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Supreme Court of India clarifies that an order appointing an arbitrator prior to the 2015 amendment operates as *res judicata* on the existence and validity of the arbitration agreement

The Supreme Court of India ("**Supreme Court**"), in ***Eminent Colonizers Private Limited vs. Rajasthan Housing Board and Ors***[1], set aside orders of the High Court of Rajasthan ("**Rajasthan HC**") and the Commercial Court, Rajasthan ("**Commercial Court**") which had re-examined the existence and validity of an arbitration clause at the stage of proceedings under Section 34[2] of the Arbitration and Conciliation Act, 1996 ("**Arbitration Act**").

Prior to the Arbitration and Conciliation (Amendment) Act, 2015[3] ("**Amendment Act**"), courts exercising powers under Section 11[4] of the Arbitration Act were required, under the regime laid down in *SBP & Co. vs. Patel Engineering Limited*[5] ("**SBP & Co.**") to judicially determine both the 'existence' and 'validity' of an arbitration agreement before appointing an arbitrator. The Supreme Court held that such a determination, once accepted by the parties without challenge, operates as *res judicata* and cannot be re-agitated before the arbitral tribunal at the stage of proceedings under Section 34 of the Arbitration Act.

Brief facts

1. Eminent Colonizers Private Limited ("**Eminent**") was awarded separate construction contracts by Rajasthan Housing Board ("**RHB**") in 2007 and 2009 respectively. Disputes arose under Clause 45 of the agreements concerning escalation costs of labour and material. The arbitration clause in both contracts provided for referral of disputes to an empowered Standing Committee comprising government officers.
2. Eminent filed applications under Section 11 of the Arbitration Act before the Rajasthan HC. The court appointed sole arbitrators to adjudicate the dispute. RHB did not challenge the Section 11 orders.
3. The arbitrators entered upon the reference and passed awards in favour of Eminent. RHB challenged the awards under Section 34 of the Arbitration Act before the Commercial Court, contending that the agreements did not have valid arbitration clauses.

[1] 2026 SCC OnLine SC 148 (decided on February 4, 2026)
[2] Section 34 of the Arbitration Act provides for exclusive provision for challenging an arbitral award, permits setting aside of the award only on the narrow grounds specified therein, including violation of public policy of India and, for domestic awards, patent illegality on the face of the award.
[3] The Arbitration and Conciliation (Amendment) Act, 2015 came into effect on October 23, 2015.
[4] Section 34 of the Arbitration Act governs the appointment of arbitrators, allowing parties to select arbitrators and providing court intervention if appointments fail.
[5] (2005) 8 SCC 618

4. The Commercial Court accepted RHB's contention and set aside the awards, holding that the Section 11 order did not have precedential value and that the question of whether Clause 23 was an arbitration clause remained open. The Rajasthan HC in appeal, upheld the Commercial Court's order.

Issue

Whether in the *SBP & Co.* regime (i.e., prior to the Amendment Act), the courts were justified in setting aside the award by holding that Clause 23 of the contract was not an arbitration agreement?

Findings and analysis

The Supreme Court allowed the appeals, set aside the orders of the Commercial Court and the Rajasthan HC, and remanded the matters for hearing on all remaining Section 34 grounds. The Supreme Court reasoned as follows:

1. Under the *SBP & Co.* regime, the function of a Section 11 court was judicial and not merely administrative. The Section 11 court was bound to determine:
   a) whether an arbitration agreement existed in terms of Section 7 of the Arbitration Act;
   b) whether the applicant was a party to such agreement; and
   c) whether the conditions for exercise of the court's power were fulfilled. By virtue of Section 11(7)[6] of the Arbitration Act, the Section 11 court's determination on these matters was conferred statutory finality.
2. The introduction of Section 11(6A) by the Amendment Act brought about a paradigm shift, confining the Section 11 court's inquiry to the examination of the mere 'existence' of an arbitration agreement and leaving the question of 'validity' to the arbitral tribunal under Section 16 of the Arbitration Act. However, the Amendment Act was expressly prospective in operation and did not apply to the arbitral proceedings in the present case, which had commenced prior to October 23, 2015.
3. The Supreme Court drew a clear conceptual distinction between precedent and *res judicata.* A precedent operates *in rem* and binds all parties under the jurisdiction of the court. *Res judicata* operates *in personam* between the same parties in subsequent proceedings. The Section 11 order in the present case, having been accepted by RHB without challenge, operated as *res judicata* between the same parties on the question of existence and validity of the arbitration agreement. The Section 34 court had erred in treating the Section 11 order as non-binding.
4. Even though the Section 11 order did not contain an express finding that Clause 23 was an arbitration clause, the Supreme Court held that there was an implied holding to that effect. An arbitrator could not have been appointed without such a finding, the appointment would otherwise have been without jurisdiction. A party that accepted the order and did not challenge it could not subsequently deny the existence of the agreement.
5. The correctness of the Section 11 order was immaterial. Relying on *Canara Bank vs. N.G. Subbaraya Setty*,[7] the Supreme Court reiterated that *res judicata* binds the parties regardless of whether the earlier decision was right or wrong, subject only to the exception where the erroneous determination relates to the jurisdiction of the body itself.

Conclusion

The Supreme Court's decision clarifies the binding effect of unchallenged Section 11 orders passed in the *SBP & Co.* regime (i.e., prior to the Amendment Act). It reinforces that a party which accepts such an order without appeal cannot seek to re-open the foundational question of whether an arbitration agreement exists, either before the arbitral

[7] (2018) 16 SCC 228

tribunal or in Section 34 proceedings, thereby curtailing the multiple stages of challenge that may be available to a party. The decision also articulates the distinction between the pre and post Amendment Act regimes. Under the pre-Amendment Act regime, the Section 11 court's determination on 'existence' and 'validity' was final and binding and under the post Amendment Act regime, only the 'existence' of an agreement is examined at the Section 11 stage, with 'validity' left to the tribunal.

This decision is significant for clients with pending or prospective Section 34 proceedings arising from pre Amendment Act arbitrations, as it forecloses a commonly attempted avenue of challenge i.e., contesting the validity of the arbitration agreement at Section 34 stage, where the Section 11 appointment order was accepted and not appealed.

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