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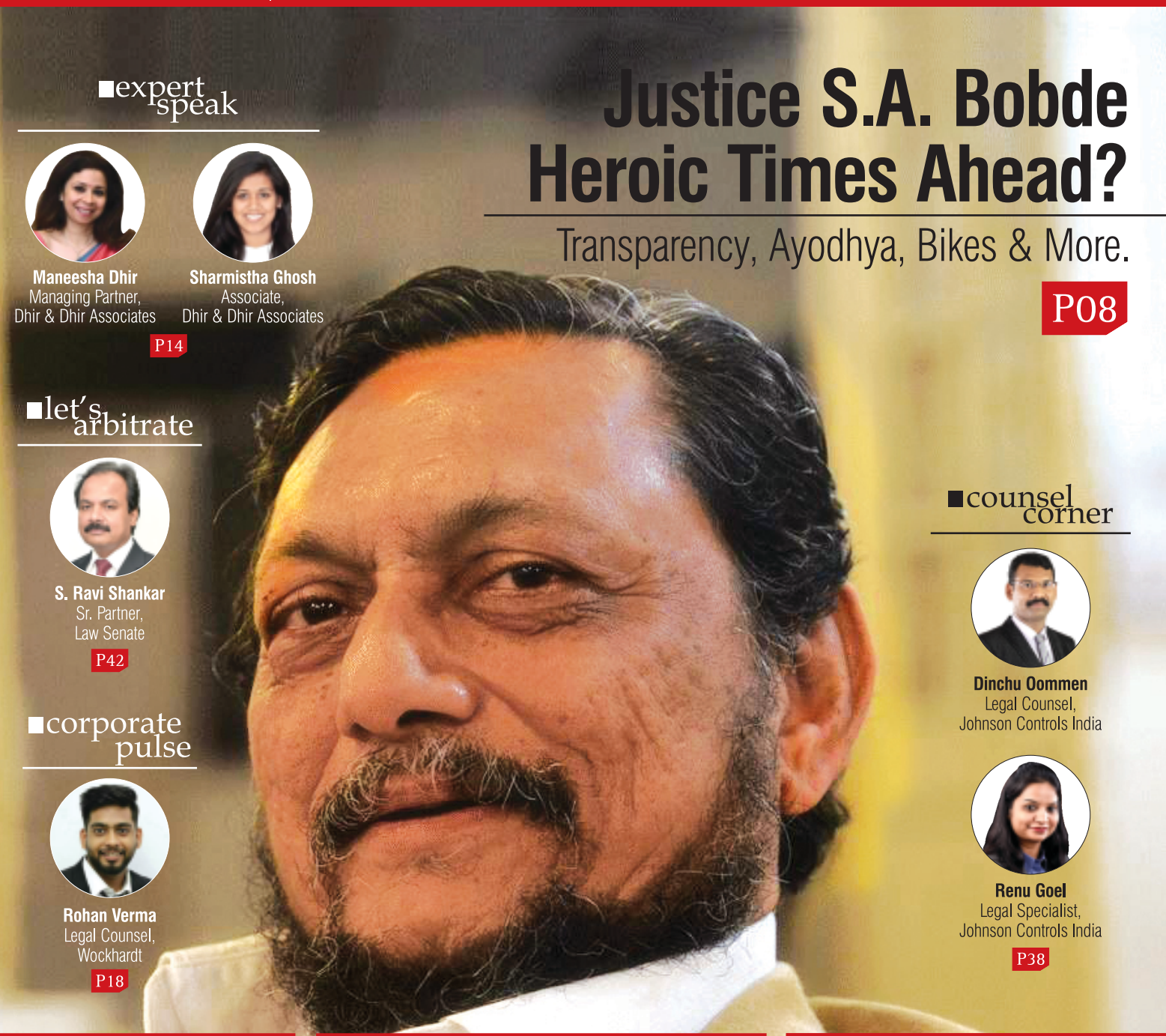

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Managing Partner,
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Partner, Sim & San

Mohit Goel
Partner, Sim & San

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Permissible Prearbitral Judicial Intervention Conundrum

Maneesha Dhir & Sharmistha Ghosh

The Arbitration and Conciliation Act, 1996 ("1996 Act") was promulgated with the main objective of making provision for an arbitral procedure which is fair, efficient and capable of meeting the needs of the specific arbitration. It also minimized the supervisory role of courts in the arbitral process and to permit an Arbitral Tribunal to use mediation, conciliation or other procedures during arbitral proceedings for the settlement of disputes.

Under Section 11(6), the Chief Justice of the High Court appoints an arbitrator for adjudication of disputes, on the application made by any of the parties.

Initially, one set of decisions ruled that the appointment of an arbitrator by the Chief Justice is an administrative order. The Hon'ble Supreme Court in Konkan Railway Corpn. Ltd. V. Mehul Construction Co.; (2000) 7 SCC 201, held that the powers of the Chief Justice under Section 11(6) are administrative in nature and that the Chief Justice and / or his designate, does not act as a judicial authority while appointing an arbitrator. The same view was reiterated in Konkan Railway Corpn. Ltd. V. Rani Construction (P) Ltd.; (2002) 2 SCC 388.

However, a Constitution Bench of 7 judges overruled the afore-mentioned view in SBP and Co. V. Patel Engg. Ltd.; (2005) 8 SCC 618 and held that an order passed by the Chief Justice is not administrative but judicial in nature and subject to appeal under Article 136 of the Constitution of India. It was also held that the Chief Justice or the designated Judge will have the right to decide preliminary aspects like the Court's own jurisdiction, existence of a valid arbitration claim, the existence of a live claim, inter alia.

The decision in SBP and Co. was further clarified in National Insurance Co. Ltd. V. Boghara Polyfab (P) Ltd.; (2009) 1 SCC 267, wherein, it was held that the duty of the Chief Justice or his designate is defined in SBP and Co. It was further held that the Court identified and segregated the preliminary issues that may arise for consideration in an application under Section 11 of the Act into three categories, i.e. (1) issues which the Chief Justice or his designate is bound to decide; (2) issues which he can also decide, i.e. issues which he may choose to decide;

Dhir & Dhir
Advocates & Solicitors

D-55, Defence Colony,
New Delhi-110 024.
Tel: 91(11) 42410000,
Fax: 91 (11) 42410091
E:expertspeak@dhirassociates.com

and (3) issues which should be left to the Arbitral Tribunal to decide.

The same view pertaining to Section 11(6) and the issues to be dealt with by the Chief Justice or his designate was followed in Shree Ram Mills Ltd. V. Utility Premises (P) Ltd.; (2007) 4 SCC 599 and Arasmeta Captive Power Co. (P) Ltd. V. Lafarge India (P) Ltd.; (2013) 15 SCC 414.

As a consequence, to the afore-mentioned line of decisions, the Chief Justice or his designate was conferred with the jurisdiction to decide a large number of preliminary aspects.

In this context, the Law Commission of India, vide its Report No. 246, recommended amendments to Section 8, the addition of a new sub-section, namely, sub-section (6-A) in Section 11, inter alia other amendments to Section 11 of the 1996 Act.

The Law Commission Report endorsed restricting the scope of the judicial intervention only to situations where the Court / Judicial Authority finds that the arbitration agreement does not exist or is null and void. In so far as the nature of intervention was concerned, it was recommended that in the event the Court / Judicial Authority was prima facie satisfied against the argument challenging the arbitration agreement, it shall appoint the arbitrator and / or refer the parties to arbitration, as the case may be.

The amendment proposed by the afore-mentioned Law Commission Report envisaged that the judicial authority shall not refer the parties to arbitration only if it finds that there does not exist an arbitration agreement or that it is null and void. In the event that the judicial authority was of the prima facie opinion that the arbitration agreement exists, then it shall refer the dispute to arbitration, and leave the existence of the arbitration agreement to be finally determined by the Arbitral Tribunal. However, if the judicial authority

concludes that the agreement does not exist, then the conclusion will be final and not prima facie. The amendment proposed a conclusive determination as to whether the arbitration agreement is null and void. Thus, if the judicial authority refers the dispute to arbitration and / or appoints an arbitrator, under Sections 8 and 11 respectively, such a decision will be final and non-appealable. An appeal can be maintained only under section 37 i.e. in the event of refusal to refer parties to arbitration, or refusal to appoint an arbitrator

Pursuant to the recommendations of the Law Commission Report, Section 11(6-A) was first introduced by means of an Ordinance and then by the Arbitration and Conciliation (Amendment) Act, 2015, with effect from 23.10.2015, vide Amendment Act 3 of 2016, with the objective to provide that the High court or the Supreme Court shall examine the existence of a prima facie arbitration agreement and no other issues, while considering any application for appointment of arbitrator, so that the arbitration process becomes more user friendly, cost-effective and leads to expeditious disposal of cases.

Amendment Act 3 of 2016 altered the language of Section 11(6), conferring upon the Supreme Court in addition to, the High Court or any person or institution designated by such Court, as the case may be, the jurisdiction to take necessary action for appointment of an arbitrator, on application by a party.

Additionally, sub-section (6-A) to Section 11 was inserted, confining the power of the Court to only examining the existence of an arbitration agreement. The amended provision in sub-section (7) of Section 11 provides that such an order passed under Section 11(6) shall not be appealable, thereby, attaching finality to the orders passed under this Section.

The intention of the Law Commission Report and the Amendment Act 3 of 2016 was to confine judicial intervention to the examination of the existence of an arbitration agreement and to leave all other issues, be it preliminary in nature, to be decided by the arbitrator.

Thus, the law prior to the Amendment Act 3 of 2016, laid down by the Hon'ble Supreme Court, which included going into whether accord and satisfaction have taken place, was legislatively overruled.

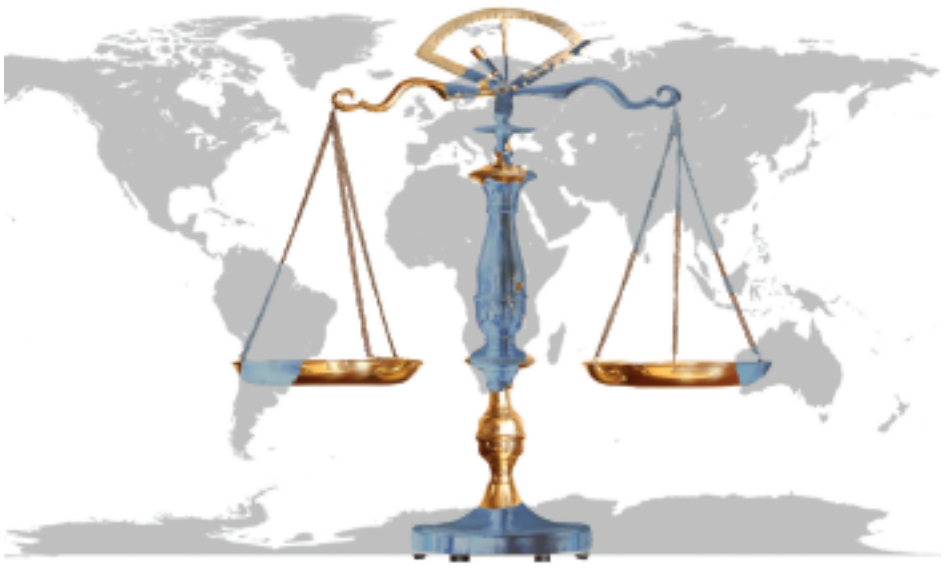
In line with the intention of the Law Commission Report and the Amendment Act 3 of 2016, the Hon'ble Supreme Court in Duro Felguera, S.A. V. Gangavaram Port Limited; (2017) 9 SCC 729, held that as per the provisions of the amended sub-section (6-A) of Section 11, the power of the Court is confined only to examine the existence of the arbitration agreement.

However, in United India Insurance Company Limited V. Antique Art Exports Private Limited; (2019) 5 SCC 362, decided on 28.03.2019, the Hon'ble Supreme Court held that the decision in Duro Felguera is a general observation about the effect of the amended provisions which came to be examined, as per the facts of the case. The Hon'ble Court took note of sub-section (6-A) to Section 11, introduced by the Amendment Act 3 of 2016 and in that context observed that the preliminary disputes are to be examined by the arbitrator and are not for the Court to be examined within the limited scope available for appointment of arbitrator, under Section 11(6) of the 1996 Act. It held that the appointment of an arbitrator is judicial power and is not a mere administrative function leaving some degree of judicial intervention. It is always necessary to ensure that the dispute resolution process does not become unnecessarily protracted when it comes to the question of examining the existence of judicial intervention.

On 05.09.2019, a three-Judge Bench of the Hon'ble Supreme Court in Mayavti Trading Pvt. Ltd. V. Pradyuat Deb Burman; 2019 SCC OnLine SC 1164, overruled the judgment of United India Insurance Company Limited as not having laid down the correct law. It was held that Section 11(6-A) is confined to the examination of the existence of an arbitration agreement and is to be understood in the narrow sense, as has been laid down in the judgment of Duro Felguera.

While this judgment clarifies the effect of inserting sub-section (6-A) to Section 11 vide the Amendment Act 3 of 2016, it also lays down that the said sub-section now stands deleted, since the passing of the Amendment Act of 2019.

The omission is pursuant to a High-Level Committee Review regarding the



institutionalization of arbitration in India and in an effort to limiting judicial intervention in the arbitration process.

The Committee recommended that in order to ensure speedy appointment of arbitrators, Section 11 may be amended to provide that the appointment of arbitrator(s) under the Section shall only be done by arbitral institution(s) designated by the Supreme Court (in case of international commercial arbitrations) or the High Court (in case of all other arbitrations) for such purpose, without the Supreme Court or High Courts being required to determine the existence of an arbitration agreement.

Accordingly, it can now be seen that after the Amendment Act of 2019, sub-section (6-A) to Section 11 has been omitted, as the appointment of arbitrators is to be done institutionally, in which case, the Supreme Court or the High Court, under the old statutory regime are no longer required to appoint arbitrators and consequently, to determine whether an arbitration agreement exists or not.

It has also been clarified vide Section 11(6B) that the designation of any person or institution by the Supreme Court, or, as the case may be, the High Court, shall not be regarded as a delegation of judicial power by either the Supreme Court or the High Court.

Therefore, it is apparent that all the amendments and the judicial pronouncements, therein, endeavor to achieve the main objective of the 1996 Act i.e. to make provision for an arbitral procedure which is fair, efficient and capable of meeting the needs of the specific arbitration and to minimize the supervisory role of courts in the arbitral process and to permit an Arbitral Tribunal to use mediation, conciliation or other procedures, during arbitral proceedings, in the settlement of disputes.

Maneesha Dhir is Managing Partner of Dhir & Dhir Associates, a full service law firm. Her core area of practice include Telecom, Dispute Resolution & Arbitration, Insolvency Laws, Corporate & Financial Restructuring and Merger & Acquisitions.

Sharmistha Ghosh is an Associate with the firm and has more than 5 years of experience in Litigation. She has been handling matters pertaining to civil and commercial disputes and regularly appears before the Hon'ble Supreme Court, High Court of Delhi and other Tribunals.