REVIEW OF SECTION 11's ORDER: SCOPE OF MAINTAINABILITY

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ABSTRACT

Section 11 of the Arbitration and Conciliation Act 1996 provides a detailed mechanism for appointment of an arbitral tribunal through judicial interference. It empowers the Chief Justice of India in international commercial arbitration and the Chief Justice of the relevant High Court in non-international commercial arbitration to appoint arbitrators under certain select circumstances. However, unlike the position under the UNCITRAL Model Law, the exercise of power under Section 11 of the Indian Enactment entails an exercise of the judicial function, resulting in a judicial order. This poses several concerns, one of them being the issue of maintainability of review against an order passed under Section 11 of 1996 Act. By means of the present paper, I will assess the maintainability of a review petition filed against a Section 11 Order for appointment of an arbitral tribunal with reference to the various conflicting judicial decisions on the issue and the anomalous situation created in India as a consequence of the same.

Keywords– Arbitration, Conciliation, Tribunal, International commercial arbitration, Maintainability, Review petition.

INTRODUCTION

Commercial arbitration is a method of dispute resolution by which parties mutually agree to definitively resolve their arbitral disputes by one or more independent adjudicators of their own choice, referred to as either arbitrators or collectively as an arbitral tribunal. The arbitral tribunal so constituted renders its decision in the form of an arbitral award, which is binding upon the parties. Though any party may assail the resultant arbitral award before an appropriate Court under Section 34 of the Arbitration and Conciliation Act or even by raising objections under Section 48 of the Arbitration Act if the foreign award is sought to be enforced in India, it may only do so on certain limited grounds enlisted therein. These grounds do not ordinarily involve any assessment of the merits of the dispute. Commercial arbitration, as such, essentially entails the renunciation of a person's right to seek legal redress before a court and thus imposes enormous consequences on all parties who are signatories to the arbitration agreement. It then does not come as a surprise that almost every commercial dispute sought to be resolved through arbitration poses a rather critical preliminary question – where, and by whom, will this dispute be decided? In nine cases out of ten, the answer to the said question decisively affects the eventual outcome of the dispute.[i]

Under the provisions of the Arbitration Act, parties are free to determine the number of arbitrators, provided it is not an even number, as well as the procedure for appointing them. However, if the parties are unable to agree on the said procedure, or constitute the arbitral tribunal to their mutual satisfaction, they may resort to an appropriate remedy under Section 11 of the Arbitration Act, which provides detailed machinery for appointment of arbitrators through judicial intervention. In both international as well as domestic arbitrations, the said proceedings are considered to be of tremendous commercial significance as they ensure that any inadvertent or deliberate failure to agree on constitution of an arbitral tribunal does not delay the commencement of arbitral proceedings.

Section 11 of the Arbitration Act originally empowered the Chief Justice or any person designated by it, to appoint arbitrators under the circumstances specified therein. In the case of an international commercial arbitration,[ii] this power was exercisable by the Chief Justice of India and in case of a non-international or domestic arbitration, this power was exercisable by the Chief Justice of the High Court within whose local limits the court as defined under Section

2(1)(e) of the Arbitration Act, is situated. However, post the promulgation of the Arbitration and Conciliation (Amendment) Act, 2015 ["Arbitration Act"], this power has now been transferred from the concerned Chief Justice to the Supreme Court of India in the case of international commercial arbitrations and the concerned High Court in case of domestic arbitrations.[iii] Yet, despite such a monumental change in the position of law, the provisions of the principal or un-amended enactment continue to hold great relevance.

As per Section 26 of the Amendment Act, subject to an agreement between the parties to the contrary, the above amendment shall apply only to the arbitral proceedings commenced in accordance with Section 21 of the principal Arbitration Act before the Amendment Act came into effect on 23rd October, 2015. In this regard Section 21 of the Arbitration Act states that unless otherwise agreed by parties, arbitral proceedings in respect of a particular dispute shall commence "on the date on which the request for that dispute to be referred to arbitration is received by the respondent." This implies that where a request for Arbitration is received after 23rd October 2015, the arbitration proceedings and any litigation under the Arbitration Act incidental thereto, shall be conducted as per the amended provisions of the Arbitration Act. However, where such request is received prior to 23rd October, 2015, any subsequently initiated proceeding under the Arbitration Act, including under Section 11, shall continue to be governed by the principal or un-amended Arbitration Act, notwithstanding its actual date of filing. Thus, at present there are two distinct arbitration regimes simultaneously operating in India. As detailed above, one is governed by the amended Arbitration Act, while the other remains subject to the principal enactment. It is the latter regime of arbitration law that I will focus upon herein, in particular, those proceedings governed by the un-amended Section 11 of the Arbitration Act.

The conferment of the power to appoint arbitrator(s) on the Chief Justice or its designate under the un-amended Arbitration Act posed several questions that continuously troubled the Indian Judiciary. For instance, it took the Supreme Court of India almost a decade, and four separate benches of varying strengths, to finally determine, incorrectly in my opinion, that the proceedings under Section 11 of the Arbitration Act are judicial in nature, and the resultant order a judicial one.[iv] However, the designation of an order for appointing an arbitrator under Section 11 of the Arbitration Act [''Section 11 Order''] as a judicial order has inadvertently created several concerns that are yet to receive a definite response from the Indian judiciary. It

is one such concern relating to the maintainability of a review against a Section 11 Order that I will address herein, with primary emphasis on the proceedings catered to by the principal un-amended Arbitration Act.

On one hand, one may argue that since Section 11 involves the exercise of a judicial function, and a Section 11 Order is judicial in nature, it must be considered to be subject to a review by the Chief Justice who passed the order in the first place. On the other hand, it is conceivable that since neither the Arbitration Act, nor any other relevant

statutory enactment, confers upon the Chief Justice the power to review its Section 11 Orders, the same cannot be considered to be permissible under the Indian law.

In the second part of this paper, I will begin by briefly outlining the nature of proceedings under Section 11 of the Arbitration Act, when juxtaposed against its corresponding provision under the UNCITRAL Model Law. In the third part, I will discuss the concept of review with references to the myriad judicial decisions on the issue. In the fourth part, I will evaluate the issue of maintainability of review against a Section 11 Order on the parameters discussed in the previous heads. Finally, in the fifth part, I will briefly review the possible implications of the recent amendments made to Section 11 of the Arbitration Act, before summarizing my conclusions in the sixth part.

SECTION 11 OF THE ARBITRATION ACT: OVERVIEW

The right to approach the Chief Justice of the Supreme Court, or an appropriate High Court, for appointment of an arbitrator is exercisable in the following circumstances:

i. If the arbitral tribunal is to consist of three arbitrators, and either a party fails to appoint an arbitrator within thirty days from the receipt of a request to do so from the other party, or the two appointed arbitrators are unable to appoint a third arbitrator, then Section 11(4) of the Arbitration Act empowers the Chief Justice to make the requisite appointment on an application made by either party;

ii. In case of arbitration with a sole arbitrator, if the parties are unable to appoint their arbitrator mutually, then Section 11(5) of the Arbitration Act empowers the Chief Justice to appoint the sole arbitrator on an application made by either party;

iii. In case of any departure from the appointment procedure agreed to by the parties, Section 11(6) of the Arbitration Act allows the Chief Justice to appoint arbitrators as a necessary measure to commence the arbitration. As evident, Section 11 of the Arbitration Act caters to a range of circumstances where the parties are unable or unwilling to constitute an arbitral tribunal, notwithstanding the reasons behind the same. The ostensible purpose is to ensure that any difficulty in constituting the arbitral tribunal does not delay the commencement of the intended arbitral proceedings. The question whether the same constitutes a judicial or an administrative function, however, is no longer res integra.

A. Whether Judicial or Administrative?

Section 11 of the Arbitration Act confers upon the Chief Justice the power to appoint arbitrators in certain select circumstances. The said provision corresponds to Article 11 of the UNCITRAL Model Law [''MLA''].[v] In fact, as stated in the Preamble to the Arbitration Act, the said legislation had been enacted ―taking into account the aforesaid Model Law'. However, interestingly, Article 11, MLA, confers the power to appoint an arbitrator on a 'court', or any 'other authority specified in Article 6, of the MLA, and not particularly the Chief Justice. 20 Further, Article 6, MLA permits each country enacting the Model Law to specify the court(s), or another competent authority to appoint an arbitrator under Article 11. The objective behind vesting such discretion with a State is discernible from the Analytical Commentary to the MLA, which states that ''[t]he functions referred to in this article relate to the appointment of an arbitrator… To concentrate these arbitration-related functions in a specific Court is expected to result in the following advantages. It would help parties, in particular foreign ones, more easily to locate the competent court and obtain information on any relevant features of that ''Court'', including its policies adopted in previous decisions. Even more beneficial to the functioning of international commercial arbitration would be the expected specialization of that Court…''

Mindful of the aforementioned objective, the Analytical Commentary proceeds to clarify that the Court designated under Article 6 need not necessarily be a full court at all. ''It may well

be, for example, the president of a court or the presiding judge of a chamber for those functions, which are of a more administrative nature, and where speed and finality are particularly desirable.'' It continues ''that a state may entrust these administrative functions even to a body outside its court system'' such as an arbitration commission or a specialized institution created to handle international disputes. Therefore, the MLA clearly envisages the function of appointment of arbitrators under Article 11 to be a mere administrative function, with absolutely no judicial overtones.

In India, the seeds of a departure from the position under the MLA were initially sown by the 176th Report of the Law Commission of India on The Arbitration and Conciliation (Amendment) Bill, 2001. The Law Commission began by noting that it had been cautioned, by several responses to the Consultation Paper, that it should not go by the ''1940 Act mindset'' but has to keep the UNICTRAL Model Law in mind. However, the Commission went on to opine that "while we should not have the 1940 Act mindset", that does not mean we should have a closed mind and not try to improve on the Model Law. Thus, for an objective consideration of what is best for the parties who seek arbitration, neither an undue adherence to the ''1940 Act mindset'' nor an unnecessary anxiety to maintain ''UNCITRAL mind set'' in its totality is desirable. After discussing the perceived benefits of classifying the function performed under Section 11 as a judicial function, the Law Commission 'proposed that [Section 11] be appropriately amended by substituting the words 'Supreme Court' for the words 'Chief Justice of India' and the words 'High Court' for the words 'Chief Justice of the High Court' a proposal eventually given effect to by the Amendment Act in 2015.[vi]

Subsequently in 2005, a seven-judge-bench of the Supreme Court of India, in S.B.P. & Co. v. Patel Engineering Ltd. [''Patel Engineering''], arrived at a conclusion contrary to the position under the MLA through a majority judgment of 6:1. The majority held, inter alia, that when a statute confers a power on the highest judicial authority, i.e. the Chief Justice of India or that of a High Court, that authority must necessarily act judicially, unless the statute provides otherwise. On such basis, the Supreme Court concluded that,

> ''(i) The power exercised by the Chief Justice of the High Court or the Chief Justice of India under Section 11(6) of the Act is not an administrative power. It is a judicial power…

> (iv) The Chief Justice or the designated judge will have the right to decide the
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> preliminary aspects as indicated in the earlier part of this judgment. These will be, his own jurisdiction to entertain the request, the existence of a valid arbitration agreement, the existence or otherwise of a live claim, the existence of the condition for the exercise of his power and on the qualifications of the arbitrator or arbitrators…
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> (vii) Since an order passed by the Chief Justice of the High Court or by the designated judge of that court is a judicial order, an appeal will lie against that order only under Article 136 of the Constitution of India to the Supreme Court…
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> (viii) There can be no appeal against an order of the Chief Justice of India or a judge of the Supreme Court designated by him while entertaining an application under Section 11(6) of the Act.

In arriving at its conclusions, the majority judgment, in Patel Engineering, overturned a long list of precedents set by lower benches of the Supreme Court in *Ador Samia Pvt. Ltd. v. Peekay Holdings Ltd.*,[vii] *Konkan Railway Corp. Ltd. v. Mehul Constructions*,[viii] and *Konkan Railway Corp. Ltd. v. Rani Constructions Pvt. Ltd.*[ix], wherein Section 11 of the Arbitration Act was agreed to be administrative in nature. However, despite being criticized by scholars and practitioners alike, the law laid down in Patel Engineering continues to hold force for the arbitrations governed by the principal un-amended enactment.

B. Scope of Proceedings

As a corollary to its conclusion, the Supreme Court in Patel Engineering opined that before exercising its jurisdiction under Section 11 of the Arbitration Act, the Chief Justice must be satisfied as to the existence of certain preliminary conditions, or jurisdictional facts, which permit it to exercise jurisdiction in the first place. These include questions as to the territorial jurisdiction, existence of a valid arbitration agreement etc. Moreover, it was noted that the decision of the Chief Justice on such jurisdictional facts shall be binding upon the parties, as well as the arbitral tribunal, in so far that an arbitral tribunal shall not be competent to re-examine such issues, despite being competent to rule on its own jurisdiction under Section 16(1) of the Arbitration Act.

The said findings in Patel Engineering were reiterated with more clarity by a two judge- bench of the Supreme Court in *National Insurance Co. Ltd. v. Boghara Polyfab Pvt. Ltd*[x]. [''Boghara Polyfab'']. Therein, the Supreme Court laid down the following classification:

> ''Where the intervention of the court is sought for appointment of an Arbitral
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> Tribunal under Section 11, the duty of the Chief Justice or his designate is defined in [Patel Engineering]. This Court identified and segregated the preliminary issues that may arise for consideration in an application under Section 11 of the Act into three categories, that is, (i) issues which the Chief Justice or his designate is bound to decide; (ii) issues which he can also decide, that is, issues which he may choose to decide; and (iii) issues which should be left to the Arbitral Tribunal to decide.
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> 22.1. The issues (first category) which the Chief Justice/his designate will have to
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> decide are: (a) Whether the party making the application has approached the appropriate High Court; (b) Whether there is an arbitration agreement and whether the party who has applied under Section 11 of the Act, is a party to such an agreement.
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> 22.2. The issues (second category) which the Chief Justice/his designate may choose to decide (or leave them to the decision of the Arbitral Tribunal) are: (a) Whether claim is a dead (long-barred) claim or a live claim; (b) Whether the parties have concluded the contract/transaction by recording satisfaction of their mutual rights and obligation or by receiving the final payment without objection.
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> 22.3. The issues (third category) which the Chief Justice/his designate should leave exclusively to the Arbitral Tribunal are: (i) Whether a claim made falls within the arbitration clause (as for example, a matter which is reserved for final decision of a departmental authority and excepted or excluded from arbitration); (ii) Merits or any claim involved in the arbitration.

In 2013, the above classification prescribed in Boghara Polyfab was cited with approval by a three-judge-bench of the Supreme Court in *Chloro Controls India Pvt. Ltd. v. Seven Trent Water Purification Inc.*[xi]. It was specifically noted that such classification was ''very much in conformity with the judgment of the Constitution Bench in [Patel Engineering]''.

Subsequently, a two-judge-bench of the Supreme Court, in *Arasmeta Captive Power Co. Pvt. Ltd. v. Lafarge India Pvt. Ltd.*,[xii] while repelling a challenge to the correctness of Boghara Polyfab and Chloro Controls, affirmed that ''the propositions set out in [Patel Engineering]… have been correctly understood by the two-judge-bench in [Boghara Polyfab], and the same have been appositely approved by the three-judge-bench in [Chloro Controls]''.

A perusal of the above march of case law establishes that unlike the MLA, Section 11 of the Arbitration Act in India involves the exercise of a judicial function. Moreover, as already iterated above, prior to appointing an arbitrator under Section 11, the Chief Justice must first necessarily satisfy itself of the existence of certain jurisdictional facts such as the territorial jurisdiction, existence of a valid agreement to arbitrate, and a commonality of the intention of parties. Additionally, the Chief Justice may also decide further questions that have been iterated above. The underlying objective behind such classification appears to be an obstinate belief that the highest judicial authority of India cannot be expected to perform a mere administrative or mechanical function, and that the exercise of its power may eventually be rendered futile if an arbitral tribunal subsequently finds that there does not exist a valid arbitration agreement.

The implications of such a drastic departure from the position under the MLA, and an over-enthusiastic expansion of the jurisdiction of the Chief Justice under Section 1, have created several concerns, which were never contemplated by the Supreme Court in Patel Engineering. Presently, the broad scope of jurisdiction now vested with the Chief Justice under Section 11, the judicial nature of the resultant order, and that it is binding upon the parties, undoubtedly renders a Section 11 Order to be of great strategic significance for either of the two parties. In such a circumstance, the aggrieved party, more often than not, attempts to assail a Section 11 Order in the most expeditious manner possible, i.e. by filing a petition for review before the Chief Justice, who had pronounced the original order. It is in this context that the question of whether a Section 11 Order can be reviewed in the first place assumes crucial importance.

THE CONCEPT OF REVIEW

Justice Oliver Wendell Holmes believed that the object of the study of law is prediction, the prediction of the incidence of public force through instrumentality of courts.40 He emphasized

that law is not something that merely exists on paper; rather, it is what is developed in courts and influenced by the individual experiences of the judges; hence, his statement ‘‘the life of law has not been logic: it has been experience’’. In this context, the term ‘experience’ refers to the subconscious intuition of the judges, while ‘logic’ refers to an attempt to impose some consistency on such intuitively developed law. Though Justice Holmes was never concerned with Arbitration law, and bearing the risk of over-simplification, I believe that his statements amply illustrate the need, and provide a logical justification for a body performing a judicial function to be always vested with the power to review the correctness of its earlier orders. However, even if that were to be true, it is still necessary to assess what is the precise nature and origin of the power of review, and in what circumstances can a judicial authority be considered to possess this power.

In 1970, a three-judge-bench of the Supreme Court in *Narshi Thakershi v. Pradyumansinghji*[xiii] [‘Narshi Thakershi’] was required to determine whether a person acting as a mere delegate of a State Government had the power to review its earlier order. Answering this question in the negative, the Supreme Court explained that the power to review was not an inherent power, and must be conferred by law either specifically or by necessary implication. As such, since the power of review sought to be exercised by the delegate of the State Government could not be sourced to any legislative enactment, the Supreme Court denied its existence.

Thereafter, in 1981, a two-judge-bench of the Supreme Court, in *Grindlays Bank Ltd. v. Central Govt. Industrial Tribunal*,[xiv] [‘Grindlays Bank’] while addressing a similar issue, clarified the position of law laid down in Narshi Thakershi, by drawing a pertinent distinction between the concepts of substantive review and procedural review of an order. The Supreme Court noted that:

> ‘‘.....[Narshi Thakershi] is an authority for the proposition that the power of review is not an inherent power, it must be conferred either specifically or by necessary implication… [However,] the question whether a party must be heard before it is proceeded against is one of procedure and not of power… The expression 'review' is used in two distinct senses, namely (1) a procedural review which is either inherent or implied in a court or Tribunal to set aside a palpably erroneous order passed under a misapprehension by it, and (2) a review on merits when the error sought to be corrected

> is one of law and is apparent on the face of the record. It is in the latter sense that the Court in Narshi Thakershi's case held that no review lies on merits unless a statu[te] specifically provides for it. Obviously when a review is sought due to a procedural defect, the inadvertent error committed by the Tribunal must be corrected ex debito justitiae to prevent the abuse of its process, and such power inheres in every court or Tribunal.

The underlying rationale behind the above conclusion pertains to the very nature of the function being performed by a particular body. In Grindlays Bank, the Supreme Court relied upon ''a well-known rule of statutory construction that a Tribunal or a body should be considered to be endowed with such ancillary or incidental powers as are necessary to discharge its functions effectively for the purpose of doing justice between the parties… unless there is any indication in the statute to the contrary. This implies that a body, as long as it is exercising a judicial function, will be considered to possess an inherent power to review its earlier orders on procedural grounds, irrespective of whether it can be categorized as a court or a tribunal. The assertion stands duly affirmed by the fact that the principle of inherent power has been recognized to extend even to an arbitral tribunal, which is merely a creation of a private contract. The power to review the substance of such orders, however, must still be vested by an applicable statute.[xv]

This being the legal position, questions still remained as to what may be these procedural grounds on the basis of which a body may review its earlier judicial orders. This aspect was clarified in 2005 by a three-judge bench of the Supreme Court in *Kapra Mazdoor Ekta Union v. Management of Birla Cotton Spinning and Weaving Mills Ltd.*[xvi] Therein, the Supreme Court was required to assess whether a tribunal had the jurisdiction to recall its earlier order, which in its opinion, essentially constituted a review of the order. Interpreting the two decisions in Narshi Thakershi and Grindlays Bank in harmony, the Supreme Court reiterated the distinction between substantive and procedural review to conclude that:

''Where a Court or quasi-judicial authority having jurisdiction to adjudicate on merit proceeds to do so, its judgment or order can be reviewed on merit only if the Court or the quasi-judicial authority is vested with power of review by express provision or by necessary implication. The procedural review belongs to a different category. In such a review, the Court or quasi-judicial

authority having jurisdiction to adjudicate proceeds to do so, but in doing so commits a procedural illegality which goes to the root of the matter and invalidates the proceeding itself, and consequently the order passed therein.

Cases where a decision is rendered by the Court or quasi-judicial authority without notice to the opposite party or under a mistaken impression that the notice had been served upon the opposite party, or where a matter is taken up for hearing and decision on a date other than the date fixed for its hearing, are some illustrative cases in which the power of procedural review may be invoked. In such a case, the party seeking review or recall of the order does not have to substantiate the ground that the order passed suffers from an error apparent on the face of the record or any other ground which may justify a review. He has to establish that the procedure followed by the Court or the quasi-judicial authority suffered from such illegality that it vitiated the proceeding and invalidated the order made therein… The order passed is liable to be recalled and reviewed not because it is found to be erroneous, but because it was passed in a proceeding which was itself vitiated by an error of procedure or mistake which went to the root of the matter and invalidated the entire proceeding.

Accordingly, the concept of review can be understood either as a review of the merits of a judicial order, or a review of the procedure followed in rendering the same. While the latter is a power inherent in a court or any judicial authority to set aside a palpably erroneous order passed by it under a misapprehension, the former is a power of law that involves correction of an error apparent on the face of the record.[xvii] The said distinction has immense bearing on the issue pertaining to the maintainability of a review against a Section 11 Order; the implication being that the power of a Chief Justice to review the merits of its earlier orders for appointment of arbitrators must necessarily be sourced to a provision under the Arbitration Act or another applicable statute. In the absence of the same, it is likely that a Section 11 Order passed by a Chief Justice may only be amenable to a review on procedural grounds.

MAINTAINABILITY OF REVIEW AGAINST A SECTION 11 ORDER

Substantive Review/ Review on Substantive Grounds

In India, it is settled that the power of a judicial authority to review its earlier orders will exist only if it is provided for, either specifically or by implication, by a statutory enactment. Therefore, for a Chief Justice to review its Section 11 Orders, the power to do so must be sourced to a provision in a relevant legislative enactment, such as the Arbitration Act or the Code of Civil Procedure, 1908 it contains the provisions concerning the establishment, jurisdiction and the powers of the Supreme Court. Accordingly, the subsequent analysis is conducted under the following:

i. Arbitration & Conciliation Act, 1996

The Arbitration Act is a special enactment that integrates various laws relating to arbitration in India, earlier governed by three separate legislations, viz. the Arbitration Act, 1940, the Arbitration (Protocol and Convention) Act, 1937, as well as the Foreign Awards (Recognition and Enforcement) Act, 1961. The same is evident from a bare perusal of the Statement of Objects and Reasons of the Act, which acknowledges that the Act had been introduced ‘‘to consolidate and amend the law relating to domestic arbitration, international commercial arbitration, enforcement of foreign arbitral awards,’’ and ‘‘to comprehensively cover international commercial arbitration… as also domestic arbitration.’’ Therefore, the Arbitration Act is rightly considered to lay down a holistic set of rules for governing various aspects concerning arbitration in India, including a mechanism for appointment of arbitrators. However, despite being a holistic self-contained code, the said Act nowhere confers upon the Chief Justice a power to review its earlier Orders under Section 11.

Considering the fact that the Arbitration Act was intended to comprehensively cover the various aspects concerning both international and domestic commercial arbitration in India, the absence of any provision expressly conferring upon the Chief Justice the power to review its earlier Section 11 Orders is crucial. One may infer that since the Arbitration Act is a self-contained special code, it impliedly excludes the applicability of the general procedural law. Thus, where the special Act does not provide the Chief Justice with a power to review its Section 11 Order, the legislative intent behind such non-conferment must be acknowledged.

In *Sanjay Gupta v. KSIDC, T.B. Radhakrishnan*,[xviii] J. of the Kerala High Court arrived at a similar conclusion, when he opined that ―the [Arbitration Act] is a comprehensive one and is not one which confers power on the High Court to pass any order under Section 11… unless a

power of review is expressly conferred under the Act itself, the general power of review as may be available to the High Court under other jurisdictions; civil, criminal or writ; cannot be extended to review the earlier order issued by Chief Justice or his nominee.'' Likewise, in *Amber Enterprises v. TVS Electronics Ltd., Surjit Singh,*[xix] J. of the High Court of Himachal Pradesh relied on the decision in Patel Engineering to note that ''there is no provision of review of an order passed, under Section 11 of the Arbitration and Conciliation Act, 1996, by the Chief Justice of the High Court or the Judge designated by him'', and therefore, the only remedy that is available to an aggrieved person is to assail a Section 11 Order of the Chief Justice of a High Court before the Supreme Court by way of a Special Leave Petition under Article 136 of the Constitution of India.

The rationale behind the aforementioned assertion may be further elucidated by drawing an analogy with the decision rendered by the Supreme Court of India in *Fuerst Day Lawson Ltd. v Jindal Exports Ltd.*[xx] [''Fuerst Day Lawson'']. In Fuerst Day Lawson, a twojudge- bench of the Supreme Court was required to assess whether an order, if not appealable under Section 50 of the Arbitration Act, could be subject to an appeal under the Letters Patent of the High Court. —In other words, even though the Arbitration Act does not envisage or permit an appeal from the order, [whether] the party aggrieved by it can still have his way, by-passing the Act and taking recourse to another jurisdiction? Answering this question in the negative, the Supreme Court reasoned that: Arbitration Act 1940, from its inception and right through 2004 was held to be a self-contained code. Now, if Arbitration Act, 1940 was held to be a self-contained code, on matters pertaining to arbitration the Arbitration and Conciliation Act, 1996, which consolidates, amends and designs the law relating to arbitration to bring it, as much as possible, in harmony with the UNCITRAL Model must be held only to be more so. Once it is held that the Arbitration Act is a self-contained code and exhaustive, then it must also be held… that it carries with it a negative import that only such acts as are mentioned in the Act are permissible to be done and acts or things not mentioned therein are not permissible to be done. In other words, a Letters Patent Appeal would be excluded by application of one of the general principles that where the special Act sets out a self-contained code the applicability of the general law procedure would be impliedly excluded.''

Undeniably, the reasoning enunciated by the Supreme Court in Fuerst Day Lawson may very well be extended to negate the existence of the Chief Justice's power to review its Section 11

Order. However, it is equally possible to differentiate the decision in Fuerst Day Lawson on the basis of the context in which the ratio was laid down, i.e. to emphasize that the appellate remedies under the Arbitration Act are exhaustive in nature. Accordingly, the proposition that the Arbitration Act completely ousts the application of the general procedural law, including the Code of Civil Procedure, 1908 [''CPC''] and the Constitution of India [''Constitution''], is itself dubious. In fact, the Supreme Court of India in *Hakam Singh v. Gammon (India) Ltd.*[xxi], by relying on Section 41 of the Arbitration Act of 1940, had clarified that the Code of Civil Procedure applies to proceedings under the said enactment,60 with the principle being followed in context of the Arbitration Act as well.61 Thus, even though the power to review a Section 11 Order cannot be sourced to a provision under the Arbitration Act, it shall be appropriate to ascertain whether such power may still emanate from a provision outside the purview of the Arbitration Act.

ii. Code of Civil Procedure, 1908

In any event, Article 137 of the Constitution is limited to the power of the Supreme Court to review its earlier judgments or orders, and does not apply to the High Courts. The High Courts, instead, derive their power of review from Section 114 and Order XLVII of the CPC. As such, it still remains to be seen whether the Chief Justice of a High Court, in the context of domestic arbitrations, can derive its power to review a Section 11 Order from the above provisions under the CPC.

Section 114, CPC states that ''any person considering himself aggrieved – (a) by a decree or order from which an appeal is allowed by this Code, but from which no appeal has been preferred; (b) by a decree or order from which no appeal is allowed by this Code; or (c) by a decision on a reference from a Court of Small Causes, may apply for a review of judgment to the Court which passed the decree or made the order, and the Court may make such order thereon as it thinks fit.''[xxii]

Order XLVII, Rule 1, CPC also provides that any person considering himself aggrieved by any of the above described decrees or orders, ''and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any

other sufficient reason, desires to obtain a review of the decree passed or order made against him may apply for a review of judgment to the Court which passed the decree or made the order.'' In this regard, the expression ''sufficient reason' is of sufficiently wide import to include any kind of misconception of fact or law by a Court or even by an advocate.''

It is pertinent to note that notwithstanding its criticism, the decision rendered by Thakker, J. in Jain Studios continues to be cited with tremendous vigor before various High Courts to assert the existence of the power of review vis-à-vis a Section 11 Order. It is often contended that though a High Court derives its power of review from Section 114 and Order XLVII of CPC, and not Article 137 of the Constitution, a Chief Justice of a High Court, just like the Chief Justice of India, can still review its orders under Section 11 of the Arbitration Act. Fortunately, time and again, different High Courts have repelled such misplaced contentions and refused to blindly follow the decision laid down in Jain Studios.

For instance, in *N. S. Atwal v. Jindal Steel and Power Ltd.*[xxiii], a Division Bench of the Delhi High Court aptly differentiated the decision in Jain Studios by reasoning that it pertains to Article 137, which applies only to the Supreme Court, and not to the High Courts. On this basis, the Division Bench rightly concluded that Jain Studios cannot be regarded as an authority for the proposition that a review petition is maintainable against a Section 11 Order passed by a Chief Justice of a High Court. Similarly, A.K. Ganguly, C.J. of the Orissa High Court in *Narendra Nath Panda & Co. v. Union of India*[xxiv], in his succinctly worded judgment, opined that:

> *''... in so far as the High Court is concerned, Article 137 is not applicable. The review power available to the High Court normally flows from the Code of Civil Procedure under Order 47 and Section 114 thereof. The Constitution does not vest the High Court with any power of review. In so far as Supreme Court is concerned it enjoys a constitutional power of Review which is very special power and is part of Chapter IV of the Constitution. Supreme Court's powers under Article 141, 142 are also part of that Chapter. Therefore, the ratio in the case of Jain Studios is applicable only in the case of an order passed by the Hon'ble Chief Justice of India or the nominated Judge appointed by the Hon'ble Chief Justice of India but the same is not attracted to the orders passed by the Hon'ble Chief Justice of a*

> *High Court or his nominee. The ratio in the case of Jain Studios is therefore not attracted to the order passed by the Hon'ble Chief Justice of a High Court or his nominee in respect of an order under Section 11(6) of [the Arbitration Act].''*

On the other hand, having differentiated the applicability of the decision in Jain Studios, numerous High Courts have continuously denied the maintainability of review against a Section 11 Order by relying upon the observations of the Supreme Court in Patel Engineering, which have already been extracted above. Such decisions portray a far more nuanced understanding of not only the import of Section 11 of the Arbitration Act, but also of the object of minimum judicial intervention as codified in Section 5 of the said Act. The decisions to this effect are in plenty.

In 2008, B.D. *Ahmed, J., in Shivraj Gupta v. Deshraj Gupta*[xxv], opined that after reading the ratio laid down by the Supreme Court in Patel Engineering, ''it immediately becomes clear that the power under Section 11(6) of the said Act is not conferred on the High Court but is conferred on the Chief Justice of the High Court… the power that is exercised under Section 11(6) by the Chief Justice or his designate is not a power which is exercised by them as a Court and, therefore, would not be governed by the normal procedure of that court which includes the right of appeal as well as the power of review, revision etc.''

In a 2010, a decision titled *Shivhare Builders v. Executive Engineer, PWD*[xxvi], F.I. Rebello, then C.J. of the Allahabad High Court also held that "on a conjoint reading of the scheme of the Act and the power traceable in the Chief Justice… the Chief Justice is not a Court who (sic) can exercise the power of substantive review as it has not been specifically conferred. At the highest, what would be the inherent would be only the power of procedural review. In the instant case, the review is not sought on the ground that the application was dismissed ex parte or in the absence of the Petitioner or his counsel. Section 5 of the Act shall also be read in that context, namely, that the judicial authority will only exercise powers conferred upon it." Similarly, in 2011, V. Gopala Gowda, the then C.J. of the Orissa High Court in *G. C. Kanungo v. Rourkela Steel Plant & Anr.*[xxvii], held that "review is in the nature of a remedy and is a substantive part. Therefore, when the Legislature has consciously given, under Section 11(7) of the Act, finality to a decision of the Chief Justice or his designate under Section 11(6) of the Act, and has not provided for

review, then to read a right of review in such provisions by an interpretation process would, amount to amending the statute by reading something into it which is clearly not there. Such an interpretation would fall foul of Section 5 of the Act."

Therefore, a consideration of the provisions contained in the Constitution, as well as the CPC, conclusively affirms that notwithstanding the decision in Jain Studios, the Chief Justice of India or that of a High Court is not competent to review the merits or substance of its earlier Section 11 Orders as it has not been conferred with any such power either under the Arbitration Act or any other applicable enactment in this regard.

The Impact of the Arbitration & Conciliation (Amendment) Act, 2015

The Amendment Act of 2015 has altered the entire scheme of Section 11 of the Arbitration Act drastically as an attempt to minimize judicial intervention at the pre- arbitration stage. In particular, the power to appoint arbitrator(s) has been transferred from the Chief Justice to the Supreme Court of India, and the concerned High Court as the case may be. The fact that the said amendment shall apply ''notwithstanding any judgment, decree or order of any Court'' indicates the legislative intent to overrule the rather expansive interpretation preferred by the Supreme Court of India in Patel Engineering.

Since the power to appoint arbitrator(s) is now vested with the Supreme Court of India and the High Court, it may follow that the resultant Section 11 Order shall be judicial in nature. However, transferring the said power from one authority to another is not the only change introduced by the Amendment Act. The newly introduced Section 11(6B) of the amended Act states that ''[t]he designation of any person or institution by the Supreme Court or, as the case may be, the High Court, for the purposes of this Section shall not be regarded as a delegation of judicial power by the Supreme Court or the High Court.'' On a bare reading, this implies that if the power to appoint arbitrator(s) under Section 11 is exercised by the Supreme Court or the High Court, the same is judicial in nature. However, where it is delegated to another person or institution, it shall not entail the exercise of a judicial function. Undoubtedly, the reasoning behind such distinction remains unclear. Further, one may even construe the said provision as indicating the nature of this power to appoint arbitrator(s), irrespective of who it is exercised by. Notwithstanding the myriad ways in which the amended Section 11 may be interpreted in the near future, the ostensible intention

behind the recent amendments appears to not focus on the administrative-judicial debate initiated in the judicial corridors of India, but on limiting the scope of intervention under Section 11. Indeed, such an approach would be in line with the observations made by the Law Commission of India in its 246th Report, wherein it noted that ''[u]nfortunately… the question before the Supreme Court was framed in terms of whether such a power is a judicial or an administrative power, which obfuscates the real issue underlying such nomenclature/ description…''

Another significant alternation made by the Amendment Act pertains to Section 11(7) of the Arbitration Act. Earlier, Section 11(7) provided that ''[a] decision on a matter entrusted by [Sections 11(4), 11(5) or 11(6)] to the Chief Justice or the person or institution designated by him is final.'' However, the amended provision not only makes any similar decision taken by the Supreme Court of India, or the concerned High Court final, but expressly states that ''no appeal including Letters Patent Appeal shall lie against such decision.'' The arrayed amendments raise three significant aspects concerning the maintainability of review against a Section 11 Order, as discussed in context of the un- amended Arbitration Act.

First, the transfer of the power to appoint arbitrator(s) to the Supreme Court of India, and the concerned High Courts, allows the said courts to rely on their respective powers to review their earlier orders. In other words, the Supreme Court and the High Courts can now source their power to review a Section 11 Order from Article 137 of the Constitution of India, and Section 114 of CPC respectively; something that was beyond the purview of a Chief Justice. After all, the conferment of such power on the Chief Justice, and not the High Courts, was the dominant concern raised in most decisions highlighted above, which now stands remedied by the recent amendments.

Second, in stark contrast, when the power under Section 11 is delegated to an institution or any person, such person, not being the Supreme Court or the High Court, will not be able to derive his or her power to review from the Indian Constitution or the CPC as the case may be. In fact, Section 11(6B) of the Arbitration Act expressly clarifies that such delegation shall not be regarded as delegation of a judicial power. As such, owing to the administrative nature of the delegation, an institution or person entrusted with the task of appointing an

arbitrator(s) will not possess the inherent power to review its earlier Section 11 Orders even on procedural grounds.

Finally, as stated above, Section 11(7) of the amended Arbitration Act expressly excludes the possibility of filing an appeal, including Letters Patent Appeal against a Section 11 Order. If read in conjunction with Section 5 of the Arbitration Act, one may construe this provision as prohibiting the review procedure as well. However, as tempting as it may be, a review is distinct from an appellate proceeding. On the face of it, while the latter is preferred against an appellate court situated higher in the judicial hierarchy, the former is filed before the same judicial authority that had passed the order now sought to be assailed. Nonetheless, this new insertion in Section 11(7) allows the Indian courts an opportunity to attach a more rigid sense of finality to a Section 11 Order, in line with Section 5 of the enactment.

CONCLUSION

The ostensible object behind the decision in Patel Engineering, which recognized Section 11 Orders to be judicial in nature, was to limit the remedies available to an aggrieved party against the Order of the Chief Justice. This is precisely why the majority judgment had amply clarified that an aggrieved party can assail a Section 11 Order only by way of a Special Leave Petition under Article 136 of the Constitution. However, in the event the Section 11 Order is rendered by the Chief Justice of India in context of an international commercial arbitration, even this remedy ceases to exist. It is this very objective that stands completely nullified if a Chief Justice is considered to be competent to review its earlier Section 11 Orders on both substantive and procedural grounds.

Admittedly, the power of procedural review of a judicial order is an inherent power of each body that exercises a judicial function, and as such, will also include the Chief Justice of India, or a High Court, acting under Section 11 of the Arbitration Act. However, it is equally true that no such power has been conferred upon the said Chief Justice under any applicable law in case a review is sought on the substance of an earlier Section 11 Order. To this extent, I am in agreement with the view taken by various High Courts in permitting a

procedural review of a Section 11 Order, but dismissing all applications seeking to review the substance or merits of such order. However, the anomalous decision by Thakker, J. in Jain Studios has created a bizarre situation that warrants rectification for the simple reason that it creates an artificial distinction between an international commercial arbitration, and a non-international or domestic arbitration. Presently, if an order is passed by the Chief Justice of India under Section 11 of the Arbitration Act in relation to an international commercial arbitration, then such order may be reviewed by the Chief Justice on both procedural and substantive grounds as per the decision in Jain Studios. However, where a Section 11 Order emanates from the Chief Justice of a High Court in context of a non-international commercial arbitration, then it can only be reviewed to correct a procedural irregularity and not on its substance.

Interestingly, the above-described inconsistency may already have been mitigated by the decision of a three-judge-bench of the Supreme Court of India in Associated Contractors. It is pertinent to take note that the decision in Jain Studios is essentially an order of a Chief Justice's designate reviewing its earlier order under Section 11 of the Arbitration Act, and not a judgment given by the Supreme Court. In this regard, Article 141 of the Constitution, which prescribes the law declared by the Supreme Court of India to be binding on all courts within territory of India, does not appear to render any binding force or precedential value to any Section 11 Order of the Chief Justice of India, including the decision in Jain Studios. Thus, in light of the observations of the Supreme Court in Associated Contractor that a Section 11 Order, not being an order of the Supreme Court or the High Court, has no precedential value, there is sufficient room to argue that the decision given in Jain Studios is not a binding precedent to be followed by other courts in India.

Such argument would certainly not be unprecedented. For instance, in N S Atwal, the Division Bench of the High Court of Delhi had noted that *''...power under Section 11(6) is the power of a designate referred to under the section and not that of the Supreme Court, albeit that it has now been held to have judicial characteristics. Since this is the power of the Chief Justice and not the power of the Supreme Court, the specification in Order VII Rule 1 of the Supreme Court Rules, 1966 prescribing the minimum number of Judges, would have no application thereto. It necessarily follows that a chamber decision does not have the trappings of a binding precedent for this very same reason.''*

Recently, in *Sasan Power Ltd. v. North American Coal Corporation India Pvt. Ltd.*[xxviii], the Counsel appearing for the Respondent, had submitted before the Division Bench of the High Court of Madhya Pradesh (Jabalpur Bench) that ''even though the order passed in [a Section 11 proceeding] is subject to judicial review under Article 226 and 227 of the Constitution, but the proceedings are not before a Court and once the order passed in a proceeding under Section 11 is not by a Court, it will not have the effect of law, laid down by the Supreme Court as envisaged under Article 141 of the Constitution.'' Unfortunately though, the Division Bench did not consider it necessary to ''go into all these questions.''

Nonetheless, it must not be overlooked that the artificial distinction created between an international and a non-international commercial arbitration vis-à-vis the legal treatment of a Section 11 Order is completely erroneous and devoid of any merit. As such, the compelling need to rectify the same cannot be overstated. In fact, the Supreme Court of India has been afforded such an opportunity vide the Special Leave Petition filed against the judgment pronounced by F.I. Rebello, then C.J. of the Allahabad High Court, in Shivhare Builders.

Lastly, the impact of the various amendments made by the Amendment Act of 2015 is quite severe, largely reversing the position of law as regards maintainability of review against a Section 11 Order under the previous enactment. Considering that these amendments make it easier for the aggrieved parties to file a review petition against a Section 11 Order, it adds a further obstruction for those hoping for minimized pre-arbitration judicial intervention. The coming years should clarify the precise scope of operation of the said amendments. However, since the two arbitration regimes are likely to operate simultaneously for a significant period of time, what is clear is that the Indian judiciary is bound to face more questions than answers in the coming years. One prays, literally so, that the Indian judiciary is able to add the desired clarity on the controversies surrounding the present question.

ENDNOTES

[i] Gary B Born, International Commercial Arbitration, 65 (2010).
[ii] Section 2 (1)(f) of The Arbitration & Conciliation Act, 1996.
[iii] Section 6 of The Arbitration & Conciliation (Amendment) Act, 2015.
[iv] S.B.P. & Co. v. Patel Engineering Ltd., (2005) 8 SCC 618.
[v] Markanda P.C, Law Relating to Arbitration and Conciliation, 8th edition, 2013.
[vi] Law Commission of India, 176th Report on The Arbitration & Conciliation (Amendment) Bill, 2001.
[vii] (1999) 8 SCC 572.
[viii] (2000) 7 SCC 201.
[ix] (2000) 8 SCC 159.
[x] (2009) 1 SCC 267.
[xi] (2013) 1 SCC 641.
[xii] AIR 2014 SC 525.
[xiii] AIR 1970 SC 1273.
[xiv] AIR 1981 SC 606.
[xv] Senbo Engineering Ltd. v. State of Bihar, AIR 2004 Pat 33.
[xvi] (2005) 13 SCC 777.
[xvii] Food Corporation of India v. Regional Provident Fund Commissioner, W.P. (C) 5678/2013, 11th March, 2015 at page no. 18.
[xviii] (2009) 4 KLT 147.
[xix] OMP No. 22/2010 in Arb. Case no. 28 of 2019.
[xx] (2011) 8 SCC 333.
[xxi] (1971) 1 SCC 286.
[xxii] Section 114 of the Code of Civil Procedure, 1908.
[xxiii] (2011) 178 DLT 454.
[xxiv] 2007 (Supp.) OLR 141.
[xxv] RP no. 445/2007 in Arb. P. in 101/2005, 2nd February, 2008.
[xxvi] 2011 (3) ADJ 414.
[xxvii] 2012 (1) ILR 1.
[xxviii] (2008) 14 SCC 271.