Analysis of Appointment Procedure under Section 11(6) of the Arbitration and Conciliation (Amendment) Act, 2015

Introduction

Parties to any relationship of a contractual nature often resort to arbitration for adjudication of their disputes. They do so, since, resorting to arbitration allows them, among other things, to decide on an arbitrator of their own choice. Choosing an arbitrator is a significant step towards successful outcome of the arbitration proceedings as the decision of the arbitrator is final and binding, and cannot be challenged on merits. It can only be set aside under the provisions of Section 34 of the Arbitration and Conciliation Act, 1996. Much relevance is also given to the qualification, independence, and impartiality of the arbitrator, as it can be a ground for setting aside the arbitral award under Section 34 of the Act. Due to these imperative issues, parties are always in conflict over choosing an arbitrator. In such situations, to set the arbitration proceedings in motion, they often have to resort to Section 11(6) of the Act, which provides for appointment of an arbitrator, in a domestic arbitration, by the Chief Justice of the High Court or its designate. Under Section 11(6), on an application made by any of the parties, the Chief Justice of the High Court appoints an arbitrator for adjudication. However, this provision is not as simple and clear as it appears. Section 11(6) has had its share of controversy. Although, it has considerably been amended by the Arbitration and Conciliation (Amendment) Act of 2015, which makes the position clearer, it is imperative to embark upon a study of its evolution in order to determine the significance of the amendment.

Controversy regarding appointment under Section 11(6) of the Act of 1996

A three-judge bench of the Supreme Court in *Konkan Railway Corp Ltd v/s Mehul Construction Co*[1] considered the provisions of Section 11(6) in the year 2000. The Apex Court therein held that the powers of the Chief Justice under the provision were

[1] AIR 2000 SC 2821

that of an administrative nature and the Chief Justice or its designate could not act as a judicial authority while appointing an arbitrator. Consequently, it was open for the parties to challenge the appointment of the arbitrator before the Arbitral Tribunal under Section 16 of the Act. Section 16 of the Act is a special provision, which embodies the principle of *Kompetenz-Kompetenz* and empowers the tribunal to decide on its own jurisdiction. The same view was reiterated and confirmed in the subsequent case of *Konkan Railway Corp Ltd v/s Rani Construction Co*[2] by the Constitution Bench of the Supreme Court. The view taken by the Supreme Court in the above two cases emerged as sound and logical, since the words "Chief Justice or any person or institution designated by him" used by the legislature in the provision reveals that the intention of the Parliament was not to empower the Chief Justice with judicial powers while appointing the arbitrator. Had it been so, it wouldn't have given the Chief Justice the power to designate its powers to any other person or institution, as such designation would have made the provision unconstitutional. It would have also made Section 16 of the Act infructuous, in cases where appointment was made under Section 11(6), since the order therein of the Chief Justice could only be challenged in a Special Leave Petition under Article 136 of the Constitution. The Act of 1996 does not contain any provision allowing for an appeal against the order under Section 11(6).

However, a seven judge Bench of the Supreme Court in *SBP Ltd v/s Patel Engineering Ltd*[3] in the year 2005, over-ruling the above two decisions, decided on the powers and nature of the order under Section 11(6) and held that the nature of the order passed by the Chief Justice under 11(6) is not an administrative one but a judicial order. It noted that the question regarding existence of an arbitration agreement could not be left to the arbitral tribunal to decide, and it was necessary for the Chief Justice to look into the existence of the arbitration agreement while exercising its powers under the Act. It further said that the powers cannot be said to be only of an administrative nature since bringing a party to constitute an arbitral

[2] AIR 2002 SC 778
[3] (2005) 8 SCC 618

tribunal where there not existed an arbitration agreement, affected the rights of the parties to the dispute. In such a situation, it was imperative for the Chief Justice to look at the agreement between the parties and determine whether they consented to arbitration and that the subject matter of the dispute was arbitrable. This decision meant that the powers under Section 11(6) now could only be exercised by the Chief Justice and its designate who shall not be a person other than the judges of the High Court before which the jurisdiction to file such an application lay, as no other person or institution could exercise judicial powers.

After the decision of the seven judge Bench in *SBP Ltd v/s Patel Engineering Ltd*, the Chief Justice or its designate could consider the following while appointing an arbitrator under Section 11(6), as clarified in *National Insurance Company Ltd v/s Boghara Polyfab Private Ltd*[4]:

1. Whether the High Court to which the party had made the application had jurisdiction to decide it?
2. Whether an arbitration agreement existed between the parties?
3. Whether the party who had made an application under 11(6) was a party to the arbitration agreement?
4. Whether the claim was time barred?
5. Whether the parties had concluded the contract?

The decision in *SBP Ltd v/s Patel Engineering Ltd* also enabled a party to the arbitration agreement to exercise dilatory tactics as it could now go to the Supreme Court under Article 136 to challenge the order under Section 11(6) to avoid adjudication of the dispute before an arbitral tribunal.

Changes brought by the Arbitration (Amendment) Act, 2015

[4] (2009) 1 SCC 267

The decision in *SBP Ltd v/s Patel Engineering Ltd* remained good law for ten years before Section 11(6) was amended by the Act of 2015. The Act of 2015 brought the position back to the pre-SBP Ltd v/s Patel Engineering Ltd era. The Act of 2015 substituted the words "the Chief Justice or any person or institution designated by him" appearing in Section 11(6) to "the Supreme Court or, as the case may be, the High Court or any person or institution designated by such court". By doing so, the legislature ended the controversy regarding the nature of the powers under Section 11(6). It is now clear that under Section 11(6), the powers shall be of a judicial nature, since it now vests such powers to the "High Court" instead of vesting it to the "Chief Justice" alone.

Secondly, the Act of 2015 has inserted a new Section, namely, Section 11(6A) after sub-section (6) of Section 11. According to the new insertion, the High Court while exercising jurisdiction under Section 11(6) shall only confine to the examination of the existence of an arbitration agreement. Consequently, it is now open for the Arbitral Tribunal to decide on its jurisdiction under Section 16 of the Arbitration Act, as the High Court now does not have the prerogative of deciding the jurisdiction of the Arbitral Tribunal because of the new amendment.

Finally, the Act of 2015 has also, by way of amendment in Section 11(7), clarified that the order of the High Court under Section 11(6) shall be final and no appeal including Letters Patent Appeal shall lie against such decision. However, the option of invoking Article 136 of the Constitution of India against such an order is still open to the parties.

Thus, the Act of 2015 has somewhat ended the controversy regarding appointment of arbitrator by the High Court under Section 11(6). It has tried to minimize the interference of the Court in an arbitration proceeding, which is a step in the right direction.