A Party, Upon Suffering An Award, Cannot Reopen Issues Pertaining To A Section 11 Reference Made Under The Pre-2015 Regime: Supreme Court

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Introduction

In ***Eminent Colonizers Pvt. Ltd. vs. Rajasthan Housing Board*** [2026 INSC 116], the Supreme Court examined whether a party can, after participating in arbitration and suffering an award, reopen the reference by contending at the Section 34-stage that the contractual dispute resolution clause was not an arbitration agreement at all.

The Supreme Court held that, where an arbitrator was appointed by the High Court under Section 11 of the Arbitration and Conciliation Act, 1996 (the "**Arbitration Act**") in the pre-2015 regime governed by ***SBP & Co. v. Patel Engineering Ltd.*** [(2005) 8 SCC 618], the Section 11 order carries *inter partes* finality on the existence and validity of the arbitration agreement. Once such an appointment order attains finality, the issue cannot be reopened before the arbitral tribunal under Section 16, or later before the Courts in Section 34 proceedings.

Brief Facts

The Supreme Court decided two connected appeals together because they raised the same question regarding the interpretation of "*Clause 23*" of the underlying contract. In both cases, contractors had invoked dispute resolution, the State entity had not constituted the committee contemplated by Clause 23 in the manner required, and the High Court, in Section 11 proceedings, appointed a sole arbitrator.

Years later, after the tribunal had passed awards in favour of the contractors, the State entity sought to set aside the awards on the footing that Clause 23 was not an arbitration clause at all. The Supreme Court's analysis turns decisively on the legal regime applicable to the appointment and the significance of the appointment order having attained finality.

Facts

Facts in Civil Appeal No. 753 of 2026

On 8 July 2009, the contractor was awarded construction work for 40 HIG-1 (High-Income Group) houses and 10 HIG-2 flats (Stilt + 10 Storey) at Pratap Nagar, Jaipur, on a lump-sum contract of INR 5,27,00,070 (Indian Rupees Five Crores Twenty-Seven Lakhs and Seventy), with a 12-month completion period.

The contractor claimed it completed the work within time and at a lower cost, but a dispute arose over non-payment of escalation costs claimed under Clause 45 of the underlying contract.

Clause 23 in the agreement provided for reference of disputes to an empowered Standing Committee comprising specified senior government officials, with a defined process and a non-refundable fee structure. The contractor asserted that the respondents failed to constitute an empowered Standing Committee in accordance with Clause 23 despite the contractor's application and payment of fee. The contractor, therefore, filed an application under Section 11 of the Act before the High Court.

On 23 May 2014, the Single Judge allowed the Section 11 application and appointed a sole arbitrator, noting that the committee constituted by the respondents was not in terms of Clause 23 and proceeding on that basis. Importantly, the respondents accepted this appointment order and did not challenge it. The appointment thus attained finality.

The sole arbitrator entered upon the reference and, on 15 September 2015, passed an award in favour of the contractor for INR 17,10,624.70 with interest at 9 percent per annum from 13 September 2014. Before the arbitrator, the respondents objected to the validity of Clause 23 as an arbitration clause, but the arbitrator rejected the objection on the basis that the appointment order had attained finality.
The respondents then filed an application under Section 34 of the Act. The Commercial Court, while deciding the Section 34 application, set aside the award, holding that Clause 23 was not an arbitration clause, relying on Rajasthan High Court decisions which had taken that view in other matters. The High Court upheld the Commercial Court's reasoning.

Aggrieved by the decision of the High Court, the contractor approached the Supreme Court.

Facts in Civil Appeal No. 754 of 2026

The second appeal arose from a similar work contract awarded on 11 October 2007 for construction of 180 LIG (Low-Income Group) skeleton flats at Pratap Nagar, Jaipur. The contractor raised claims for escalation under Clause 45 and refund of a penalty of INR 2.5 lakhs. Again, alleging failure to constitute the empowered Standing Committee under Clause 23, the contractor moved a Section 11 application before the High Court.

On 23 May 2014, the Single Judge appointed a sole arbitrator on the footing that the committee constituted was not in terms of Clause 23 of the underlying contract. The arbitral tribunal passed an award on 25 February 2016, granting the penalty refund and the escalation amount, with interest.

Despite the award being of 2016, the High Court recorded that the arbitral proceedings had commenced prior to the commencement of the 2015 amendment. The respondents raised the same objection that Clause 23 was not an arbitration clause. The arbitrator rejected the objection, but the Commercial Court and the High Court set aside the award on the same reasoning as in the first matter. The contractor, therefore, approached the Supreme Court.

Moot Question before the Supreme Court

The Supreme Court framed the core issue as follows: in a case where the arbitrator was appointed under Section 11 of the Act in the ***SBP & Co. (supra)*** regime (pre-2015 amendments), could the Courts set aside the award by holding, at the Section 34 stage, that the relevant clause in the contract was not an arbitration agreement?

The Supreme Court answered the question in the negative and did so by combining three strands of reasoning: (i) the ***SBP & Co. (supra)*** regime's binding effect, (ii) the finality attached to Section 11 decisions under the old law, and (iii) the doctrine of *res judicata* between the same parties.

The Pre-2015 Amendment Regime

The Supreme Court noted that the 2015 amendments did not apply to these proceedings. The Section 11 appointment orders were dated 23.05.2014, i.e., prior to the introduction of Section 11(6A) with effect from 23.10.2015.

Relying on the seven-Judge Bench decision in ***SBP & Co. (supra)***, the Supreme Court reiterated that, in the pre-2015 regime, the power under Section 11 was a judicial power, and the Section 11 Court was obliged to decide, *inter alia*, whether there was a valid arbitration agreement. The finding on the existence and validity of the arbitration agreement was binding on the parties before the arbitral tribunal and at subsequent stages, subject only to challenge before the Supreme Court.

On this footing, the Supreme Court held that the Section 34 Court erred in going into the existence and validity of Clause 23 after an unchallenged Section 11 appointment.

The Appointment Carries an Implied Determination

The Commercial Court reasoned that the Section 11 order did not expressly decide whether Clause 23 constituted an arbitration agreement, and therefore, the issue remained open. The Supreme Court rejected this argument. It held that, in the regime under ***SBP & Co. (supra)***, once an arbitrator is appointed, there is at least an implied holding as to the existence and validity of an

arbitration agreement. If an arbitration agreement did not exist, the appointment could not have been made.

The respondents' acceptance of the Section 11 appointment order, and the absence of any challenge to it, placed the issue beyond controversy between the parties.

The Supreme Court reaffirmed that, in the pre-2015 regime, the binding effect of a Section 11 decision extends to subsequent stages, which includes Section 34 proceedings. The Commercial Court and the High Court, therefore, could not set aside the awards by reopening whether Clause 23 was an arbitration clause.

Precedent vs. Res Judicata

A central issue identified by the Supreme Court was the Commercial Court's observation that the Section 11 order had no "*precedential value*" and therefore was not binding. The Supreme Court clarified the conceptual distinction. A precedent operates generally, whereas *res judicata* operates *inter partes* and is rooted in finality. The absence of precedential value does not dilute the binding effect of a final order between the same parties.

Accordingly, even if other Rajasthan High Court decisions had taken a different view on similarly worded clauses, those decisions could not displace the *inter partes* finality of the Section 11 appointment order in these matters.

The Supreme Court contrasted this with the post-23.10.2015 regime, where Section 11(6A) of the Arbitration Act confined the referral Court's enquiry to examination of the existence of an arbitration agreement, and where referral Court views are *prima facie* and do not bind the arbitral tribunal or the enforcement Court in the same manner. This contrast was noted to explain why the outcome here was driven by the pre-2015 regime.

Relief

The Supreme Court set aside the High Court judgments in both appeals. However, since the Commercial Court had set aside the awards solely on the Clause 23 issue and recorded that other objections were not considered, the Supreme Court remitted both Section 34 proceedings to the Commercial Court to adjudicate other grounds, expressly excluding the concluded issue relating to the existence and validity of Clause 23 as an arbitration agreement. The Supreme Court directed disposal of the matters within three months, noting the age of the awards (2015 and 2016).

Comments

This decision reinforces a discipline essential to arbitral finality in pre-2015 references.

First, where the High Court appoints an arbitrator under Section 11 in the ***SBP & Co. (supra)*** regime and the appointment order attains finality, parties cannot later contend, whether before the arbitral tribunal under Section 16 or before Courts under Section 34, that the clause was not an arbitration agreement.

Secondly, Courts must not conflate "*precedential value*" with *inter partes* finality. A Section 11 order need not operate as a precedent to bind the parties to that order.

Thirdly, in the pre-2015 framework, appointment itself necessarily carries an implied determination of the existence and validity of an arbitration agreement, unless the appointment order is set aside in appropriate proceedings.

Finally, Section 34 proceedings cannot be converted into a collateral route to undo what has already been concluded at the appointment stage under the then governing statutory scheme.

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