub-section 11(6A) has not been notified hence the said sub-section continues to remain in force and courts should give full effect to the legislative intent[25]. Further, in the separate but concurring decision to *NN Global III,* authored by Justice Sanjiv Khanna, who also authored *Vidya Drolia* judgement*,* admitted the error that *Vidya Drolia* observes sub-section 11(6A) has ceased to be operative[26]. However, it is important to note here that the Supreme Court's observation was an obiter dicta and remarks of Justice Sanjiv Khanna were in his concurring judgement and not in the majority decision.

Since sub-section 11(6A) had not been omitted, the expanded the scope of examination is in contradiction to the legislative intent behind enacting the said sub-section. The Law Commission of India, in its 246th report, recommend that scope of the intervention should only be restricted to where the Court find that the Arbitration Agreement does not exist or is null and void and that the Court shall appoint the arbitrator if it is prima facie satisfied against the challenge to the arbitration agreement[27].

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[23] *Interplay Between Arbitration Agreements under A&C Act, 1996 & Stamp Act, 1899, In re* (2024) 6 SCC 1.
[24] *N.N. Global Mercantile (P) Ltd. v Indo Unique Flame Ltd.* (2023) 7 SCC 1.
[25] Ibid [162], at 87.
[26] Ibid [277], at 123.
[27] Law Commission of India, Report No 246 – Amendments to the Arbitration and Conciliation Act 1996 (August 2014) 3 [10] https://cdnbbsr.s3waas.gov.in/s3ca0daec69b5adc880fb464895726dbdf/uploads/2022/08/2022081615.pdf accessed (December 21, 2024).

With the words of the sub-section 11(6A) clear and unambiguous, the expanded scope of enquiry to remove *ex-facie* dead barred claims is in contradiction to the legislative intent.

Admissibility of claims is in the domain of arbitral tribunal

The Supreme Court in *Nortel Networks* noted that the issue regarding limitation, which is mixed question of fact and law, should lie within the domain of the arbitral tribunal. The Court distinguished between jurisdictional issues and admissibility issues, where the jurisdictional issues pertain to power and authority of the arbitrator to decide a dispute[28] and the issue of admissibility relate to procedural requirements, including breach of pre-arbitration requirements, or challenge to a claim[29]. The Supreme Court noted that the issue of limitation of claims is challenge to admissibility of the claim, which is to be decided by the Arbitral Tribunal[30]. Applying the 'tribunal v claim' test, the Court held that the issue of statutory time bar against the claim is to be decided by the arbitral tribunal, as the issue regarding limitation concerns admissibility and it must be decided by the arbitral tribunal[31]. However, the Supreme Court, relying on *Vidya Drolia*, affirmed that a Court may undertake a prima facie review and interfere at the appointment stage when it is manifest that the claims are *ex-facie* time barred[32].

Internationally, the prevailing position is that the question regarding admissibility of claims should be decided by the Arbitral Tribunal, including issues related to claims being time-barred. The distinction between jurisdictional issues and admissibility issues has succinctly been summarized by Sir Michael Burton in the judgement of English High Court *Republic of Sierra Leone v SL Mining Ltd.*[33]as follows [selectively reproduced]:

> "*It was common ground before me that there is a distinction…between a challenge that a claim was not admissible before Arbitrators (admissibility) and a challenge that the Arbitrators had no jurisdiction to hear a claim (jurisdiction).*"[34]

In Singapore, the Court of Appeal in *BBA v BAZ*[35], while upholding the arbitral award and dismissing the appeals filed by the respondents in the arbitration, stated that issue of claims being time barred, arising from statutory limitation, is an admissibility issue and issues of admissibility

[28] *Bharat Sanchar Nigam Ltd. & Anr. v Nortel Networks India Pvt. Ltd.* (2021) 5 SCC 738.
[29] Ibid [39], at 762.
[30] Ibid [40], at 762.
[31] Ibid [43], at 763.
[32] *Bharat Sanchar Nigam Ltd. & Anr. v Nortel Networks India Pvt. Ltd.* (2021) 5 SCC 738.
[33] *Republic of Sierra Leone v SL Mining Ltd.* [2021] Bus LR 704 (England).
[34] Ibid [8].
[35] *BBA and Ors. v BAZ and Anr. appeal,* In the Court of Appeal of the Republic of Singapore, Civil Appeal Nos 9 and 10 of 2019 (2020).

are to be decided by the arbitral tribunal[36]. The Court of Appeal applied the 'tribunal v. claim' test, affirmed by the Supreme Court in *Nortel Networks*, to arrive at its conclusion. Further, the Court of Appeal noted that this is also the position of law on this subject in other jurisdictions as well[37]. Similarly, in *Nuance Group (Australia) Pty Ltd. v Shape Australia Pty Ltd.*[38] the Supreme Court of New South Wales, considered the difference between issue regarding admissibility and jurisdiction and, adopting the analysis of the Singapore Court of Appeal in *BBA v BAZ*, noted that the issue regarding claims being time barred does not oust the jurisdiction of the arbitrator[39].

The analysis of the Supreme Court in *Nortel Networks*, where it held that the issue regarding claim being time-barred shall lie within the domain of the Arbitral Tribunal, is line with the international position. However, by placing reliance on *Vidya Drolia,* Supreme Court, in *Nortel Networks*, proceeded to decide an issue regarding admissibility, and hence infringing upon the jurisdiction of the Arbitral Tribunal. Hence, while the Supreme Court affirmed 'tribunal v. claim' test, it also proceeded to take decision contrary to the said test by deciding the issue of admissibility of claim itself rather than leaving the same for the Arbitral Tribunal to decide.

Conclusion

The jurisprudence of Section 11 of the Arbitration Act has come a long way since the Supreme Court ruled in *Patel Engineering* that order of appointment of an arbitrator is judicial in nature. However, it appears that the contours of the power exercised by court are shifting again, in contradiction to express language of Section 11(6A), with courts now refusing appointment of the arbitrator after finding the claims to be *ex facie* time barred, which was envisaged under *Patel Engineering* as well.

While the Supreme Court has repeatedly asserted in the above referred judgments that the review of claims of a party shall be prima facie, considering that there are no strict standards as to what constitutes a prima facie review, the Supreme Court itself is aware of the dangers of adopting such standard. The Supreme Court in *SBI General Insurance Co. Ltd. v Krish Spinning*[40] clarified *Arif Azim,* stating that the Courts "*must not conduct an intricate evidentiary enquiry into the question whether the claims raised by the applicant are time barred and should leave that question for determination by the arbitrator*"[41].

[36] Ibid [73].
[37] Ibid [82].
[38] *Nuance Group (Australia) Pty Ltd. v Shape Australia Pty Ltd.* [2021] NSWSC 1498 (Austl.).
[39] Ibid [132].
[40] *SBI General Insurance Co. Ltd. v Krish Spinning* 2024 SCC OnLine SC 1754.
[41] Ibid [133].

The "duty" of the court to examine and reject *ex-facie* time barred claims itself is based on a shaky foundation, in contravention to the intention of the Indian Legislature as well as the international position. So, the contour of power of the court under Section 11 is only set for further examination before the courts in India as the risk of the position of law reverting to what was laid down in *Patel Engineering* appears to be alive, even if unlikely.

However, for now, the intent of the Indian Legislation, of restricting the power of the courts to only the examination of the existence of an arbitration agreement, appears to be taking a backseat. Now, a party seeking appointment of an arbitrator under Section 11 faces a risk of its dispute being decided at the stage of appointment of an arbitrator itself, without undergoing a trial before an Arbitral Tribunal and in complete contradiction to the intent of introduction of Section 11(6A), if a court, in its prima facie review, holds that the claims of the party seeking appointment are time barred.