



KOCHHAR & Co.
ADVOCATES & LEGAL CONSULTANTS



India: Arbitrability of Disputes Arising Out of Builder-Buyer Agreements

17 July 2017

by [Alok Tewari](#) (Gurgaon) and [Yudhist Singh](#) (Gurgaon)

Kochhar & Co.

Your **[LinkedIn Connections](#)**
with the authors

In a pivotal order, the NCDRC has held that the arbitration clause in a builder-buyer agreement cannot circumscribe the jurisdiction of consumer forums.

Introduction

A three member panel of the National Consumer Disputes Redressal Commission ("NCDRC") while hearing a number of clubbed petitions between developer Emaar MGF Land Limited and various home-buyers passed an order dated 13 July 2017 and held that an arbitration clause in a builder-buyer agreement cannot circumscribe the jurisdiction of the consumer forum irrespective of the amendments made to Section 8 of The Arbitration and Conciliation. (Amendment) Act, 2015. [3 of 2016] ("**Arbitration Act**").

Facts

The developer (the complainant) had filed a set of applications under Section 8 of the Arbitration Act praying that the issues raised by the opposite parties be referred to arbitration in terms of the dispute resolution clauses in the builder-buyer agreements executed between the developer and them for the purchase of immovable properties located in Gurgaon/Mohali. The aggrieved home-buyers had alleged that the developer had failed to deliver timely possession of their properties and the aggrieved parties had approached the consumer forum seeking remedy.

Issues

The major issue before the NCDRC was whether under Section 8(i) of the Arbitration Act the NCDRC had valid jurisdiction to pass directions in the aforementioned matters or was it a mandatory requirement for the NCDRC to refer the parties to arbitration unless it found that prima facie no valid arbitration agreement existed in the builder-buyer agreements. Under Section 8(i) of the Arbitration Act, unless the judicial authority finds that prima facie no valid arbitration agreement exists, the relevant judicial/quasi-judicial authority is obliged to refer the parties to arbitration in the event that a valid arbitration agreement exists.

Section 8(i) of the Arbitration Act is as follows:

"(1) A judicial authority, before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party to the arbitration agreement or any person claiming through or under him, so applies not later than the date of submitting his first statement on the substance of the dispute, then, notwithstanding any judgment, decree or order of the Supreme Court or any Court, refer the parties to arbitration unless it finds that prima facie no valid arbitration agreement exists.";

Observations

The three member panel of the NCDRC observed that prior to the amendments brought about by the Arbitration Act, the Hon'ble Supreme Court of India had previously resolved and clearly settled that consumer forums are not bound to refer disputes to arbitration under Section 8 of the Arbitration Act.

In the present matter, the NCDRC analysed whether an arbitral clause if empowered through a statutory amendment can undermine or nullify other statutory protections afforded to certain categories of disputes. The NCDRC as part of its analysis discussed the legislative intent behind the amendments to the Arbitration Act and jurisprudence on the arbitrability of consumer disputes.

It took into consideration several landmark judgments laid down by the Hon'ble Supreme Court and relied heavily on the observations made by the apex court in **National Seed Corporation Limited vs. M. Madhusudhan Reddy & Anr**¹ wherein it held as follows:

"The remedy of arbitration is not the only remedy available to a grower. Rather, it is an optional remedy. He can either seek reference to an arbitrator or file a complaint under the Consumer Act. If the grower opts for the remedy of arbitration, then it may be possible to say that he cannot, subsequently, file complaint under the Consumer Act. However, if he chooses to file a complaint in the first instance before the competent Consumer NCDRC, then he cannot be denied relief by invoking Section 8 of the Arbitration and Conciliation Act, 1996 Act. Moreover, the plain language of Section 3 of the Consumer Act makes it clear that the remedy available in that Act is in addition to and not in derogation of the provisions of any other law for the time being in force."

The NCDRC also stressed on the observations made by the Hon'ble Supreme Court in **National Insurance Company Ltd. Vs. Hindustan Safety Glass Works Ltd.**² wherein it held as follows:

"...in a dispute concerning a consumer, it is necessary for the courts to take a pragmatic view of the rights of the consumer principally since it is the consumer who is placed at a disadvantage vis-à-vis the supplier of services or goods. It is to overcome this disadvantage that a beneficent legislation in the form of the Consumer Protection Act, 1986 was enacted by Parliament."

Order:

The NCDRC arrived at the following conclusions:

- i. the disputes which are to be adjudicated and governed by statutory enactments, established for specific public purpose to sub-serve a particular public policy are not arbitrable;
- ii. there are vast domains of the legal universe that are non-arbitrable and kept at a distance from private dispute resolution;
- iii. the subject amendment was meant for a completely different purpose, leaving status quo ante unaltered and subsequently reaffirmed and restated by the Hon'ble Supreme Court;
- iv. Section 2(3) of the Arbitration Act recognizes schemes under other legislations that make disputes non-arbitrable and,
- v. in light of the overall architecture of the Consumer Act and Court-evolved jurisprudence, amended sub-section (1) of Section 8 cannot be construed as a mandate to the Consumer Forums, constituted under the Act, to refer the parties to Arbitration in terms of the Arbitration Agreement.

Comment:

Prior to the amendments in the Arbitration Act, it was a settled position of law that consumer forums were not bound to refer disputes to arbitration under Section 8 of the Arbitration Act.

In terms of this order, the NCDRC has upheld the supremacy of the Consumer Protection Act, 1986 ("**Consumer Act**") in such disputes and has brought clarity to the interpretation of Section 3 which states that the protection afforded to persons under the Consumer Act "*shall be in addition to and not in derogation of the provisions of any other law for the time being in force.*"

Given the impact of the judgment, the order of the NCDRC may be further challenged which might tantamount to amendments/interpretation of the aforementioned laws in the future.

Footnotes

1 National Seeds Corpn. Ltd vs M.Madhusudhan Reddy & Anr on 16 January, 2012

*The content of this article is intended to provide a general guide to the subject matter.
Specialist advice should be sought about your specific circumstances.*

AUTHOR(S)



Alok Tewari
Kochhar & Co.



Yudhist Singh
Kochhar & Co.

