

Section 11 And The Vanishing Threshold: How Far Can A Court Look Before Appointing An Arbitrator?

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ABSTRACT

Section 11 of the Arbitration and Conciliation Act, 1996 occupies a critical position at the threshold of arbitral proceedings because it determines the extent to which courts may intervene before an arbitral tribunal is constituted. The principal difficulty has been to identify the matters that a referral court may examine without converting the appointment proceeding into a preliminary adjudication on the merits. Indian arbitration jurisprudence has moved through substantially different approaches, from extensive judicial scrutiny under *SBP & Co. v. Patel Engineering Ltd.* to the prima facie review contemplated in *Vidya Drolia v. Durga Trading Corp.* and the “eye of the needle” formulation in *NTPC Ltd. v. SPML Infra Ltd.* The subsequent Constitution Bench decision in *In Re: Interplay Between Arbitration Agreements under the Arbitration and Conciliation Act, 1996 and the Indian Stamp Act, 1899*, followed by *SBI General Insurance Co. Ltd. v. Krish Spinning* and *Goqii Technologies Pvt. Ltd. v. Sokrati Technologies Pvt. Ltd.*, has significantly narrowed the permissible scope of judicial scrutiny at the referral stage.

This paper examines that doctrinal evolution through the competing principles of kompetenz-kompetenz, arbitral autonomy, judicial supervision, procedural efficiency and protection against vexatious or non-existent claims. It particularly examines whether questions relating to limitation, accord and satisfaction, alleged frivolity, non-arbitrability and disputed factual circumstances should be determined by the referral court or left to the arbitral tribunal. The paper argues that Section 11 is increasingly being transformed from a preliminary adjudicatory forum into a gateway for constitution of the arbitral tribunal. At the same time, the narrowing of judicial scrutiny creates a corresponding need for effective mechanisms within arbitration to address manifestly non-existent, mala fide or otherwise abusive claims. The emerging jurisprudence therefore reflects not the disappearance of judicial scrutiny altogether, but a

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redistribution of adjudicatory responsibility between the court at the referral stage and the arbitral tribunal under Section 16.

KEYWORDS

Section 11; Arbitration and Conciliation Act, 1996; Appointment of Arbitrator; Arbitral Tribunal; Kompetenz-Kompetenz; Arbitral Autonomy; Judicial Intervention; Prima Facie Review; Non-Arbitrability; Limitation; Accord and Satisfaction; Section 16; Referral Court.

INTRODUCTION

A The appointment of an arbitrator under Section 11 of the Arbitration and Conciliation Act, 1996 appears, at first sight, to involve a simple question: if the parties agreed to arbitrate and their agreed mechanism for constituting the tribunal has failed, should the Court appoint an arbitrator?

Indian arbitration law, however, spent several years struggling with a more difficult question:

How much should the Court examine before making that appointment?

Should the Court merely satisfy itself that an arbitration agreement exists? Or should it also examine whether the dispute is genuine, whether the claim is maintainable, whether it is barred by limitation,² whether there has been accord and satisfaction, whether the claim is frivolous, and whether the dispute is ultimately capable of being arbitrated?

The answer has changed considerably over time.³

The journey from *Vidya Drolia v. Durga Trading Corporation* to *NTPC Ltd. v. SPML Infra Ltd.*, and thereafter to *In Re: Interplay Between Arbitration Agreements*, *SBI General Insurance Co. Ltd. v. Krish Spinning* and *Goqii Technologies Pvt. Ltd. v. Sokrati Technologies Pvt. Ltd.*, shows a clear movement in one direction:

The Court appoints, the arbitrator adjudicates

That distinction is becoming increasingly important. The Problem with Too Much Scrutiny at the Section 11 Stage Every arbitration begins with jurisdiction. Before deciding the merits,

² *Bharat Sanchar Nigam Ltd. v. Nortel Networks India Pvt. Ltd.*, (2021) 5 SCC 738.

³ Abhishek Shivpuri, *Appointment of Arbitrators: Nebulous Contours of Section 11 of the Indian Arbitration and Conciliation Act 1996*, 20 Asian Int'l Arb. J. 31, 31–54 (2024).

somebody must determine whether there is an arbitration agreement, whether the dispute falls within it and whether the tribunal has jurisdiction. There are two possible approaches. The first is to permit the Court to decide these questions comprehensively before constituting the tribunal. The second is to allow the Court to undertake only a threshold examination and leave contested questions to the arbitrator under Section 16.

Indian law initially travelled closer to the first approach.⁴ It has progressively moved towards the second. This movement reflects the principle of kompetenz-kompetenz embodied in Section 16.⁵ An arbitral tribunal is competent to rule upon its own jurisdiction. If courts decide substantial jurisdictional and merits-related issues at the Section 11 stage itself, Section 16 loses much of its purpose. There is also a practical difficulty. A Section 11 proceeding is not a trial. Pleadings are limited. Evidence has ordinarily not been led. Witnesses are not examined. Yet, if the Court starts deciding whether a claim is genuine, whether a settlement was voluntary, whether coercion occurred, or whether a contractual condition was satisfied, the Section 11 proceeding can itself become a miniature arbitration.

That is precisely what the later Supreme Court jurisprudence has attempted to prevent.

The 2015 Amendment: “Existence” of the Arbitration Agreement

The decisive legislative intervention came through the 2015 amendment. Section 11(6A) required the Supreme Court or High Court, while considering an application for appointment of an arbitrator, to confine itself to examining the existence of an arbitration agreement.⁶ The provision was deliberately narrow. Although Section 11(6A) was proposed to be omitted by the 2019 amendment, the omission has not been brought into force.⁷ The Supreme Court in *SBI General Insurance v. Krish Spinning* therefore expressly recognised that Section 11(6A) continues to remain on the statute book and must be given effect. The legislative message was straightforward: appointment proceedings should not become adjudicatory proceedings.

This was reflected in *Duro Felguera, S.A. v. Gangavaram Port Ltd.*, where the Supreme Court famously described the Section 11 inquiry after the 2015 amendment as essentially whether an

⁴ O.P. Malhotra, *Opening the Pandora's Box: An Analysis of the Supreme Court's Decision in SBP & Co. v. Patel Engineering Limited*, Special Issue NLSIR 69, 69–80 (2013).

⁵ Julian D. M. Lew, Loukas A. Mistelis & Stefan M. Kröll, *Comparative International Commercial Arbitration* 330–35 (Kluwer Law International 2003); Stavros Brekoulakis, *The Negative Effect of Compétence-Compétence: The Verdict Has to Be Negative*, 2009 Austrian Arb. Y.B. 238, 238–52.

⁶ Shaurya Sahay, *Scope of Proceedings Under Section 11(6A) of the Arbitration and Conciliation Act, 1996*, Bar & Bench (May 21, 2020).

⁷ *Birendra Kumar Gupta @ Virendra Kumar Gupta v. Sudhir Prasad*, 2025 SCC OnLine Jhar 5209, ¶¶ 13–14.

arbitration agreement exists, “nothing more, nothing less.”⁸ But subsequent cases demonstrated that even this apparently simple formulation was capable of producing difficult questions.

Vidya Drolia: Referral is the Rule, Refusal the Exception

The judgment in *Vidya Drolia v. Durga Trading Corporation* (2021), became the major authority on the relationship between the referral court and the arbitral tribunal. The Supreme Court recognised the principle that the arbitral tribunal should ordinarily be the first authority to decide questions of non-arbitrability. That was the rule. But the Court also recognised an exception. In rare cases, a referral court could refuse reference where it was manifestly and ex facie certain that the arbitration agreement was non-existent or invalid, or that the dispute was non-arbitrable.

The Court described the purpose of this limited scrutiny as cutting off the “deadwood”. The formulation was attractive because it attempted to reconcile two competing concerns. On one side was arbitral autonomy. Courts should not conduct a mini-trial before arbitration has even begun.

On the other side, was procedural fairness. Why should a party be forced to incur the cost and time of an arbitration where it is obvious from the beginning that no arbitrable dispute exists?. *Vidya Drolia* attempted to find the middle ground. If there was doubt, the matter should be referred. If determination required examination of contested facts, the matter should be referred. If the objection was plainly arguable, the matter should be referred. Only where non-arbitrability was manifest and beyond genuine doubt could the Court decline reference. The difficulty, however, was obvious.

HOW DOES A COURT DETERMINE THAT A CASE IS OBVIOUSLY DEADWOOD WITHOUT EXAMINING THE MERITS OF THE CASE?

That difficulty became clearer in subsequent decisions.⁹

1. NTPC v. SPML: Looking Through the “Eye of the Needle”

In *NTPC Ltd. v. SPML Infra Ltd.*, 2023, the Supreme Court developed what became known as the “eye of the needle” test. The Court contemplated two levels of inquiry. The primary inquiry

⁸ Abhishek Shivpuri, *Appointment of Arbitrators: Nebulous Contours of Section 11 of the Indian Arbitration and Conciliation Act 1996*, 20 Asian Int'l Arb. J. 31, 31–54 (2024).

⁹ Vanshika Jain, *The Road to Clarity: Court's Role in Time-Barred and Dead Claims in Arbitration*, GNLU SRDC ADR Mag., Vol. V, Issue II, at 33–37 (2025).

concerned the existence and validity of the arbitration agreement, including questions concerning the parties to the agreement and privity. The secondary inquiry concerned non-arbitrability.

On the second question, the tribunal remained the preferred forum. Nevertheless, following *Vidya Drolia*, the Court held that in exceptional cases a referral court could reject a claim which was manifestly and ex facie non-arbitrable. The Court stressed that this was only a prima facie review. There could be no detailed examination of contested facts or elaborate appreciation of evidence.

The threshold was extremely high. The Court had to reach the conclusion that there was practically no doubt that the claim was non-arbitrable. The expression “eye of the needle” captured the intended narrowness of this jurisdiction. Yet the conceptual difficulty remained.¹⁰ Even an “eye of the needle” examination is still an examination.

To determine whether a claim is frivolous, dead, dishonest or extinguished, a court may have to examine correspondence, settlements, discharge vouchers, allegations of coercion and competing factual versions. The supposedly narrow gateway could therefore gradually become a merits inquiry. The subsequent judgments of the Supreme Court confronted this problem directly.

2. In Re: Interplay: Kompetenz-Kompetenz Returns to the Centre

The seven-Judge Bench decision in *In Re: Interplay Between Arbitration Agreements under the Arbitration and Conciliation Act, 1996*, was principally concerned with the effect of non-stamping or inadequate stamping upon an arbitration agreement.¹¹

Its importance for Section 11 jurisprudence, however, goes considerably beyond stamp duty. The Constitution Bench emphasised three interconnected ideas: arbitral autonomy, kompetenz-kompetenz and minimum judicial interference. The Court drew an important distinction between the function of the referral court and that of the arbitral tribunal.

The Section 11 court conducts an examination. The tribunal under Section 16 rules upon its jurisdiction. The difference is substantive. “Examination” at the referral stage is preliminary. “Ruling” involves adjudication. The referral court therefore does not have to resolve every

¹⁰ See also *SBI Gen. Ins. Co. Ltd. v. Krish Spinning*, 2024 INSC 532, ¶¶ 110–19 (India).

¹¹ Nabeel Malik, *Supreme Court Settles the Law on the Validity of Arbitration Agreements Contained in Unstamped / Insufficiently Stamped Instruments*, Mondaq (Jan. 4, 2024).

objection affecting the validity or enforceability of the underlying transaction before constituting the tribunal.

This reasoning subsequently became the foundation for a significant reconsideration of *Vidya Drolia* and *NTPC v. SPML*.

3. Krish Spinning: The Crucial Course Correction

The most important post-*Vidya Drolia* development came in *SBI General Insurance Co. Ltd. v. Krish Spinning*, 2024. The dispute concerned an insurance claim and a discharge voucher/full-and-final settlement. The insurer argued, in substance, that there was no subsisting dispute capable of reference because the claim had already been settled. This presented precisely the type of question which earlier jurisprudence had sometimes permitted the referral court to examine. The Supreme Court undertook an extensive review of the Section 11 jurisprudence. Its conclusion significantly narrowed the permissible judicial inquiry.

The Court held that, following *In Re: Interplay*, the inquiry at the stage of appointment is limited to the prima facie existence of the arbitration agreement, and nothing else. More significantly, the Court questioned whether the observations in *Vidya Drolia*, subsequently adopted in *NTPC v. SPML*, permitting the referral court to weed out ex facie non-arbitrable or frivolous disputes in cases concerning accord and satisfaction, could continue to operate after *In Re: Interplay*. The answer was substantially in the negative.

Questions such as whether a discharge voucher was voluntarily executed, whether there was coercion, whether there was accord and satisfaction, and consequently whether a genuine dispute survives require adjudication. That adjudication belongs to the arbitral tribunal. The judgment also contains an important criticism of expressions such as “eye of the needle” and “ex facie meritless”.

Although those formulations were intended to restrict judicial intervention, their practical application still required a referral court to examine contested facts and undertake some appreciation of evidence. The Supreme Court considered such an exercise inconsistent with modern arbitration jurisprudence, which places arbitral autonomy and minimum judicial interference at the forefront. This represents an important doctrinal shift. The question is no longer: “Is this claim so weak that the Court should stop it before arbitration?”. Rather the more appropriate question is: “Is there, prima facie, an arbitration agreement between the parties?”.

If the answer is yes, questions concerning the strength, weakness, maintainability or factual foundation of the claim ordinarily belong elsewhere.

They belong before the arbitrator.

4. Goqii Technologies: The Principle Applied

If *Krish Spinning* explained the principle, *Goqii Technologies Pvt. Ltd. v. Sokrati Technologies Pvt. Ltd.*, demonstrated its practical application. The Bombay High Court had refused to appoint an arbitrator after examining the factual background and material, including an auditor's report, and concluding that the dispute sought to be referred lacked merit and substance.¹² The Supreme Court reversed that approach. It held that the scope of inquiry under Section 11 is limited to ascertaining the prima facie existence of an arbitration agreement. The High Court had exceeded that jurisdiction by entering into a detailed examination of the factual matrix.

The significance of *Goqii* is therefore difficult to overstate. It demonstrates that even where the referral court believes that a claim appears frivolous, dishonest or weak, that conclusion ordinarily does not permit the Court to undertake an adjudication which properly belongs to the tribunal. Frivolity itself may require examination of evidence. And if evidence has to be examined to determine whether the claim is frivolous, the referral court has already travelled beyond its proper function.

BUT WHAT ABOUT OBVIOUSLY FRIVOLOUS ARBITRATIONS?

There is an understandable concern with this approach. A party may invoke arbitration on a plainly untenable claim and force the opposite party to incur substantial costs in constituting a tribunal and defending proceedings. The Supreme Court in *Goqii* recognised this concern. But the answer was not to expand the Section 11 court's jurisdiction. The answer lies, among other things, in costs.

Where the tribunal ultimately finds that arbitration was invoked on non-existent or mala fide claims, it can appropriately deal with such conduct while awarding costs. This is an important policy choice. The possibility that some weak cases will enter arbitration is treated as a lesser

¹² Yash Mittal, *S. 11(6) A&C Act: Referral Courts Should Limit Their Enquiry to Prima Facie Existence of Arbitration Agreement: Supreme Court*, LiveLaw (Nov. 7, 2024).

evil than allowing every Section 11 proceeding to become a preliminary trial on the merits. That choice favours arbitral autonomy.

WHAT, THEN, CAN A SECTION 11 COURT EXAMINE TODAY?

After *In Re: Interplay*, *Krish Spinning* and *Goqii*, the answer is considerably narrower than it appeared after *Vidya Drolia* and *NTPC v. SPML*. The referral court can examine whether an arbitration agreement *prima facie* exists. This necessarily permits the Court to look at the document said to contain the arbitration agreement and determine whether the basic requirements of Section 7 are satisfied. It may have to identify whether there is, on the face of the record, an agreement to arbitrate.

But that examination should not be converted into adjudication of contested jurisdictional facts or the merits of the underlying dispute. Questions such as whether a claim has been settled, whether a discharge voucher was obtained through coercion, whether a claim is factually frivolous, whether contractual obligations have been discharged and similar disputed questions ordinarily belong to the tribunal.

Even questions concerning non-signatories have increasingly been placed within the competence of the tribunal. The Constitution Bench in *Cox and Kings Ltd. v. SAP India Pvt. Ltd.*¹³ emphasised the tribunal's competence under Section 16 to determine questions going to its jurisdiction, including questions concerning parties to the arbitration agreement. The emerging principle is therefore one of institutional allocation. The Section 11 Court constitutes. The Section 16 tribunal adjudicates. The Section 34 Court reviews within the limited statutory grounds available after the award.

THE SECTION 11 JUDGE IS NOT THE FIRST ARBITRATOR

Perhaps the jurisprudence can be reduced to one proposition: A judge hearing a Section 11 petition is not the first arbitrator in the dispute. The Court does not have to decide whether the claimant will succeed. It does not have to decide whether the defence is convincing. It does not ordinarily have to decide whether a settlement completely extinguished the claim. It does not have to decide disputed questions merely because one party characterises the other's case as frivolous. These are adjudicatory functions.

¹³ *Cox & Kings Ltd. v. SAP India Pvt. Ltd.*, (2024) 4 SCC 1, 76–91 (India).

Section 11 performs a different function: facilitating constitution of the forum which the parties themselves selected. This distinction also respects commercial autonomy. Once parties have chosen arbitration, their bargain is not merely that an arbitrator will decide the final merits. Their bargain ordinarily includes the proposition that the tribunal will decide questions concerning its own jurisdiction, subject to the statutory supervisory jurisdiction of courts.

CONCLUSION

The history of Section 11 reflects the larger history of Indian arbitration law. The early instinct was to protect parties from unnecessary arbitration through judicial scrutiny at the threshold. *Vidya Drolia* attempted to balance that instinct with arbitral autonomy by allowing only manifestly non-arbitrable “deadwood” to be stopped. *NTPC v. SPML* refined the exception through the “eye of the needle” test. But experience revealed the difficulty: even limited scrutiny of whether a claim is frivolous can require a court to enter into contested facts and evidence.

Krish Spinning translated that constitutional-bench reasoning into the Section 11 context and substantially confined the referral court to examining the prima facie existence of the arbitration agreement. *Goqii Technologies* then demonstrated the consequence: the Court should not reject a reference by examining the factual merits merely because the dispute appears weak or even frivolous.

The direction of travel is therefore clear. Section 11 is increasingly a gateway to arbitration, not a preliminary adjudication of arbitration. The referral court must certainly verify that there is a gateway. But once the existence of the arbitration agreement is prima facie established, it should ordinarily allow the parties to walk through it. The arbitrator can then decide whether the claim survives. That is not an abdication of judicial responsibility. It is recognition of the responsibility which the parties, the statute and the principle of competence-competence have assigned to the arbitral tribunal.