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"Notwithstanding the Non-obstante clause" can the Courts refuse to refer Non-Arbitrable Disputes to Arbitration?

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Non-arbitrability of disputes is a ground for setting aside the arbitral awards under Sections 34(2)(b) and 48(2) of the Arbitration and Conciliation act 1996 (the "**Act**"), the award is against the public policy of India. Arbitrability, here, refers to the *objective arbitrability* of the disputes, i.e., whether the national law imposes any restriction on the resolution of the dispute by the arbitral tribunal. However, in Indian law confusion has arisen as to whether the courts can at a pre-arbitration stage, i.e., at the time of referring parties to arbitration in pursuant to a valid arbitration agreement decide upon the arbitrability of the dispute. The Supreme Court of India in the Case of *Booz Allen Hamilton v. SBI Home Finance* ((2011) (5) SCC 532), held that:

> Where the issue of `arbitrability' arises in the context of an application under section 8 of the Act in a pending suit, 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 there is an arbitration agreement between the parties, and even if the dispute is covered by the arbitration agreement, the court where the civil suit is pending, will refuse an application under section 8 of the Act*, 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. (Emphasis in italics added).

The Supreme Court further carved out a non-exhaustive list of six disputes that are incapable of being subject to private arbitration:

- Disputes relating to rights and liabilities which give rise to or arise out of criminal offenses;
- Matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights, child custody;

- Guardianship matters;
- Insolvency and winding up matters;
- Testamentary matters (grant of probate, letters of administration and succession certificate);
- Eviction or tenancy matters governed by special statutes where the tenant enjoys statutory protection against eviction.

Further, the Supreme Court in *Shri Vimal Kishor Shah v. Jayesh Dinesh Shah & Ors* (Civil Appeal No. 8614 of 2016) further carved out a seventh category of dispute that is incapable of being subject to private arbitration: disputes arising out of trust deeds and under the Trust Act.

The 2015 amendment to Section 8 of the Act has, however, created uncertainty with respect to the court's power to decide upon arbitrability of dispute at the pre-arbitration stage.

The amended Section 8 introduces a non-obstante clause, which reads as follows:

> . . . notwithstanding any judgment, decree or order of the supreme court or any other court, refer the parties to arbitration unless it finds that prima facie no valid arbitration agreement exists.

In contrast, Section 8 of the 2006 UNCITRAL Model Law and Section 45 of the Act provide that:

> . . . unless it finds that the agreement is null and void, inoperative and incapable of being performed.

This phrase, however, does not find its place in Section 8 of the Act. Thus, a plain reading of amended Section 8 appears to have rendered nugatory the interpretation of courts regarding the arbitrability of disputes at the stage of Section 8. The amended Section 8 suggests that the courts can only inquire the *prima facie* existence of a valid arbitration agreement and leave the rest to be determined by the arbitral tribunal by virtue of the principal of *Komptenz-Komptenz* as enshrined under Section 16 of the Act. The courts only have the power to set aside the arbitral award under Sections 34(2)(b) or 48(2) of the Act on the ground that the subject matter of the dispute is not arbitrable as per the public policy of India

The Supreme Court in the case of *Ayyasamy v. A. Paramasivam & ors* (Civil Appeal

Nos. 8245-8246 of 2016, decided on 04.10.2016), while dealing with a reference with respect to an agreement entered into prior to the 2015 amendment, have held in respect of Section 8 of the Act that

> while mere allegation of fraud simplicitor will not confer jurisdiction on the courts to assume jurisdiction, however, in case of serious allegations of fraud the court can sidetrack the arbitration agreement.

Thus, the Supreme Court has imposed a restriction on arbitrability on account of fraud. However, the court in its judgment has not referred to the amended Section 8 and it is not clear whether the judgment was intended to be made applicable to the amended Section 8. If that were the scenario the judgment would be *per incuriam* in light of the amended Section 8 of the Act.

However, an alternate argument could be that serious fraud and non-arbitrability of the dispute would in itself affect the validity of the arbitration agreement. Even in such a case, it is doubtful if the court can undertake an in-depth analysis into the question of arbitrability (even on account of serious fraud) since the amended Section 8 of the Act restricts the power of the court to undertake only a *prima facie* view of the validity of the arbitration agreement. Thus, the decision in Ayyasamy is *per incuriam*, since the court would have to delve into the merits of the dispute to determine the degree of fraud.

The full bench of National Consumer Disputes Redressal Commission (NCDRC) in *Aftab Singh v. Emaar MGF Land Limited & Anr.* (Consumer Case No. 701 OF 2015, Order Dated 13.17.2017) while rejecting the plea of the respondent-builder to refer consumer dispute to arbitration, reiterated the view of Supreme Court in Booz Allen and Ayyasami that disputes governed by statutory enactments creating special tribunals (such as NCDRC) for a specific public purpose cannot be mandatorily referred to arbitration. The court further held that amendment to Section 8 of the Act does not intend to nullify erstwhile statutory interpretation of the Act by the courts and the sole purpose of the amendment is to curtail wide enquiry by the courts.

The effect of the non-obstante clause on pre-arbitral jurisprudence by the courts is yet to be determined by the Supreme Court. Once the parties to a dispute have agreed to resolve their disputes through binding arbitration, the purpose of arbitration would be defeated and precious time of the parties would be wasted in the determination of the validity of arbitration agreement before the national courts. This apprehension was also taken into account by Chandrachud, J. while delivering the judgment in the case of *Ayyasamy v. A. Paramasivam & ors*. Therefore, the correct view would be that while

non-arbitrable disputes should not be referred to arbitration, the courts under Section 8 have only a limited scope of interference and cannot undertake an in-depth analysis into the merits and arbitrability of disputes at a pre-arbitration stage. Further, a dispute should be categorized as non-arbitrable only on limited grounds, in cases of compelling public interest.
