

Dispute Resolution Hotline

November 09, 2005

SUPREME COURT REDEFINES SECTION 11 OF ARBITRATION AND CONCILIATION ACT, 1996

In a landmark judgment delivered on October 26, 2005 by a seven judge bench of the Supreme Court of India, ("**Court**") in the matter of S.B.P. and Co. V/s Patel Engineering Ltd. and Another, the Court, inter alia, held that the power exercised by the Chief Justice of the High Court or the Chief Justice of India under Section 11(6) of the Arbitration and Conciliation Act, 1996 ("**Act**") is not an administrative power but a judicial power. The judgment overrules the judgment delivered in the matter of Konkan Railway Corporation Ltd. and Another v. Rani Construction Pvt. Ltd. It is clarified that the judgment will not have a retrospective effect but from the date of the judgment, the position as adopted in the judgment will govern even pending applications under Section 11(6) of the Act.

The Court observed that whether there was an arbitration agreement, was not merely a jurisdictional fact for commencing the arbitration itself, but it was also a jurisdictional fact for appointing an arbitrator on a motion under Section 11(6) of the Act. A Chief Justice could appoint an arbitrator in exercise of his power only if there existed an arbitration agreement and without holding that there was an agreement, it would not be open to him to appoint an arbitrator saying that he was appointing an arbitrator since he has been moved in that behalf and the applicant before him asserts that there is an arbitration agreement. The Court further observed that acceptance of such an argument, with great respect, would reduce the high judicial authority entrusted with the power to appoint an arbitrator, an automaton and sub-servient to the arbitral tribunal, which he himself brings into existence.

The Court held that power under Section 11(6) could be delegated, by the Chief Justice of the High Court only to another judge of that court and by the Chief Justice of India to another judge of the Supreme Court contrary to the existing power of delegation to any institution as per the Act. The Court further held that Chief Justice or the designated judge will have the right to decide the preliminary aspects such as his own jurisdiction, 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. The appeal against the Order passed under section 11 (6) of the Act, will lie under Article 136 of the Constitution of India to the Supreme Court. 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.

This judgment will have a far-reaching impact on the scope of adjudication of the applications for appointment of arbitrators filed under section 11 (6) of the Act. The judgment reduces the length of arbitration proceedings as it limits the number of appeals against order passed under section 11 (6) of the Act but increases the judicial intervention at the stage of appointment of arbitrators.

-Vyapak Desai & Vivek Kathpalia

Source: S.B.P. and Co. V/s Patel Engineering Ltd. and Another

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