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The Analysis of Party Autonomy & Arbitrability in Tenancy Disputes: In Special Reference to Vidya Drolia v. Durga Trading Corporation Case

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ABSTRACT

There have been numerous and inconsistent attempts to refurbish and adapt the arbitration code in India in order to make the nation congenial to arbitration. The jurisprudence on the arbitrability of disputes have not yet been well settled and has remained inconsistent time and again even after several attempts by Indian judiciary. One such step in the right direction in deciding the arbitrability of landlord- tenant disputes, which had long pendency has been the Vijay drolia II judgment commenting on the jurisprudence of the same. It has required the essential four -fold test to decide the arbitrability of disputes, with respect to not only tenancy matters but also other questionable subject matters. This paper seeks to examine the test, and analyze the same with intent to further discuss the facets of the same. It seeks to highlight the past infamous attempts commenting on the jurisprudence of arbitrability which led to several misinterpretations and factors leading to the Durga Trading test by the hon'ble Supreme Court putting an end to the saga of long due debate on arbitrability of tenancy disputes.

Keywords: *Alternative Dispute Resolution, Arbitration, Arbitrability, Arbitration Agreement and Non-Arbitrability.*

I. INTRODUCTION

Arbitrability has been a persistent question and controversy in India and to deal with the same the judiciary has made several attempts to pave a way for deciding the arbitrability of various subject matters in question. To develop India as an arbitration- friendly country in both domestic and international arena several policy changes and amendments have come into the view, but still leaving arbitrability hanging into question, specifically the New Delhi International Arbitration Centre Bill, 2018 and the Arbitration and Conciliation (Amendment) Act, 2018 ["2018 Amendment"] passed by the Legislature[3], the question for arbitrability still

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[3] Express News Service, *Lok Sabha passes Bill to help India become arbitration hub*, THE NEW INDIAN EXPRESS (Aug. 11, 2018, 03:58 AM), https://indianexpress.com/article/india/lok-sabha-passes-bill-to-help-india-become-arbitration-hub-5301216/.

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remained unanswered. The term 'arbitrability' has different meanings, broadly it relates to the capability or ability of arbitral tribunals to rule on its jurisdiction. For the tribunal to exercise its jurisdiction, (i) the action must be capable of being adjudicated by tribunal, (ii) arbitration agreement must be in existence, (iii) the dispute must be referred to arbitration on parties will.[4] Even after these factors being fulfilled various subject matters have been rendered to be non-arbitrable and courts have left the arbitration clause to be ineffective. The judicial authority has a duty to contemplate the existence of a valid and Bonafede arbitration agreement and whether the dispute sought to be referred to arbitration is within the ambit of the arbitration agreement or clause.[5]

The constant debate on arbitrability has been due to lack of expressive provisions dealing with scope and extent of arbitrability of numerous disputes. The Section 2(3) of the Arbitration Act is the only provision referring to some extent the question of arbitrability which simply puts that "certain disputes may not be submitted to arbitration",[6] while not expressly excluding any subject-matter of disputes that cannot be arbitrated.[7]Deciding the arbitrability of disputes mainly rests in the hands of the case laws rather than being governed by statutes in India, Sections 34(2)(b) and 48(2) of the Arbitration Act has empowered the courts to set aside an arbitral award if the dispute was not capable of being settled by arbitration or if there leaves a contradiction with the public policy of India, hence, the question of arbitrability relies in the shadow of the courts decisions.

In India, post liberalization, there has been an upscale in commercial business and projects, which has in turn given rise to leasing and tenancy agreements and transactions. As a general rule such tenancy agreements were governed by Transfer of Property Act 1882, but the upscale has required specific statutes like the rental control act, 1948 and other state legislations to come into the picture and afford special protection to landlord- tenant relationships under agreements. These legislations also empower specific courts like, Small Causes Court to deal with such specific disputes.[8]The power to adjudicate was completely vested in public forum by the courts, as the arbitration and conciliation act ,1996 have remained silent on subject matters which are non- arbitrable the supreme court and various high courts have time and again held

[4]Booz Allen and Hamilton Inc. v. SBI Home Finance Ltd, AIR 2011 S.C. 2507 (India).
[5]S.B.P & Co. v. Patel Engineering Ltd., (2005) S.C.C 618. (India).
[6]The Arbitration and Conciliation Act, No. 26 of 1996, § 2(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"] [hereinafter "Arbitration Act"].
[7]A. Ayyasamy v. A Paramasivam, (2016) 10 S.C.C 386; Aftab Singh v. Emaar MGF Land Limited, (2017) S.C.C Online NCDRC 1614.
[8] Natraj Studios (P) Ltd v. Navrang Studios & Anr, (1981) 1 S.C.C 523, para 24.

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tenancy matters to be non- arbitrable until this ambiguity has been laid to rest in ***Vidya Drolia And Others v. Durga Trading Corporation***.[9]

II. THE PRE VIDYA DROLIA II ERA

The existence of the question of arbitrability of tenancy disputes was first recognized by the supreme court way back in 1981 in the judgement of ***Natraj Studios (P) Ltd. v. Navrang Studios & Ors.*** **["Natraj Studios"]** [10]The issue raised was whether section 28(1) of the Bombay rents, hotel and lodging house rates control act, 1947, empowering the small causes court with exclusive jurisdiction for disputes relating to the tenant's protection annuls any arbitration clause in the agreement executed between the contesting parties.

The Court held that the arbitration clause in the said agreement was declared to be inoperative, and the application for dispute being referred to arbitration was dismissed. The Courts which have jurisdiction to entertain and try such a suit are the Courts specified in S.28 of the said act and no other".[11]

Another important development was in 2011, in the case of ***Booz Allen and Hamilton Inc. v. Sbi Home Finance Limited.*** **["Booz Allen"]**[12]wherein the scope of section 8[13] of the Arbitration and was put forth for consideration. The question raised before the hon'ble Supreme Court was whether subject matter of mortgage is arbitrable. The supreme court had delivered the judgement with a broader spectrum, while commenting on the concept of "arbitrability of disputes".

The court was of the view that "*every civil or commercial dispute, either contractual or non-contractual, which can be decided by a court, is in principle capable of being adjudicated and resolved by arbitration unless the jurisdiction of arbitral tribunals is excluded either expressly or by necessary implication"*.[14]The court has further elaborated the difference of the arbitrability of the disputes of varied natures pertaining to *right in rem* and *right in personam*, the court held that the mortgage suit was not an arbitrable subject matter being an action *in rem.*

Certain other prominent developments and observations pertaining to the issue of tenancy whether arbitrable or non- arbitrable were made by the hon'ble court in the case of ***Himangni***

[9]Vidya Drolia And Others v. Durga Trading Corporation, Civil Appeal No. 2402 of 2019.
[10] Natraj Studios, *supra*note 6.
[11] In Babulal Bhauramal & Anr. v. Nandram Shivram & Ors., AIR 1959 SCR 367.
[12] Booz Allen, *Supra* note 2.
[13]The Arbitration and Conciliation Act, No. 26 of 1996, § 8. [Power to refer parties to arbitration where there is an arbitration agreement].
[14]A. Ayyasamy vs. A. Paramasivam, Civil Appeal No. 8245-8246 Of 2016.

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***Enterprises v Kamaljeet Ahluwalia*[15].**An application under section 8was filed, the apex court was seized with the same question pertaining to tenancy, that whether the dispute was arbitrable, and whether the subordinate courts were correct in their stance of rejecting the application for dispute being referred to arbitration under section 8. The answer was in negative, following the court's stance in *Natraj Studios* and *Booz Allen*. The application filed by the tenant under section 8of arbitration act was rejected by three- judges bench and, *inter alia,* the civil suit filed by the landlord was maintainable. "*It was held that the disputes of such nature cannot be referred to the arbitrator".*[16]

III. THE VIDYA DROLIA CLIMAX

In ***Vidya Drolia***[17], the supreme court was called upon to look into the correctness of the *Him Angi Enterprises*[18] as the legal ratio laid in the case, 'landlord-tenant disputes governed by the provisions of the Transfer of Property Act, are not arbitrable as this would be contrary to public policy', were in the field of doubt. The factual matrix of the case is based out on the tenancy agreement between the parties wherein, the tenancy of a godown and other structures for a maximum period of ten years was involved.[19] The clause 23 of the agreement was an arbitration clause wherein any dispute/ difference between the parties arising out of the same shall be submitted to arbitral tribunal comprising of three arbitrators.The court in *Vidya Drolia* examined the legal ratio and analysed the meaning of arbitrability, non- arbitrability on the basis of a four- fold test and who decides non- arbitrability.

A deeper consideration of the order of the reference framed out two issues before the court to be dealt broadly:

(i) meaning of non-arbitrability and when the subject matter of the dispute is not capable of being resolved through arbitration; and

(ii) the quandary – "who decides" –at the reference stage whether the court or the arbitral tribunal in the arbitration proceedings would decide on the query of non-arbitrability.[20]

The court has agreed that *"Arbitration is a creature of consensus. It is completely dependent on party autonomy and the intention expressed in the agreement".*[21]The Arbitration Act does not specifically exclude any category of disputes from arbitrability, whether civil or

[15](2017) 10 SCC 706.
[16]Booz Allen and Hamilton Inc. v. SBI Home Finance Ltd, AIR 2011 S.C 2507, Para 21.
[17]*Supra note 9.*
[18] *Ibid.*
[19]Vidya Drolia v. Durga Trading Corporation, 2019 S.C.C ONLINE S.C 358.
[20]Vidya Drolia And Others v. Durga Trading Corporation, Civil Appeal No. 2402 Of 2019, para 2.
[21]Vidya Drolia And Others v. Durga Trading Corporation, Civil Appeal No. 2402 Of 2019, para14.

commercial. The judicial authority has an obligation under section 8 of the Arbitration Act, to refer the parties to arbitration if the matter is subject to the arbitration agreement, unless *prima facie,* there exists no valid arbitration agreement. On the same stance, the authorities have a clear mandate for interference in arbitrability at the pre- reference stage. The court was also of the opinion that even upon the findings of the arbitral tribunal, there exists valid arbitration agreement, *per se*, certain subject matters stand outside the scope of arbitrability.

(A) Non- Arbitrability

The concept of Non-arbitrability is basic for arbitration as it relates to the very jurisdiction of arbitration tribunal. It was held to be no longer *res integra* as answered in *Himangi Enterprises*, following the decisions laid in *Natraj Studio* sand *Booz Allen.* Broadly, the court observed on the basis of public policy, the arbitrator lacked jurisdiction on tenancy matters. The matters governed under transfer of property would only be triable by civil court and not by the arbitrator. But the question of non-arbitrability kept on lingering before the supreme court and was finally put to end by the decision laid in *Vidya Drolia* by the hon'ble apex court, by reversing its own judgement.

The court referred to ***Duro Felguera, S.A v. Gangavaram Port Limited,***[22]and observed, *"that there is nothing in this Act and law to show that a dispute relating to the determination of lease, arrears of rent etc. cannot be decided by an arbitrator. The grounds predicated on public policy could be raised before the arbitrator as they could be raised before the court".*[23]

1. Existence and validity of arbitration agreement

The jurisdiction of the arbitral tribunal well depends on the nature and type of the subject matter of the dispute alleged in the question. The order draws distinction between *non arbitrability on account of existence* and *non- arbitrability on account of validity of an arbitration agreement*[24] for the purpose of exercise of jurisdiction. The existence of arbitration agreement is fairly necessary for determining the jurisdiction, *albeit*, the validity of the same must also be established *prima facie,* to rule out non-arbitrability by the arbitral tribunal itself. The principle of *kompetenz- kompetenz,* as discussed in **Chloro Controls(I) P. Ltd. V. Severn Trent Water Purification Inc.**[25]is emphasized which requires that the arbitral tribunal must be given preference to determine and decide the question of its jurisdiction and non-arbitrability. Though, even upon establishment of the validity of the arbitration agreement, the arbitral

[22](2017) 9 SCC 279.
[23]*Supra* note 21, para5.
[24] *Ibid*, para 9.
[25]28 September 2012.

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tribunal may not have jurisdiction to adjudicate the dispute, *intuitu,* will of the parties expressed in the same.

2. Adjudication of actions in rem and actions in personam

Right *in rem* refers to rights against the public at large and right *in personam* refers to rights against a private individual. The court crystallised the legal principles for determining non-arbitrability *via* drawing a distinction between adjudication of actions *in rem* and actions *in personam.* The court referred to *Booz Allen***,** where in the tenancy dispute was held to be non-arbitrable, being an action *in rem* are matters of public policy, to protect the tenants and must be adjudicated by *public fora.*

The apex court held that tenancy disputes governed by transfer of property act 1882, are arbitrable. It was observed that *"they are not actions in rem but pertains to subordinate rights in personam that arise from rights in rem".*[26]Often, rights *in rem* results in an enforceable right *in personam.* Thus, disputes of such nature are not action *in rem,* nor actions *in personam* but forms part of the subordinate rights *in personam* arising from rights *in rem.*

3. Four- fold test

In order to determine the non-arbitrability of the subject matter of a dispute in arbitration agreement, the apex court upon analysing the earlier judgements, propounded a test called the four- fold test, broadly on basis of, "*(a) when the cause of action and subject matter of the dispute relates to actions in rem, that do not pertain to subordinate rights in personam that arise from rights in rem, (b) when cause of action and subject matter of the dispute affects third party rights; have erga omnes effect; require centralized adjudication, and mutual adjudication would not be appropriate and enforceable; (c) when cause of action and subject matter of the dispute relates to inalienable sovereign and public interest functions of the State, which renders unenforceability of mutual adjudication; and (d) when the subject-matter of the dispute is expressly or by necessary implication non-arbitrable as per mandatory statute or statues*."[27]

The court clarified, tests not being a water tight compartment, they are interrelated and overlap each other. They require a holistic and pragmatic approach for their application, in order to serve the purpose for determining the non-arbitrable subject matters. The affirmative answer to these, hold the dispute or subject matter to be non-arbitrable. Upon applying these tests, the apex court found the answer to be in negative and held the landlord- tenant disputes governed

[26]*Supra* note 21, para 48.
[27]*Supra* note 21, para 45.

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under transfer of property act to be arbitrable. As discussed above the disputes of such nature does not arise from right *in rem* but exists in subordinate rights *in personam* emerging from rights *in rem,* nor they have era omnes affect, i.e., they would not affect third-party rights. An award deciding tenancy dispute has an enforcement that of a civil court decree. The Arbitration Act does not bar arbitration expressly, it has a public purpose to regulate landlord- tenant agreements, adjudication of disputes amongst them by arbitrator, would bind the arbitrator to the provisions of the act.

(B) Who Decides Non-Arbitrability?

The legal problem for allotment of decision-making authority between courts and arbitral tribunal arises at initial stages, prior to arbitrator are seized of the baton of the dispute, the baton, lies in the hands of the court where the steps for prevention of arbitration agreement from being ineffectual are taken. There is no straightforward universal answer pertaining to, *who decides non-arbitrability.* But the apex court has cleared the air and laid the question to rest. In accordance to the general rule, based on principle of severability and doctrine of *kompetenz-kompetenz* under section 16[28]states that arbitral tribunal is the primary authority to exercise jurisdiction on despite arising out of arbitration agreement.

Issue of non-arbitrability can be put forth at three stages:

1. Before the court, on application for reference or for stay of pending judicial proceedings under section 8 and 11 of the arbitration acts.
2. Before the court, for challenge of arbitral award or its enforcement.
3. Before the arbitral tribunal, when the arbitral proceedings are in course.

These stages question the scope of section 8 and 11for judicial review and jurisdiction of the court. The apex court held that under both the sections, the scope of judicial review and jurisdiction of the court is alike and complementary in nature[29] but tightly limited on the very end. The limited review is must in order to keep a check on forced arbitration, when the matter qualifies for non-arbitration. The courts must not try and usurp the jurisdiction of the arbitral tribunal at these stages, but uphold the efficacy of arbitration. Upon application under section 8 or 11 before the court, and arbitration agreement comes into view among the parties, the courts must limit their interference and refer the parties to arbitration

[28]The Arbitration and Conciliation Act, No. 26 of 1996, §16 [Competence of arbitral tribunal to rule on its jurisdiction].
[29]*Supra* note 5, pg. 2.

IV. CONCLUSION

The view and clear stance taken by the hon'ble apex court in affirming the arbitrability of tenancy disputes governed under the transfer of property act, 1882, is without a jinx of doubt a pro-arbitration decision. The cloud of uncertainties which remained around arbitrability of tenancy disputes have been led in the right direction. The inadequate test of actions *in rem* and *in personam* in this jurisprudence has been corrected. The judicial interference should be minimum and limited in the arbitral proceedings and at reference stage of section 8 and section 11 of the arbitration and conciliation act,1996*albeit,* have the power for "second look" post award and have been tipped to "when in doubt, do refer". Arbitral tribunal has been rendered as the primary authority to determine the arbitrability, *per se, kompetenz- kompetenz.* The consequence of the four- fold test propounded in the judgement and the expansion of the scope of review under section 11 on the pending matters would be table turning, and positively render India to be 'pro-arbitration' nation.

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