



## **THE HON'BLE SUPREME COURT CLARIFIES LAW IN RELATION TO THE APPOINTMENT OF ARBITRATOR UNDER SECTION 11 OF THE ARBITRATION & CONCILIATION ACT, 1996 (AS AMENDED)**

**Author: Deepesh<sup>1</sup>**

### **SUMMARY**

The Hon'ble Supreme Court in the case of NTPC Ltd. Vs. M/s SPML Infra. Ltd.<sup>2</sup> ("SPML") referred to its earlier decisions and held that while exercising jurisdiction under Section 11(6) of the Arbitration and Conciliation Act, 1996 (the "**Act**") the courts must ensure that the parties are protected from frivolous and untenable claims and are not compelled to arbitrate a dispute which is non-arbitrable.

### **I. BACKGROUND FACTS**

The Hon'ble Supreme Court was hearing an appeal from an order passed by the Hon'ble Delhi High Court<sup>3</sup>, where the Hon'ble High Court had appointed an arbitrator on an application under Section 11(6) of the Act. Before the Hon'ble Supreme Court, NTPC Ltd. raised a contention that there were no existing disputes in view of a settlement arrived between the parties.

### **II. OBSERVATIONS OF THE HON'BLE SUPREME COURT OF INDIA**

The Hon'ble Supreme Court while referring to its earlier decisions<sup>4</sup> *inter alia* held as under:

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<sup>1</sup> The author is a partner in the dispute resolution team of the Firm's Delhi office.

<sup>2</sup> In Civil Appeal No. 4778 of 2022 dated April 10, 2023.

<sup>3</sup> In Arbitration petition No. 477 of 2020 dated April 08, 2021.

<sup>4</sup> Vidya Drolia and Ors. v. Durga Trading Corporation (2021) 2 SCC 1; BSNL and Anr. v. Nortel Networks India (P) Ltd. (2021) 5 SCC 738; Secunderabad Cantonment Board v. B. Ramachandraiah & Sons (2021) 5 SCC 705

- (a) The jurisdiction of the courts under Section 11(6) of the Act is narrow and the courts have to thoroughly examine the existence and the validity of an arbitration agreement (which includes an inquiry as to the parties to the agreement) and applicant's privity to the said agreement.
- (b) The courts need to adjudicate the issue of non- arbitrability of the dispute.
- (c) The courts may reject claims which are manifestly and ex-facie non-arbitrable.
- (d) The courts must not undertake full review of contested facts.
- (e) The courts need to examine whether the assertion on arbitrability is bona fide or not.
- (f) The courts must prima facie reach a conclusion that the claim is non-arbitrable. However, in case of doubt the dispute is to be referred to arbitration.
- (g) The courts must protect the parties from being forced to arbitrate when the matter on the face of it is non-arbitrable.

Basis the above, the Hon'ble Supreme Court held that the Section 11 application filed by SPML before the Hon'ble High Court was not bona fide and there were no pending claims between the parties for submission to arbitration.

The Hon'ble Supreme Court further held that SPML's case is an attempt to initiate ex-facie, meritless and dishonest litigation and accordingly set aside the order passed by the Hon'ble High Court.

### **III. CONCLUSION**

The present case law passed by the Hon'ble Supreme Court is a move in the right direction to curtail the reference of every matter to arbitration since the general tendency of the courts was to allow Section 11(6) applications and leave the parties to challenge the jurisdiction of the arbitrator by way of filing a Section 16 application under the Act in the arbitration proceedings. However, with the above guidelines and clarifications, the courts would be more cautious while dealing with Section 11(6) applications and the claims which are frivolous and untenable would be knocked down.

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