

Dispute Resolution Hotline

July 25, 2017

STATUTORY REMEDY VS. ARBITRATION: WHAT SURVIVES? INTERPLAY BETWEEN SPECIAL STATUTES AND THE ARBITRATION ACT ON APPLICABILITY OF NON-OBSTANTE CLAUSES

The NCDRC has held that:

- Disputes governed by statutory enactments established for specific public purpose cannot be mandatorily referred to arbitration;
- Amendment to Section 8 calling for reference “notwithstanding any judgment, decree or order of the Supreme Court or any Court” was solely to curtail wide enquiry by courts on existence or validity of arbitration agreements - under Sections 8 and 11, A&C Act;
- The amendment does not intend to sidestep pre-amendment body of case law on arbitrability;
- A contrary construction would result in mandatory reference of parties to arbitration under Section 8, dehors other special laws in force.

INTRODUCTION

A three-member panel of the National Consumer Disputes Redressal Commission (“NCDRC”) in Aftab Singh and Others (“**Complainants**”) v. Emaar MGF Land Limited and Another (“**Builders**”)¹ has held that an arbitration clause in agreements between Builders and Purchasers cannot circumscribe the jurisdiction of a Consumer Forum, notwithstanding the amendments made to Section 8² of the Arbitration & Conciliation Act, 1996 (“**A&C Act**”).

Recognizing that the Consumer Act was envisaged as a special social legislation to protect consumer rights and provide a special dispute redressal mechanism, the NCDRC held that disputes governed by statutory enactments established to serve a particular public policy are not arbitrable.

BRIEF FACTS

This case involves batch matters. The complainants in these matters had booked residential villas/flats/plots in Projects of the Builders and accordingly executed Buyers’ Agreements (Agreements). Every agreement contained an arbitration clause. Upon the Builders’ failure to deliver possession of properties by the agreed date, the Complainants filed complaints before Single Member of the NCDRC. On the other hand, the Builders filed applications before the NCDRC under Section 8 of the Arbitration Act - praying for reference to arbitration as per the Agreements.

Considering the potential wide impact of the issue involving interplay between dispute redressal mechanism under the Consumer Protection Act (“**CPA**”) and the A&C Act (“**A&C Act**”), the Learned Single Member referred the issue to a larger bench.

CONTENTIONS OF THE COMPLAINANTS

- In *National Seeds Corporation Limited*,³ the Supreme Court held that the remedies provided under Section 3 of the CPA are in addition to, and not in derogation of, other laws in force. A consumer complaint can therefore be filed before the consumer forum taking aid of Section 3 under CPA, despite presence of an arbitration clause as per A&C Act.
- The addition of words – “*notwithstanding any judgment, decree or order of the Supreme Court or any Court*” (“**Non-obstante clause**”) in the amended Section 8 of A&C Act cannot be interpreted to alter law declared by the Supreme Court prior to amendment. The amended Section 8 does not override any other law in force.
- The aforesaid amendment was intended solely to curtail the scope of enquiry by courts into issues of existence of arbitration agreement in applications filed under Section 11 and Section 8 of the A&C Act. It did not alter nor affect the interplay between Section 3 of the CPA and the A&C Act.

CONTENTIONS OF THE OPPOSING PARTY

- Section 8 read with the expression in Section 5 of the A&C Act⁴ - “*notwithstanding anything contained in any other law for the time being in force*” – includes other Acts/Laws such as the CPA as well as law laid down by the Supreme Court prior to amendment.
- The amended Section 8 of the A&C Act mandates any “judicial authority” to sidestep decisions of the Supreme Court prior to the amendment, and mandatorily refer parties to arbitration. The judgment in *National Seeds Corporation Ltd.*, therefore, ceases to be a valid precedent.

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- A combined reading of Section 5 and amended Section 8 implies that notwithstanding provisions of the CPA and pre-amendment judgments denying reference to arbitration of consumer disputes, a judicial authority would be bound to refer parties to arbitration.

JUDGMENT

The NCDRC rejected the contentions of the Builders and held that an arbitration clause in the Agreements cannot circumscribe the jurisdiction of a Consumer Fora, notwithstanding the amendments to Section 8 of the A&C Act. The reasoning of the NCDRC is as follows:

'Arbitrability' of certain disputes

The NCDRC analysed principles on arbitrability of certain types of disputes, as culled out in landmark cases of the Supreme Court viz. Booz Allen Hamilton,⁵ Vimal Kishore Shah,⁶ Natraj Studios⁷ and Ayyaswamy.⁸ In particular, it relied upon jurisprudence on non-arbitrability of consumer disputes,⁹ or to be accurate, on recourse to special remedy under the CPA - rather than arbitration under the A&C or civil suits under the Code of Civil Procedure.

In these decisions, rendered prior to amendment of Section 8 of the A&C Act, the Supreme Court had placed reliance on Section 3 of the CPA and held that the legislature intended to provide a remedy in addition to the consentient arbitration or the civil action in a suit. Hence, the remedy of approaching a consumer forum was not in derogation of the A&C Act by mere presence of an arbitration clause under the Agreements.

Amendment to Section 8, A&C Act vs. law on arbitrability

The amended Section 8(1) states that: the judicial authority shall refer parties to arbitration, inter alia "*notwithstanding any judgment, decree or order of the Supreme Court or any Court...*" The NCDRC held that the Non-obstante clause under the amended provisions was not intended to, and in fact cannot, undo existing jurisprudence under the CPA on adjudication of consumer disputes before consumer fora.

The NCDRC looked into the legislative history of the amendments to Section 8 and held that the Non-obstante clause was intended solely to curb continued application of judgments where excessive judicial power was usurped by courts while enquiring into issues of existence or validity of arbitration agreements - in the matter of appointing arbitrators under Section 11 (as in SBP¹⁰) as also in making reference to arbitration under Section 8. The NCDRC held that interpretation of the Non-obstante clause to ignore the entire body of pre-amendment case law would also unfasten jurisprudence related to other non-arbitrable areas of disputes - such as tenancy, trusts, crimes, insolvency etc. Such an interpretation would also tantamount to over-ruling by the Parliament of law made by the Supreme Court.

Special Legislations

The NCDRC considered the principle of exclusion of jurisdiction of a forum in the presence of a special forum under special legislations. In the context of consumer disputes, it relied on *Skypack Couriers, National Seeds Corporation* and *Rosedale Developers*.

Considering the specific case of the Indian Trusts Act, 1882, the NCDRC relied on the Supreme Court ruling in Vimal Kishore where it was held that, "*since sufficient and adequate remedy is provided under the Trusts Act, 1882 for deciding the disputes in relation to trust deed, trustees and beneficiaries, the remedy provided under the Arbitration Act for deciding such disputes is barred by implication*". The NCDRC reiterated that public policy requires that parties cannot also be permitted to contract out of the legislative mandate which requires certain kind of disputes to be settled by Special Courts constituted by the Act.¹¹

Object of CPA vs. A&C Act

The NCDRC further observed the importance of remedies available under the CPA and the special object and purpose of a beneficial legislation such as the CPA in protecting interests of consumers. The NCDRC reasoned that allowing Section 8 to oust the jurisdiction of consumer fora would set at naught the entire purpose and object of the Consumer Act, which was to ensure speedy, just and expeditious resolution and disposal of consumer disputes. Exposure of such disputes to the Arbitration Act could invite application of portions of the A&C Act that are enforceable only through Civil Courts. This would be repugnant to the manifest purpose underlying the enactment of the CPA. The NCDRC also briefly relied on Section 2(3)¹² of the A&C Act which recognizes schemes under other legislations that make disputes non-arbitrable.

The NCDRC finally held that in light of the overall architecture of the CPA and Court-evolved jurisprudence, amended sub-section (1) of Section 8 cannot be construed as a mandate to the Consumer Fora, constituted under the CPA, to refer the parties to arbitration in terms of the Arbitration Agreement.

ANALYSIS

This judgment is a welcome reiteration of the principle that - jurisdiction of specially constituted judicial authorities cannot be ousted by a blanket mandate to refer disputes to arbitration under the umbrella of Section 8, A&C Act. On the ground level, it provides relief to a party to avail special remedies available under a statute, despite presence of an arbitration clause. This serves to protect parties from lop-sided and sparsely-negotiable standard form agreements. From another angle, parties will no longer be mandated to adopt the relatively long and expensive process of arbitration - in disputes arising under specific statutes having specific dispute redressal mechanisms.

This judgment could also be used to interpret Section 79 of the Real Estate (Regulation and Development) Act 2016 ("Real Estate Act") which bars the jurisdiction of civil courts in matters involving real estate. The NCDRC applied the reasoning in *Ayyaswamy* to conclude that the same principles could apply to cases under the Real Estate Act, which provides a special mechanism for resolution of disputes between buyers and builders.

The reasoning of this judgment is simple and well-founded on object of beneficial legislations, coupled with recourse to special remedies provided there-under. However, what is of utmost importance is interpretation of the Non-obstante clause under the amended Section 8, A&C Act. Delving into the legislative intent and mischief attempted to be remedied by this clause, it is clear that the Non-obstante clause was added to undo the effect of judgments

like *SBP & Co.* which opened floodgates of enquiry by courts into existence / validity of arbitration agreements - at pre-arbitration stages of Section 8 and Section 11. This power could also be sufficiently exercised by arbitral tribunals under Section 16 of the A&C Act, except in certain circumstances (as laid out in *Ayyasamy*).¹³

Therefore, the Non-obstante Clause is likely to assist in ignoring pre-amendment case law that widens court-intervention. However, it certainly cannot be interpreted to upset the long-standing and carefully examined body of case law that determines types of disputes that are or are not arbitrable. In this regard, a combined reading of Section 5 and Section 8 - alongwith Section 2(3) of the A&C Act - is crucial to acknowledge laws under which certain disputes cannot be submitted to arbitration.

The Supreme Court considered this issue of arbitrability in the context of Section 8, A&C Act in the landmark case of *Booz Allen*. It held that all aspects of arbitrability have to be decided by the court seized of the suit, and cannot be left to the decision of the Arbitrator. Even if an arbitration agreement exists and the dispute is covered therein, the court will refuse to refer the parties to arbitration - if the subject matter of the suit is capable of adjudication only by a public forum or the relief claimed can only be granted by a special court or Tribunal.

The NCDRC is a special forum constituted under the CPA for adjudication of consumer disputes. It is therefore, needless to mention that the NCDRC will be the proper adjudicatory forum for any dispute falling under the CPA, despite existence of an arbitration agreement. This reasoning also finds place in rulings of the Supreme Court – notable ones being *Natraj Studios*¹⁴ for disputes relating to leave and license under the then existing Bombay Rent Act,¹⁵ and *Vimal Kishore* for disputes arising under the Indian Trusts Act, 1882.

Does this imply that arbitration cannot be resorted to for adjudication of disputes falling under specific statutes? If a party submits to arbitration by filing its statement of defence, or files its statement of claim followed by a corresponding statement of defence by the opposing party, would it constitute submission to arbitration? Would such submission, once crystallized, preclude a party from adopting the statutory remedy? These issues call for scrutiny and purposive interpretation of the statute vis-a-vis the A&C Act.

– **Kshama A. Loya & Vyapak Desai**

You can direct your queries or comments to the authors

¹ Consumer Case No. 701 of 2015

² Section 8(1) under A&C Act, 1996:

8. Power to refer parties to arbitration where there is an arbitration agreement.—

(1) A judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration.

Amended Section 8(1) under A&C Act, 2015:

8(1). "(1) A judicial authority, before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party to the arbitration agreement or any person claiming through or under him so applies not later than the date of submitting his first statement on the substance of the dispute, then, notwithstanding any judgment, decree or order of the Supreme Court or any Court, refer the parties to arbitration unless it finds that prima facie no valid arbitration agreement exists."

³ National Seeds Corporation Limited v. M. Madhusudhan Reddy & Anr. (2012) 2 SCC 506

⁴ Section 5. Extent of judicial intervention.—Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part.

⁵ Booz Allen and Hamilton Inc. v. SBI Home Finance Limited & Ors., (2011) 5 SCC 532

⁶ Vimal Kishor Shah & Ors. v. Jayesh Dinesh Shah, (2016) 8 SCC 788

⁷ Natraj Studios (P) Ltd. v. Navrang Studios, (1981) 1 SCC 523

⁸ A Ayyasamy Vs. A Paramasivam & Ors., (2016) 10 SCC 386

⁹ Skypak Couriers Ltd. v. Tata Chemicals Ltd., AIR 2000 SC 2008; Secretary, Thirumugugan Cooperative Agricultural Credit Society Vs. M. Lalitha (through LRs) & Ors., (2004) 1 SCC 305; Fair Air Engineers Pvt. Ltd. & Anr. Vs. N.K. Modi, (1996) 6 SCC 385; National Seeds Corporation Limited; Rosedale Developers Pvt. Ltd. Vs. Aghore Bhattacharya, (2015) 1 WBLR 385 (SC)

¹⁰ SBP v Patel Engineering, (2005) 8 SCC 618

¹¹ Natraj Studios

¹² "2. Definitions...

(3) This Part shall not affect any other law for the time being in force by virtue of which certain disputes may not be submitted to arbitration."

¹³ Please see out hotline on Ayyasamy case [here](#).

¹⁴ Natraj Studios (P) Ltd vs Navrang Studios & Anr., AIR 1981 SC 537

¹⁵ Bombay Rents, Hotel and Lodging House Rates Control Act, 1947

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